DELINKING DISPROPORTIONALITY FROM DISCRIMINATION:
Procedural Burdens as Proxy for Substantive Visions

MAXWELL O. CHIBUNDU*

A belief that the difficult issues of our society can best be resolved by adherence to some defined process drives much of contemporary western intellectual thought.[1] The consequence is a pronounced preference for focusing on "means" and not on "ends." When we find the system failing to attain a desired objective, the primary inquiry into the failure revolves around the correct structure and alignment of the means. This approach raises the question of whether such an inquiry can be confined to the use of procedural tools crafted to avoid the sort of predetermined outcome that the "means" approach aims to achieve.

This question is at the core of much of the recent debate over the appropriate means for correcting observed statistical differences in the make-up of the American workforce. The United States Supreme Court's construction of the procedural requirements of Title VII litigation in *Wards Cove Packing Co. v. Atonio*[2] exemplifies one dominant response to the question. The answer, the *Wards Cove* Court asserted, lies in the atomized dissection of the procedural mechanism and the application of

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* Assistant Professor of Law, University of Maryland School of Law.

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1. *See, e.g.*, STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE (1989). This "process" orientation for defining the "good" operates in varied spheres, ranging from first-order concerns such as the resolution of political conflicts within a "democratic" system, to secondary and tertiary matters, as in eligibility for participation in sporting events or exclusion from dining clubs. It finds expression within the economic arena in the strong adherence to the position that the only legitimate organizing principle is that of "voluntary exchange" or "the market." *See* ROBERT E. LANE, THE MARKET EXPERIENCE (1991). Nowhere, however, is the vitality of the yardstick more luminescent than in the legal sphere. Here, "process" is a deity synonymous with justice. *Cf.* JOHN ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1979). The recent confusion over whether to equate the nature of the presumption to which a presidential nominee for the Supreme Court who seeks senatorial confirmation is entitled when accused of wrongdoing in that essentially political setting with the distribution of the "burden of proof" in a judicial proceeding is only a specific application of the more general phenomenon.

2. 490 U.S. 642 (1989).

routinized formulae to the process.[3] By crafting well-calibrated neutral procedural instruments, and applying these to discrete elements of the process regime, it is possible to derive right conclusions without putting one's own imprimatur on the proper end that should be realized.[4] But this answer, and the polarized reaction it has generated in the polity at large, reveals the extent to which core substantive terms such as the meaning of discrimination remain undefined.[5]

Twenty years ago the Supreme Court, in *Griggs v. Duke Power Co.*,[6] embraced a conception of discrimination based on statistical disparities in the racial composition of an employer's workforce. The underlying theory, subsequently termed "disparate impact," contended that in order to demonstrate the existence of discrimination in the workplace, an employee from an underrepresented group need not show a conscious decision by the employer to treat her differently from others. Sweeping language employed by the Court equated the absence of discrimination with the existence of parity—at least in the employment setting.[7] By contrast, the Court, applying the same disparate impact theory in *Wards Cove*, insisted that discrimination can be established only by pointing to some specific conduct of the employer directly responsible for the statistical imbalance in the employer's workforce.[8]

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3. *See* discussion *infra* part II(B).

4. *Cf.* Justice White's summary of the controlling principle in *Wards Cove*:

> [T]he question here is not whether we 'approve' of petitioners' employment practices or the society that exists at the canneries, but, rather, whether respondents have properly established that these practices violate Title VII.

Wards Cove, 490 U.S. at 649 n.4. Compare Martin v. Wilks, 490 U.S. 755 (1989), where, in a challenge by white firefighters to a consent decree requiring affirmative steps to promote blacks within the city of Birmingham's fire department, the Court framed the issue in terms of the relevance of Federal Rules of Civil Procedure 24 and 19 to truncate the right of the white firefighters to have their day in court. For Justice Stevens, however, the issue, rather than being access to the Courts, was the proper disposition on the merits of a collateral challenge to a consent decree where there was no contention of fraud, collusion, transparent invalidity, or lack of jurisdiction to enter the decree. *Martin*, 490 U.S. at 769-92 (Stevens, J., dissenting).

For a recent study documenting significant differences between whites and blacks in their perception of the prevalence of discrimination, see NAACP LEGAL DEFENSE AND EDUCATION FUND, THE UNFINISHED AGENDA ON RACE IN AMERICA (1989).

5. At one level, discrimination may be said to arise whenever there is an "asymmetrical" treatment of individuals. This definition, however, has virtually no utility in a modern (and perhaps any) society. In a real sense, the fundamental issue yet unresolved is what forms of asymmetrical treatment are permissible or, more specifically, what criteria shall society employ to determine when asymmetrical treatment should be viewed as unacceptable.

Traditional exploration of these issues have tended to focus on the role of the state in perpetrating or sanctioning the conduct giving rise to the asymmetry. *See, e.g.*, David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). Focusing as they have on governmental conduct, these analyses have tended to explore discrimination in terms of the appropriateness of such rationalizing factors as motivation, intent, purpose, stereotyping, animus, prejudice, and subjugation. *But see* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L. J. 1619, 1621-22 (1991) (recognizing two types of discrimination — "taste for discrimination" and "statistical discrimination" — that are determined by economic rather than legal choices).

6. 401 U.S. 424 (1971).

7. *See* discussion *infra* part IIA(1).

8. *See* discussion *infra* part IIA(4).

Disagreeing with the *Wards Cove* decision, Congress has attempted to enshrine the *Griggs* decision not by adopting the substantive definition of discrimination embodied in *Griggs*, but by rewriting the procedural mechanics of *Wards Cove*.[9] Thus, in a reversal of conventional jurisprudential roles,[10] Congress has espoused for the political branches the credo that a substantively correct outcome can and should be produced by adherence to a rigid structure of procedural rules.[11] It has endorsed the claim that the efficacy of remedial legislation directed at removing the impact of discrimination in the workplace can be confined to and made dependent on the definition and allotment of the burden of proof.[12]

Although the Executive Branch initially responded to *Wards Cove* by taking the position that no legislation was needed since the ruling was "technical" in character,[13] it subsequently checked congressional action

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9. *See* discussion *infra* part III.

10. Traditionally, judicial insistence on strict legislative adherence to process has been restricted to a very narrow sphere: those with significant impact on "suspect classes" or the exercise of "fundamental rights." *See, e.g.*, San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1972). In the absence of these considerations, it is generally sufficient that legislative action can be explained as serving some "legitimate" purpose. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

11. Thus, even as Congress by large margins sought both to realign and to redefine the distribution of the burdens of proof embraced by the Court in *Wards Cove*, it expressly rejected the suggestion that the purpose or effect of the revisions is to create substantive rights. The most prominent example of this disclaimer was contained in section 5 of the House Bill (HR1 of 1991) which stated that the legislation shall not be construed to "require, permit or encourage" the use of quotas.

Similarly, determined to emphasize the limited procedural scope of the legislation, Congressional proponents went out of their way to "disavow" the use of "race-norming"—a practice embraced even by the conservative Reagan-Bush Department of Labor—to "correct" for disparities in the scores of blacks and whites on general aptitude tests. *See, e.g.*, Holly K. Hacker, *Adjusted Federal Employment Tests Stir Controversy*, L.A. TIMES, June 6, 1991, at A5. The current statutory provision is codified at 42 U.S.C. § 2000e-2(l) (West Supp. 1992). Race-norming is the practice of rating the scores of members of one group against other members of that group, rather than rating all test-takers together. Peightal v. Metropolitan Dade County, 940 F.2d 1394, 1396 (11th Cir. 1991) (citing instance of race-norming).

12. Proponents of legislative action regularly asserted the purpose of the legislation to be the reversal of the Supreme Court's distribution and definition of the burden of proof in *Wards Cove* by restoring the Court's purported pre-existing definition in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

This narrow framing of the legislative enterprise resulted in quite a few striking ironies. In a division reminiscent of that on the Court, the disagreements within the political branches, at least on the surface, go to issues of ascertaining the scope of the pre-existing *Griggs* standard, and giving content to an idea that, at best, was embryonic in *Griggs*. Since the *Griggs* standard—whatever its definition—is not self-executing, the battle has been over the appropriate technical calibration of the relevant yardsticks. Both Congress and the President appeared to agree on the broad outlines of the distribution of the burden of proof, but differed on the definition of the burden. *See* discussion *infra* part III. However, as a political columnist has pointed out, it is a remarkable statement of the depths to which the use of racially polarized political symbolism has sunk when the focus of legislation revolves around the uncompromising adherence by politicians to such terms as "significant," "manifest," or "substantial" in defining a procedural burden. *See* Michael Kinsley, *Hortonism Redux; Bush's Pseudo-Racism in Opposing New Civil Rights Law*, THE NEW REPUBLIC, June 24, 1991. The reality, of course, is that the disagreements relate to substantive concerns that inhere with the acceptance of "disparate impact" (i.e., statistical disproportionality) as a sufficient basis for governmental action. *See* discussion *infra* part IV.

13. *See* President's News Conference, 25 WEEKLY COMP. PRES. DOC. 982 (June 27, 1989). President Bush stated:

> The Justice Department has told me that the decisions reflects [sic] interpretation of the civil rights laws by the Court on technical subjects, and we're talking about burdens of proof and statutes of limitations. But that is the advice I am getting . . . .

by proposing alternate slates of procedural rules.[14] In this latter guise, it forthrightly disputed the "neutrality" of the effects of burden allocation. To the contrary, it argued vigorously for a substantive vision of society that insists on an undifferentiated symmetrical consideration of claims to societal protection.[15] According to the Bush Administration, the choice between the adoption of its procedural rules and those put forward by the Congress was tantamount to a choice between the allocation of social and economic resources on the basis of "merit" and of allocation under a "racial spoilage" system.[16]

The adoption of the Civil Rights Act of 1991[17] after over two years of acrimonious debate on the appropriate allocation of the burden of proof, far from resolving the issue, returned it back to the courts, with confusing instructions that allowed each side to declare victory.[18] The exchanges are thus bound to continue to bring to the forefront a long submerged problem: the utility of relying on arcane procedural and evidentiary rules to tackle systemic policy disagreements. In particular, they raise the questions as to whether economic disparities correlatable along well-defined social cleavages such as race or gender are relevant as elements of the discharge of burden allocations, or whether these disparities constitute substantive impairments to the body politic meriting the sort of direct ends-oriented confrontation that can be brought about only by changes in the substantive law regime.

The core claim of this paper is that although only recently brought to the front burner by the *Wards Cove* decision,[19] the masking of

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14. *See* discussion *infra* part III.

15. The charade that justice lies in the undifferentiated treatment of all alike without regard of prior history or contemporary position is often referred to as "color-blindness." *See, e.g.*, William B. Reynolds, *An Equal Opportunity Scorecard*, 21 GA. L. REV. 1007 (1987); Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984). As contended in part IV below, a color-blind society may just as easily be said to exist when it is impossible to predict with any degree of accuracy on the basis of one's color one's position or economic well-being in society. Color-blindness, then, need not be defined in terms of the race-neutrality of the process, but the racial indistinctness of the end-product.

16. The Bush Administration routinely denounced congressional proposals on the ground that they would foster allocation of jobs by quotas. *See, e.g.*, 136 CONG. REC. S16418 (daily ed. Oct. 22, 1990) (veto message of Pres. Bush). Yet, as commentators regularly pointed out, it was unclear how the differences contained in the Administration's alternative procedures were less likely to result in hiring by the numbers. *See, e.g.*, Michael Kingsley, *Hortonism Isn't Racism, But It is a Great Lie*, L.A. TIMES, June 6, 1991, at 7; *cf. Bush's 'Quota' Politics*, THE CHRISTIAN SCIENCE MONITOR, June 3, 1991, at 20 ("If the [Civil Rights] [B]ill originated to fight exclusionary employment practices, a traditional civil rights issue, it has turned into a focal point for the national debate over those inclusionary employment practices known as affirmative action . . . .").

17. *See* 42 U.S.C. § 2000e; *see also* discussion *infra* part III.

18. *See* 42 U.S.C. § 2000e; *see also* discussion *infra* part III.

19. Although ostensibly a case about the allocation of evidentiary burdens in a Title VII disparate impact case, and although no member of the Court challenged the continuing viability of disparate impact as a basis for litigating a Title VII claim, it was evident that the procedural devices invoked by members of the Court and on which so much of the opinions turned barely masked substantive disagreements. As both the majority and the dissent recognized, procedural formulae are themselves statements of substantive goals. Justice White explained the Court's rejection of prior decisions that did not concur with his formulation of the burden of proof by arguing that adoption of those other approaches would result in mandating the use of proportional representation in the workplace,

differences by resort to burden allocation rules and manipulation of the probative value of statistical disparities has been essential to the development of the Supreme Court's jurisprudence of "equal opportunities" in the economic sphere over quite a considerable period of time. The disagreements on the Court, while couched in terms of how to prove "disparate impact" (or similar procedurally-based theories for relief), go to the substantive definition of "discrimination" and, therefore, to the reach of the "antidiscrimination" principle.[20] Further, the paper argues that this focus, in turn, necessarily directs attention to the broader prescriptive view of the structure of contemporary society, and the normative vision for the community of the future. Specifically, the distribution of burdens of proof[21] in this area over the last twenty years has spoken directly to the Court's perception of the prevalence of discrimination, and what can and ought to be done about it. In large measure, the debate has not been about doing right in the particular case, but doing right about the structure of economic distributions in the community.[22] The meaning and relevance of burden allocation and statistical disparities relate directly to the mediating role judicially crafted norms play in translating the Court's vision of the community to the disposition of the individual case, and the function of these norms in transmitting the consequences of the particular case back to our vision of the structure of the community.[23] These devices pose the issue of the extent to which

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an objective he said Title VII precluded. *Wards Cove*, 490 U.S. at 656-61.

By contrast, in what surely must be one of the more provocative statements from the Supreme Court bench in recent years, Justice Blackmun argued that the majority's evidentiary rules constituted a direct attack on the antidiscrimination norm itself, a norm surely at the core of Title VII.

> Today a bare majority of the Court takes three major strides backwards in the battle against race discrimination . . . . Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was.

Id. at 661-62 (Blackmun, J., dissenting).

Highlighting this departure from the nominally procedural context of the issues in question was Justice Stevens's complaint that Title VII cases should be treated like any other case. *Id.* at 673 (Stevens, J., dissenting).

20. For discussion of the antidiscrimination principle, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Paul Gewirtz, *Choice in the Transition, School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986).

21. *See* discussion *infra* part II.

22. Despite the large number of blacks who have become members of the ubiquitous American middle-class over the last three decades, it remains the case that categorical statements can be made with justification that correlate economic welfare with race, so that a black drawn at random is twice as likely to be unemployed as a white, three times as likely to be below the poverty line, and infinitely less likely to be the chief executive of a large american corporation as her white counterpart. *See generally* David Swinton, *The Economic Status of African Americans: Limited Ownership and Persistent Inequality, in* THE STATE OF BLACK AMERICA 1992, at 61 (1992); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673 (1984-85).

23. The following two statements from two prevailing opinions of the Court perhaps best articulate the relevance of statistics to perception, and its translation into dominant judicial doctrine over time:

> [A]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial

procedural rules developed primarily in the context of relatively stable routinized adjudication of private (or quasi-private) relationships gone awry can be assigned meaningful dispositive roles in the polarized substantive-policy-laden domain of Title VII (and similar civil rights) law.[24]

In exploring the uses of burden allocation (and the related issue of the probativeness of statistical disparities) as proxy for the generation of substantive antidiscrimination economic law, the paper elaborates on four contentions. First, despite judicial rhetoric suggesting the function of "burden allocation" in Title VII and related "Equal Protection" litigation[25] as the traditional procedural device of assuring "an orderly presentation of evidence,"[26] burden allocation has consistently been employed to define and shape the substantive contours of the cost the judicial system has been willing to impose on societal institutions as the price for greater participation by blacks[27] in the mainstream activities of the national economy.

> and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though Section 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population . . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1976) (citation omitted).

> The 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population. *See* Sheet Metal Workers v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that individuals of one race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination").

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989).

24. As Professor Patricia Williams has observed:

> The reflexive referral of all but the most privatized controversies to the legislature obscures the fact that even the narrowest contract or property dispute is never really as private as theory would have it. Courts always have to consider social ramifications that are rarely limited to the named parties, whether that consideration is of 'policy'—the contemporaneous society of those similarly situated—or whether the controversy is funnelled into issues of 'precedent'—the prior subsequent society of others.

Patricia J. Williams, Comment, *Metro-Broadcasting Co. v. F.C.C.: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 539 (1990).

25. Title VII, focusing as it does on employment practices, is paradigmatic of economically-based claims, but it is not the exclusive source of judicial decisions on the interplay of race, economics, and the law. Essentially similar issues are presented in other areas, such as the letting of contracts, which may be covered either by the Equal Protection provisions of the Fifth and Fourteenth Amendments of United States Constitution (where the defendants are public actors), or by provisions of the Civil Rights Act of 1866. 42 U.S.C. § 1981.

Such claims may be advanced either by those who have been traditionally underrepresented in gainful economic activity (*e.g.*, blacks and women), or by persons affected by affirmative efforts to correct such underrepresentation. Actions brought by persons in the former group may be referred to as "direct discrimination" cases; those in the latter class are sometimes termed "reverse discrimination" or "affirmative action" cases.

26. *Cf.* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978).

27. To the extent that specificity of group identification is important for the discussion expounded

Second, this understanding highlights the inadequacy of the procedurally-based distinctions between the various theories of Title VII litigation, such as "disparate impact," "disparate treatment," "mixed motives," and "pattern and practice." Rather than reflecting internally consistent and justifiable procedural approaches to factual settings, each reformulation of the applicable procedural rules was bound up with positions as to the appropriateness of substantive law demands.[28] Procedural formulations thus functioned as readily accessible means for the reinterpretation of substantive antidiscrimination doctrines.[29]

Third, employing procedural devices as substitutes for the explicit articulation of substantive principles has significant shortcomings. Rhetorical or not, the Court's expressed reliance on procedural devices shifts the focus of attention from the substantive concerns of Title VII (and like proceedings) to the narrow and ultimately much less useful issue of the proper delineation and accurate calibration of the procedural mechanisms.[30] Such change in focus undercuts Title VII's integrity in three

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on in this paper—and it frequently is—I rely on the position of black citizens because the black experience has been central to the development of civil rights law. Blacks do form the archetypal "protected group" for whose "especial benefit" the positive laws in force (notably the Fourteenth Amendment of the United States Constitution and Title VII of the Civil Rights Act of 1964) were enacted. Even in those cases involving the enforcement of these laws where none of the parties is black, the Supreme Court has gone out of its way to emphasize the applicability of the concepts to black litigants, while the reverse has not always been the case. *Cf.* Johnson v. Transportation Agency of Santa Clara, 480 U.S. 616 (1986). Similarly, despite efforts to promote the enactment of civil rights legislation by emphasizing its beneficial effects on others such as women, *see, e.g. Democrats Offer Compromise on Contentious Bias Bill*, 49 CONG. QUART. 1286 (May 18, 1991), the dominant and controlling perception is that the primary beneficiary is the Black citizen.

28. Thus, as more fully explained below, courts have drawn distinctions between disparate impact and disparate treatment, Title VII and equal protection, and voluntary affirmative action and judicially mandated remedies. For each of these legal categories, the Court starts out attempting to formulate some distinctive rule. In each case, despite an auspicious start—i.e., either a unanimous or super-majority vote—no consistent substantive theory emerges, and again and again the Court is forced to discard previous formulations and to borrow the language and procedural formulation of cases that supposedly tackled a different class of cases to explain internal contradictions among the precedents. For one exploration of the difficulties of the undertaking in reconciliation, see George Rutherglenn & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1988).

29. Each new theory was usually embraced by a good number of the members of the Court because it appeared initially as offering some principled way to resolve the vexing problem of the correlation of economic inequality to race without having to adopt some overarching substantive view that would demand radical steps to restructure a society many of whose practices most professed as unpalatable. Griggs v. Duke Power Co., 401 U.S. 424 (1971), traditionally acclaimed to have been the basis for disparate impact theory, received the unanimous support of the Court. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), the "twin pillars" of disparate treatment, were virtually unanimous opinions.

In each of these cases, the Court adroitly used procedural rules to craft significant substantive rights and norms. The initial consensus broke down as attempts to refine the procedure further revealed the tension between the presentation of process as a neutral mechanical instrument of adjudication, and its actual operation as a tool for the generation and entrenchment of substantive norms. *See* discussion *infra* part II.

30. Procedural rules embodied in burden allocation and the use of statistics in Title VII have often been presented as though these rules possess definite and constant forms that can dispose of claims with little regard to prevailing social and economic concerns. Justice White could thus assert "the question here is not whether we 'approve' of petitioners' employment practices or the society that exists at the canneries, but, rather, whether respondents have properly established that these

ways. First, it creates uncertainty as to the place and role of procedure in the antidiscrimination realm. Second, the resulting efforts to restore coherence to the procedural doctrine by the regularized incantation of ritualized formulae compounds the uncertainty and promotes obscurantism in civil rights law. Third, by focusing on procedural definitions, the judicial system and society risk avoiding the need to come candidly to grips with the actual substantive value differences that genuinely exist.[31] Old substantive assumptions—although having lost their virility—are neither re-examined nor jettisoned. New substantive conceptions are left unexplored.

Finally, the quagmire into which legislative efforts to correct *Wards Cove* have sunk should be evaluated in this context of the appropriateness of employing procedural devices to resolve substantive policy disagreements. This approach is flawed because the legislature, unlike the courts, need not resort to the subterfuge of process to validate prescriptive norms. This is particularly the case where, as demonstrated below, the effect of procedural subterfuge has been to obfuscate substantive norms. The resort to burden allocation by Congress in the Civil Rights Act of 1991, far from giving guidance to the courts, leaves unresolved fundamental socio-economic issues related to the definition of discrimination.[32]

These issues are explored in this essay as follows:

Part I puts forward three contending perspectives on the role of antidiscrimination law in current society. This understanding provides context for the substantive relevance of burden allocation in civil rights law.

Part II disentangles the various uses to which burden allocation and statistical disparities have been put in the judicial construction of the antidiscrimination laws.[33] The part argues that from 1971-1977, a majority

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practices violate Title VII." *Wards Cove*, 490 U.S. at 649 n.4; *see also*, Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981). *But see* Marshall Walthew, Comment, *Affirmative Action and the Remedial Scope of Title VII: Procedural Answers to Substantive Questions*, 136 U. PA. L. REV. 625 (1987); *see also* discussion *infra* part IV.

31. For example, the basic question in Title VII of whether the statute mandates economic equality bottomed on the adoption of measures to ensure proportionate economic participation in the mainstream of the economy, *see, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); United Steel Workers v. Weber, 443 U.S. 193 (1979), or whether it requires no more than the removal of explicit impediments to black participation in the economy, *e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), are substantive issues that remain unresolved. As demonstrated in part II *infra*, the structure and procedural delimitations of disparate impact analysis has embodied and lent credence to both substantive views.

32. Thus, as elaborated on in part III *infra*, neither proponents of nor detractors from the Civil Rights Act of 1991 discussed or evaluated statistical disparities in terms of what they tell us on their own merits about hitherto sacrosanct beliefs and institutions such as the concept of racial, ethnic, gender and like "equality," "merit," or the efficacy of aptitude tests. Rather, the focus was entirely on the appropriate use of such disparities to meet the finely calibrated procedural edifice that has been erected around the disparate impact theory.

33. Although current dissatisfaction over the use of statistics in Title VII is directed primarily to its role in making out the prima facie showing under disparate impact analysis, statistical evidence has by no means been limited to this stage. The Court has suggested that statistics may be relevant under disparate treatment, at both the rebuttal and pretext stages of the discharge of the burden of proof. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) (disparate treatment); Furnco Constr. Co. v. Waters, 438 U.S. 567, 580 (1978) (rebuttal); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (pretext).

of the Supreme Court viewed statistical disparities as emblematic of a divided society that could not live in harmony until the inequalities symbolized by the disparities had been removed. Because, traditionally, judicial ability to intervene is constrained by the insistence that relief is available only to those who can demonstrate causal linkage between their injury and wrongful conduct by the defendant, the Court faced a dilemma: reconciling the provision of relief designed to ameliorate disparities with adherence to traditional rules of causation. While the individual cases before the Court could have been disposed of on narrow legal grounds, the Court foresaw the very limited consequences of such an approach. As an alternative answer, the Court refashioned the procedural device of allocating burdens of proof into a distinctive tool that put the status quo on the defensive, and challenged society to reform itself. By 1979, the wisdom of a judicial policy that focused on the removal of disparities was under siege. The resulting shift in substantive views was characterized by a different approach to the symbolic value the Court found in statistical disparities. The Court, while seemingly retaining the prior structure of burden allocation, engaged in a reinterpretation which disclosed significantly different substantive concerns. Economic cost rather than social harmony underlay judicial choices. The Court sought to fit the old structure into this new concern by articulating a highly formalistic construction of the burden rules to be applied in ascertaining the level of credence to be accorded statistical disparities.

Part III discusses congressional efforts to reverse the Court's change in philosophy by legislating specific rules on burdens of proof. The analysis contends that this is an ineffectual means of resolving the substantive concerns inherent in Title VII.

Part IV explores alternatives to a procedurally-based approach to statistical disparities. In particular, it suggests reexamination of the "fault-based" view of antidiscrimination law, and the insistence on "causation-in-fact" as a prerequisite for providing relief to members of under-represented groups.

I. CONTENDING PERSPECTIVES ON THE REMEDIAL FUNCTION OF CIVIL RIGHTS LAWS

Despite the ferocity of the debate on the relevance of race to the distribution of economic goods, there is remarkable consensus that any mandated interference with proprietary decisions that favor members of a particular racial or ethnic group over others must be limited to the "correction of past wrongs."[34] This consensus is in most minds summed

34. The discussion of this point has generally been framed and is most widely understood as a constitutional problem rather than a statutory one. *See, e.g.*, Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616, 620 n.2 (1986). For a discussion of the utility of this dichotomy, see Shurberg Broadcasting of Hartford, Inc. v. Federal Communications Comm'n, 876 F.2d 902 (D.C. Cir. 1989), *rev'd sub nom*, Metro-Broadcasting Co. v. FCC, 497 U.S. 547 (1990).

Although the inclusionary approach described below may at first inspection appear to fall outside

up by one phrase: "equal opportunity."[35] Differences thus are couched in terms of the extent to which contemporary laws and practices can be harmonized with the principle. At one end of the spectrum, the argument is that equal opportunity must necessarily take into account background conditions.[36] According to this view, the current status of blacks *vis-a-vis* whites renders unworkable a doctrine of equal opportunity that excludes affirmative allocation of resources to blacks when necessary to enable them to compete effectively.

The argument at the other end of the spectrum asserts that the society's commitment is to "equal opportunity," not to "equal outcome" or "equal results." According to this view, genuine commitment to equal opportunity requires the government to eschew any race-based intrusion into, or manipulation of, economic forces. It requires acceptance of the efficacy of traditional economic institutions to reward the industrious and to discourage sloth.[37] The government's obligation must be the unwavering commitment to treat all individuals as individuals without regard to their group identity, or to the group's collective past history.

In between these polar ends, a variety of positions exist. For example, one may subscribe to the belief that equal opportunity demands the taking into account of background conditions, and yet argue that society ought to reject the allocation of resources on a group basis, preferring instead to support individualized evaluation and treatment of disadvantaged persons.[38] The concern ought to be "equalization of 'life chances,'" not

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of this retrospectively-driven regime, the approach's frequent resort to history to explain (if not to justify) correcting structural defects brings it squarely within this "corrective" consensus. While the approach's prescriptions do emphasize avoidance of a purely backward-looking "fault-based" justification for remedial measures, its proponents do advance past wrongs as the basis for presumptively favoring blacks as a group. *See, e.g.*, Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986); WILLIAM J. WILSON, THE TRULY DISADVANTAGED 141, 147 (1987). *But see* JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY (1983) (advocating a purely forward-looking "equalization of life chances," and denouncing any form of retrospective compensation of a group—at least in the absence of unequivocal proof that the individual beneficiary had been specifically wronged).

35. Notably, the concern is not with equity or fairness. Rather, as Professor Jim Fishkin has succinctly phrased the presumption, "[e]qual opportunity is the central doctrine in modern liberalism for legitimating the distribution of goods in society . . . . Rather than being concerned with equality of outcomes, liberalism, in both theory and practice, has been concerned with the rationing of opportunities for people to become unequal." JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY 1 (1983).

The discussion in this paper is primarily of judicial and legislative action, and is limited to orthodox "liberal" points of view as manifested in the current historical setting.

36. This view is perhaps most graphically portrayed in President Lyndon B. Johnson's frequently quoted Howard University address of 1965:

> You do not take a man who, for years, has been hobbled by chains, liberate him, bring him to the starting line of the race saying: "you are free to compete with all of the others," and still justly believe you have been completely fair. Thus, it is not enough to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and more profound stage of the battle for civil rights.

President's Address to Howard University, 21 PUB. PAPERS 635, 640 (1965).

37. *See, e.g.*, JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY 147-51 (1983); Morris B. Abrams *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986).

38. Such disadvantage may be predicated on social (i.e., cultural, educational, or linguistic)

the creation of preferences or exemptions from obligations on the basis of race.[39] Alternatively, one may posit that even if "equal opportunity" requires the state and society to ignore background conditions and to act without regard to the racial or ethnic identity of citizens, the principle is not relevant in two important situations: where the conduct is private; or where, regardless of current conditions, unfettered competition would likely result in the exclusion of members of a group from the benefits of societal intercourse.[40] Because the desires of private actors cannot be easily presumed to be controlled by the neutral workings of economic laws, and because resulting exclusions both denigrate the excluded persons for an improper reason, and deny to society the benefits of diversity,[41] some forms of intervention may be proper. For example, preferential allocation of resources to such persons may be permissible if it serves to promote not individualized or narrowly based group interests, but overall societal welfare.

No consensus currently exists on these conceptions of the ultimate goal, nor of the relevance of the state or of the law in their promotion. Nonetheless, by relating articulated cause to prescribed cure, one can identify three competing categories or visions of the role of law in shaping societal responses to issues of the substantial disparity of group participation in the national economy. The first locates current black underrepresentation centrally in terms of the history of blacks in American society. That history, epitomized by the arrival of the black in bondage and strewn with nefarious discriminatory treatment, has resulted in relative economic inequality for blacks. That history imposes an obligation on American society to rectify the state of inequality by compensating for

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shortcomings, economic disadvantage, physical or mental handicap, or other disabilities that prevent an individual subject to the condition from taking full advantage of resources otherwise available to the general population. This has been the predicate for the so-called "Disadvantaged Business Enterprise" programs. *See, e.g.*, Small Business Administration Act § 8, 15 U.S.C. § 637 (1990); The Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, 101 Stat. 132 (1987); *see also* Tennessee Asphalt Co. v. Farris, 942 F.2d 969 (6th Cir. 1991); Milwaukee Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir. 1991), *cert. denied*, 111 S. Ct. 2261 (1991); *see also infra* part IV.

39. JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY 147-51 (1983). However, establishing the boundaries between "equalization of life chances" for the disadvantaged, and "giving preferences" to those disadvantaged groups is no easy undertaking. The claim often is made that certain forms of education, such as "secondary" or "vocational" education (presumably as distinguished from postgraduate or professional education), are so basic that assuring them to all regardless of competitive performance is permissible, but employment is not. Aside from the uncertainty (indeed impossibility) of knowing where to draw the line, as professor Ely convincingly noted almost twenty years ago, the most that can be said for the approach is that it seems intuitively correct; however, it may be no less arbitrary or indefensible for that reason. *See* John Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974). The recent outcry over the award of scholarships to black students already admitted to colleges where until not too long ago they were excluded or received inferior education exemplifies the caprice of the distinction. *Compare* Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992).

40. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). The theoretical underpinnings of such a nonemotive basis for engaging in discriminatory conduct and the correlative purely instrumentalist response (i.e., one not grounded on human passions) has led to the articulation of two forms of discrimination that are not grounded in an intent to hurt or demean the person being excluded. *See, e.g.*, David Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L. J. 1619 (1991).

41. Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997, 3001 (1990).

past wrongs.[42] Relevant policies must both root out the effects of such past discrimination through compensatory measures, and assure through laws and policies that there is no return to racial bias—as occurred during the post-Reconstruction era.[43] This approach calls, therefore, not only for the adoption of race-neutral legislation prohibiting decision-making on account of race, but requires the adoption and enforcement of laws that affirmatively promote the removal of obstacles to black participation in the economy. Such affirmative measures may require the granting of preferences.[44] This approach may be termed the "broadly remedial."[45]

Interestingly, the hurdle to judicial (as opposed to legislative) embrace of this approach lies more in the historical basis of the proposition rather than in its prescription.[46] As a historical claim, its factual validity can hardly be contested. The difficulty exists, however, in the logistics of its verification as an empirically relevant consideration in the context of a specific claim by an individual or class of persons in the litigation forum. One can rely on what appears to be self-evident, and presume the causal link. Taking this approach, a proponent of the broadly remedial approach would place the burden of proving otherwise on those who dispute the causal link. Alternatively, one can insist that those who seek the benefit of the assumption prove its validity. As demonstrated in part II, much of the law on the relevance of statistics concerning black participation in the national economy has focused on determining the appropriate presumption of the linkage of racial bias and black under-representation in the economy. Explicit appreciation of this nature of the disagreement, however, did not rise to the surface of discourse until the 1980s. When it did, it became evident that the concern was not so much in proving

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42. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 142-46 (1976).

43. *Id.*

44. Justice Blackmun's statement in Regents of the University of California v. Bakke, 438 U.S. 265 (1979), that "[i]n order to get beyond racism . . . [a]nd in order to treat some persons equally, we must treat them differently," is the most succinct and eloquent reconciliation of the two aspects of this approach. *Id.* at 406 (Blackmun, J., separate opinion).

45. I use this term to distinguish the approach from the narrowly remedial, which only accepts rectification of specifically identified instances of racial discrimination.

46. Judicial rejection of a broadly remedial approach today is frequently framed substantively in terms of the purported injury to innocent nonminorities. *See, e.g.*, Firefighters v. Stotts, 467 U.S. 561, 583 (O'Connor, J., concurring); Wygant v. Jackson Bd. of Educ., 476 U.S. 276 (Powell, J., plurality opinion); Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting). *But see* Fullilove v. Klutznick, 448 U.S. 448, 478 (1980) (Burger, C.J., plurality opinion); United States v. Paradise, 480 U.S. 149 (1987).

For an evaluation and critique of this focus on "injury to innocent victims," see David Chang, *Discriminatory Impact, Affirmative Action and Innocent Victims, Judicial Conservatism or Conservative Justices*, 1991 COLUM. L. REV. 790. Remarkably, however, the discussion of the appropriate relief usually provides an alternate (not the primary) ground for the disposition of the case. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 (1986) (O'Connor, J., concurring). In only one instance, Franks v. Bowman Transp. Corp., 424 U.S. 747 (1976), has the Court, following a judicial determination of liability in favor of the plaintiff, nonetheless invalidated the grant of relief on the ground that it was too broad or not narrowly tailored. *Cf.* Firefighters v. Stotts, 467 U.S. 561 (1984) (invalidating negotiated remedy sanctioned by a judicial decree).

the factual assertion, but in the judicial system's unwillingness to accept the consequences of the remedies that had evolved.[47]

The second approach proceeds from the premise that the significance of past racial discrimination on the contemporary situation of blacks is either unknowable or irrelevant to black representation in the economy.[48] What is relevant is the right of each and every individual in today's society not to be denied full participation in the economy on account of race. To the extent the history of past racial discrimination has any relevance for the present, it is entirely instructional: the state should adopt and enforce only those laws that apply evenhandedly to all. This "color blind" approach permits only those race-based state intrusions that remedy proved cases of current discrimination. Of necessity, then, race-conscious laws that seek to correct past discrimination are unacceptable because they imply state-sanctioned discrimination against non-blacks—"reverse discrimination." In short, the national commitment to eradicate racial discrimination is satisfied by penalizing those who are proved to have violated specific antidiscrimination laws. Where the violation is established, this antisocial behavior may be sanctioned by providing compensatory relief (including exemplary damages) to the specific individuals who make out a case that their protected individual rights have been infringed.[49] This approach may be termed the "narrow antidiscrimination" principle.[50]

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47. *See* discussion *infra* part II.

48. Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987).

49. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in the judgment); Firefighters v. Stotts, 467 U.S. 561, 580-82 (1984). *But see* Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986); United States v. Paradise, 480 U.S. 149 (1987) (rejecting the idea that only actual victims of past discrimination are entitled to relief under the Equal Protection Clause); *cf.* Teamsters v. United States, 431 U.S. 324, 362-71 (1977).

Senator Hatch is a primary proponent of this conception of the antidiscrimination laws, and its ascendancy is reflected in section 102 of the Civil Rights Act of 1991 (to be codified at 42 U.S.C. § 1981A). The depth of the commitment of the proponents of the narrow antidiscriminatory approach to the use of antidiscrimination laws as full and effective deterrence to discriminatory conduct appears belied by the strict limitation (or capping) of available damages. *See id.*

50. Proponents of the narrow antidiscrimination principle in recent years appear willing to accept a less doctrinaire formulation of the "color blind" norm. They claim that practices which disproportionately favor blacks are not necessarily in conflict with the principle *provided* that some rationale other than race is advanced for their use. Thus, a state may, for example, establish preferences favoring residents of the inner city, and such preferences would be constitutionally valid. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J. concurring). Since the Supreme Court has not confronted such a situation, the scope and details of such programs are at best speculative. Language in court of appeals opinions intimate the limited practicability of this concession. *E.g.*, Milwaukee County Pavers Assoc. v. Fiedler, 922 F.2d 419, 422 (7th Cir. 1991). Thus, in a recent decision, applying the *City of Richmond* decision, a district court struck down a preference favoring the physically handicapped. *See* Contractors' Ass'n of E. Pennsylvania v. City of Philadelphia, 735 F. Supp. 1274 (E.D. Pa. 1990). However, to the extent that the articulated reason for the validity of such a program is the recognition that correcting class-based structural impediments demand a different level of scrutiny (and therefore deference) from the courts, these narrow antidiscrimination adherents have edged closer to the position taken by the proponents of the "inclusionary" principle.

A basic criticism of this conception of the role of law in dealing with racially correlatable economic inequality is that it purveys a construction of "formal equality" that is ahistorical. Consciously avoiding the past, it seeks to create a harmonious present by positing the existence of individuals devoid of roots, and existing in a spatial and temporal world removed from what our common-sense observations tell us.[51]

A third approach, while acknowledging the possible continuing effects of past discrimination, does not accept that such effects alone explain the current position of blacks in the economy.[52] Whatever the significance of past discrimination, the important focus ought *not* to be on the consequences of past discrimination, but on identification of current policies that foster relative black economic inequality.[53] That inquiry, in the view of proponents, would disclose that current black under-performance is attributable to predominantly "class-based" structural factors that create and amplify incidents of poverty among those born into already disadvantaged settings.[54] The prescription offered by this approach—which may be referred to as "inclusionary"—is the tackling of the structural impediments to full participation by the disadvantaged without regard to their race.[55]

Judicial adoption of this approach would constitute a departure from the traditional legitimating principle that a "remedy" is available only after liability for wrongful conduct has been established. In the absence of the linkage between specific "wrongdoing" and "remedy," the judicial system would have to develop alternative conceptions of "liability" to serve this purpose. Specifically, the system would be faced with the need to identify factors that would circumscribe the application of the inclusionary principle.[56] Proportionality—a reasonable relationship between group participation in the economy and its composition in a defined pool (e.g. the national population)—might be one such factor.[57] It is a viable

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51. *See generally*, Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989).

This criticism is particularly telling since most of the proponents of the narrow antidiscrimination principle are "conservatives," and as one scholar has forcefully argued, a sense of connection to the past is central to authentic conservative philosophy. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990).

52. *See* WILLIAM J. WILSON, THE TRULY DISADVANTAGED 10, 12 (1990).

53. *Id.* at 118 (discussing concept of "life chances"); *cf.* Owen M. Fiss, *Groups and the Equal Protection Clause* 5 PHIL. & PUB. AFF. 149 (discussing the role of exclusion in shaping group identification). *See generally* Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

54. *See generally*, WILLIAM J. WILSON, THE TRULY DISADVANTAGED (1990).

55. *Cf.* Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

Both Justices O'Connor and Scalia's opinions in *Croson* appear to make bows in this direction. *See Croson*, 488 U.S. at 469; *id.* at 520 (Scalia, J. concurring).

56. This appears to be a contemporary problem in other areas of tort law. *See* discussion *infra* part IV.

57. Proportionality, as used here, should be distinguished from statistical parity. The assumption here is that proportionality is the substantive end sought to be achieved; that is, it is "a good" in and of itself. By contrast, statistical parity, as explained in part II *infra*, is simply an element of the procedural burden; that is, a "means" to some other end.

one, however, only if one postulates either that parity—and the other values it symbolizes[58]—is a good in and of itself (a position for which very few have seriously argued) or by relating the absence of proportionality to past wrongful conduct, making the approach essentially indistinguishable from the broadly remedial.[59] As a result, the inclusionary approach has tended to be quite unstable, finding shifting support both from advocates of the broadly remedial and the narrowly antidiscriminatory.[60] Removal of the straightjacket of procedure may encourage serious examination of the interesting issues this approach raises.[61]

The attitude and pronouncements of the United States Supreme Court have been central to the hegemony (and, indeed, viability) of these contending approaches both as theoretical and as practical organizing concepts.[62] For close to a half century, and certainly during the last twenty years, the Court has been the final arbiter both as to claims brought by blacks alleging individual or systemic unfairness to them in the economic arena, and claims by whites challenging programs that take race into account in defining access to economic opportunities. In resolving these claims, the Court's role has not been limited to that of disposing of the cases on the narrowest ground available. Rather, because of the Court's prior role as the conscience of the nation in matters of race, its pronouncements have garnered oracular quality for the private person, the public official, and society at large.[63]

Strikingly, in the economic sphere, the Court has discharged this role primarily by resort to discrete adjudicatory rule-making, rather than the

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58. Such values might include creation of an integrated work-force, doing away with racial stereotyping, diversity in the work-place, and economic empowerment for all citizens.

59. The more recent articulation of the approach focuses on the argument for the correction of economic imbalances without regard to race. *See* discussion *infra* part IV. The difficulty with this argument, like the difficulty identified in the text, is prescribing the relevant criteria for determining who is included and who is excluded. This determination is essential if the resulting prescription is not to go askew by benefiting the undeserving without correcting the perceived problem.

But see David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L. J. 1619, 1647 (1991) (advocating a statistical approach circumscribed by the requirement that an employer's hiring, promotion, and compensation practices must "benefit minority employees according to their proportions in the relevant labor pool, *unless* the employer can show that it would be very costly to do so.") (emphasis added).

60. Acceptance of the inclusionary approach by advocates of the broadly remedial approach is not difficult to explain. To the extent the focus is on the end-result, the inclusionary approach complements the historical justification approach of the broadly remedial. Acceptance of the inclusionary approach by those subscribing to the narrowly antidiscriminatory is of more recent vintage, and is very much in flux. A key consideration appears to be the criteria for "inclusion." These issues are explored in some detail in part IV *infra*.

61. *See* discussion *infra* part IV.

62. As contended *infra*, part II, the special role of the Court in shaping national law and morality on the issue of racial equality has been no less pronounced in the area of statutory interpretation than in constitutional adjudication. *Compare* Griggs v. Duke Power Co., 401 U.S. 424 (1971) *with* Brown v. Board of Educ., 347 U.S. 483 (1954).

63. This has been the case whether the problem seeking judicial resolution is deemed to arise under statutory or constitutional law.

explicit embrace of substantive norms.[64] Because the Court's application of such rules has exemplified substantive policy choices, the Court's failure explicitly to own up to its continuing function as a law-maker has had systemic costs, not the least of which has been the failure of the political branches to recognize properly and respond to the judicial role.[65]

While the themes underlying these approaches have received their fullest articulation in judicial opinions, their practical applications are easily seen in the practices of the political branches.[66] Usually unshackled by such traditional judicial constraints as the philosophical commitment to "neutrality" in the abstract, and to a regime of "precedent," the political branches—municipal, state, and federal—react to the practical demands of the political and economic environment.

When the nation turned from the promotion of civil and political equality to the eradication of economic disparities, the primary question was not—as it had been in the socio-political arena—which steps to take to correct the disparities, but instead was a more pristine query: whether society, and more particularly the government, has an obligation to correct such disparities.[67]

Although the courts were not squarely forced to confront these issues until the late 1960s and early 1970s,[68] the questions were, by the mid-1960s, placed before the political branches of government at the federal, state, and local levels. Their responses are instructive. Invariably, they began with policies that easily fall into the "narrow antidiscrimination" approach. With experience, these policies appeared inadequate, and these institutions in their practice (if not their explicit statement of policy) moved on to the broadly remedial approach.

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64. By this term, I mean the creation of categories of cases that should be subjected to like rules or principles. Examples would be the classification of cases into "Title VII" as opposed to "equal protection," "disparate treatment" rather than "disparate impact," and "benign" rather than "invidious" discrimination.

65. A significant feature of the development of civil rights laws has been that the Supreme Court's construction of these laws has been out of sync with the conception of the political branches. Thus, the Court started out with acceptance of past historical treatment as a basis for race-conscious remedies. It retreated from this position to the adoption of the "narrow antidiscrimination" principle. By contrast, the political branches started out with the narrow antidiscrimination principle, and adopted affirmative action in part as a response to the Court's lead. Current debate is a direct product of this asynchronous understanding of how to resolve issues raised by the obvious disparity in the representation of blacks in the national economy.

66. Additionally, this point should not be lost sight of because of the detailed discussion, in the next section, of the use of judicially created procedure as a substitute for substantive law-making.

67. *See, e.g.*, HUGH D. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972, 100-21 (1990).

68. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). Many of these issues were first raised in the context of challenges to a federal Executive Order (11,246) requiring contractors on federal construction projects to take affirmative action to seek out and employ blacks in those construction jobs. *See, e.g.*, Ass'n of Contractors of E. Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971).

Thus, although the federal Executive Branch today stands—as it did for much of the 1980s—as the embodiment of opposition to affirmative action and to a broadly remedial conception of Title VII, it was very much in the forefront of the initial move from a narrow to a broad conception of the meaning of racial equality. Motivated by a combination of moral concern over the relative inequality of blacks, belief in societal compensation for discrimination, the potential political power of increasingly enfranchised blacks, and administrative convenience, the executive branch of the federal government led the way in the unabashed enunciation of a policy committing the government to take affirmative steps to assure full integration of and participation by blacks in the economy.[69] The executive branch, in a series of steps, demonstrated that fair treatment required not a facially neutral or passive administration of the antidiscrimination laws, but affirmative steps to bring blacks into participation in government employment and contracting opportunities.[70] In essence, the executive branch, starting out from the narrow antidiscrimination principle, moved gradually but steadfastly to embrace the broadly remedial.[71]

State and local government experiences were not very different. By the mid-1960s, states, through "unfair employment" laws, had a network of antidiscrimination laws that emphasized the narrow antidiscrimination principle.[72] Despite occasional attempts by administrative or executive

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69. For an exhaustive treatment of the role of the federal executive in promoting affirmative action programs, see generally HUGH D. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972 (1990).

Although the starting point was a policy statement that simply required "fair treatment" (defined as the avoidance of discriminatory acts against blacks), it became evident to the executive branch that given the background inequalities, a policy of "nondiscrimination" was by itself insufficient to assure representative black participation in taking advantage of employment and contract opportunities.

70. While concerted executive action has been traced to President Franklin D. Roosevelt's 1941 Fair Employment Executive Order 8802, the watershed executive action is generally acknowledged to be the promulgation of Executive Order 11,246 by President Kennedy in 1963. *See id.* at 114-15. These initial executive orders easily fit within the narrow antidiscrimination principle. By 1969, when the Minority Business Development Agency was created in the Department of Commerce, the policy had matured from mere avoidance of discriminatory policies to affirmative steps to assure participation to blacks.

71. By the 1980s, the executive's commitment was no longer to a broadly remedial, but was instead a wavering commitment to the narrow antidiscrimination principle mingled with occasional articulation of the inclusionary approach. The ambiguities that occasionally crept into the policies of the Executive Branch were best demonstrated in the August 25, 1985, ABC News *This Week With David Brinkley* interview given by then-Attorney General Edward Meese III on the occasion of the passage of six months since his confirmation in that position. As succinctly summarized by a *Reuters* dispatch on the interview, Mr. Meese took the position that "although the administration has long opposed setting hiring quotas or goals to bring more minorities into the work-force, [it] favors a broad requirement that government contractors engage in affirmative action hiring ." *Reuters, Ltd.*, Aug. 25, 1985, *available in* LEXIS, Nexis Library, Archives File; *see also* Tom Morganthaw & Diane Weathers, *Black Voters: A Move to the GOP?*, NEWSWEEK, Jan. 27, 1986, at 18.

72. For the discussion of some examples of such laws, see Landis, *The Economics of State Fair Employment Laws*, 76 J. POL. ECON. 507 (1968); Arnold N. Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study*, 18 VAND. L. REV. 965 (1965); Robert A. Girard & Louis L. Jaffe, *Some General Observations on Administration of State Fair Employment Practice Laws*, 14 BUFF. L. REV. 114 (1964); Herbert Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFF. L. REV. 22 (1964).

branch agencies in the states to give these statutes broadly remedial reading,[73] the passage of the Civil Rights Act of 1964, and the provisions for coordination of enforcement of the statute by the Equal Employment Opportunities Commission and state agencies, overshadowed many of the state laws and enforcement practices. Many claims became subsumed under the federal statute. However, after the Supreme Court sanctioned Congress's explicit adoption of preference programs,[74] local governments, doubtless reacting to political pressures,[75] followed suit in significant numbers[76] and explicitly endorsed the broadly remedial approach.[77]

Motivated by moral and political concerns, and with executive action as an indicator of the feasible,[78] the Congress followed a route similar to local governments. Beginning with the Civil Rights Act of 1964, Congress in 1972 put its imprimatur on the Supreme Court's quite broad interpretation of that statute.[79] In 1977, Congress went significantly further. It adopted policies that expressly authorized preferential treatment of blacks in access to government contracting opportunities.[80] These policies were expanded in subsequent legislations.[81]

These policies of the political branches were often out of step with the judicial approach. In particular, the political branches and those institutions that confront on a daily basis the practical effects of economic disparities moved from a narrow antidiscrimination perspective to embrace the broadly remedial conception.[82] By contrast, as will be demonstrated

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73. One such example (in Illinois) was cited to by the Court in the *Griggs* decision. *See Griggs*, 401 U.S. at 434 n.10.

74. Fullilove v. Klutznick, 448 U.S. 448 (1980).

75. Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983); Drew Days, III, *Fullilove*, 96 YALE L. J. 453 (1986).

76. According to the mass media, at least two hundred political jurisdictions had strong affirmative action programs—in the nature of set-asides and like preferences—in existence in 1989.

77. Thus, both the National League of Cities and other organizations representing state and local governments, as well as individual political jurisdictions, filed briefs as *amici* in support of the broadly remedial approach that characterized the City of Richmond's affirmative action program. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 470 (1989).

78. *See e.g.*, statement of Parren Mitchell in enacting the Public Works Employment Act of 1977, *quoted in* Fullilove v. Klutznick, 448 U.S. 448, 458 (1980).

79. 42 U.S.C. § 2000e.

80. Public Works Employment Act, § 105(f), 42 U.S.C. § 6705(f) (1977). The constitutionality of this provision was resolved in Fulilove v. Klutznick, 448 U.S. 448 (1980).

81. *See, e.g.*, The Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(F), 96 Stat. 2097, 2100 (1982); The Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132 (1987); Business Opportunity Reform Act of 1988, Pub. L. No. 100-656 (1988). *See generally* 15 U.S.C. § 637(a), (d) (1988).

More recently, the framing of these preferences has been in terms of "disadvantaged" persons, rather than "minorities," with the "rebuttable presumption" that members of groups classified as "minorities" are disadvantaged. *See, e.g.*, The Surface Transportation and Uniform Relocation Assistance Act of 1982, Pub. L. No. 97-424, § 105(F), 96 Stat. 2097, 2100 (1982).

82. The reactions of the private sector of the national economy, particularly the larger business entities, suggest a similar recognition through experience of the value of moving from a narrow antidiscrimination perspective of their obligations under the law to a broadly remedial approach to the composition of their work-force. Thus, comparisons of the recent affirmative steps taken by companies such as AT&T, Xerox Corporation and others, *see, e.g.*, BUSINESS WEEK July 8, 1991, contrast vividly with the recalcitrance of large companies evident in cases such as *Griggs* and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1974), discussed below. This move by America's

in part II, the judicial progression has been the reverse, moving from an essentially broadly remedial vision of antidiscrimination laws to the currently dominant narrow approach. The next section explores the relationship between the Supreme Court's use of burden allocation and its substantive move from a broadly remedial conception of Title VII to a much narrower reading of the antidiscrimination laws.

II. SUBSTANCE MASQUERADING AS PROCEDURE: FROM *GRIGGS* TO *WARDS COVE*

This part examines the Supreme Court's reliance on burden allocation as an essential tool in the evaluation of claims of discrimination. It posits as a distinctive feature of these cases the lack of consistency in the content of the standard applied through the Court's statement of the burden of proof and the statistical inquiry demanded of the parties. It contends that substantive concerns such as skepticism over the asserted "objectivity" of traditional yardsticks, rather than the search for procedural fairness (e.g., assigning the burden for production of information on the party with the better access to the information), provide more comprehensible explanations for the Court's allocation and definition of the burdens of proof. Further, because the weight and nature of the substantive issues masked by the Court's dispositive use of procedure are best understood in the context of the dynamic changes in the judicial conception of the role of antidiscrimination laws in shaping the structure of society, a chronological rather than a thematic exploration of the cases is warranted.

Subpart A examines the Court's statement and implementation of burden allocation as an element of the causation requirement in "direct discrimination" cases; that is, where black plaintiffs challenge the status quo. Subpart B explores the transposition of the causation test to claims by white plaintiffs challenging affirmative action programs. In both instances, the causation standards enunciated and applied by the Court were demonstrably inconsistent, and reflected more the prevailing substantive policy choice dominant on the Court than any principled attempt to give effect to procedure as an organizing tool.

A. Disproportional Representation and Discrimination

Suits brought under Title VII of the Civil Rights Act of 1964[83] have provided the vehicle for the most elaborate articulation by the Supreme

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large companies towards a broadly remedial conception of the principle of antidiscrimination is perhaps most glaringly illustrated by the position of the Business Roundtable (an organization of the country's largest 200 business companies) with regard to the enactment of the Civil Rights Act of 1991. *See* Arthur A. Fletcher, *Racism is Sapping Our Energies and Squandering Our Resources*, U.S.A. TODAY, May 21, 1991, at 12a. Indeed, it was stated that it would have made virtually no difference for the employment of blacks or women by the private sector which version of the competing civil rights bills became law since their provisions all fell short of current practices in the work-places of the large corporations. *See* BUSINESS WEEK, July 8, 1991, at 60.

83. 42 U.S.C. §§ 2000e to 2000e-17.

Court of the relevance of statistical disparities to the legal rights of black Americans in the economic arena. For eighteen years, much of the Court's discussion was framed in procedural terms. The relevance of statistics and their effect on the discharge of the burden of proof were presented as housekeeping elements of litigation in the particular case, and presented with minimal explicit reference to broader societal concerns.[84] This subpart traces the development of this proceduralist approach to its current formulation.

The journey proceeds in four stages. Subpart (1) examines the four cases[85] employed by the Court to erect the structure of the procedural approach. The exploration shows that in these building block cases, the invocation of the allocation of burden of proof was not viewed as critical to the disposition of the particular case. Rather, the allocation of burdens embodied a broad conception of the relevance of antidiscrimination lawsuits to the structure of a broadly inclusive society. Reliance on statistical disparities in these cases reflected both skepticism as to the efficient and no-bias properties claimed for neutral selection criteria, as well as the vision for a society in which one's status could not be readily predicted by racial or ethnic ancestry.

Subpart (2) discusses the application of the burden of proof analysis to the so-called "pattern and practice" cases. The exploration exposes an incipient dichotomy between continuing judicial skepticism in the case of private employers, and judicial deference to selection criteria employed by governmental bodies.

Subpart (3) discusses cases decided by the Court between 1978 and 1983. The reasoning of these cases unmistakably make them precursors to the more controversial decisions of 1988-1989. The subpart also demonstrates that while these cases are often classified as "disparate treatment," the effort to distinguish them from the earlier cases on this ground is of no consequence. What is significant about these cases is not their dissimilarity to prior cases, but the flexibility the relatively unexplored "disparate treatment" approach appeared to provide a court in search of a consensus formula to camouflage a reversal of substantive visions.[86]

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84. In its 1988 and 1989 decisions, the Court abandoned this purely procedural approach, and made it plain that the use of the shifting of burdens was the product not of a "neutral principle" of adjudication, but of a substantive policy objective defined and limited by one's view of Title VII as a distributive principle. *E.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) ("We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. . . . It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."); *see also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989).

85. Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas v. Green, 411 U.S. 792 (1973); Albemarle Paper v. Moody, 422 U.S. 405 (1975); Teamsters v. United States, 431 U.S. 324 (1977).

86. *See* discussion *infra* part A(3).

Finally, subpart (4) discusses the Court's decisions in 1988-1989, seeking to relate the role of the allocation and definition of the burdens of proof as articulated by the Court to the precedents discussed in subparts (1) through (3).

1. Disproportionality as Discrimination

The problem of black under-representation in mainstream economic activity and its relationship to the country's history of discrimination was first squarely faced by the modern Supreme Court in *Griggs v. Duke Power Co.*[87] The Court's disposition of the case illustrates its approach in the "broadly remedial" phase.[88]

Griggs came out of North Carolina. A group of black employees of the Duke Power Company ("Company") sued it under Title VII of the Civil Rights Act of 1964[89] on the ground that the Company's practice of requiring a high school diploma and success on standardized general intelligence tests as a condition for promotion into certain departments of the Company was in violation of the law because blacks were disproportionately affected by the requirement.[90] Although the facts of the case were sufficiently egregious so that a finding in favor of the plaintiffs could have been made on the ground that the Company had engaged in discrimination against the thirteen individual plaintiffs before the Court,[91]

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87. 401 U.S. 424 (1971).

88. The phase was dominant in the Court's jurisprudence roughly between 1971-77.

89. 42 U.S.C. §§ 2000 to 2000e-17 (1988).

90. 401 U.S. at 425-26. Specifically, the action was brought under 42 U.S.C. § 2000e-2(a), which provides:

> It shall be an unlawful employment practice for an employer —
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

91. For example, prior to July 2, 1965, the effective date of Title VII, Duke Power explicitly discriminated against its black employees by restricting them to the lowest rung of a hierarchically structured workforce, where the highest pay received by the black employees was less than the lowest pay in the next rung from which blacks were totally excluded. *Griggs*, 401 U.S. at 427. Even assuming that Title VII did not apply retroactively to penalize such conduct, the *Griggs* opinion could still have been written as a "disparate treatment" or "intentional discrimination" case by grounding the Court's ruling on the Company's post-Title VII conduct of imposing academic qualification requirements for transfers and promotions from and within departments on pre-Title VII black employees. As against such employees, the requirement could be viewed as a subterfuge or "pretext" for discrimination. Limiting the reach of *Griggs* to this narrow basis would also have been supported by other evidence on the record. For example, that the first black was promoted to an "operating department" only after the filing of a complaint with the EEOC, and despite the fact that the candidate, an employee since 1953, had a high school diploma the lack of which, at least until 1965 was not, even theoretically, a bar to the promotion of whites; that the institution of a high school diploma as a prerequisite for transfers from the lowest rung department into any of the other four departments came into effect concurrently with the abolition of open discrimination against blacks; that whites without high school diploma continued to receive promotions within the operating departments; and that despite the institution of success on the aptitude tests as a prerequisite

Griggs is striking because the Court did not take this narrow approach. Instead, using broad language, the Court indicated that Title VII was not only aimed at providing relief to the individual black plaintiff who can prove that she was the victim of discrimination. The law, it said, had the broader purpose of removing "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[92]

In its ruling, the *Griggs* Court was writing on a clean slate. It had never previously focused on the permissibility and scope of measures aimed at integrating blacks into the mainstream of the national economy.[93] Moreover, the action was brought under a statute of recent vintage with expansive prohibitory language.[94] But it was nonetheless a statute, and subject to the traditional rules of statutory construction.[95] While the literal wording of the statute did not appear squarely to prohibit Duke Power Company's ("the Company") employment practice,[96] the Court fashioned from the statute's "promise of equal opportunity," and the differential success rates of blacks and whites on the aptitude test, a violation of Title VII.[97]

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for transfers within the operating departments following the abolition of formal discrimination, whites who had directly benefitted from such discrimination had their benefit grandfathered by being exempted from the test requirement. *Id.* at 427-28. As discussed in the text, however, the Court's holding was much broader.

92. *Id.* at 432. Determining whether a particular procedure or mechanism measures "job capability" is, as demonstrated by the opinion itself, a thorny question that takes the inquirer into the thicket of job validation and the arcane discipline of industrial psychology. For an attempt at an administrative solution, see the EEOC Guidelines on "Employee Selection Procedures." 29 C.F.R. §§ 1607.1 to 1607.8 (1992).

93. *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193, 202-03 (1983) (summarizing legislative history of the Civil Rights Act of 1964).

94. *See* 42 U.S.C. § 2000e-2(a). The Court's reliance in *Griggs* on section 703(a)(2) was without explanation. Subsequent cases were to explain that the operative phrase on which the Court anchored the "disparate impact" doctrine was the prohibition of employment practices that "limit" or "classify" employees "in any way which would deprive or tend to deprive any individual of employment opportunities . . . ." Connecticut v. Teal, 457 U.S. 440, 448 (1982).

95. The conventional claim is that in matters of statutory interpretation, the Court's primary function is to give the legislated words their commonly understood meaning, and if uncertainty remained, to look to the legislative history to ascertain the purpose, intent or policy of the enactment and give effect to such. *See generally*, TVA v. Hill, 437 U.S. 153 (1978). *But see* Jett v. Dallas Indep. School Dist., 491 U.S. 701, 738-39 (1989) (Scalia, J. concurring) (questioning resort to legislative history).

96. *Griggs*, 401 U.S. at 426. Duke Power argued that its practice was specifically authorized by 42 U.S.C. § 2000e-2(h), which states that:

> [n]otwithstanding any other provision of this subchapter, it shall not be . . . an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Griggs, 401 U.S. at 431.

97. *Griggs*, 401 U.S. at 429-30. As the Court put it:

> [t]he objective of Congress in the enactment of Title VII is . . . to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

Id.

The Court expressly rejected the argument that disproportionalities that arise from a "neutral" working of economic forces cannot be said to deny anyone "equal opportunity." Rather, the Court stated that differences in impact along racial lines, at least where such differences can be foretold ahead of the administration of the selection criteria, constituted a violation of Title VII.[98]

The recognition that attainment of "equality of opportunities" may and often does demand consideration of effects—because what is the outcome in one instance is often the input in another[99]—was further reflected in the Court's disposition of the Company's alternative argument that the effects of the use of aptitude tests (and similar "objective" selection criteria) were specifically exempted from the reach of Title VII.[100] In a statement that both embodies the premise of the broadly remedial approach and captures the prescription of the inclusionary approach, it stated its skepticism for "tests" and other such "neutral" measures of

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98. *Id.* at 430. The Court held that:

> on the record in the present case, 'whites register far better on the Company's alternative requirements' than negroes . . . . This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are negroes, petitioners have long received inferior education in segregated schools . . . .

Id.

The Court found the statistical evidence probative because of general societal inequalities such as the fact that whites were three times as likely as blacks to possess high school diplomas, and that one study by the EEOC showed that while 58% of whites passed a battery of standardized tests including the two at issue in *Griggs*, only 6% of blacks did. *Id.* at 430 n.6. It was this sort of evidence that subsequent decisions were to reject. *See, e.g.*, Hazellwood School Dist. v. United States, 433 U.S. 299 (1977), discussed *infra* at notes 184 to 194.

The Court accepted as objective facts (1) that blacks underperformed in the standardized tests; (2) that such underperformance could be correlated to race; (3) that blacks were just as intelligent as whites; (4) that segregated black schools were inferior to segregated white schools. *See Griggs*, 401 U.S. at 430-32. Left unclear in the Court's analysis was whether the standardized tests were objective measures of intelligence, and whether the use of objective measures of intelligence were permissible selection criteria under Title VII. The Court declined to resolve these issues by relying on the societal evil of compelling blacks to attend inferior segregated schools.

99. As the Court phrased it:

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and the condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in impact.

Griggs, 401 U.S. at 431.

100. The Company argued that its practice was expressly insulated by the provision in Section 703(h) (the "Tower Amendment") exempting the use of any "professionally developed ability test" that is not "designed, intended or used to discriminate because of race." *See* 42 U.S.C. § 2000e-2(h).

The Court's direct response was that the EEOC—the administering agency—had read this provision to mean that only those "tests" success in which could be correlated to job performance were insulated from challenge under Title VII. The EEOC's interpretation was owed deference, and since Duke Power Company had not shown its tests—let alone its requirement of high school diplomas—to be job related, it could not successfully rely on the Tower Amendment.

Thus, the defense of "job relatedness" was, in *Griggs*, discussed not as a general defense to a demonstration of statistical imbalance, but merely as a specialized defense under section 703(h), relating to "professionally developed ability tests."

qualification. That skepticism led the Court to condemn in quite sweeping terms testing mechanisms with disparate impact.[101]

Having rejected the claimed efficacy and neutrality of the operation of venerable selection yardsticks, the Court was faced with the need to provide alternative limiting criteria faithful to its interpretation of Title VII.[102] Although rarely acknowledged,[103] *Griggs* left entirely open both the method and substance of how Title VII litigation would proceed within the broad scope of the ruling.[104]

One answer would have been to provide substantive requirements for employers. Liability would thus have been predicated on an employer's failure to satisfy the specified substantive objective. Substantive law developments could then have taken the form of articulating and developing what constitutes, as a substantive matter, disparate impact and the requirements of "job-relatedness." Under such an approach, the focal point of inquiry would be defining the meaning of differential effects and of job-relatedness, not on the procedural nicety of who ought to carry the burden of demonstrating their existence.[105] The corollary remedy would also be substantive: the removal of the disparate impact and/or use of practices found not to be job-related. This approach would have raised the question of whether the primary concern ought to be removing disproportionate effects, or simply using practices, procedures, or tests deemed to be job-related.

The subsequent development of Title VII litigation, however, took a distinctly different approach. It relied on the essentially procedural and

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101. *Griggs*, 401 U.S. at 433. The Court stated that:

> [t]he facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

Id.

102. *Id.* Given the Court's holding, a perfectly plausible construction would have been to adopt the admittedly radical reading of the Act as mandating proportionality—at least in employment. The Court rejected this approach by making the non sequitur claim that "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications," and by asserting without explanation that the Act does not "command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Id.* at 430-31.

103. See, however, the discussion in part III *infra*, concerning whether *Griggs*' "business necessity" defense requires the employer to show that its selection criteria are "job-related" because they measure (or are predictive of) performance on the job, or whether they are "job-related" because they have a "manifest relationship" to the business needs of the employer.

104. This issue may be viewed as the precursor to what subsequently has become known as the "quota conundrum"; that is, to what extent would a strict application of the disparate impact theory result in hiring by numbers as employers seek to avoid the invalidation of their selection practices and procedures? *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989); *cf.* Connecticut v. Teal, 457 U.S. 440 (1983) (rejecting one potential solution, the so-called "bottom line" defense); *see also* discussion *infra* part A(4).

105. Such an approach would not have rendered entirely irrelevant the distribution of burdens, but it would have shifted the focus of debate to substantive rather than procedural disagreements. *See* part IV, below.

seemingly content-neutral device of burden allocation. This approach was neither compelled by the logic of *Griggs* nor the wording of Title VII. The procedure, however, afforded the Court an opportunity to embrace a broadly remedial substantive vision without engaging in the sort of potentially divisive discussion that adoption of the alternative substantive approaches would have entailed. This was possible because the concept of burden of proof, while giving the appearance of arcane traditionalism, is highly elastic and malleable.[106]

The second Title VII case faced by the Court demonstrated the potential of procedure to provide a seemingly coherent means of reconciling the narrowly antidiscriminatory language of Title VII with the dominant broadly remedial vision of the Court. *McDonnell Douglas Corp. v. Green*[107] presented the Title VII problem in a trying factual setting for the enunciation and application of the broadly remedial vision. If the black plaintiffs in *Griggs* presented a compellingly sympathetic class for relief, the case of the plaintiff in *McDonnell Douglas* was less so.

Green, a black activist employee of McDonnell Douglas, lost his employment as part of a general reduction in the company's workforce.[108]

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106. Ordinarily, the allocation of the burden of proof is both a statement of the order in which evidence is to be presented, and the quantum or weight of the evidence required to be presented. The burden is a corollary of that of pleading which is itself highly subject to manipulation. *See, e.g.*, Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959). The initial burden falls on the plaintiff, who is required to present evidence indicating that some recognized legal rights of hers is in jeopardy. She does so by showing that some demonstrable facts (i.e., other than her mere allegations) exist that threaten such rights. If such demonstrable facts satisfy the substantive elements of the claim, she is said to have made out a prima facie case. *See generally*, CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 337 (Edward W. Cleary ed., 3d ed. 1984). The burden now shifts to the defendant to respond to the prima facie case. *See infra* notes 120-21.

The quantum of evidence a party may be required to adduce in support of an element of a claim or defense may be obviated by the creation of a legal presumption; that is, the demonstration of certain "basic facts" compels the drawing of a legal conclusion that an as yet unproved ultimate fact must be found. When presumptions ought to be created, who ought to create them, and their effect in reallocating the quantum or weight of evidence that must be produced by the other side in order to rebut the presumption—i.e., that of production or of persuasion on the disputed point—have been grounds for extensive and not infrequent metaphysical writings by academics. For more recent attempts at clarification, see Kenneth Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C. L. REV. 697 (1984); Ronald J. Allen, *Presumptions in Civil Actions Reconsidered*, 66 IOWA L. REV. 843 (1981); Neil S. Hecht & William M. Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U. L. REV. 527 (1978). Three of the early writings that framed the terms of the debate are JAMES THAYER, A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE (1898); Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920); Edwin M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931).

Three justifications are generally advanced for the creation of presumptions. First, factual probabilities favor the presumption because past experience indicates that in the absence of unusual circumstances, the presumed occurrence would have followed from the established basic facts. Second, the creation of the presumption is seen to be fair because the party against whom the presumption operates is in a better position to acquire information with which to rebut the presumption than the party in whose favor it operates is to acquire information dispositive of the presumed fact. Third, an explicit societal policy would be furthered by the creation of such a presumption. *See generally*, CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 342-44 (Edward W. Cleary ed., 3d ed. 1984).

107. 411 U.S. 792 (1973).

108. *Id.* at 794.

Claiming his discharge and McDonnell Douglas's hiring practices to be racially tainted, Green and others engaged in a series of disruptive protest measures directed against McDonnell Douglas.[109] Arrested, Green pleaded guilty to charges of traffic violation, and, having paid the fines, instituted a number of racial discrimination claims against McDonnell Douglas.[110]

Sometime after these activities, McDonnell Douglas advertized employment openings in a field in which Green possessed some experience. Green's application was turned down on the basis of his participation in protest activities. Green filed a complaint with the Equal Employment Opportunities Commission ("EEOC") alleging both a violation of section 703 (prohibiting discrimination in employment) and section 704(a) (prohibiting retaliatory conduct against those protesting or seeking correction of discriminatory conditions of employment).

While the EEOC made no ruling as to the section 703 claim, it found that reasonable cause existed for a possible violation of section 704(a). Green sued McDonnell Douglas pursuant to a "right to sue" letter.[111]

The Supreme Court stated that the issue presented to it for review was "the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964."[112] This framing of the issue was explained in part by the district court's denial of Green's request for discovery of statistical evidence relating to the composition of McDonnell Douglas's workforce,[113] and in part by the court of appeals's application to the case of the allocation of the burdens of proof it derived from *Griggs*.[114]

Accepting the decision in *Griggs* as providing the appropriate starting point, the Supreme Court explained the *Griggs* holding as embodying the need to balance two considerations. On the one hand, *Griggs* recognized that the plain purpose of Title VII was to ensure equality of employment opportunities through the elimination of "those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[115] On the other hand, "[a]s noted in *Griggs*, 'Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications'."[116] According to the *McDonnell Douglas* Court, *Griggs* reconciled this conflict

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109. *Id.* at 794-95. Notably, Green participated in a "stall-in" involving the use of cars to block an access road into a McDonnell Douglas facility, and a "lock-in" during the course of which some unidentified person locked from the outside a room in which McDonnell Douglas employees were conducting a meeting.

110. *Id.* at 794 n.2. He filed "formal complaints" with the Civil Rights Commission, the Departments of Justice, Defense and the Navy, and with the Missouri Commission on Human Rights.

111. *Id.* at 797. The lower courts held that *McDonnell Douglas*' conduct was not in violation of section 704(a). Green did not contest this holding before the Supreme Court.

112. *Id.* at 793-94. Subsequently, the issue was rephrased as concerning "the order and allocation of proof in a private, non-class action challenging employment discrimination." *Id.* at 800.

113. *Id.* at 800 n.10.

114. *Id.* at 801 n.12 (citing Green v. McDonnell Douglas Corp., 463 F.2d 337, 352-53 (8th Cir. 1972)).

115. *Id.* at 800 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971)).

116. *Id.* (citing Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971)).

by authorizing a limited interference with the privately ordered selection of employees by an employer to promote a broad societal interest "shared by employer, employee, and consumer, [in] efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."[117] Remarkably, however, the *McDonnell Douglas* Court articulated a purely structural mechanism—the judicial assignment and supervision of the burdens of proof—as the means of realizing this lofty substantive goal.

Viewed in the abstract, this is a rather conservative interpretation of (if not retrenchment from) *Griggs*. Looked at in context, however, both the resort to the allocation of the burdens of proof and, more particularly, the definition of those burdens in the context of the individual claim at issue in *McDonnell Douglas* represented a strong reemphasis of *Griggs*'s skepticism of the claimed neutrality of employment decision-making.

Starting with the traditional rule that a complaining party ought to carry the burden of showing that it is entitled to relief, the Court stated that the hurdle is scaled at the outset by a plaintiff's ability to make out a prima facie case. The Court then defined this hurdle.[118] The plaintiff simply has to show: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the employment remained open, and the employer continued to seek candidates of the applicant's qualifications.[119]

Assuming that this burden is satisfied,[120] it is then up to the employer "to articulate some legitimate, nondiscriminatory reason for the [applicant's] rejection."[121] Unlike the prima facie element, the Court did not spell out with any specificity the minimum threshold that the defendant must satisfy in order to discharge this evidentiary burden. The Court

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117. *Id.* at 801.

118. *Id.* at 802; *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (describing the burden as "non-onerous").

119. *McDonnell Douglas*, 411 U.S. at 802. Under traditional rules, this is tantamount to a statement that the elements of the claim consist of these four items. Such a holding is a far cry from the subsequent conclusion that disparate treatment analysis, of which *McDonnell Douglas* is frequently cited as the progenitor, requires a showing of the intent to discriminate.

As a general statement of the prima facie case, this formulation is remarkably geared to the claims of a black applicant for a job opening, as contrasted, for example, to the Title VII claims of a white dispatcher passed over for promotion because of the implementation of an affirmative action program. *See* Johnson v. Transportation Agency of Santa Clara, 480 U.S. 616 (1987). Thus, elements of the test speak in terms of establishing membership in a minority group or protected class. Moreover, the Court has never presented a convincing explanation of why the plaintiff should show that the vacancy remained open, and that the employer continued to look for others of the applicant's qualification. *But cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989) (Kennedy, J., dissenting).

120. The Court held that the plaintiff had satisfied this prima facie standard. Although the Court noted that this formulation is not necessarily applicable in every respect to different factual situations, it has repeated this formulation in all of its disparate treatment cases, and has never indicated in what way one might, consistent with disparate treatment analysis, depart from it. *McDonnell Douglas*, 411 U.S. at 802 n.13.

121. *Id.*

simply noted that it need not "detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire."[122]

While this facet of the burden has attracted the most scrutiny,[123] and, at least until 1989, presented the decisive inquiry in Title VII actions, its resolution in *McDonnell Douglas* was simple and uncontroversial.[124]

The defendant's satisfaction of the rebuttal burden, however, was not sufficient to dispose of the case. Perhaps in the clearest statement of the broadly remedial approach and the attendant skepticism of the neutral application of even widely accepted norms, the Court introduced yet a third tier of burden-shifting, one uncommon to traditional common law litigation and whose meaning and usefulness has been questioned.[125]

The addition is the so-called "pretext" tier. Assuming that a defendant satisfies the rebuttal burden, the presentation of evidence does not terminate at this stage. Rather, the plaintiff "must . . . be afforded a fair opportunity to show that [the defendant's] stated reason for [plaintiff's] rejection was in fact pretext."[126] The Court explained the need for this

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122. *Id.* at 802-03.

123. *See generally* Watson v. Fort Worth Bank and Trust 487 U.S. 977, 1011 (Blackmun, J., concurring). At the core of the debate is whether the burden is merely one of advancing a plausible legitimate reason for the employer's rejection of the plaintiff (the so-called burden of production), or whether the employer is required to persuade the factfinder that not only is the legitimate reason a plausible explanation for its conduct, but that the employer's conduct was actuated by it (the "burden of persuasion"). As the discussion below explains, the Court has vacillated between both approaches. For an explicit recognition of this vacillation, see Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659-60 (1989). One means of reconciling these approaches—embraced by the liberal members of the Court—has been to read the employer's burden as that of "production" in disparate treatment cases, and that of "persuasion" in disparate impact cases. *Id.* at 667-70 (Stevens, J., dissenting).

An alternate perspective views the discussion in terms under which challenges to a plaintiff's prima facie case may be considered under one of two rubrics: a "rebuttal" burden and an "affirmative defense." The former challenge ordinarily takes the form of a frontal attack on the factual aspects of the evidence, while the latter involves a "collateral" challenge in which the defendant concedes the stated facts, but interposes additional reasons to explain why the plaintiff is not entitled to relief. Because the rebuttal response does not concede, but rather directly challenges the basis of the plaintiff's prima facie case, the fact-finder's task is that of resolving a conflict as between two submissions. At least in theory, then, the stronger the prima facie case, the stronger the rebuttal evidence needed to undermine it, and vice-versa. The role of the judge in such a situation is to weigh evidence adduced by the parties.

By contrast, the defendant, in an affirmative defense situation, concedes the facts constituting the plaintiff's prima facie case but then asserts that an independent set of facts or laws disinvests the plaintiff of her claim to relief. Here, the judge is not simply being asked to weigh contradictory evidence, but to engage in the quasi-legislative function of choosing from among competing claims that which ought to be preferred. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 286-95 (1989) (Kennedy, J. dissenting).

124. After noting that McDonnell Douglas "assigned" the unlawful protest activities as its reason for rejecting Green's application, the Court stated that "[w]e think that this suffices to discharge [McDonnell Douglas'] burden of proof at this stage and to meet [Green's] prima facie case of discrimination." *McDonnell Douglas*, 411 U.S. at 802-03.

The Court elaborated on this point by examining Green's role in the protests, and by pointing out that his section 704(a) claim had been dismissed.

125. *See, e.g.*, Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory Of Discrimination*, 73 VA. L. REV. 1297 (1987).

126. *McDonell Douglas*, 411 U.S. at 804. Thus, success at the defendant's rebuttal is a legal issue that creates a presumption of rightful conduct by the defendant.

new tier simply by observing that while Title VII does not compel the hiring of persons who have engaged in unlawful protest activities, neither does it permit the use of such activities as a coverup for the sort of discrimination prohibited by Title VII. Indicating how a plaintiff might discharge the pretext burden, the Court, while focusing on the facts of the specific employment decision,[127] strongly suggested that the plaintiff can rely on generalized statistical evidence.[128]

The resulting structure, then, was not the straightforward transposition of settled concepts of burden allocation to Title VII litigation. Rather, it involved the creation of a definitive process embodying substantive norms and concerns. Under the rubric of engaging in a narrowly personalized inquiry, the Court actually articulated concepts that embraced a broadly remedial conception of litigation as an instrument for fashioning a community of interrelated interests.[129]

Albemarle Paper Co. v. Moody,[130] a case whose facts are remarkably similar to those in *Griggs*, readily fits into this pattern of cases that, animated by a broadly remedial substantive vision, adopted a structural framework favoring the imposition of a quite light burden on a plaintiff's ability to demonstrate causal link between injury to a group of which she is a member and her right to obtain relief. Until 1964, the employer

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127. The Court suggests that of significant relevance to the pretext case is whether white employees involved in unlawful acts similar to those of the plaintiff were treated less harshly or whether there is other evidence that the plaintiff was being retaliated against for engaging in permissible civil rights activities. *Id.* at 804.

128. According to the Court, "statistics as to [McDonnell Douglas'] employment policy and practice may be helpful to a determination of whether [the] refusal to rehire . . . conformed to a general pattern of discrimination against blacks." *Id.* at 805 (citation omitted). Similarly, the Court indicated that it is permissible for the district court to conclude on the basis of statistical evidence that the racial composition of the work force was reflective of restrictive or exclusionary practices by the employer. *Id.* at 805 n.19 (citing Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co., and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 92 (1972)). The Court further suggested that Green could successfully discharge the pretext burden by relying on statistical disparities in the composition of McDonnell Douglas' work force. *See McDonnell Douglas*, 411 U.S. at 805.

In this sense, one may question how the evidence here differs from that used to establish a prima facie case under the disparate impact theory. In short, the role of statistics here undercuts the argument that disparate treatment constitutes a separate line of cases because the critical inquiry is into motivation or intent, rather than effects. *See, generally*, Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988).

129. McDonnell Douglas v. Green, 411 U.S. 792 (1973). Thus, the burden placed on the plaintiff to make out a prima facie case is a light one. That burden is defined in terms of injury to a class, not to the individual plaintiff.

Because the formulation of the elements of the prima facie case is so closely interwoven with the facts of *McDonnell Douglas*—an individual non-class action suit—this observation is not immediately apparent. The application of the test in subsequent cases makes plain that the inquiry as to the generalized treatment accorded members of the plaintiff's class is not necessarily the specific treatment received by the complaining plaintiff.

Similarly, it is only after the defendant has successfully rebutted the claim of group-based discrimination that the individual is then required to demonstrate that she has been harmed by the defendant's use of a prohibited consideration in evaluating her individual capacity for employment. But even here, the plaintiff's case is not restricted to factual evidence in her individual case; rather, she may use evidence of group-based disparities to support such an individual claim.

130. 422 U.S. 405 (1975).

in *Albemarle Paper* had operated an overtly discriminatory employment system in which jobs were explicitly segregated on the basis of race. Black employees were restricted to the unskilled and lower paying jobs.[131] Thereafter, cessation of outright segregation of the workforce was accomplished simply by superimposing departments on one another. Unsurprisingly, the departments hitherto staffed by blacks ended up at the bottom of the new structure.

The Title VII claims arose out of the procedure used by the paper company to determine promotions within the newly merged lines. Promotions from the unskilled into the skilled positions now required possession of a high school diploma and success in two aptitude tests.[132] The disproportionate impact on blacks of these requirements flowed not from a higher failure rate by blacks—there is, remarkably, no discussion of this point in the Court's opinion—but from the fact that the tests were used for promotions into the skilled lines. Given prior employment patterns that relegated blacks to unskilled positions, the tests were more apt to be taken by blacks seeking transfer to skilled positions than whites who, already ensconced in the skilled lines, were not required to pass the tests in order to retain their jobs or promotion rights.[133]

The district court rejected the black employees' Title VII challenge because it found that the paper company had, whatever the definition and scope of the plaintiff's burden, carried the rebuttal burden by "proving that these tests are 'necessary for the safe and efficient operation of the business' . . . ."[134]

In affirming the court of appeals' reversal of the district court, the Supreme Court characterized the issue squarely in terms of the discharge of the burden of proof.[135] In particular, viewing *Griggs* and *McDonnell Douglas* as essentially indistinguishable parts of the same whole, the Court restated and adopted the procedural approach it had embraced in *McDonnell Douglas*. In so doing, the Court drew no distinction in the definition of burden allocations between disparate impact and disparate treatment.[136]

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131. *Id.* at 409.

132. *Id.* at 428-29. The tests were the Wonderlic (which purportedly measured verbal intelligence, and on which Duke Power Co. had also relied), and the Beta Test.

133. *Id.* at 429.

134. *Id.* at 411. That proof consisted of a "validation" study conducted just before trial and probably in response to the decision in *Griggs*. The validation study consisted of an industrial psychologist retained by Albemarle Paper comparing the scores of some employees on the Beta and Wonderlic tests with the judgments of their supervisors as to the competence of the employees. The employees were drawn from ten job groupings selected from the middle or top of the plant's skilled workers. The expert found a statistically significant correlation of test scores to supervisorial ratings in three job groupings for the Beta test, in seven job groupings for the Wonderlic Test, and in two job groupings for the required combination of the Beta and Wonderlic tests. *Id.*

135. The Court's reliance on *Griggs* in this context was at most perfunctory. *See id.* at 425 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

136. First, the defendant's burden "arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* at 425 (citing McDonnell Douglas v. Green, 411 U.S. 792, 811 (1973)). This

As an elaboration of what has come to be known as the "disparate impact" standard, *Albemarle Paper* is significant for several reasons. First, it confirmed that a prima facie case of Title VII violation could be made out solely on the basis of statistical disparity without regard to the discriminatory intent of the employer.[137] Second, the *Albemarle Paper* Court borrowed from *McDonnell Douglas* the tripartite distribution of burdens. Although the "pretext" burden had been justified in *McDonnell Douglas* as an effort to avoid the use of an otherwise legitimate disciplinary decision as a coverup for discrimination, the *Albemarle Paper* Court shifted the emphasis from the concern about possible hidden subjective motivations to an empirical inquiry into the objective exclusionary consequences of the employer's decision. The emphasis here was not on the plaintiff's ability to demonstrate, in this third tier, the possible insincerity of the employer, but on the availability of alternative selection criteria with less disproportionate effects on members of the plaintiff's class. As an evidentiary matter, this approach appeared less onerous on the plaintiff, and thus in accord with a broadly remedial conception of Title VII.

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was a conflation of the *McDonnell Douglas* prima facie requirement into the *Griggs* effects test. The Court's use of the term "pattern" suggested that successful discharge of the prima facie burden hinged on no more than a showing of racial disproportionality in the selection process.

Next, if an employer meets the burden of "proving that its tests are job-related, it remains open to the complaining party to show that other tests or selection devices without a similarly undesirable racial effect would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Id.* at 425 (quoting McDonnell Douglas v. Green, 411 U.S. 792, 821 (1973)). According to the Court, "[s]uch a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination." *Id.* at 425.

In outlining these standards, the Court provided no reason for this alignment of burdens, nor did it explain why, assuming that a defendant successfully rebuts the prima facie case, a plaintiff should have a second chance to prove that the defendant's explanation was pretextual. Yet, the meaning and significance of the "pretext" phase is not self-evident, but instead has been the source of much puzzled commentary. *See, e.g.*, George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987); Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1982)). Its relevance is particularly obscure in such cases as *Griggs*, *Albemarle Paper*, and Connecticut v. Teal, 457 U.S. 440 (1982), where the facts indicate that an employer took some affirmative steps to ameliorate the disparate effects of its recruitment or promotion procedures. Since such evidence is irrelevant to the discharge of the defendant's "business necessity" burden, the adversarial system's procedure for assuring fair-play—giving each side the opportunity to contradict the other's position—would seem to require yet a fourth tier, in which a defendant would respond to the plaintiff's "pretext" argument. Yet, the formulaic approach taken by the Court has consistently chimed the tripartite breakup of burdens under Title VII and it has never indicated that such a fourth tier exists.

137. At first inspection, this standard would appear to differ from the more personalized inquiry required for the plaintiff's discharge of her prima facie case under the *McDonnell Douglas* standard. That is, under *Albemarle Paper*, there was no demand that the plaintiff demonstrate that she was personally qualified for the job (or promotion), and that the employer continued to seek others with her qualification after her rejection. This seeming difference is, however, quite less substantial than it appears on the surface. As already suggested, the formulation of the pretext element of the *McDonnell Douglas* standard which permits the plaintiff to prevail on a showing of statistical disparities undercuts the distinction. It should be noted, however, that in *Albemarle Paper*, as in *Griggs*, abundant evidence of pre-Act discriminatory motivation existed on the record, and the possible effect, conscious or subconscious, of such evidence on the disposition of the case should not be discounted.

Any doubt on this score was removed by *Albemarle Paper*'s most substantial contribution to Title VII jurisprudence: the definition of the defendant's rebuttal burden, and, in particular, the relevance of statistical evidence to its discharge.

Two aspects of the Court's definition of the burden are noteworthy. The first is the Court's use of the EEOC guidelines as the standard for establishing the sufficiency of an employer's validation study, and particularly the strict application of the guidelines to the facts of the case.[138] The second is the Court's insistence that the validation has to be "of the job," not of the employer's procedure. As the Court stated:

> [e]ven if the study were otherwise reliable, this odd patchwork of results would not entitle Albemarle to impose its testing program under the Guidelines. A test may be used in jobs other than those for which it has been professionally validated only if there are "no significant differences" between the studied and unstudied jobs.[139]

Taken together, these aspects suggested the willingness of the Court to engage in finely tuned statistical analysis, at least where the statistical evidence was put forward by the defendant,[140] and to impose on the defendant a substantial burden of showing that the defense must bear a direct relationship to the skills needed for performance on the particular job at issue, rather than to some other generalized interest of the business entity. The Court's failure to provide an explanation for strict adherence

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138. *Albemarle Paper*, 422 U.S. 405. The Court's reference to the EEOC guidelines is particularly striking because, for the first time, the Court attempted to flesh-out the hitherto cryptic reference to statistics as a relevant tool. It did so not in the context of the plaintiff's prima facie burden but, rather, that of the defendant's rebuttal burden. Thus, it was the defendant, not the plaintiff, who had the duty of establishing a nondiscriminatory work-force by showing that the statistical effects of the selection criteria were not at odds with EEOC administrative guidelines.

"Measured against the Guidelines," the Court found the validation study falling below its requirements for several reasons. *See generally id.* at 431-35. First, the methodology of the study rendered its result unreliable because it sought to correlate test scores to selected supervisorial ratings without demonstrating that those ratings are themselves accurate measures of job-performance. Thus, unlike the unskilled employees who were required to take the tests, participants in the validation study were drawn from the middle and top ranks of the skilled lines of progression. *Id.* at 411. Second, the conduct of the validation study rendered its results suspect and unacceptable. According to the Court, the questionnaire used to obtain the supervisorial ratings were "vague and fatally open to divergent interpretations." *Id.* at 433. Third, the results of the validation study were used to prove too much. The study showed significant correlation for the Beta Examination in only three of the eight lines for which correlation was tested, in seven job groupings for the Wonderlic, and in only two job groupings for both the Wonderlic and the Beta examinations. *Id.* at 411. Moreover, although two forms of the Wonderlic were administered, and although they were each purportedly designed to test the same verbal proficiency, significant correlations for one form but not for the other were obtained in four job groupings. *Id.* at 431-32.

139. *Id.* at 432 (quoting 29 C.F.R. § 1607.4(c)(2)).

140. It is quite possible to read *Albemarle Paper* simply as holding that the party seeking to use statistical evidence has the burden of proving its probative value. So understood, it might be squared with the reading taken by the Supreme Court in *Wards Cove* that the plaintiff who relies on statistical evidence to make out a prima facie case must identify the link between the challenged employer's practice and the claimed statistical disparity. Such a reading, however, would reduce disparate impact analysis to no more than an administratively convenient tool for proving intentional discrimination. Dothard v. Rawlinson, 431 U.S. 321 (1977), and the belief that disparate impact analysis applies to unintended discrimination render such an interpretation of disparate impact untenable.

to the statistical yardsticks of the EEOC guidelines left the door open either for manipulation of those guidelines, or for an unquestioned Pavlovian adherence to them.[141] This was precisely what happened.

The Court's reliance on the EEOC guidelines (which the Court readily acknowledged constituted no more than an agency's interpretation of the statute)[142] to the exclusion of the district court's holding raises procedural questions that go to the core of the traditional understanding of the uses of burdens of proof.[143]

The choice the Court faced was whether the district court's ruling was one of fact or law, and, therefore, what deference was due the finding. If the burden was straightforwardly one of factual proof—i.e., sufficiency of evidence adduced to rebut a presumption—then the factfinder's conclusions were owed deference, and should have been reversed only if clearly erroneous. Alternatively, if the burden imposed on the defendant was one of law requiring it to sustain an affirmative defense—i.e., pleading and proving a confession and avoidance—the Supreme Court owed no deference to the trial court's findings.

The Supreme Court did not address its review in either of these terms. Avoiding statement of the standard of review in traditionally familiar terms, it engaged in a factual review that could support either a theory that the district court had clearly erred in its factual findings, or that the burden the defendant carried was that of establishing an affirmative defense.

The Court could thus have explained that application of the clearly erroneous standard to the district court's findings[144] was proper because the district court had not adequately taken account of the continuing prevalence of discrimination, nor of the recalcitrance of societal institutions in abandoning their old ways.[145] Such an explanation would have provided a delimiter for the rigorous use of statistical evidence to instances where the evidence was invoked in defense of the status quo. This would have resulted in avoidance of the subsequent development of a statistical shell game in which the probative value of the statistical evidence is examined first in the context of the plaintiff's prima facie case, re-

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141. As already demonstrated, the backbone of the evidence was statistical. Thus were sowed the seeds of finely calibrated statistical proof as the sine qua non of Title VII actions. Yet, as explored below, the derivation of statistical evidence is frequently presented with the sort of scientific objectivity and therefore demanding of the same sort of mystical respect that the scientific process has come to receive. *See* Lawrence Tribe, *Trial by Mathematics*, 82 HARV. L. REV. 1329 (1971). The unfortunate consequence is that the approach to statistical evidence tends to lack that skepticism of mind which is the hallmark of the fact-finder in analyzing anecdotal evidence. Seduced by the false presumption of the impersonal character of statistical evidence, the fact-finder more often than not ignores that statistical evidence is equally tainted by the dominant human proclivity to present information in the light most self-serving to the presenter.

142. *Albemarle Paper*, 422 U.S. at 431.

143. The Court concluded, on the basis of the application of its construction of the Guidelines, that Albemarle had failed to prove "the job relatedness of its testing program." *Id.* at 436.

144. *Cf. id.* at 445 (Rehnquist J., concurring in part.)

145. *Cf.* Green v. School Bd. of New Kent County, 391 U.S. 430 (1968); Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

examined as part of the defendant's rebuttal, and then tested again at the pretext stage.

Because the Court did not take this step, two trends emerged. First, there was an attempt to re-define procedurally the defendant's burden by derogating from the requirement that the defendant "prove" job-relatedness, substituting in its place the suggestion that mere "articulation" of some "job-related rationale" would suffice to discharge the defendant's burden.[146] Second, since the Court's de novo review was presented in procedural terms, it left open the issue of whether the rationale could be just as readily invoked against the weight of statistical evidence presented by a plaintiff.[147]

The final building block of the broadly remedial conception of Title VII was provided by the Court in its disposition of *Teamsters v. United States*.[148] The Court, in this so-called "pattern and practice" case, explained the burden-shifting methodology as embodying the representative character of both the injury sustained by individual plaintiffs and of society's pronounced interest in removing the cause of those injuries.[149]

The facts in *Teamsters* parallel those that had led the Court to adopt statistical disparity as a sufficient prima facie showing of racial discrimination.[150] The United States alleged Title VII violations against a private employer and its union in the hiring and promotion of blacks and Spanish-surnamed Americans.[151] Although the United States prosecuted the action on a theory of disparate treatment,[152] and although the Supreme Court took some pains to distinguish between disparate treatment and disparate impact,[153] neither the analysis employed nor the end result fits any more readily into *McDonnell Douglas* than *Griggs*.[154] Despite the Supreme

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146. *E.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); *see* discussion *infra* part A(2).

147. *See* discussion *infra* part A(2).

148. 431 U.S. 324 (1977).

149. *Teamsters*, more than any other case, illustrates the artificiality of the line-drawing between disparate impact and disparate treatment. *Id.* at 335-36 n.15. The case properly portrays the key concern as being class treatment, and the case, more than most, is candid about both the end-result and the motivating concerns for the methodology adopted to reach that end-result. It does so by highlighting the tensions between the substantive goals at stake—common law type narrowly-based problem-solving, and broader societal rectification of ills through the judicial system—and the inadequacy of the procedural device of the burdens of proof to the task. *Id.*

By employing the language of the balancing of competing but equally legitimate interests, Justice Powell masterfully attempted to paper over the tension, and the *Teamsters* decision, as a consequence, has provided ammunition to all sides in the subsequent fray. *Compare* Watson v. Fort Worth Bank and Trust 487 U.S. 977, 1002 (Blackmun, J. concurring); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651 (1989); *id.* at 665 (Stevens, J., dissenting); City of Richmond v. Croson, 488 U.S. 469, 501 (1989).

150. *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

151. *Teamsters*, 431 U.S. at 328.

152. *Id.* at 335-36 n.15.

153. *Id.* According to the Court, under disparate treatment theory the employer simply treats some persons less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical to such claims. Under disparate impact, employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another, and cannot be justified by business necessity, are condemned. Proof of discriminatory motive is not required under this theory. *Id.*

154. The United States, as the plaintiff, had the initial burden of making out the prima facie case. *Id.* at 336.

Court's assertion that the applicable theory of disparate treatment imposed on the government the obligation to prove the intent to discriminate by the employer, and that the discharge of the obligation could not be sustained by the "mere occurrence of isolated or accidental or sporadic discriminatory acts," the Court held the government could discharge its burden entirely on the basis of statistical disparities.[155]

Nor did the Court's disposition of the rebuttal burden suggest any distinction between this disparate treatment case and the *Griggs* disparate impact analysis. In particular, the Court's disposition of the employer's "articulation" of the reasons for the under-representation of blacks in its work-force reflected a construction of the word "articulate" readily harmonized with the approach in *Griggs*, and at odds with the Court's subsequent approach in disparate treatment cases.[156] Thus, the evaluation of the employer's rebuttal burden centered on a factual inquiry into whether the statistical disparity was the result of industry-wide poor business conditions and an attendant slow-down in hiring, or reflected some bias or indifference by the employer in the racial consequences of its conduct.[157] In neither event did the Court require a showing of an affirmative intent to discriminate by the employer.

It is evident then, that the burden imposed on the defendant in this "disparate treatment" case was not simply one of stating some plausible explanation for the statistical disparity, but one of carrying or sustaining that explanation in the same manner as would proof of an affirmative defense.[158]

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155. *Id.* at 335-39. The statistical disparities marshalled by the government were significant. Although blacks and Spanish surnamed Americans made up 9% of the defendant employer's workforce, less than 1% of the prized "line driver" positions were held by persons of such ancestries. Moreover, with one exception, all of the black line drivers were hired after litigation had commenced. By contrast, 83% of the blacks and 78% of the Spanish surnamed employees held the lower paying "city operations" and "serviceman" jobs, as compared with only 39% of the white employees. *See id.* at 337-38.

Of course, the outcome in *Teamsters*, no more than the outcome in *Griggs* can be viewed purely in terms of raw statistical data. Collateral evidence suggested the figures were not the accident of history, but rather its fulfillment. As the Court noted (in a now famous passage), "[i]n any event, fine tuning of statistics could not have obscured the glaring absence of minority line drivers . . . . '[t]he Company's inability to rebut the inference of discrimination came not from a misuse of statistics, but from the inexorable zero.'" *Id.* at 342 n.23 (quoting United States v. T.I.M.E.-D.C. 517 F.2d 299, 315 (5th Cir. 1978)).

156. *See* discussion *infra* part A(3).

157. The Court observed that despite the slow-down, the employer did engage in some hiring of line drivers, and these were disproportionately white. *Teamsters*, 431 U.S. at 341-42.

158. The approach in Franks v. Bowman Transp. Agency, 424 U.S. 747 (1976) is to the same effect. *See, e.g., id.* at 773 n.32; *cf. id.* at 777-78. In *Franks*, the Court stated that:

> the result we reach today which, standing alone, establishes that a sharing of the burden of the past discrimination is presumptively necessary is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that '[a]ttainment of a great national policy . . . must not be confined within narrow canons . . . deemed suitable by chancellors in ordinary private controversies.'

Id. (citation omitted) (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941)).

In sum, although *Griggs v. Duke Power Co.*[159] and *McDonnell Douglas v. Green*[160] are cited as paradigms of two distinct analytical approaches to evaluation of claims under Title VII, this position is not justified by the contemporaneous record. The two cases, far from representing two separate lines of Title VII inquiry, reinforced each other to portray a jurisprudence that emphasized the need to do away with race-based structural inequalities over systematic demonstration of cause and effect. The Court thus treated *McDonnell Douglas* simply as an elaboration of *Griggs*.[161] Furthermore, despite being classified a disparate impact case, *Albemarle Paper Co. v. Moody*[162] liberally drew on the analytical scheme of *McDonnell Douglas*. Finally, the approach adopted in *Teamsters v. United States*[163] confirmed that the Court viewed Title VII litigation not in terms of disparate theories of causation and injury, but as a distinctive tool in the broader strategy of doing away with those conventional obstacles to equal participation by blacks in the economic life of the nation.

This failure to draw hard distinctions between the various theories of Title VII (as was subsequently to become the case) was not an oversight. The Court recognized and accepted Title VII litigation as being about classifications. The action, whether maintained as an individual or a class action, a single event or a pattern and practice case, could only be understood in the context of a societal ill: a tendency, sometimes conscious, frequently unconscious, to treat blacks alike and distinct from whites. Moreover, the distinction in the treatment could not be uncovered merely by examining the specific conduct of persons, but frequently required examination of the institutions and practices through which society operated. "Burden of proof," as a tool for demonstrating causation, had to be shaped around these factors. In that sense, the use of "presumptions" and the definition of the "burden" reflected the Court's policy orientation.

As class litigation, the presumption that the status quo should be the norm, and that the complaining party constitutes an aberration who must be put to stringent tests in order to establish the basis for liability, were inapposite. Rather, the applicable rules put the status quo on the defensive. A norm whose effect was to exclude so many had to be justified not in terms of itself, but of some broader vision. It had to be justified in the context of the broadly remedial approach. The allocation of the burden of proof and the determination of the scope and relevance of statistical evidence were not viewed as self-contained dispositive procedural devices, but instrumentalist avenues to the realization of the broadly remedial vision of Title VII litigation. Hence, the Court did not seek to

159. 401 U.S. 424 (1971).
160. 411 U.S. 792 (1973).
161. *See supra* notes 116-18 and accompanying text.
162. 422 U.S. 405 (1975).
163. 431 U.S. 324 (1977).

explain its allocation of the burdens of proof in the traditional language of probabilities or fairness to the parties.[164]

Likewise, the evaluation of statistical evidence, far from following any predetermined "scientific" formula, was eminently flexible and nonmechanistic. In short, while the language of these four cases created the basic framework that would subsequently circumscribe Title VII analysis into very narrow procedural inquiries, the presumptions they embodied reflected a clear-cut skepticism of the determinism of the purported objective validity of the yardsticks used to measure employment qualifications.

2. Peering Into the Chasm: Local Governments As Defendants

The significance of the radical interpretation of "equal opportunities" embodied in *Griggs v. Duke Power Co.*[165] and institutionalized through the nontraditional use of burden allocation came under challenge in Title VII cases brought against local governments.[166] In the 1972 amendments to the Civil Rights Act, Congress, following the Supreme Court's lead, embraced the broadly remedial conception of the statute.[167] In particular, it authorized suits against local government bodies and federal agencies.[168]

The first such case to reach the Supreme Court was *Washington v. Davis*,[169] and the Court's disposition of the case foreshadowed judicial reappraisal of the substantive interpretation of Title VII.

First, however, the Court was compelled to address explicitly the underlying skepticism implicit in its treatment of "facially neutral selection criteria." Its response was to retreat from such skepticism. Second, shorn of that skepticism, the procedural structure erected in *Griggs* and its progeny proved too radical for the new jurisprudence. Third, emerging concerns about the reach of equal protection analysis and its reconciliation with Title VII doctrine led the Court to focus on the motivation for the defendant's conduct rather than relief to the plaintiff. This in turn resulted in a shift of societal focus to the costs of removing disparities rather than the structural concerns. Taken with the second development above, the consequence was the realignment of the burdens of proof that favored the status quo and put the plaintiff challenging it on the defensive. Similarly, the scrutiny of statistical evidence took as a starting hypothesis the absence of discrimination—in direct contrast to *Griggs* and its immediate progeny.

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164. *See supra* note 106.

165. 401 U.S. 424 (1971).

166. Five such cases heard by the Court between 1976-80 were: Washington v. Davis, 426 U.S. 229 (1976); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Dothard v. Rawlinson, 433 U.S. 321 (1977); Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); New York Transit Authority v. Beazer, 440 U.S. 568 (1979).

167. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 n.11 (1975).

168. Washington v. Davis, 426 U.S. 229, 238 n.10 (1976).

169. 426 U.S. 229 (1976).

This subpart explores these developments in the setting of actions against local governments, and shows how these actions were precursors providing the intellectual underpinning for the rethinking of burden allocation in actions against private actors.

Davis grew out of the disproportionate effects of a long-used screening device, "Test 21," on the recruitment of blacks into the Washington, D.C. police force.[170] In challenging the use of the test, the plaintiffs argued that it had a highly discriminatory impact on blacks since a disproportionately high number of blacks failed to obtain the threshold score.[171] Moreover, the plaintiffs contended that performance on the test bore no relationship to the effective performance of a police officer's duties.[172]

Both the district court and the court of appeals found the claims of disparity sufficient to shift the burden to the defendant.[173] Consistent with *Griggs*, *McDonnell-Douglas*, and their elaborations, these Courts differed only as to whether the defendant had successfully discharged the burden. While the district court held that it had,[174] the court of appeals disagreed.[175]

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170. *Id.* at 234. The test, purportedly designed to measure verbal ability and reading comprehension of the English language had been widely used for recruitment into the federal service since 1883. To qualify for a place in the program, the applicant had to score at least 40 points out of a maximum possible 80 points, possess a high school diploma (or equivalent), and meet "certain physical standards."

171. *Id.* at 235. The exact scope of the disproportionality is not entirely clear. The court of appeals stated that four times as many blacks as whites failed to obtain the requisite minimum score on the test. *Id.* at 237 (citing Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975)). The district court, from the evidence, concluded that three inferences could be drawn from the record: (1) black representation in the police officer corps of the District of Columbia was proportionately below the composition of blacks in the population of the District of Columbia; (2) blacks failed Test 21 at a disproportionately higher ratio to whites; (3) Test 21 had not been validated pursuant to EEOC guidelines to establish its reliability as a measure of job performance on the police force. *Id.* at 235 (citing Davis v. Washington, 512 F.2d 956, 960 n.24 (D.C. Cir. 1975)).

172. *Id.* at 235.

173. Because the action had been filed prior to the effective date of the 1972 Amendments, the plaintiffs' claims had been grounded on the Due Process Clause of the Fifth Amendment which the Supreme Court had held embodied the equal protection component of the Fourteenth Amendment. Bolling v. Sharp, 347 U.S. 497 (1954). Both the district court and the court of appeals assumed that the analytical framework under the Equal Protection Clause was identical to that under Title VII. *See Davis*, 426 U.S. at 258 (Brennan, J., dissenting).

174. *Davis*, 426 U.S. at 258 (Brennan, J., dissenting). The district court found, on the basis of the following considerations, that the defendant had satisfied the burden, whatever its scope: (1) the percentage of new recruits since 1969 into the police force who were black (44%) was proportional to 20-29-year-old blacks residing within a fifty-mile radius of the District of Columbia; (2) the police department had engaged in systematic and affirmative efforts to enroll in the program blacks who passed the test but had failed to report for duty; (3) Test 21 was not "culturally slanted," and it was not designed (and it did not operate) to discriminate against otherwise qualified blacks; and (4) the test was reasonably and directly related to the requirements of the training program, and failure to validate it for on-the-job performance was, therefore, not fatal.

175. The court of appeals rejected the "bootstrap" approach of the district court, and, adhering rigidly to prior formulaic pronouncements, held that the defendant had not satisfied the rebuttal burden since it had not shown that Test 21 was an adequate measure of job performance. *See* Davis v. Washington, 512 F.2d 956, 963 (D.C. Cir. 1975). Specifically, the defendant had failed to meet the *Albemarle Paper* validation standard requiring that the test be a predictor of how a recruit would perform as a police officer, or at least that the test was a reliable indicator of probable success in the training program.

The Supreme Court, however, adopted an entirely distinctive framework. First, ruling on an issue not presented in the petition for certiorari, it held that "the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it."[176] Specifically, the Court rejected the Title VII doctrine that disproportionate impact alone might suffice to establish a violation.[177] Rather, the Court held that equal protection analysis required the plaintiff to show that the official conduct was motivated by the intent or purpose to discriminate.[178]

The break with existing jurisprudence,[179] however, was not limited to the creation of a dichotomy between equal protection and Title VII analysis. Rather, in addressing the issue squarely presented by the petition for certiorari—whether the court of appeals had misapplied the *Griggs* standard to the facts of the case—the Court essentially reinterpreted and restructured Title VII analysis, adopting what at least one commentator has termed a "commonsensical" approach.[180] Seemingly eschewing the centrality of burden allocation and of statistically defined impact,[181] the Court found it difficult to credit the claim that an examination that merely tested verbal skills and that had been in federal use since 1883 should be struck down as discriminatory, with or without validation.[182]

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176. As the Court pointed out, however, none of the parties contended that such was error by the court of appeals. Certiorari had been sought on the ground that the court of appeals had misapplied the *Griggs* standard. *See Davis*, 426 U.S. at 238.

177. *Id.* at 238-39.

178. *Id.* at 239. The Court held that "our cases have not embraced the proposition that a law or other official conduct without regard to whether it reflects a racially discriminatory purpose is unconstitutional solely because it has a racially disproportionate impact." *Id.* The Court nonetheless observed that there are "some indications to the contrary in our cases." *Id.* at 242 (citing Palmer v. Thompson, 403 U.S. 217 (1971); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972)).

179. As the Court readily conceded, lower courts that had analyzed constitutionally based claims of discrimination in public employment had adopted the disproportionate impact approach of *Griggs*. *Id.* at 244 n.12. "The cases impressively demonstrate that there is another side to the issue." *Id.* at 245; *see also id.* at 254 (Stevens, J., dissenting).

180. *See* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1318 n.89 (1987). Similarly, the *Davis* Court stated that:

> [a]s an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory, and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.

Davis, 426 U.S. at 245.

181. Recall that in the lower courts a central focus was on the different statistical proofs put on by the parties. The plaintiffs, in making their Title VII claim, relied essentially on the disproportionately low number of blacks on the Washington, D.C. police force, and particularly on the number of blacks who failed Test 21. By contrast, the defendants and the trial court focused on the seeming parity in the number of blacks recruited into the police force since 1969 despite their failure rate on Test 21, and the correlation of this number to 20-29-year-old males within a fifty mile radius of Washington, D.C. *See Davis*, 426 U.S. at 235. The Supreme Court made virtually no attempt to address the relevance of these distinct approaches to the use of statistics.

182. *See id.* at 245. Yet, the logic of *Griggs* and its subsequent development compelled precisely the opposite approach. *Griggs*, after all, had been based on the assertion that "basic intelligence must have the means of articulation to manifest itself fairly in a testing process," and that in the case of nonvalidated aptitude tests with disproportionate impact on blacks, this might not be the case since "because they are negroes, petitioners have long received inferior education in segregated schools . . . ." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

For the Court, this was putting form over substance. Requiring that the government cease using Test 21 in the recruitment of police officers until the test had gone through the chimera of validation brought home to the Court as clearly as could any situation the cost to society and to the defendant (both of which in this case were represented by the government) of the broadly remedial approach.[183] It also indicated just how closely and decisively the procedural device of burden allocation and reliance on statistical evidence had become intertwined with and dispositive of the substantive view of *Griggs*. It was impossible to reject that world view by adhering to prior application of the contents of the *Griggs* procedure. To create a new orthodoxy thus required a new architecture. Although the Court employed the same mortar and brick in erecting that new orthodoxy by using the same tripartite procedural facade, its specifications, contours, and arches were quite distinct from what had preceded.

The new project began in earnest with *Hazelwood School Dist. v. United States*.[184] Relying on the pattern and practice theory that the Supreme Court had adverted to in *Teamsters v. United States*,[185] the United States Department of Justice, in *Hazelwood*, sought to make out a claim of discrimination against a local school district on the basis of statistical evidence showing substantial disparity between the representation of blacks and whites in the district's employment of teachers.[186]

Although Hazelwood offered no rebuttal evidence,[187] the Court held that it did not have to since the government had not discharged its prima facie burden. In an approach virtually irreconcilable with *Teamsters*, the Court, while accepting that the "[statistical] differences were on their

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183. The Court pointedly observed that invalidating the use of the test would "raise serious questions and perhaps invalidate a whole range of tax, welfare, public service, regulatory and licensing statutes." *Davis*, 426 U.S. at 248. The picture looked even more bleak when the test being invalidated was administered by an entity that had taken affirmative steps to ensure that blacks who passed the test were enrolled in the program. If Washington, D.C. did not measure up, what would?

184. 433 U.S. 299 (1977).

185. 431 U.S. 324 (1977).

186. For example, the Hazelwood School District did not hire its first black teacher until 1969. In 1970, of the 957 teachers hired, only 6 were black; in 1972, of 1,107, 16 were black; and in 1973, 22 out of 1,231 were black. By contrast, according to the 1970 census figures, of the 19,000 teachers in the St. Louis metropolitan area (which included Hazelwood), 15.4% were black. *Hazelwood*, 433 U.S. at 303.

The United States did not rest, however, on statistics alone. It pointed to a past history suggestive of discrimination against blacks. As late as the 1962-63 school year, the application forms used by the school district to fill vacancies required the applicant to state his/her race. *Id.* at 302 n.2. Recruiters visited predominantly white schools, while ignoring predominantly black schools. Applicants with student or substitute teaching experience in the predominantly white suburban Hazelwood school system were generally given preference, and school principals had virtually unfettered discretion in deciding who to hire. Finally, the United States cited instances of alleged discrimination against 55 individual black applicants. *Id.* at 302-03.

187. *Id.* at 303. Hazelwood challenged the sufficiency of the government's evidence, and pointed to its formal policy that all teachers be hired on the basis of "training, preparation and recommendations regardless of race, color and creed." *Id.* at 303-04.

face substantial,"[188] held that the requirement of purposeful discrimination in a pattern or practice disparate treatment case required something more. The statistical disparity must be "probative"; that is, the disproportionality must arise from meaningful comparisons—apples to apples, oranges to oranges.[189] Moreover, the burden of demonstrating probativeness was the plaintiff's, and had to be discharged as part of the prima facie case.[190]

The Court's most radical departure from precedent in *Hazelwood* related to its willingness to subject the statistical disparity put forward as the basis of the plaintiff's prima facie case to stringent technical analysis. The Court suggested that lawyers and judges, in evaluating statistical disparities, should roll up their sleeves and conduct a professionally sound analysis to determine whether the disparity is significant.[191]

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188. *Id.* at 308-09.

189. The Court explained that only by such a requirement would statistical disparity conform to the requirement that the plaintiff prove discriminatory conduct, not simply suggest its existence. *Id.* at 308-09.

190. Using language reminiscent of antitrust law, the Court faulted the statistical evidence adduced by the United States on the ground that it was not sufficiently tied to the relevant "labor market area." *Id.* at 310-12.

With regard to the labor market, the Court said that the disparity in *Teamsters* could be relied on as probative of discrimination because the job-skills involved there—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. *Id.* at 308 n.13.

By contrast, according to the Court, school teaching requires specialized skills, and the proper pool for determining the appropriate representation of blacks is not with the general population, but some narrower subgroup such as those who hold teacher certification papers. *Id.* at 308. In drawing this contrast, however, the Court ignored the fact that the determinative comparison in *Teamsters* was not between "drivers" (or even truck-drivers) and the general population, but between "line drivers" (i.e., those who drove trucks in inter-city runs) and the general population.

The Court also found faulty the definition of the relevant geographical market. Again, while the Court in Teamsters v. United States, 431 U.S. 324, 337-38 n.17 (1977), had brushed aside the employer's contention on this point and paid it limited attention in Washington v. Davis, 426 U.S. 229, 241 (1976), the distinction took on seminal importance in *Hazelwood*. Thus, the Court emphasized that if the proper geographical market was defined to exclude the City of St. Louis, black representation in the qualified pool of employable teachers fell from 15.4% to 5.7%, thereby reducing the level of the disparity. *See Hazelwood* 433 U.S. at 308-10.

It should be noted that while in *Davis* the Court relied on a broader geographical market than that contended for by the plaintiff, it found a narrower geographical market relevant in *Hazelwood*. That these corresponded to the existing patterns of hiring surely should not have been decisive. Whatever weight existing patterns ought to be given must be balanced against the possibility that absent prior discrimination, those patterns would not have emerged. *See id.* at 316 n.3 (Stevens, J., dissenting).

191. *Hazelwood*, 433 U.S. at 309 n.14 ("A precise method of measuring the significance of such statistical disparities was explained in Castaneda v. Partida, 430 U.S. 482, 496-497 n.17.").

A plaintiff seeking to rely on statistical evidence must first clearly state the theory in support of which the evidence is being offered; i.e., the hypothesis. Next, she must identify the category of evidence as to which disparity is claimed; e.g., the racial or gender composition of the work-force. The relevant statistical data must then be systematically gathered. This may be done through a process of "sampling" or "random selection." The sampled data then is compared to a professionally determined norm. Four such norms are in common usage. The match of the sampled data to (or its deviation from) the norm is then computed; or, as the Court states in *Hazelwood*, the process involves the "calculation of the 'standard deviation' as a measure of predicted fluctuations from the expected value of a sample." *See Hazelwood*, 433 U.S. at 309 n.17. Legal importance is then attached to the deviation. Such deviation is said to reflect the likelihood or otherwise that the disparity exhibited by the sampled data was the result of chance occurrence, or of systematically exclusionary practice by an employer.

The attempt to divorce statistical evidence from a normative vision of society, and to present the inquiry within a narrowly circumscribed description of statistics as a science, is glaringly portrayed by the Court's insistence that this closer scrutiny must take into account the extent to which any comparative disparity reflects the success of neighboring communities in attracting blacks to their employment. Thus, Hazelwood's relative failure should not be penalized because of the City of St. Louis's relative success in hiring blacks.[192] In short, the Court questioned the starting hypothesis which assigned a strong a priori probability of the prevalence of discrimination in the St. Louis/Hazelwood area. The methodology employed to sift through the statistics, and the inference to be drawn from the figures,[193] marked a significant shift from the prior use and interpretation of statistics.[194]

New York City Transit Auth. v. Beazer[195] provided a further demonstration of the emerging change in the Court's interpretation of Title VII, at least when employed against local government bodies. Readily affirming that "[a] prima facie violation of [Title VII] may be established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities,"[196] and that such a showing shifts the burden to the defendant, the Court nonetheless found that the statistical showing here was not sufficient to discharge the plaintiff's prima facie burden.[197] In reaching this conclusion, the Court combed through the statistical evidence with greater depth than had been customary, demanding demonstration of the approximation of statistical with specific (if not knowing) wrongful conduct by the defendant.[198]

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192. *See id.* at 310-11 (suggesting that the statistical disparity would be less probative if somehow it could be shown that blacks preferred working in St. Louis rather than Hazelwood, or that the City of St. Louis' effort to attract blacks resulted in a smaller pool of black applicants from which Hazelwood could draw black teachers).

193. Again illustrative of the Court's seeming willingness to discount the relevance of the past—a willingness that clearly distinguishes *Hazelwood* from *Teamsters*, *Albemarle* and *Griggs*—was the Court's insistence that only such statistical evidence that flowed from post-1972 conduct by Hazelwood had probative value. *See id.* at 311-12 n.17.

194. As previously explained, anything approximating stringent statistical analysis had been employed only in reviewing the defendant's discharge of her burden. *See* discussion *supra* part A(1). The stringency of the standard, and the selection of the party to bear the cost of sustaining it, said volumes, of course, on the Court's perception of a starting assumption as to the prevalence of discrimination in society.

Moreover, the Court had always considered past conduct as providing at least part of the explanation for any observed disparities. To focus on the bare numbers in a discrete time-frame reflected an ahistorical approach to the use of statistics.

195. 440 U.S. 568 (1979). The critical issue boiled down to the effect to be given statistics showing that the exclusion of methadone users from employment may have had disproportionate effect on blacks and hispanics. To the extent invocation of the disparate treatment theory is dependent on an invidiously discriminatory animus by the employer, the theory was foreclosed by the time the case reached the Supreme Court. The district court had found (and the plaintiffs did not challenge) that the Transit Authority's preclusion of the employment of persons on methadone was not based on prejudice or other purposefully discriminatory biases against such persons. *Id.* at 584 n.25.

196. *Id.* at 584.

197. *Id.*

198. Thus, the Court found as nonprobative the showing that 81% of narcotics users referred

Moreover, although the Court found that the plaintiffs did not make out a prima facie case, it went on to rule that any prima facie case would have been rebutted by the Transit Authority's "demonstration that its narcotics rule (and the rule's application to methadone users) is job related."[199] The explanation of this conclusion, based as it was on the cost to society at large of insisting that the defendant prove the incapacity of the plaintiffs to perform the task, echoed the *Davis* Court's concerns. The consequence of these concerns necessarily was a shift of focus from a sympathetic hearing of the plaintiff's challenge to a concern that an innocent defendant not be penalized for the past sins of society.[200]

Davis and the subsequent Title VII cases thus marked a significant reassessment of the role of burden allocation and statistical evidence in the establishment of a Title VII violation.[201] Critically, the Court shifted

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to the Transit Authority's medical offices were black or hispanic. Rather than simply inferring that 81% of the methadone users would also be black or hispanic, the Court insisted on a closer demonstration of the correlation. *Id.* at 584-85 n.25.

Similarly, the Court dismissed reliance on the racial and national origin composition of methadone users receiving treatment in publicly funded institutions on the ground that it did not present direct evidence of who was actually denied employment by the transit authority. *Id.* at 585-86. The Court also questioned whether the disproportionate representation of blacks and hispanics in publicly funded methadone treatment centers necessarily implied a disproportionate representation of blacks and hispanics among methadone users in New York. It postulated that it is conceivable that black and hispanic usage of methadone may simply reflect their proportion in the general population of New York City. *Id.* at 586 n.30.

199. *Id.* at 587.

200. The successful rebuttal of the prima facie case apparently consisted of the Transit Authority's proof to and finding by the district court (a finding apparently also conceded by the plaintiffs) that for the well-being of its general ridership, there are security related jobs from which narcotics users including persons in methadone treatment may lawfully be excluded. This ruling was based in part on a further finding by the district court that at least one-third "and probably a good many more" of those on methadone would be classified as unemployable for such and other jobs.

Finally, covering all of the bases, the Court concluded that the plaintiffs would be unable to discharge their burden of showing pretext because of the finding by the district court that the exclusion of methadone users was not motivated by racial animus. *Id.* at 587. Omitted from the discussion of this issue was the statement in *Albemarle Paper* that pretext may be demonstrated where a plaintiff shows the existence of alternative means of achieving the defendant's business needs that have less disparate impact on the plaintiff's class. Of course, given the court's blanket insulation of the employer's interest by reference to its security needs, one might question whether any level of statistical gymnastics would have satisfied the Court.

201. On its face, Dothard v. Rawlinson, 433 U.S. 321 (1977), would appear to be an exception to this claim. Dothard represented the first attempt by the Court to apply *Griggs* and its elaboration to Title VII claims by women. The application of norms developed in the race discrimination area to gender-based discrimination has frequently tested the Court's analytical mettle. *See, e.g.*, Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987); *cf.* Frontiero v. Richardson, 458 U.S. 718 (1982); Mississippi College for Women v. Hogan, 411 U.S. 677 (1973). *See generally* Assoc. Gen. Contr. of California, Inc. v. City and County of San Franscisco, 813 F.2d 922 (9th Cir. 1991).

Dothard may be understood, therefore, as an early attempt by the Court to stick to reasonably familiar grounds in the absence of any experience with which to gauge the viability of the *Griggs* approach to gender-based claims. It may also be significant that the selection criteria at stake in *Dothard*—height and weight limitations—epitomized the classic case of stereotyping based on physical characteristics. Virtually no other set of selection criteria are likely to arouse skepticism as such criteria.

the focus of inquiry from the defendant's rebuttal evidence to the plaintiff's prima facie case. Contemporaneously, the Court invariably found the plaintiff's evidence to lack probative value, a result not unlike that which prevailed when the scrutiny of statistical evidence focused on the defendant's rebuttal showing.[202]

As the above demonstration suggests, the transformation was neither accidental nor compelled by any internally consistent neutral operation of the procedural devices invoked by the Court. The change reflected, no less than the *Griggs* decision, the Court's reassessment of substantive policies implicated in Title VII.

That shift embodied judicial concerns about imposing liability on governmental bodies. The explanation for the concern—the cost to institutional integrity—foreshadowed the change in judicial climate about the appropriateness of committing the nation and national resources to a broadly remedial program. Whatever the subjective motivation, as a practical matter the cases involving governmental agencies demanded a movement away from concern over the availability of redress to "protected groups" to a dominating concern over the cost of granting such redress. That the defendants were governmental agencies engaged in providing services to the public made vividly logical and irrefutable the equation of that cost to the reduction of public welfare. The outcome could be rationalized on the entirely substantive notion that a plaintiff seeking redress, the grant of which would result in an overall decrease of societal welfare, ought to be put to the task of demonstrating that she indeed was injured by the conduct of the governmental agency being sued. Transferring this rearrangement of concerns to suits involving entirely private litigants was undertaken by elaboration of the disparate treatment theory.

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202. *See, e.g.*, Teamsters v. United States, 431 U.S. 324 (1977); Albemarle Paper v. Moody, 422 U.S. 405 (1974).

This is hardly surprising. Although courts have tended to treat statistical evidence as if it is the product of a scientific process that operates independent of personal values or ideology, this is far from being the case. Challenges to the accuracy of the statistical evidence focus on its shortcoming as a social (not a natural or physical) science. The starting hypothesis is derived not from disinterested observation or controlled experimentation, but simply states some objective or policy. It is this subjective hypothesis that then shapes the gathering and use of data. This process itself is not controlled by any well-established professional rules or guidelines, but by the exigencies of the adversarial process. The litigant freely ignores information that detracts from the hypothesis, and magnifies the importance of helpful information. Nor is this self-serving collection of data likely to be corrected (as it is in the physical sciences) by insistence on replication of the data in other settings and over time. To the contrary, because the statistical evidence is relevant only for the particular litigation (and, indeed, causation requirements may limit its probative value to such litigation), there is no incentive for such replication. The sole test of accuracy, then, lies in the ability of the opposing party to challenge effectively the statistical result. Often, the only effective way to do so is by challenging the hypothesis, and by mounting a counter statistical demonstration using quite different data and assumptions. The result is a war of statistics with victory predicated not on the underlying accuracy of the conflicting data, but judicial acceptance of underlying assumptions. The use of statistics merely gives the appearance of scientific validity to a fight about assumptions.

3. Maturation of the Disparate Treatment/Disparate Impact Divide

The most ballyhooed distinction in Title VII litigation is that between disparate treatment and disparate impact. Lacking functional, instrumental, or operational significance, the theory of the distinction nonetheless postulates that disparate treatment demands establishing an intent to discriminate, while disparate impact permits a showing of Title VII violation without demonstrating the existence of such an intent.[203] The distinction, however, masks a good deal more than it reveals. It fails to delineate such crucial considerations as when one ought to use either analytical framework to the exclusion of the other, or the consequence to the available remedy of employing either theory of liability.

This subpart demonstrates how and why the allocations of the burdens of proof and statistical evidence have been pressed into the service of the claimed distinction. The central argument is that although the distinction lacks any practical significance, it has offered an intellectual basis for obtaining some consensus on a substantively divided Court. This allowed the Court some modicum of coherence as it moved from the broadly remedial vision to the narrowly antidiscriminatory. For the members of the Court who retained the broadly remedial viewpoint, the basic structure of burden allocation and the significance of statistical evidence appeared relatively undisturbed. The core of Title VII analysis would remain that embodied in disparate impact, with disparate treatment analysis readily distinguished and cabined to an insignificant quibble about whether the particular plaintiff had put on evidence of discriminatory conduct perpetrated against her as an individual, not whether the group to which she belonged had been the victim of discrimination.[204] For those with the narrowly antidiscriminatory perspective, disparate treatment analysis constitutes the essence of Title VII. Rigorous use of the procedural device of burden allocation coupled with an insistence on the demonstration of causation independent of statistical evidence offered a judicial mechanism of returning Title VII litigation to an essentially individualized fault-based tort claim responsive to concerns over the cost to a defendant of defending broad-based imposition of liability. Successfully enshrining disparate treatment analysis, furthermore, would offer the possibility of returning the genie of disparate impact analysis into the bottle.[205]

The opinion in *Furnco Construction Corp. v. Waters*,[206] rendered the same term as the Supreme Court's first affirmative action decision,[207] illustrates the point. The *Furnco* opinion, without directly challenging

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203. The statutory basis for the dichotomy purportedly lies in section 703(a)(1) (disparate treatment), and section 703(a)(2) (disparate impact). *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1983); *cf.* International Bd. of Teamsters v. United States, 431 U.S. 324 (1977) (disparate treatment constitutes the stereotypical Title VII claim).

204. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 717 (1983) (Blackmun, J. concurring).

205. Watson v. Fort Worth Bank and Trust Co., 487 U.S. 977 (1988).

206. 438 U.S. 567 (1978).

207. Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

maintenance of the broadly remedial principle as a substantive norm, attempted to limit the scope of its applicability. The instrument the Court employed to achieve this objective was that of purporting to enunciate a procedurally-based distinction between disparate impact and disparate treatment.[208]

In *Furnco*, black bricklayers, as plaintiffs, argued that a selection process under which the employer hired "only bricklayers he knew were experienced and competent," or "[who were] recommended to him as similarly skilled," while declining to hire persons at the job-site regardless of their qualifications,[209] contravened Title VII inasmuch as the result was the under-representation of blacks in the employer's workforce.[210] The plaintiffs argued their case under both the *Griggs v. Duke Power Co.*[211] and *McDonnell Douglas v. Green*[212] theories. The lower courts appear not to have conceptualized any practical or legally meaningful distinction between the approaches. In keeping with the substantive approach of prior Supreme Court cases, the fundamental question for both the district court and the court of appeals was whether the facts, taken as a whole, supported a belief that Furnco, and more particularly its practice of employing only those persons known to the decision-maker or recommended to him by friends, together with available statistical data, dictated that Furnco be made to open up its hiring process.[213] The

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208. The Court had adverted to such a distinction in Teamsters v. United States, 431 U.S. 324, 335 (1977), but had otherwise applied essentially the same evidentiary standard in *Teamsters* (purportedly a disparate treatment case) as it did in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (purportedly a disparate impact case).

209. *Furnco*, 438 U.S. at 570. Two plaintiffs who were "fully qualified" applied for jobs by appearing at the job site gate.

210. Subtly, there is a shift of focus in the analysis of the statistics from an evaluation of the defendant's longterm conduct to the defendant's conduct in the particular case. Thus, the Court justifies the statistics to which it resorts by noting that Furnco did not maintain a "permanent force of bricklayers." Meaningful statistical evidence had to do, therefore, not with Furnco's bricklayer work force, but the composition of persons hired for the specific job. *See id.* at 569.

The evidence indicated that between August 26 and September 8, of six bricklayers hired, all were white. The first black was hired on September 9. Of eight bricklayers hired between September 9-13, one was black. Between September 13-23, two of the twenty-four persons hired were black. Between October 12-18, six bricklayers, all black, were hired. The result appears to have been that despite the bunching together of the hiring of blacks to the tail end of the process, Furnco apparently exceeded its "self-imposed" goal (apparently motivated by prior disputes) of hiring 16 blacks by ultimately employing 20. *Id.* at 572. Moreover, of the 1,819 "man days" on the job, 242, or 13.3%, were by black bricklayers. *Id.* at 570.

211. 401 U.S. 424 (1971).

212. 411 U.S. 792 (1973).

213. *See Griggs*, 438 U.S. at 572-73. The district court rejected the plaintiffs' *Griggs* claim on the ground that refusal to hire at the gate was a facially neutral practice with no showing of disproportionate effect on blacks. *Id.* at 572. The ground for the rejection of the *McDonnell Douglas* claim is unclear. *Id.* As the Supreme Court observed, the touchstone of the district court's findings, whether under *Griggs* or under *McDonnell Douglas*, was the business justification for Furnco's use of the people-you-know network. "The [District] Court left no doubt that it thought Furnco's hiring practices were justified as a business necessity in that they were required for the safe and efficient operation of Furnco's business, and were 'not used as a pretext to exclude negroes.'" *Id.* at 572 (quoting Appeal for Cert. at A20-21).

In reversing the district court and finding for the plaintiffs, the court of appeals, while purportedly applying *McDonnell Douglas*, relied on the sort of historical evidence typified by *Griggs*. It pointed

lower courts thus treated the incantation of the allocation of burdens of proof as a ritualistic wand that explained a conclusion reached on other grounds.

The Supreme Court viewed the matter quite differently. First, the Court made it clear that its primary focus was not on any alleged injury sustained by the plaintiffs, but on the injury to the defendant in being haled into court.[214] Second, the Court, for the first time, strongly intimated that there were fundamental differences between the *Griggs* disparate impact and the *McDonnell Douglas* disparate treatment approaches.[215] In this regard, the Court significantly departed from prior formulation in its statement of the nature of the rebuttal burden shifted onto the employer as defendant. The burden means that the employer "need only 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.' "[216] Thus, the burden was not one of "proving" but merely one of "articulating"[217] a nondiscriminatory reason for the hiring practice. To discharge this burden:

> the employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided.[218]

In explaining the reassignment of burdens, the Court relied on substantive as well as procedural justifications. Observing that the allocation of the burdens of proof "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination,"[219] the Court stated the rules should not be

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to "the historical inequality in the treatment of black workers." *See id.* at 573-74. It explicitly discounted the importance of selecting people whose capabilities had been demonstrated through the people-you-know network. *Id.*

214. The Court framed the issue for which it granted certiorari as "whether the Court of Appeals had gone too far in substituting its own judgment as to proper hiring practices in the case of an employer which claims the practices it had chosen did not violate Title VII." *Id.* at 574.

215. *Id.* at 575 n.7. While distinguishing *Griggs* on the ground that the case involved "examinations," the Court did not explain why this distinction was meaningful in the context of the allocation of the burdens of proof. *Cf. id.* at 582 (Marshall, J., concurring in part and dissenting in part).

The Court's carving out of a special niche for "disparate treatment" analysis appeared particularly ominous given its warning that the *McDonnell Douglas* four-part inquiry into a plaintiff's prima facie case would "differ from case to case," and that the standard might be different from that employed in *Teamsters*, which the Court characterized as a "pattern and practice" case. *Id.* at 575 n.8.

216. *Id.* at 578.

217. While the Court in *Furnco* appeared to use the words "prove" and "articulate" interchangeably, it made it unmistakably clear in Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978), that "articulate" imposes a less heavy burden, requiring no more than the "production" of some evidence. *Compare Furnco*, 438 U.S. at 577-78 *with Sweeney*, 439 U.S. at 25 n.2 (Stevens, J., dissenting).

218. *Furnco*, 438 U.S. at 578-79. *But cf.* Connecticut v. Teal, 457 U.S. 440 (1983).

219. *Furnco*, 438 U.S. at 577. The Court candidly acknowledged that the substantive issue at stake was whether in combatting discrimination the employer, in its hiring procedure, should use that method which allows the employer to consider the qualification of the largest number of "minority applicants." It acknowledged that the formulation and allocation of the burden of proof had a direct bearing on this choice. *Id.* at 576.

"rigid, mechanized, or ritualistic."[220] It held that the prima facie case under the "disparate impact" analysis shifts the burden to the defendant by "rais[ing] an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[221] For the Court, this imposed a duty on the defendant only of putting forward some legitimate explanation for its conduct, and the articulation of such an explanation shifts the burden back to the plaintiff to persuade the Court that the defendant's conduct was motivated by an impermissible consideration of race or other forbidden factor. Moreover, the Court invoked substantive concerns, such as the cost to the employer, to explain this procedural structure for prosecuting Title VII cases.[222]

Following *Furnco*, the Court sought to institutionalize its new ideology by employing (as had the Court in *Albemarle Paper Co. v. Moody*,[223] and despite the explicit warning in *Furnco*) a highly formulaic approach to the allocation of the burdens of proof. In each case, however, the substantive underpinning of the formalism was obvious. It was clear that the focus of the Court's concern was not in assuring that parties discharged their burdens seriatim, but that the elements of the burden protect the status quo. Discrimination was to be presumed as a rare exception, with an attendant burden on those claiming it to prove its existence.[224] This deference to the status quo was explained and enshrined in the notion that Title VII litigation was essentially individual in character, the judicial

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220. *Id.* at 577.

221. *Id.* The Court went on to explain that the inference would be appropriate when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions. Yet, the Court's adoption of the sufficiency of the prima facie case as articulated in *McDonnell Douglas* cannot be reconciled with this explanation; for that standard did not require the plaintiff to advance any specific reasons for the employer's conduct, but was based solely on the identity of the plaintiff, plus the defendant's conduct following the rejection of the plaintiff. *Id.* at 575.

222. As the Court stated:

> Title VII prohibits [the employer] from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.

438 U.S. at 577-78.

223. 422 U.S. 405 (1975); *see also supra* notes 130-43 and accompanying text.

224. In Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978), for example, the Court, per curiam, restated that successful discharge of the prima facie burden creates only an "inference of discriminatory conduct," and that to dispel such inference, the employer need only "articulate some legitimate nondiscriminatory reason for the employee's rejection." the Court added:

> [w]hile words such as 'articulate', 'show' and 'prove,' may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason,' and 'prov[ing]' absence of discriminatory motive. By reaffirming and emphasizing the *McDonnell Douglas* analysis in Furnco Construction Corp. v. Waters, . . . we made it clear that the former will suffice to meet the employee's prima facie case of discrimination.

Id. at 25. Further emphasizing the substantive difference of *Furnco* and the Court's new line from prior precedent, the Court explicitly rejected the notion (adopted by the Court in *Teamsters*) that the allocation and definition of the burdens of proof should bear some relationship to a party's access to relevant information. *Id.*; *see also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

function being to vindicate the right of individuals, not to protect a class. Allocation of the burdens of proof under the disparate treatment theory was a conveniently malleable procedure for the formal application of this new approach.

Texas Dep't. of Community Affairs v. Burdine,[225] which with *McDonnell Douglas* is frequently cited as enunciating the disparate treatment theory, provided the fullest articulation and attempt at coherent justification of the new orthodoxy. *Burdine* was an opportune vehicle. Like *McDonnell Douglas*, the facts of the case were essentially sui generis, depicting the foibles of individualized office politics, not the classic yarn of group-based discrimination.[226] Like *McDonnell Douglas*, the Court employed the decision as the basis for a highly formalistic statement of the role of the burden of proof.

In *Burdine*, the court of appeals, notwithstanding *Furnco*, had placed on the defendant the "burden of proving by a preponderance of the evidence the existence of a legitimate nondiscriminatory reason" for its employment decision.[227] In reversing this holding, the Supreme Court placed a good deal of emphasis on the distinction between disparate treatment and disparate impact.[228] Because disparate treatment purportedly focused on the discriminatory motivation of the employer, the Court stated that the defendant's rebuttal burden is satisfied by the defendant "producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."[229]

Assuming that the defendant meets this burden, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity."[230] The plaintiff then assumes the role of

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225. 450 U.S. 248 (1978).

226. Burdine, an employee of the Texas Department of Community Affairs, alleged that the denial to her of a particular job assignment had been motivated by gender-based discrimination. At the time the case reached the Supreme Court, she was still an employee of the Department (albeit in a different division), having "kept her salary and . . . responsibility commensurate with what she would have received" in the absence of the alleged discriminatory conduct. *Id.* at 251.

It should be noted that since the facts are grounded in the unique circumstance of the plaintiff, and as they are easily distinguishable from the general perception of what ails society, a disposition of the case sounding entirely in terms of individual treatment does not immediately arouse the sort of unease that allegations of group-based discrimination tend to elicit.

227. *Id.* at 252. Notably, the Fifth Circuit, clearly influenced by the broadly remedial character of pre-*Furnco* decisions, also required that the defendant "prove by objective evidence that those hired or promoted were better qualified than the plaintiff." *Id.* The Supreme Court unanimously rejected this condition.

228. *Id.* at 253 n.5 ("We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes.").

229. *Id.* at 254. That production burden demands that the defendant's evidence "raises a genuine issue of fact as to whether [defendant] discriminated against the plaintiff." *Id.* And, "[t]o accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant." *Id.* at 255. The Court does not articulate what evidence would, as a substantive matter, justify judgment for the defendant. Presumably, however, such evidence need not be either job-related nor need it meet the business necessity requirement of *Griggs*.

230. *Id.* at 255.

showing that the defendant's submitted reasons are pretextual.[231] If the plaintiff can satisfy this pretext burden, she would have succeeded in discharging both her intermediate and ultimate burden of persuasion.

The Court offered functional and policy explanations for this distribution of burdens. The defendant's burden must be understood in light of the plaintiff's ever present, continuing, and ultimate burden to demonstrate that the defendant engaged in intentional discrimination.[232] The allocation of burdens of proof in turn function not to realign the plaintiff's responsibility, but merely as an intermediate mechanism to facilitate the presentation of evidence. Viewed in this light, the purpose of shifting the burden to the defendant by a successful prima facie showing is entirely logistical: it enables the defendant to demonstrate that the case should proceed beyond the prima facie stage.[233]

Explaining its rationale for this arrangement, the Court harkened back to precedent for the claim that the plaintiff's prima facie burden must

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231. *Id.* at 255-56.

232. *Id.* at 253 ("The ultimate burden of persuading the trier of facts that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." (citing Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978)); *see also* 9 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2489 (James H. Chadbourn rev., 1970).

The Court again provides little guidance on why this or any other Title VII case should be viewed as a "disparate treatment" (i.e., with the focus on intentional discrimination) rather than a "disparate impact" case. It does suggest that the determination is entirely dependent on the plaintiff's theory of the pleading, and whether the allegation is one against a "facially neutral" employment practice. *Burdine*, 450 U.S. at 252-53. But the line is hardly ever clear-cut. Indeed, rarely can any rational decision in the employment setting be based exclusively on so-called "facially neutral" or on "subjective" decision-making. The requirement of validation in the context of standardized tests calls into question the very concept of "neutrality," and of course, it has long been argued that most standardized tests evaluate subjective attributes such as culture. A recent study suggests that such skepticism over the "objectivity" of aptitude tests is widespread among the general population, blacks and whites alike. *See* NAACP LEGAL DEFENSE AND EDUCATION FUND, THE UNFINISHED AGENDA ON RACE IN AMERICA 29 and table 63 (1989).

233. *Burdine*, 450 U.S. at 253 ("The McDonnell Douglas division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question [of whether the defendant intentionally discriminated against the plaintiff].").

The Court's defense of this assertion is, at best, convoluted. On the one hand, it asserts that:

> [e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the Court must enter judgment for the plaintiff because no issue of fact remains in the case.

Id. at 254.

One page later, the Court states that:

> [t]he word 'presumption' properly used refers only to a device used [to allocate] the *production* burden. In a Title VII case, the allocation of burdens, and the creation of presumptions by establishment of a prima facie case is intended to sharpen the inquiry into the elusive factual question of intentional discrimination.

Id. at 255 n.8 (citations omitted) (emphasis supplied).

Yet a third formulation reads:

> [t]he phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue . . . . *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense.

Id. at 254 n.7.

be light.[234] Far from embracing the rationale underlying the precedents—the pervasiveness of race-based discrimination in the allotment of economic opportunities[235]—the *Burdine* Court's explanation for limiting the defendant's burden to that of articulating some legitimate nondiscriminatory reason undercuts it.[236]

Although the functional basis of the Court's allocation and definition of the burdens may have been imprecise, its substantive concerns were clearly articulated. The Court made plain its changed vision of Title VII. In an ironic twist, the disparate treatment theory's focus on the individual was seen to be essential to the realization of Title VII's "overriding interest . . . [in] efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions."[237] Out of this claim, the Court underscored two negative propositions: first, the Act should not be read "to require the employer to restructure his employment practices to maximize the number of women and minorities hired;" and second, the Act "does not demand that an employer give preferential treatment to minorities or women."[238]

Thus, despite the claim that disparate treatment is about individual liability, the Court's discussion is quite explicit in demonstrating the

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234. It explains this requirement in part by citing to prior precedent. *Id.* at 254 (citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977)). But, as explained earlier, that precedent is best understood as the product of judicial distrust of the claimed racial neutrality of traditional selection criteria, and the accompanying judicial philosophy that favored a broadly remedial construction of Title VII.

235. As the Court framed it, effective discharge of the burden "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Id.* at 253.

236. While the Court is clear that the articulate standard does not require the defendant to persuade the trier of facts that its actions were not motivated by discriminatory animus, *id.* at 254, the scope of the burden as defined in *Burdine* is imprecise. On the one hand, the verb "articulate" and its distinction from the "burden of persuasion" suggests that the burden is simply that of adducing any legally cognizable nondiscriminatory explanation.

On the other hand, the Court's definition of the burden as demanding that "[t]he explanation . . . must be legally sufficient to justify a judgment for the defendant" suggests the burden might carry some weight; i.e., something greater than mere presentation of a legally cognizable rational explanation. *Burdine*, 450 U.S. at 255, 257-58. The Court has yet to delimit the scope of this burden.

237. *Burdine*, 450 U.S. at 258 (quoting McDonnell Douglas v. Green, 411 U.S. 792, 801 (1973)).

238. *Id.* at 259 (citing 42 U.S.C. § 2000e-2(j)).

The significance of these policy concerns to the Court's statement and allocation of the burdens of proof is highlighted by contrasting the *Furnco* and *Burdine* opinions with that in United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1984), a disparate treatment case the facts of which conformed so much to the stereotype of unvarnished racial discrimination that the application to it of the standard rhetoric of burden allocation shrills as a mimicry of procedural justice. There, the Court's opinion suggested that the shifting of burdens terminated with the defendant's rebuttal burden, thereby eliminating the pretext phase. As the Court put it:

> [b]ut when the defendant . . . responds to the plaintiff's evidence by offering proof of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII.

Id. at 714-15. *But see id.* at 717 (Blackmun, J., concurring specially to observe that the plaintiff continues to have the opportunity following the defendant's rebuttal to show that the defendant's proffered reasons were pretextual). Thus, in a case strongly representative of the archetypal variety of unexamined prejudice, the Court confined its inquiry to an approach whose structure resembles the essentially housekeeping function of burden allocation.

inexorable linkage between individual treatment and social costs. The insistence on reducing to a minimum the potential for an erroneous determination of a finding of wrongful conduct by the defendant, no less than the desire to avoid incorrectly denying a deserving plaintiff redress, expressed social preferences that embodied structural visions not simply of the community in which one lives, but, more vitally, of the community in which one ought to live. It is thus not coincidental that in explaining the decisive concerns under the disparate treatment theory, the Court addressed precisely the issues that had become dominant in the discussion of affirmative action and the concomitant issue of group representation.

One last case, *Connecticut v. Teal*[239] deserves attention. Although the Court characterized *Teal* as a disparate impact case, and although the reasoning of the closely divided Court appears on its face to embrace the broadly remedial approach of the pre-*Washington v. Davis*[240] Court, the decision is quite consistent with the personalized focus of Title VII suits suggested in *Burdine*.

In *Teal*, four black employees sued the State of Connecticut under Title VII because a written examination had disparate impact on black aspirants for promotion.[241] More than a year after the lawsuit was filed, and about one month before trial, Connecticut made promotions from the eligibility list generated by the examination. Having taken other factors into account,[242] Connecticut ended up promoting a significantly higher proportion of blacks who took the examination than of whites.[243]

The Court stated the issue presented was as whether an employer could be found in violation of Title VII when it uses, as part of its selection procedure, an examination having disparate impact on blacks where the "bottom line" result of the process as a whole was an appropriate racial balance.[244] Adhering to a very formalistic presentation of the burden allocation, the Court framed the response entirely in terms of the rebuttal

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239. 457 U.S. 440 (1983).

240. 426 U.S. 229 (1976); *see also supra* notes 169-83 and accompanying text.

241. Data for the examination in 1978—which the plaintiffs had taken and failed — showed that of 329 exam takers, 48 identified themselves as blacks, and 259 as whites. The average score for all 329 candidates was 70.2; that for blacks was 63.7. The pass-rate was set at 65—apparently in part to offset the disparate consequences of the examination. This resulted in 54.17% of the blacks achieving passing scores, and 79.5% of whites doing so. *Teal*, 457 U.S. at 443-44 nn.3-4.

242. In addition to the consideration of the examination results, Connecticut apparently also considered past work performance, the recommendations of the candidate's supervisors, and the candidate's seniority. There was also some indication that Connecticut factored in the race of the candidate in order to increase the number of blacks receiving permanent promotion. *Id.*

243. Of forty-six persons receiving promotion, eleven were black and thirty-five white. Thus, 22.9% of the exam takers identifying themselves as black received promotion, while 13.5% of those identifying themselves as white were promoted. As the Court noted, the actual promotion rate of blacks who took the written examination was about 170% that of whites. *Id.*

244. *Id.* at 457. This issue presented the Court with the opportunity to elaborate on and take account of the possible differences between a defendant's rebuttal burden, and that of an affirmative defense. The defendant's contention appeared to suggest that the "bottom line" result should be evaluated as an affirmative defense. *Id.*

burden,[245] and sought to justify this approach by emphasizing the individualistic framework of Title VII.

Treated as an affirmative defense, the issue would be whether, despite the accepted discriminatory consequences of the examination, the State of Connecticut could nonetheless avoid liability by taking particularized steps to assure that members of the group suffering from the discrimination were adequately represented in the final selection. In other words, Connecticut would be taking a broadly remedial approach which would assure fairness to the group, but not necessarily fairness to any particular individual. In rejecting such a justification under Title VII, the Court did not rely on such considerations as the efficacy of the remedy or its cost to society, but on a highly individualistic conception of Title VII. The Court held that:

> [t]he fact remains that . . . irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiff's group can be of little comfort to the victims of . . . discrimination . . . . Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory.[246]

In summary, starting with *Washington v. Davis*,[247] the Court substantively commenced the reappraisal of the *Griggs v. Duke Power Company*[248] Title VII jurisprudence. The animating vision changed from the broadly remedial to a much narrower conception of Title VII as a limited antidiscriminatory statute. The Court communicated the switch in three ways. The first, which was articulated in *Davis* and which framed the issues in purely substantive terms, was short-lived and was abandoned in favor of two procedural approaches. In *Hazelwood School Dist. v. United States*[249] and *New York Transit Authority v. Beazer*,[250] the Court resorted to the device of requiring the plaintiff to put on a tightly woven statistical prima facie case. In *Furnco Construction Corp. v. Waters*[251]

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245. *Id.* at 454. The Court rejected the bottom line defense apparently because, literally read, the defense says nothing about the job-relatedness of the source of the racially disparate impact result—the written examination. Viewed as a presumption, the prima facie case was thus unrebutted, although if conceded, the "bottom line" figures may have provided a sufficient affirmative defense.

246. *Id.* at 455.

The members of the Court making up the majority in *Teal* were on the liberal wing of the Court; i.e., those who had viewed Title VII essentially in terms of its function as a tool for blacks as a group to participate in the mainstream of the national economy. Acceptance of the bottom line defense (even as an affirmative defense) may have been antithetical to this view, but the individualistic rationale advanced by the Court surely threatened the group conception just as effectively. *Id.*

247. 426 U.S. 229 (1976); *see also supra* notes 169-83 and accompanying text.

248. 401 U.S. 424 (1971); *see also supra* notes 87-104 and accompanying text.

249. 433 U.S. 299 (1977); *see also supra* notes 184-94 and accompanying text.

250. 440 U.S. 568 (1979); *see also supra* notes 195-200 and accompanying text.

251. 438 U.S. 567 (1978); *see also supra* notes 206-22 and accompanying text.

and *Texas Dept. of Community Affairs v. Burdine*,[252] the Court adopted the alternative approach of imposing on the defendant a very light rebuttal burden. In all three instances, the substantive effect was to favor the narrowly antidiscriminatory philosophy by taking judicial cognizance of the impact of the broader *Griggs* reading on the defendant, whose interests were identified as generally being synonymous with those of society.

While one can only speculate as to the reasons for the Court's quick retreat from the explicit invocation of substantive concerns in *Davis*,[253] it is clear that the procedural substitutes it embraced were unstable. While seemingly retaining the format for burden allocation first articulated in the broadly remedial, the Court made significant changes to the discharge of the burdens. In so doing, however, the Court maintained, despite the obvious distributive effects, that it was adhering to prior precedents. Contrary to the Court's claim, the newly fashioned statistical demonstration of the prima facie case could not readily be pegged to the pre-existing formula, nor was there a consistent explanation for the complex methodological proofs to which the plaintiff was now put. Similarly, the restatement of the evidentiary weight for satisfaction of burden allocation under the so-called disparate treatment theory lacked internal consistency[254] and appeared designed more to explain an end-result rather than to be a neutral directive for arriving at a principled conclusion. Finally, the Court's dichotomy between disparate impact and disparate treatment fails because the dichotomy was, at best, one of exigency. The Court provided no guidelines as to when either theory should be invoked. Yet, by the distribution of the elements among the parties, it gave decisive significance to the a priori invocation of the proper theory.

What unified these disparate and inconsistent approaches was the Court's rethinking of the substantive concerns of Title VII. The Court moved from a view of this legislation as presumptively anti-status quo to a view overwhelmingly concerned with the costs of a broad reading of Title VII. Reliance on superficially similar procedural mechanisms to achieve these disparate interpretations stretched the fabric of procedural coherence. The resolution of the tension was what the Court undertook in the controversial cases it decided in 1988 and 1989. The next section explores these attempts.

4. Harmonization And Its Results

By 1988, the unsatisfactory character of masking substantive disagreements in a procedural veil had become glaringly evident. The Court's

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252. 450 U.S. 248 (1978); *see also supra* notes 225-38 and accompanying text.

253. Further development of the Title VII analysis in *Davis* would have obliged the Court to choose between the *Griggs* "effects" test and the *Davis* "intent" requirement at a much earlier stage in the development of Title VII law. As suggested by the dissents in *Davis*, the choice would not have been an easy one. Washington v. Davis, 426 U.S. 229, 256-70 (1976) (Brennan, J., dissenting).

254. Interestingly, the Court explicitly eschewed reliance on the traditional objective explanation for burden allocations such as that the burden should be imposed on the party with the better access to the information. Rather, it focused on the notion that as a policy matter, the burden should be imposed on the basis of some a priori sense of the probability of wrongdoing. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1978). *But see* Teamsters v. United States, 431 U.S. 324, 369 n.53 (1977).

decision in *Watson v. Fort Worth Bank and Trust Co.*[255] provided a start for addressing some of the more obvious shortcomings of the mask. Appropriately enough, the starting point was the elemental question of when a party may properly invoke the various theories of Title VII that had sprung up. This issue had become critical since the Court had effectively carved out different causes of action under Title VII through its dispositive use of burden allocation.

The Court faced the issue in the context of an individualized claim by a black female employee that the denial to her of promotions by a bank in which she had worked for an extended period of time were made on the basis of race and gender discrimination.[256] Having failed both in her attempt to maintain the claim as a class action and to satisfy the disparate treatment standards of *McDonnell Douglas v. Green*[257] and *Texas Department of Community Affairs v. Burdine*,[258] she argued to the Court that she ought to be able to invoke the *Griggs v. Duke Power Co.*[259] statistical disparity analysis to support her individual claim. The lower courts rejected her position on the ground that the disparate impact prima facie case's reliance on statistical evidence made sense only because disparate impact theory was aimed at combatting the group-based effects of the application of objective selection criteria such as standardized tests. Because the plaintiff's claim of discrimination was based on subjective considerations that were peculiarly individual in character—i.e., the recommendations of supervisors—it had to be subjected to disparate treatment analysis.[260]

The Supreme Court unanimously disagreed. In ruling that disparate impact analysis, with its concomitant emphasis on statistical disparities, was not restricted to generic class claims such as those mounted under challenges to objective or facially neutral evaluation criteria, it effectively rendered meaningless the long-fought-for distinction between disparate impact and disparate treatment.[261] Having agreed that disparate impact

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255. 487 U.S. 977 (1988).

256. Mrs. Watson's claims and history are reminiscent of those in *Burdine*, in which the Court had attempted to rationalize the procedural structure for proving disparate treatment claims. *See supra* notes 225-38 and accompanying text.

257. 411 U.S. 792 (1973); *see also supra* notes 107-29 and accompanying text.

258. 450 U.S. 248 (1978); *see also supra* notes 225-38 and accompanying text.

259. 401 U.S. 424 (1971); *see also supra* notes 87-104 and accompanying text.

260. *Watson*, 487 U.S. at 988. Although, as the Supreme Court's opinion points out, it had never ruled on this question previously, the application of disparate treatment analysis to class actions involving the use of "subjective" selection criteria (*e.g.*, *Hazelwood*, *Teamsters*, and *Furnco*) certainly provided a not insubstantial legal basis for the lower courts' rulings.

261. *Id.* at 1002 (Blackmun, J., concurring in part and concurring in judgment).

Yet, the conclusion that a plaintiff making a claim of individualized discriminatory treatment should be able to rely on statistical evidence of the disproportionate underrepresentation of her group in the relevant economic activity hardly should be surprising. By prohibiting race or gender as classificatory grounds in the employment arena, Congress, as a substantive matter, surely gave an employee the right to demonstrate that the statute was being violated by pointing—at least as an element of her claim—to the underrepresentation in the workforce of persons who share similar attributes. That much is self-evident. The issue it poses is: how, and at what stage in the proceeding, should such evidence come in? The Court's reliance on shifting burdens had resulted in the adoption

analysis is applicable alike to subjective and objective selection criteria, four members of the Court embarked on a redefinition of disparate impact in a manner that rendered its reach no broader than that of disparate treatment.[262] Such a redefinition was perhaps overdue, because with one exception, the narrowly antidiscriminatory vision of the Court had been played out in the context of its analysis of disparate treatment.[263] That reappraisal, which in *Watson* commanded only four votes, constituted the majority opinion in *Wards Cove Packing Co. v. Atonio*.[264]

As already observed, the Court's formulation of the prima facie case in *Griggs* and its immediate successors was always hypothetical.[265] In each instance, despite the assertion that statistical imbalances might in and of themselves suffice to carry the burden, the cases confronted by the Court invariably contained anecdotal and other evidence sufficient to indicate discriminatory conduct by the employer.[266] In *Wards Cove*, the Court declined to look to such background evidence of discriminatory conduct. Rather, it insisted on strict proof of the existence of disparate impact as it had been theoretically defined by prior court cases. This application of the prima facie definition marked a departure, but one foreshadowed by precedent.[267]

The plaintiffs in *Wards Cove*, in making out their prima facie case, relied on substantial disparities in the distribution of jobs readily correlatable along racial lines. These racial disparities corresponded to employment in high-paying "skilled noncannery" jobs, and much lower-paying "nonskilled cannery jobs."[268] The Supreme Court found this evidence insufficient to meet the plaintiff's prima facie case. While maintaining the doctrine that statistical disparities may in and of themselves be sufficient to satisfy a plaintiff's burden, the Court insisted that the focus should be not on the existence of statistical disparities, but rather

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of a rigid formula that made the timing of the introduction of such evidence determinative of the outcome of the case. Under disparate impact theory, such evidence alone—at least in theory—was sufficient to shift the burden to the defendant. Under disparate treatment theory, such evidence, whatever its significance, became relevant only as part of the plaintiff's pretext case. Clearly, nothing in the wording of Title VII, nor any conceivable purpose that it was intended to serve, imposes such an outcome-determinative consequence for the procedural rule. Rather, the outcome showed the shortcomings of employing procedural rules to effectuate the Court's differing views as to the substantive norms of Title VII.

262. *Id.* at 977-1000.

263. *But see* Connecticut v. Teal, 457 U.S. 440 (1983).

264. 490 U.S. 642 (1989).

265. *See* discussion *supra* subpart (1).

266. Compare, however, the holding in *Watson*, in which the Court stated that:

> [t]his Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent. We have not limited this principle to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination. Each of our subsequent decisions, however, like *Griggs* itself, involved standardized employment tests or criteria.

Watson v. Ft. Worth Bank & Trust Co., 487 U.S. 977, 988 (1988).

267. *See* discussion *supra* subpart (2).

268. Buttressing the statistical evidence were such other indicia of differential treatment based on race as segregated dining, sleeping, and meeting facilities. *Wards Cove*, 490 U.S. at 643, 648.

on the relationship of the disparity to the particular employer's conduct.[269] This relationship took the form of requiring the plaintiff to establish: (1) the specific practice by the employer that is responsible for the statistical disparity; (2) the relevant pools from which the employer draws its work force; (3) the availability of qualified members of the plaintiff's group in the relevant pool; (4) the existence of some actual barrier to the ability of members of the plaintiff's group to move from the relevant pool into the employer's work-force; and (5) the employer's responsibility for the existence of the barrier.[270]

The Court characterized the first element of the plaintiff's prima facie burden as that of causation. Picking up on Justice O'Connor's plurality opinion in *Watson*, the Court held that a plaintiff does not make out a prima facie case simply by showing racial imbalance in the employer's work force. Rather, the plaintiff must "demonstrate" that it is the application of a "specific or particular employment practice" that has created the statistical imbalance.[271]

Wards Cove did not confine itself to the old practice of engaging in formulaic incantations and of forestalling criticism by clothing decisions in the garb of procedure. Rather, while relying on the plurality's opinion in *Watson*, the Court explicitly articulated its broader substantive concerns, and urged acceptance of its procedural approach as a means of dealing with those concerns.

Thus, the explanation given for the Court's insistence that unless the particular challenged practice is shown to be responsible for the significant

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269. Moreover, the relevant conduct must be narrowly focused to determine whether it is responsible for the statistical disparity. Other evidence of improper conduct, such as segregated social facilities, are irrelevant to the question of economic discrimination in employment.

270. *See Wards Cove*, 490 U.S. at 651-52 ("If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault), petitioners' selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites.").

The net effect of these requirements is to equate the disparate impact theory to a search for culpable conduct by the defendant; a purpose in direct derogation of the purpose hitherto advanced for disparate impact analysis. Indeed, it was on the distinction between the inquiry into the "effects" of "unintended discrimination," and that of "intentional discrimination" that the classic line dividing "disparate impact" from "disparate treatment" had been drawn. *See* Teamsters v. United States, 431 U.S. 324, 335 (1977); *Watson*, 487 U.S. at 1000-11 (Blackmun, J., concurring in part and dissenting in part).

271. *Wards Cove*, 490 U.S. at 657. On its face, the requirement is not new. Prior cases had assumed that the plaintiff would point to practices that she claimed to be responsible for the disparate impact. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (use of high school diplomas and intelligence tests); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (same); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) (refusal to take applications at the gates). Indeed, even the dissent in *Furnco* appeared to accept the proposition. *See Furnco*, 438 U.S. at 581 (Marshall, J., concurring in part and dissenting in part).

The more substantial burden implicated by this requirement lies in the failure of the opinion to elucidate the contours of plaintiff's duty—e.g., the meaning of "demonstrate," or the degree of particularity required in identifying the complained-of employment practice. The insistence that the plaintiff "demonstrate," not "plead" or "articulate," the particular employment practice suggests a more substantial burden than that imposed on the defendant. That, at any rate, appears to be Congress's reading, as illustrated by its definition of "demonstrate" in the Civil Rights Act of 1991 as meaning both the "burden of production and of persuasion." *See* 42 U.S.C. § 2000e(m) (1992).

statistical disparity, the plaintiff's prima facie case fails, is not simply that of being bound by prior precedents. Nor does the Court find support for its views by harkening to the nuances of the proper interpretation of procedure. Rather, it straightforwardly advances substantive grounds for its approach. As the Court states, "[t]o hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces'."[272]

Similarly, the Court characterized as insufficient the plaintiff's allegation that the statistical imbalance grew out of such hiring practices as nepotism and lack of promotion from within the existing work force.[273] The Court demanded not simply that the plaintiff show some link between the attacked employment practice and the statistical imbalance, but that the employment practice itself be illegitimate. In short, the Court viewed statistical imbalance as lacking independent force, and as useful only to strengthen a case of differential treatment already made out on the basis of an employer's use of illegitimate selection criteria.[274] So understood, *Wards Cove* is no different from cases such as *Burdine* or *Washington v. Davis*,[275] which require the plaintiff to demonstrate overt racial animus by the defendant as a prerequisite for obtaining relief. *Wards Cove* was simply more explicit in stating the substantive underpinning of the requirement.

In one sense, however, the Court's departure from the use of statistical evidence was quite radical. Prior decisions considered the probative value of statistical disparity offered in support of a prima facie case as hinging on the extent to which the dearth of minorities in the workforce contrasted with the availability of a pool of qualified minority applicants.[276] In *Wards Cove*, however, the Court did not limit its rejection of the proffered statistical evidence to this ground. Rather, the opinion appeared to reject as a matter of law any use of an "intra-firm" labor market comparison.[277]

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272. *Wards Cove*, 490 U.S. at 657 (quoting Watson v. Ft. Worth Bank & Trust Co., 487 U.S. 977, 992 (1988)).

This is not to argue, of course, that the Court's substantive analysis is correct. Indeed, I think the contrary more likely the case. For example, it is not evident why the presumption, going into litigation, should be that racially unbalanced work forces are more likely the result of "innocent" employment practices than the reverse. The Court certainly provides no particular support for this belief, other than its own intuition.

273. *See, e.g., id.* at 647; *id.* at 677 (Stevens, J., dissenting).

274. Similarly, in requiring that a plaintiff identify the relevant labor markets at issue—the relationship of the pool in which discrimination is claimed to exist to the pool from which eligible employees could be drawn—the Court was not, at least on its face, treading new ground, or imposing some new requirement on the plaintiff. *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); New York Transit Auth. v. Beazer, 440 U.S. 568 (1979); *cf.* Teamsters v. United States, 431 U.S. 324 (1977).

275. 426 U.S. 229 (1976); *see also supra* notes 169-83 and accompanying text.

276. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); New York Transit Auth. v. Beazer, 440 U.S. 568 (1979); Teamsters v. United States; 431 U.S. 324 (1977).

277. *Wards Cove*, 490 U.S. at 651; *cf. id.* at 661 (Blackmun, J., dissenting); *id.* at 662 (Stevens, J., dissenting). *Compare* Teamsters v. United States, 431 U.S. 324 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The Court explained this rejection not in terms of the traditional concern for substantive procedural fairness—an institutional objection to punishing a defendant for a state of affairs beyond its control—but primarily in terms of the cost to nonminorities and the litigation cost to the defendant.[278] Specifically, the Court expressed concern that accepting intra-company statistical disparity as the relevant comparison would result in "any employer who had a segment of his work force that was—for some reason—racially imbalanced [being] haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his work force."[279] According to the Court, the resulting burden on the defendant would be so great that the employer would have no choice but to "adopt racial quotas," an evil that, in the Court's view, Congress has mandated should be avoided at all cost.[280]

In the long-run, of more significance than the definition of the relevant market for statistical comparison purposes may be the Court's unwillingness to adhere to the often asserted claim that statistics alone may be sufficient to meet the prima facie burden. The Court's opinion in *Wards Cove* strongly suggests that, whatever the rhetoric, statistical evidence alone is unlikely to be found sufficient as the basis for corrective action. Rather, "[a]s long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions, . . . the employer's selection mechanism probably does not operate with a disparate impact on minorities."[281] This statement effectively capsulizes the central

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278. The Court could have rejected the intra-firm comparison in *Wards Cove* on the ground that minority group over-representation in the nonskilled jobs and under-representation in the skilled jobs was not probative of discrimination because employees were not drawn from the same pool of applicants. It did not limit itself to this sort of internally consistent argument, but looked further to the substantive social and economic impact and concerns of accepting the intra-firm comparison.

279. *Wards Cove*, 490 U.S. at 652. This argument has relevance, of course, only if the defendant's rebuttal burden extends beyond the mere articulation of the reason for the statistical disparity.

280. *See id.* at 652 (citing 42 U.S.C. §2000e-2(j)). Of course, this argument would make sense if the defendant's rebuttal evidence was a meaningless formality; that is, if defendants never successfully discharged this burden or, alternatively, if the cost of discharging the burden—such as that incurred in conducting and using a validation exercise—always exceeded the economic cost of employing unqualified minority group members. Neither the Court's prior precedents nor economic logic supports either alternative. In short, the Court's claim must be seen simply as overly exaggerated; a parade of horribles unlikely to be realized.

281. *Id.* at 653. Like the other two elements of the prima facie burden advanced in *Wards Cove*, it is unclear why these elements should be discharged by the plaintiff. The Court's explanation lies in its assumption that if the burdens are imposed on the defendant, rather than discharging them, the defendant would simply "hire by the numbers." The Court does not explain why hiring by numbers would be the logical step, nor does it provide extrinsic evidence that this has been the case. Intrinsic in the Court's response, however, is the assumption that the cost of discharging these burdens exceeds the cost of hiring by numbers. This suggests either that the cost of discharging the burden is exceptionally high, or that the cost of hiring by the numbers is low. If the former, the Court's choice of placing the burden on the plaintiff is a clear statement that it prefers the status quo. For, if the cost of discharging the burden is truly high, it is unlikely that the plaintiff is in any better position to incur that cost than is the defendant. This claim is not vitiated by the Court's assertion that the plaintiff's burden is lessened by her ability to obtain relevant information under the discovery rules of federal trial courts. The defendant enjoys the same access rights, and indeed is itself in possession of much of the relevant evidence.

shift of antidiscrimination doctrine from concern over the symbolism of a racially stratified society to concerns over the economic costs of reducing the stratification. The Court framed this latter concern by arguing that to focus on statistical disparities, rather than on culpable conduct, would mean that defendants would hire by the numbers. The underlying assumption—that the cost to the defendant of hiring by the numbers may well be lower than the cost of employing legally valid selection yardsticks—ironically echoes the judicial skepticism that characterized the imposition of the rebuttal burden on the defendant in the early 1970s. As previously demonstrated, that skepticism reflected judicial discounting, based on anecdotal evidence in Title VII cases, of the economic validity of prevalent selection criteria.[282]

The Court's unwillingness to prescribe a precise statistical model is thus not surprising. As in the 1970s, reference to statistics served an essentially rhetorical role: that of seeming to provide orderly neutrality to an essentially political and necessarily value-oriented adjudication.

B. Affirmative Action and Burdens of Proof

The Court's harnessing of the burdens of proof framework in cases challenging "voluntary"[283] affirmative action programs provides illuminating corroboration for the arguments made in part A. This part examines the Court's treatment of burden allocation and the relevance of statistics to that burden in two contexts. First, there is an examination of burden allocation in cases alleging reverse discrimination under Title VII. Second, there is a brief exploration of the application of the doctrine to equal protection claims brought against local governments. Examination of this latter situation makes vivid the relationship of burden allocation and substantive norms.

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282. The prevalence of set-asides by government procurement bodies reinforced this conclusion. *See* City of Richmond v. J.A. Croson Co., 489 U.S. 469 (1989). Both submissions to the Court and newspaper reports indicated that over 200 local authorities, and perhaps an even greater number of private entities, had such programs in effect in 1989. *See e.g.*, Brief of the National League of Cities, U.S. Conference of Mayors, National Association of Counties, and International City Management Association As Amici Curiae in Support of Appellant No. 87-998 (Jan. 15, 1989); Joel Kurtzman, *Prospects; Affirmative Action's Future*, N.Y. TIMES, Jan. 29, 1989, § 3, at 1.

283. Challenges to court ordered affirmative action programs present a set of analytically separate issues. Rarely do these cases question the defendant's liability—and, therefore, obligation—to provide relief, but ordinarily challenge the appropriateness or scope of the ordered relief. *See, e.g.*, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986); United States v. Paradise, 480 U.S. 149 (1987).

While challenges to affirmative actions promulgated pursuant to judicially approved "consent decrees" present thorny problems, especially since such stipulations are usually entered into prior to trial, the analytical construct for their evaluation on review share many of the characteristics of voluntary affirmative action programs. The inquiry would simply have to be hypothetical: could the plaintiff have provided sufficient statistical (or other) evidence to discharge the prima facie burden? If so, could the defendant have effectively rebutted the evidence? Could the fact-finder have found the rebuttal to be pretextual? *See* Firefighters v. Stotts, 467 U.S. 561 (1984); Firefighters v. Cleveland, 478 U.S. 501 (1986); *cf.* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); *see also* Marshall J. Walthew, Comment, *Affirmative Action And The Remedial Scope of Title VII: Procedural Answers to Substantive Questions*, 136 U. PA. L. REV. 625 (1987).

In *United Steelworkers v. Weber*,[284] the Court's first affirmative action case under Title VII, the Court disposed of the white plaintiff's claim of reverse discrimination without any reference to the burden allocation framework that had grown up in the context of Title VII challenges by blacks.[285] Rather, as in *Griggs v. Duke Power Co.*,[286] the Court focused first on the factual setting of the litigation, and second on the substantive implications for American society of a literal reading of the statute.

Statistical disparities supplied much of the factual context of the case. Weber, a white male, challenged under Title VII a "master labor collective bargaining" agreement between his union and his employer. The agreement contained a hiring goal for black craft workers for each of the employer's plants equal to the "percentage of blacks in the local labor force" for the area in which the plant was sited. "To enable plants to meet these goals, on-the-job training programs were established to teach unskilled production workers—black and white—the skills necessary to become craftworkers. The plan reserved for black employees 50% of the openings in these newly created in-plant training programs."[287]

In rejecting the challenge to the fifty percent set-aside, the Court took notice of the following. Prior to the collective agreement, Kaiser, the employer, employed only craft workers with experience in the field. Prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers at the Kaiser plant in question were black, even though the work force in the area was approximately 39% black. The Court further noted that there was a long history of the exclusion of blacks from craft unions nationally, an exclusion that it observed was not unrelated to the inability of black workers to satisfy Kaiser's pre-1974 hiring requirements.[288]

The Court thus recognized four plausibly relevant sets of statistics against which black participation could be evaluated: unionized employees at Kaiser; craftworkers at the local Kaiser plant; craftworkers nationally; and the composition of the local general workforce. The Court made no attempt, however, to distinguish among these various categories to determine the relevant market.[289] Consistent with the spirit that animated *Griggs*, the Court's focus was on the collective portrait presented by the statistics. Taken together, the picture was one of significant societal disparities. The relevance of these disparities could not be contained in

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284. 443 U.S. 193 (1979).

285. The Court did so even though it observed that its prior precedent made it clear that whites, no less than blacks, can sue under Title VII. *Id.* at 200-01 (citing McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 281 n.8 (1977)).

286. 401 U.S. 424 (1971); *see also supra* notes 87-104 and accompanying text.

287. *Weber*, 443 U.S. at 198.

288. *Id.* at 198-99.

289. Thus, the Court's analysis did not go off on whether the 50% set-aside would be permissible if applied to the training program, but whether it would be impermissible if used to recruit craft workers. *Cf.* Washington v. Davis, 426 U.S. 229 (1976). The Court also did not address whether the statistical imbalance relied on by the union and Kaiser was relevant since it compared the absence of black representation in a skilled craft with black representation in the general workforce. *Cf.* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

narrowly drawn confines such as that between unskilled and skilled craft jobs. These disparities instead spoke to and reflected the broader issue of black participation in the economy. What the figures said about the particular conduct of the particular defendant was, at most, instructional.

The Court was explicit in explaining that its methodology derived from a conception of law broader than simple adherence to precedent or literal translation of statutory wordings. Conceding that both gave force to the plaintiff's arguments,[290] the Court nonetheless rejected his claim for relief.[291] The dominant concern of Title VII, the Court pointed out, was "with the plight of the Negro in our economy."[292] That plight was evinced by national statistics not unfamiliar to a contemporary ear. Black unemployment rates in 1964 were high (and had been getting higher) *vis-a-vis* those of whites. Blacks were disproportionately employed in unskilled and semi-skilled jobs. Such jobs were quickly becoming extinct in a world of rapidly increasing technological automation. One way to deal with the social consequences of the resulting disproportionate disadvantaging of blacks was to assure their integration into the mainstream of the national economy.[293]

These were continuing threats in 1979, as they are today, and voluntary affirmative action was a means not inconsistent with Title VII for addressing them. As the Court said:

> [i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[294]

Thus, *Weber* actualized an analytical approach that *Griggs* had hypothesized. It relied on the animating vision of Title VII as an effort to create a society in which the economic place of any particular individual drawn at random could not, with a high degree of certainty, be told on the basis of the individual's race. It eschewed reliance on statistics that were unrelated to this dominant concern. Most straightforwardly, it did not invoke the procedural device of the allocation and definition of burdens of proof as a mechanistic ritual to avoid the need for a direct confrontation with the inadequacy of language alone to transcend time-bound compromises and contemporary disagreements. In retrospect, one finds it remarkable that this contextual approach to the interpretation of Title VII was taking place at a time when the Court had fully embraced the use of ritualistic formulae to clothe its decisions in Title VII suits

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290. *Weber*, 443 U.S. at 201.

291. It invoked the maxim that "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" *Id.* (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

292. *Id.*

293. *Id.* at 202-03.

294. *Id.* at 204.

by black plaintiffs. It was perhaps inevitable that, as the schism over affirmative action grew wider in society at large in the 1980's, the Court would call on the mask of process on which it had relied to minimize judicial dissention in claims by blacks and other direct discrimination cases. This was the case in *Johnson v. Transportation Agency of Santa Clara*.[295]

Johnson arose out of a challenge by a white male to an affirmative action program by a local government body which resulted in a white female with a somewhat lower evaluation score than the plaintiff being promoted over the plaintiff.[296] In dealing with the Title VII claim, the Court invoked the now familiar formulaic incantation of burden allocation.[297] As a preliminary matter, the Court asserted (despite the entirely statistical grounding of the defense) that the approach fitted "readily within the analytical framework set forth in *McDonnell Douglas v. Green*."[298] According to the Court, under this approach the prima facie case is satisfied by the plaintiff showing that "race or sex has been taken into account."[299] The burden then shifts to the defendant "to articulate a nondiscriminatory rationale for its decision." This burden may be effectively discharged by reference to the affirmative action plan. The Court held that "[i]f such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid."[300]

Thus, at least until the pretext stage, the allocation of the burdens of proof appears to be entirely pro forma—amounting to no more than an invitation to recite in sequence a set of pre-programmed chants. In an affirmative action setting, the plaintiff will invariably be able to show that the employer's decision was tainted by considerations of race or gender. Similarly, the employer's rebuttal burden appears to be no more than the simple statement of the existence of an affirmative action program.[301] It is only at the pretext stage that any meaningful burden is imposed on the parties. Although the burden is nominally on the plaintiff—required as she is to prove the invalidity of the affirmative action program—the standard as defined in *Johnson* amounts to a judicial inquiry into available statistical evidence without regard to the source of such evidence; that is, it is of little or no consequence that the evidence

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295. 480 U.S. 616 (1987).

296. *Id.* at 620-26. For some inexplicable reason, the claim was prosecuted solely under Title VII rather than in conjunction with an equal protection claim. *Id.* at 620 n.2.

297. The plaintiff's ultimate burden of proving the invalidity of an affirmative action plan could be discharged by (1) the plaintiff satisfying the prima facie case, and thereby (2) shifting the rebuttal burden to the defendant, which, if successfully met, (3) shifts the burden back to the plaintiff to show that the rebuttal by the defendant was merely a pretext for discrimination. *Id.* at 620.

298. *Id.* at 626.

299. *Id.* In an affirmative action case, this is always bound to be the situation.

300. *Id.*

301. While the Court observed that, as a practical matter, an employer is likely to advance evidence to support the appropriateness of the affirmative action program, the Court also made it clear that the employer has no burden to do so. Specifically, the Court rejected the argument that the employer's rebuttal burden should take the form of an affirmative defense. *Id.* at 626-27.

is provided by the plaintiff or the defendent. Indeed, chances are that it is the defendant who is more likely to provide the relevant statistics.

To understand *Johnson*, one has to reach behind the legal formula and examine the evidence adduced in the case.[302] That examination discloses that the use of burdens of proof in and of itself sheds very little light on the Court's legal analysis. The recitation of the formula amounted to little more than a ritualized incantation with no bearing on the definition of the obligations of the parties. Thus, the Court's endorsement of Santa Clara's affirmative action program did not depend on the definition of the prima facie case. The Court could just as easily have reached its conclusion, as it did in *Weber*, by a straightforward evaluation on their merits of the facts before it, without the mediation of the allocation of evidentiary burdens.[303]

As justification for affirmative action programs, statistical disparities are significant. Their importance, however, does not lie in the mathematical precision with which they can be correlated to cause and effect, but to the portrait of society that they paint. Thus, in explaining the significance of the statistical imbalances found in Santa Clara's work force, the Court, although acknowledging that some of its prior decisions required that comparisons be made in relevant labor markets,[304] paid little attention to such specificity of details. In evaluating the plaintiff's claim of discrimination in the failure to promote him to a road dispatcher position, the *Santa Clara* Court did not limit itself to consideration of statistical imbalance in this discrete labor market even though the statistical imbalance there was glaring.[305] The Court instead presented and discussed the issue in terms of statistical evidence justifying Santa Clara's promulgation of an affirmative action plan.[306] Such evidence was relevant because, as Santa Clara argued and the Court agreed, the under-representation of women in the skilled positions reflected a societal tradition of excluding them from such positions and, given such limited oppor-

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302. *Cf. id.* at 657 (O'Connor, J., concurring in the judgment).

303. Although not explicitly stating this point, Justice O'Connor's concurrence in *Johnson* is an illustration of the point.

304. *See* 480 U.S. at 631-32; *see also* Teamsters v. United States, 431 U.S. 324 (1977); United Steelworkers v. Weber, 443 U.S. 193 (1979) (to determine existence of statistical imbalance in unskilled and semiskilled job positions, the appropriate comparison is the percentage of women or minorities in the employer's work force with their percentage in the area work force or general population); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (where the job at issue requires training, the appropriate comparison should be the composition of women or minorities in the employer's service with their counterparts in the workforce who possess the relevant qualifications).

305. Of the 238 persons employed in that position, only one (whose promotion caused the lawsuit) was female. *See Santa Clara*, 480 U.S. at 621-22.

306. Such relevant statistics included the following: while making up 36.4% of the Santa Clara area labor force, women constituted 22.4% of the county's Department of Transportation work force; and the women working for the agency were concentrated in "EEOC job categories traditionally held by women." *Id.* at 621. For example, they made up 76% of clerical and office workers, but only 7.1% of agency officials and administrators, 8.6% of professionals, 9.7% of technicians, and 22% of service and maintenance workers. *Id.*

tunities, a consequent lack of motivation for them to seek employment in the skilled fields.[307]

Finally, while the Court was willing to take advantage of the empty formalism of burden allocation by asserting that the case could be analyzed within the framework of *McDonnel Douglas Corp. v. Green*,[308] it was explicit in stating the quite different substantive concerns embodied in review of challenges to affirmative action programs. As it pointed out, those differing concerns must be reflected in the conduct of the relevant statistical analysis.[309] In the Court's view, statistical disparity sufficient to demonstrate manifest imbalance in an employer's work force need not be as profound as statistical disparity necessary to make out a prima facie case. The Court explained the distinction between these analytical approaches by emphasizing Congress' intent to encourage voluntary efforts to rectify the effects of past discrimination.[310]

Examination of the role of burden allocation in the articulation of changing views on the relationship of disparities to the appropriate structure of the community would be incomplete without reference to the Court's decision in *City of Richmond v. J.A. Croson Co.*.[311] Categorized as an equal protection case, the decision is significant because it illustrates the flexible use of concepts and theories in the service of substantive objectives. In holding that state and local government affirmative action programs when challenged under the Equal Protection Clause of the Fourteenth Amendment must pass "strict judicial scrutiny" (thereby calling into question what had become the dominant approach to increasing black participation in the economy),[312] the Court employed the wellworn

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307. *Id.* This is, of course, a telling criticism of cases such as *Hazelwood* and *Wards Cove,* which narrowly define the relevant labor market to encompass only those with the qualified skills.

308. 411 U.S. 792 (1973); *see also Santa Clara*, 480 U.S. at 626.

309. *Santa Clara*, 480 U.S. at 632-33.

310. *Id.* at 628 n.7.

311. 488 U.S. 469 (1989).

Few other recent decisions of the Supreme Court have generated as much controversy. Illustrative of the controversy are the exchanges among scholars in the pages of the Yale Law Journal. *See* Judith C. Areen et al., *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J. A. Croson Co.*, 98 YALE L.J. 1711 (1989); Charles Fried, *Affirmative Action After City of Richmond v. J. A. Croson Co.: A Response to the Scholars' Statement*, 99 YALE L.J. 155 (1989); Judith C. Areen et al., *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163 (1989). Despite these erudite comments, the case actually broke little new doctrinal ground. Aside from its practical effects, the decision is worth noting primarily because it confirmed the ascendancy of a conservative majority on the Court that was more willing to take on directly the substantive distributional issues raised by affirmative action policies, and to reject the world view that enshrined such policies as necessary for contemporary American society.

312. There were, for example, well over 200 such programs extant in 1989, including 36 state programs. See Brief of the National League of Cities, U.S. Conference of Mayors, National Association of Counties, and International City Management Association As Amici Curiae in Support of Appellant (Jan. 15, 1988); Lauren Schenone, *New Efforts Made to Help Minority Firms*, N.Y. TIMES, July 23, 1991, § 12, at 1.

The effect of the *Croson* decision was to force local communities either to abandon such programs, *see, e.g.*, Ohio Contractors Association v. City of Columbus, 733 F. Supp. 1156 (S.D. Oh. 1990), seek to envelope them in parallel federal programs, *see, e.g.*, Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir. 1990), or commission backward-looking studies at significant cost on the basis of which new programs were then enacted, *see, e.g.*, Coral Constr. Co., v. King

framework of burden allocation.[313] However, the Court, in a now equally familiar step, applied to the defendant's discharge of this burden *not* the articulation standard of *McDonnell Douglas v. Green* that was suggested in *Johnson*, but a standard more akin to that imposed on the plaintiff's prima facie case in *Hazelwood School District v. United States*.[314] The Court considered insufficient to discharge this burden the showing that over a five-year period only 0.67% of contracts awarded by the City of Richmond went to blacks, despite the fact that blacks made up fifty percent of the population of the city during that period. Similarly, the inclusion of other evidence of disparities, such as the substantial underrepresentation of blacks in trade associations,[315] or ownership of construction companies,[316] added little to the discharge of the burden. Such data were simply inapposite because they did not demonstrate past wrongdoing by the city. Moreover, said the Court, where culpable conduct could be demonstrated, sufficient evidence of direct linkage between cause and effect was lacking.[317] Appropriate procedure, the Court held, de-

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County, 941 F.2d 910 (9th Cir. 1991). The fate of these new generation statutes is very much open to doubt. In some cases, the doctrines of standing or mootness have been ingenuously employed to avoid an outright determination of the issue. *See, e.g.*, Northeastern Florida Chapter of the Ass'n of Gen. Contr. of America v. City of Jacksonville, 951 F.2d 1217 (11th Cir. 1992); Cone Corp. v. Florida Dept. of Transportation, 921 F.2d 1190 (11th Cir. 1991); Maryland Highways Contractors Ass'n v. State of Maryland, 933 F.2d 1246 (4th Cir. 1991); Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 945 F.2d 1260 (3rd Cir. 1991). In other cases, courts have struck down the statutes, or expressed strong reservations as to their constitutionality. *See, e.g.*, O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992); Associated General Contractors of Connecticut v. City of New Haven, 791 F. Supp. 941 (D. Conn. 1992); Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia, 1992 U.S. Dist. LEXIS 18298 (E.D. Pa. Dec. 13, 1991).

313. *See Croson*, 488 U.S. at 493-95; *id.* at 519 (Kennedy, J., concurring); *id.* at 520 (Scalia, J., concurring in the judgement). Strict scrutiny imposes on the defendant the duty to demonstrate that its affirmative action policy serves a compelling state interest. To meet this burden, a defendant is required to show that the policy is intended to correct the lingering effects of past discrimination attributable to the defendant's past conduct or acquiescence, and that the policy is narrowly tailored to achieve this limited purpose. Statistical evidence may be probative in the discharge of both prongs of the burden. In the former case, statistical disparities must be shown to be the result of prior discriminatory conduct by the defendant. In the latter situation, the reduction of statistical disparities must proceed at no greater pace than that permitted by the existence of "available qualified" members of the victim class within the jurisdiction of the defendant. The burden of demonstrating such availability apparently falls on the defendant.

314. 433 U.S. 299 (1977). The rigor with which this standard was applied to the City of Richmond, as a defendant, contrasts sharply with the burden imposed on the defendants in *Davis*, *Hazelwood* and *Furnco*, and may be compared to the burden imposed on the plaintiffs in *Hazelwood* and *Beazer*. *Croson*, 488 U.S. at 498-506.

315. For example, of the 600 members of the local construction trade association, only two were black. *See Croson*, 488 U.S. at 480.

316. National data indicated that minorities owned 4.7% of construction firms nationwide. *See id.* at 481.

317. A history of past discrimination in such areas as the exercise of one's voting rights or access to educational opportunities—even though ordinarily their effective (as distinct from theoretical) regulation fall within the purview of the local government—could not thus be employed to discharge the defendant's burden. It appears that since such discriminatory conduct had been pervasive, only a direct (rather than inferential) showing of causal link between the local community's past conduct and current underrepresentation of blacks would suffice. *See id.* at 505. As in *Wards Cove*, it takes a good amount of suspension of rationality to argue that the standard is not tantamount to a requirement of the showing of "intentional discrimination" in the field being sued on.

manded fractionating the inquiry and insisting that each element of the test be satisfied as a prerequisite to establishing a violation, even where an aggregate examination might have suggested the existence of such a violation.[318]

While the result of the *Croson* Court's approach is undoubtedly the reverse of that employed by the Court in *Griggs*, the procedure was like *Griggs* in that it embodied a substantive vision of what disparities say about the structure of society, both as a consequence of past conduct and its acceptability in the future. The operating assumption, far from questioning the neutral consequences of traditional selection criteria, accepted even clearly subjective selection practices[319] and insisted that those who claimed that disparities were the result of discrimination prove it.[320] Similarly, looking to the future, the society envisaged by the Court is one in which the concept of color-blindness operates solely in the symbolic environment of process, not in the substantive structure of the society. Under that vision, disparities that correlate along racial lines are not the evils of primary concern; rather, it is the asymmetrical use of process that must be avoided.

In *Croson*, then, as in *Johnson*, *Wards Cove Packing Co. v. Atonio*,[321] *Furnco Construction Corp. v. Waters*,[322] and *Albemarle Paper Co. v. Moody*,[323] burden allocation is a tool called on after the fact to lend a sense of detached objectivity and procedural regularity to an outcome otherwise determined by substantive concerns. This function of the use of burden allocation directs the examination, in the next part, of congressional efforts to reverse the Court's recent decisions, and in particular *Wards Cove*.

III. THE LEGISLATIVE RESPONSE

The proper distribution and statement of the elements of the burden of proof were issues of central focus in the discussion and passage of the Civil Rights Act of 1991 ("Act").[324] With the purpose of codifying the business necessity and job related concepts of *Griggs v. Duke Power Co.*[325] and other Supreme Court decisions prior to *Wards Cove Packing*

318. *See* Michel Rosenfeld, *Decoding Richmond*, 87 MICH. L. REV. 1729 (1989).

319. Thus, in *Croson*, the Court paid scant attention to the significant role played by "old boy networks" in determining the availability of subcontracting opportunities, despite ample evidence on the record. *See generally* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The Court suggests such evidence would be relevant only if the City of Richmond could demonstrate that it had acquiesced in the discriminatory use of such subjective criteria.

320. *See, e.g., id.* at 507-08 (arguing that it is irrational to presume mathematical relationship of a group in the population and its representation in an occupation).

321. 490 U.S. 642 (1989); *see also supra* notes 264-82 and accompanying text.

322. 438 U.S. 567 (1978); *see also supra* notes 206-22 and accompanying text.

323. 422 U.S. 405 (1975); *see also supra* notes 130-43 and accompanying text.

324. *See* 42 U.S.C. §§ 2000e to 2000e-17 (1992).

325. 401 U.S. 424 (1971); *see also supra* notes 87-104 and accompanying text.

Co. v. Atonio,[326] the Act, following two years of highly acrimonious debate and a presidential veto, settled on the following framework.

Disparate impact is established only when a plaintiff demonstrates that the defendant uses a "particular employment practice that causes disparate impact on the basis of race, color, religion, sex, or national origin," and the defendant "fails to demonstrate that the challenged practice is *job related* for the position in question and consistent with *business necessity*."[327] Although tautological in formulation, the provision appears to envisage a two, rather than three, tier framework. At one level the plaintiff pleads, produces evidence, and persuades the trier of fact by the preponderance of such evidence of the existence of a causal link between some particularized employment practice and the disproportional representation of her group in the employer's work-force. At the other level, the employer fails to demonstrate — by producing evidence and persuading the trier of fact through the preponderance of such evidence — that the employment practice is job-related and justified by business necessity.

This formula makes explicit three declarations. First, the plaintiff and the defendant carry alike the burden of demonstrating the elements of their respective claims or defenses. Second, the plaintiff is required to produce evidence and persuade the trier of fact of the existence of a particular employment practice, the underrepresentation of members of her group in the work-force, and a causal link between the two sets of affairs. Third, the defendant has the burden of producing evidence and of persuading the trier of fact that the employment practice was job-related "for the position in question" and required by business necessity. In other words, this framework suggests that successful litigation of a disparate impact claim under the Act should not depend on a party's ability to meet the "intermediate" allocation of the burdens, but should proceed along the line of a plaintiff satisfying the ultimate burden without reference to the prima facie case. Meanwhile, the defendant is required to discharge the burden of pleading and proving an affirmative defense.

Because much of the disagreement on the Supreme Court has centered on the dispositive consequences to be assigned the placement and satisfaction of the intermediate burdens, legislative silence as to the availability, if any, of interim allocational burdens within this framework does little to provide the Act's claimed "guidelines." Does any element of the defendant's burden come into play before the plaintiff has persuaded the trier of fact of all of the three elements of her burden?

The answer to the question is far from clear in part because the Act defines the word "demonstrate" to mean both the burden of production

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326. 490 U.S. 642 (1989).

327. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added). The legislation provides an alternative formula for disparate impact: the complaining party demonstrates "in accordance with the law as it existed on June 4, 1989," an alternative employment practice, and the defendant refuses to adopt such alternative employment practice. 42 U.S.C. § 2000e-2(k)(1)(C). This is apparently the codification of the alternative statement of the pretext burden in *Albemarle Paper* as an independent basis for possible liability under the disparate impact theory.

and of persuasion. A logical, although by no means exclusive, reading of the allocation of burdens would be that the plaintiff must meet all of her burdens before the defendant should be required to introduce any evidence to rebut the plaintiff's claim. If such is the nature of the plaintiff's burden, one may fairly question the precedential value of prior uses of statistical evidence. Further, this reading would be in derogation of the asserted findings of Congress that made the Act necessary; namely, the need to reverse the burden allocation formula of *Wards Cove Packing Co. v. Atonio*,[328] and to grant additional protection against unlawful discrimination in the workplace.[329]

If, on the other hand, one reads the statute as not altering burden allocation at the intermediate level (or the sufficiency of evidence required to satisfy such burdens) and as only affecting substantive law definitions such as what constitutes "disparate impact," "job-relatedness," and "business necessity," then the efficacy of the Act is equally called into question. As demonstrated in part II, the definition of the "intermediate" allocation of burdens of proof was an integral aspect of the statement of the Court's substantive vision of the role of Title VII in contemporary society. Thus, although clothed in procedural garb, the definition of discrimination on the basis of disparate impact and how it can be proved was at the core of the Court's manipulation of substantive law. Disparate impact in *Griggs*, as interpreted by *Albemarle Paper Co. v. Moody*,[330] directly addressed the Court's dissatisfaction with the underrepresentation of members of a protected group in treasured positions and their overrepresentation in low-paying jobs. By contrast, from *Washington v. Davis*[331] to *Wards Cove*, the Court sought to move the theory of disparate impact away from its anchor in statistical representation to one of causation, requiring the plaintiff not only to establish statistical disparity but to demonstrate the responsibility of the employer for that disparity. Amendments of Title VII that leave unaddressed the allocation of burdens of proof at that level would be incomplete in that it would have failed to challenge that substantive vision.[332]

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328. 490 U.S. 642 (1989); *see also supra* notes 264-82 and accompanying text.

329. *See* 42 U.S.C. § 2000e-2.

330. 422 U.S. 405 (1975); *see also supra* notes 130-43 and accompanying text.

331. 426 U.S. 229 (1976); *see also supra* notes 169-83 and accompanying text.

332. Because of the tautological definition of disparate impact in the 1991 Act, it may readily be construed as straddling both substantive definitions of discrimination embodied in the Supreme Court opinions. Disparate impact is used to refer both to disproportionality of representation, and to the establishment of a causal link between the disparity and an unjustified employment practice. Rather than choosing between these contending approaches, the legislation, in what surely will prove to be a futile effort, provides for the marriage of both. It is true that the Act, unlike *Wards Cove*, requires the plaintiff to prove no more than a causal link between a particular employment practice and the underrepresentation of her group in the workforce, but it says absolutely nothing about how such a link might be established. For example, it is not clear whether a plaintiff who produces evidence of disparity in skilled positions within her place of employment would have successfully met the statutory definition of "disparate impact," by identifying as the cause her employer's practice of hiring from outside the firm rather than from among the abundant unskilled female employees of which she is one. Does the Act's requirement that she "demonstrate" (that is, persuade) the trier of fact of the causal link require more? If more is required, what is it, and how different

Much of the polarization of the debate surrounding passage of the 1991 Act—particularly following the successful veto of the earlier 1990 version of the Bill—centered on the meaning of the defense of "job relatedness" and "business necessity." That debate revolved around the effect of the *Wards Cove* decision's requirement that the plaintiff, as part of her prima facie case, show both that the cause of an imbalance in an employer's workforce was the use of a particular selection criterion and that such a selection criterion was illegitimate. Those who sought the overrule of *Wards Cove* contended that the cumulative effect of this aspect of the decision was to place on the plaintiff, contrary to earlier Supreme Court precedents, the burden of proving job-relatedness and business necessity. It placed the burden of proving job-relatedness on the plaintiff because it required her to identify specific practices injurious to her selection. It placed on her the burden of proving business necessity by virtue of the fact that she was required to prove that the practice thus identified was itself illegitimate. This last burden was seen to be particularly onerous because it approximated in practice, if not in rhetoric, proving intentional discrimination.[333]

Opponents of legislative action, while never directly challenging the concept of disparate impact as a statistically-based analytical tool, contended that any other allocation rule would result in employers, deterred by the economic cost of justifying their employment practices, hiring instead by the numbers. For them, the terms "job related" and "business necessity" simply required that the plaintiff, having proved her case, shift a nominal duty to the defendant to justify the challenged selection practice by showing the relevance of the practice to the position or job, or by showing that even if unrelated to the particular job, the practice was compelled by "business necessity."[334]

By providing that the job-related defense is to be measured in terms of the "position in question," it would appear that Congress intended an overruling of the *Davis* and *Wards Cove* standard, which endorsed a much broader definition of job-relatedness.[335] This overruling, however, should not lead one to conclude that, as a substantive matter, proponents

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is it from the requirement that the defendant produce evidence of "job-relatedness," or "business necessity?" Thus, in the absence of the use of intermediate burden allocation, and applying the Act's definition of "demonstrate," getting to the "job related" and "business necessity" defenses may be mere surplusage because the plaintiff is likely to lose the case before the burden gets shifted to the defendant.

It might be argued that Congress surely did not intend to put so heavy a burden on the plaintiff. Yet, the Act explicitly instructs that aside from the words employed in the Act, legislative intent may be ascertained only by reference to a very abbreviated legislative history; one that is entirely devoid of helpful information on the point. *See* 137 Cong. Rec. S15,276 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth).

333. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661-62 (1989) (Blackmun, J., dissenting).

334. For example, some queried whether under this formulation, a showing of preference by air travellers for female air hostesses would meet the business necessity defense even though there is no correlation between gender and the ability to serve as an air attendant.

335. *See* Washington v. Davis, 426 U.S. 229, 250-51 (1976); *see also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989).

of the narrow definition of job-relatedness have won out. The absence of any statutory definition of the terms, coupled with the explicit statutory abjuring of the use of much of the legislative history of the Act, not only leaves the interpretive function fraught with difficulties but strongly argues for an interpretation that relies heavily on judicial precedence.

One may question the significance of the seeming reassignment of the *Wards Cove* statement of the burden in two respects. First, because the plaintiff must prove that a particular employment practice causes disparity in the structure of the employer's workforce, the reference to "position in question" applied to the defendant would be no different from the work-force, the structure of which the plaintiff argues and is required to prove to be out of balance. Thus, what might first appear to be a defendant's burden, is, as held by the Court in *Wards Cove*, actually the plaintiff's burden.

More crucially, the enacted formulation papers over important differences that emerged during discussion of the job relatedness and business necessity elements of the defense. A prior formulation had required that the defendant demonstrate that the challenged selection criterion "bears a significant relationship" to effective performance of the job.[336] Opponents, including representatives of the President, argued that any showing of relevance between the job and the selection criterion would be sufficient.[337] Thus, while the requirement is that the job relatedness of the employment practice is to the position in question, the absence of any qualification as to the nature of the relationship leaves open an important area of controversy.[338]

It is in the definition, or more accurately the absence of definition, of "business necessity" that the insufficiency of legislative action is most

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336. The precise phrasing of what the defendant must show was the cause of much controversy, and the formulation varied from one enactment to another, as proponents attempted to find a formula that would be acceptable to the President.

The compromise which requires the defendant "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity," simply repeats the popular refrain without providing any guidance. *See* 42 U.S.C.A. § 2000e-2(k)(1)(A)(i). This formula certainly does not resolve the controversy about whether the permissible defense is restricted to evaluating correspondence of the criteria to performance on the job, narrowly defined, or whether the defense permits weighing other business interests. For one evaluation of how pre-*Wards Cove* decisions came out on the issue, see Memorandum from Fried, Frank, Harris, Shriver & Jacobson to NAACP Legal Defense and Educational Fund, Inc. (July 26, 1991).

337. The most celebrated of these arguments was that of the Secretary of the Department of Education, in which he contended that the "significant relationship" standard would restrict employers' use of "high school diplomas" to screen out employees, and that the administration was opposed to such a measure because, notwithstanding *Griggs*, an employer ought to be able to insist on high school diplomas in all circumstances. To take any other position, he said, would threaten this country's drive for an internationally competitive workforce. *See* Adam Clymer, *President Rejects Senate Agreement on Rights Measure*, N.Y. TIMES, Aug. 2, 1991, at A1.

338. That controversy of course revolves around whether the identified practice must be shown to be "essential" or "significant" to satisfactory discharge of the responsibilities of the position, or whether it is enough that it bears some relationship to the job in question. *Compare Wards Cove*, 490 U.S. at 659 *with id.* at 672-73 (Stevens, J., dissenting). Despite the vigorous debate surrounding the controversy, the Bill as enacted is silent on these disagreements.

evident. The Supreme Court has been remarkably cryptic in defining what constitutes "business necessity." In large measure, the focus has been shaped by extrajudicial yardsticks such as professional validation studies of employment tests,[339] or amorphous concerns about public safety.[340] The absence of judicial consensus is compounded by the equally fractious exposition of the meaning of "business necessity" that characterized the legislative debate on the point. The diversity of views on what might constitute "business necessity" ranged from the position purportedly advanced by members of the executive branch that satisfaction of customer preferences may suffice,[341] to the insistence of strict professional validation of the necessity of the skill to "essential job performance." The Act, as passed, fails not only to choose from among these positions, but explicitly instructs the courts to ignore these positions in the determination of what constitutes "business necessity."[342]

In summary, finding that the *Wards Cove* decision "has weakened the scope and effectiveness of Federal civil rights protections," and that "legislation is necessary to provide additional protections against unlawful discrimination in employment," Congress's response was one of tinkering with the formulae that had emerged from twenty years of Supreme Court litigation. The tinkering, taking as it does the route of attempting to express substantive concerns in procedural terms, accords with Supreme Court practice. Not surprisingly, it suffers from the same shortcomings. Past history and the 1991 Act itself are testimonials to the confusion of the Supreme Court's approach. Much time and energy was and promises to be spent on highly technical atomistic decisions with very little guidance either for the particular litigator, or for the community's vision of the relationships of members inter se. Given the vast amount of moral and political capital that has been expended in the fight to reverse *Wards Cove*, the end-result appears rather paltry. The next section explores whether tenable alternatives exist, or whether the law and politics of disparate impact analysis must inextricably be mired in the limited framework of employing procedural burdens as proxies for substantive goals.

IV. ALTERNATIVE APPROACHES

The discussion, thus far, suggests that the transformative use of procedure in the form of the continuing reliance on formulaic distribution of burdens of proof to realize controversial policy goals carries at least

339. *See, e.g.*, Albemarle Paper v. Moody, 422 U.S. 405 (1974). It should be noted, however, that the Court termed such tests "impermissible" unless based on criteria that are significantly correlated with, or predictive of, relevant elements of work behavior. *Id.* at 431.

340. *E.g.*, New York Transit Auth. v. Beazer, 440 U.S. 568 (1979); *cf.* Dothard v. Rawlinson, 433 U.S. 321 (1977).

341. *See, e.g.*, Ruth Marcus, *Compromise on Civil Rights Bill Skirts Controversial Definition*, WASH. POST, Oct. 26, 1991, at A6. In a directive issued contemporaneously with the signing of the legislation, the President reportedly instructed executive agencies to adopt the less stringent relationship between the challenged business practice and the needs of the employer. *See* Stephanie Saul, *The Directive in Dispute*, NEWSDAY, Nov. 22, 1991, at 7.

342. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b) (1991).

three significant costs. First, achieving the desired substantive ends may require such modification of the process that it loses coherence. Second, the poorly adapted procedure may fail to realize the substantive end for which it is invoked. This failure increases the cost of corrective action because it becomes unclear whether the failure is due to the practical unsuitability of the modified process, or to some intrinsic flaw in the sought-for object. Third, the use of procedure may obscure the substantive nature of the problem, hindering inquiry into possible political resolution of underlying bottlenecks.

Set off against these costs is the value of the purported principled neutrality that the systematized regime of procedure brings to bear on the resolution of conflicts. Although this paper has thus far argued that this purported benefit is at best illusory, the trade-off might be acceptable if the law regulated discrete or static relationships. Discrimination, or at least that much of it which attributes significance to substantial disproportionalities correlatable to well-defined social cleavages such as race or gender, is too central an aspect of contemporary life to be disposed of by arcane rules. As the various Supreme Court opinions demonstrate,[343] and the debate over the 1991 Civil Rights Act[344] puts beyond cavil, nothing short of re-examination of underlying concepts and their relevance to the dynamic environment of current society will suffice.

The *Wards Cove* Court and proponents of the reversal of the decision alike agree that unlawful discrimination may exist by virtue of statistical disproportionalities and in the absence of demonstrable specific intent by the employer to prefer members of one group over the other. There appears also to be some consensus that not all statistical disproportionalities are unlawful. How then is lawful and socially acceptable statistical disparity to be distinguished from the societally unacceptable? This is the same old dilemma that the Supreme Court faced in *Griggs v. Duke Power Co.*.[345] The post-*Griggs* decisions offered reliance on burden allocation as the solution. Portrayed as a process that worked because the contents of the illness of discrimination could be segmented into their various component parts and systematically analyzed, burden allocation had the ring of scientific rigor and legal objectivity. Presented as an efficient means of adducing relevant information, the content of the burden, as applied, nonetheless reflected substantive norms that varied from the broadly remedial to the narrowly antidiscriminatory. Mechanistic application of burden allocation could be transferred from one to the other because the basic distinction among these norms revolved around

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343. As illustrated by the discussion in part II, above, the Court has frequently reversed the lower courts, not because they misstated or misapplied accepted doctrine, but because they chose the wrong test or burden of proof. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas v. Green, 411 U.S. 792 (1973); Washington v. Davis, 426 U.S. 229 (1976); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

344. *See* 42 U.S.C. §§ 2000e to 2000e-17 (1992).

345. 401 U.S. 424 (1971); *see also supra* notes 87-104 and accompanying text.

the extent to which the rules of causation should be dispositive. Missing from this framework, however, was any attempt to understand or present statistical differences as a generalized statement of society's sense of community, whether in terms of the way it is understood or in terms of the way it should be constructed. Under both the broadly remedial and the narrowly antidiscriminatory approaches, the Supreme Court's decisions offered up an image of the law as no more than a plumber's tool for fixing the immediate leak in the pipe.

The core failing of the legislative response that wholeheartedly embraces this judicial conception of the role of law lies in its unwillingness or inability to come to grips with the relevance of theories of causation to a vision of society that embraces color-blindness not simply with regard to inputs and processes, but to its revolving and permanent structures as well. Without a resolution—or at a minimum an understanding—of the link between causation and concepts of unlawful discrimination grounded in the presence of statistical disparities, procedural instruments such as burden allocation will continue to be highly malleable and lacking in integrity.

The central teaching of *Griggs* was the unease with which the Court, and by proxy society, viewed the significant economic disparities that could be readily correlated with well-worn societal categories such as race. The belief that these disparities represented the results of discriminatory conduct rather than open-ended impersonal competitive forces was buttressed not only by generalized historical experience, but also by the broad outlines of the facts in *Griggs*.[346] Legal experience—notably in the context of school desegregation cases[347]—had demonstrated the frustrations of tackling the systemic problem of racial discrimination within the confines of liability determinations characteristic of the case-by-case methodology of individual tort claims.[348] The construction and application of burden allocation in the broadly remedial phase gave voice to these judicial concerns.

The concept of discrimination in American society, however, has not been static. The claim that statistical disparities reflect the consequences of unlawful discriminatory conduct had lost many of its adherents by 1976.[349] It is today by no means uniformly accepted and is certainly a minority position on the current Supreme Court.[350] In this environment, burden allocation became an instrument for de-emphasizing the significance of statistical disparities. The Court, however, did not overrule *Griggs*, nor the post-*Griggs* decisions that gave broad interpretive sig-

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346. *See supra* notes 87-104 and accompanying text.

347. *E.g.*, Green v. School Bd. of New Kent County, 391 U.S. 430 (1968).

348. *Compare* Richard Delgado, *Beyond Sindell: Relaxation of the Cause-in-Fact Rules for Indeterminate Plaintiffs*, 70 CALIF. L. REV. 881 (1982).

349. *E.g.*, Washington v. Davis, 426 U.S. 229 (1976).

350. *See Croson*, 488 U.S. at 506-07 (there are a myriad of innocent causes for black underrepresentation in government contracting opportunities); *see also* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

nificance to statistical disparities.[351] Instead, it employed burden allocation to make these decisions virtually inconsequential.

Thus, even as Congress contended that the Act is intended to "confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits" by codifying pre-*Wards Cove* decisions,[352] it failed to take account of the reality that those decisions embodied two quite distinct conceptions of the relevance of statistical disparities to claims of unlawful discrimination. It is simply not the case, as congressional rhetoric would suggest, that *Wards Cove* was sui generis and marked a complete break with the past.

American society's ambivalence toward dispensing with statistical imbalances as an element in the equation of discrimination is understandable. The relevance of statistical disparities was forged in the crucible of history. Whatever may be the status of current skepticism, either as to the prevalence of discrimination in daily practice[353] or as to the persistence of the effects of past discrimination,[354] not even the most ardent proponents of a color-blind society contend that contemporary black underrepresentation in the economic arena bears no relationship to discrimination. Burden allocation, like strict scrutiny, thus functions as a means of teasing out the precise nature of the relationship. If the relationship cannot be teased out, then the cost is made to remain on where it falls; that is, on the unidentified victims of past discrimination.

This choice may be justified on three grounds. The first is that it comports with the limited role of a court in a constitutional democracy.

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351. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Teamsters v. United States, 431 U.S. 324 (1977); *see also* notes 130-43, 148-58 and accompanying text.

352. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3 (1991).

353. The use of "paired testers" in which persons with essentially identical credentials are placed in the same situation (e.g., interviewing for the same job or seeking to purchase the same house) calls into question the accuracy of the increasing belief that discrimination, to the extent it persists, is not manifested by failure to hire qualified blacks. Thus, in a recent study employing black and white paired testers with college educations for publicy advertised clerical and blue collar positions in Washington, D.C. and Chicago, researchers found discrimination against black males "widespread" and "the existence of discrimination against blacks at the ninety-nine percent significance level." *See* MARGERY TURNER ET AL., OPPORTUNITES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISRIMINATION IN HIRING xi-xii, 63 (1991).

354. Statistical evidence of persisting significant economic disparities across racial lines abound. For recent data, see David Swinton, *The Economic Status of African Americans: Limited Ownership and Persistent Inequality*, *in* THE STATE OF BLACK AMERICA 1992, 63-67 (1992); ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 93-133, 232-33 (1992).

Nonetheless, some have questioned the relevance of past or contemporary discrimination for the most egregious forms of black poverty, notably that of unemployed blacks—especially males—in central city neighborhoods. *See, e.g.*, WILLIAM J. WILSON, THE TRULY DISADVANTAGED 109-11 (1987) (downplaying the significance of overall statistical data since some blacks—notably those in the administrative and professional classes—have benefitted disproportionately than other blacks from programs supposedly aimed at eradicating discrimination); *cf.* John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) (reporting that trend in antidiscrimination lawsuits focus on promotion and dismissals rather than hiring). *But see* MARGERY TURNER ET AL., OPPORTUNITES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISRIMINATION IN HIRING (1991) (reporting significant statistical differences in the treatment of blacks and whites with regard to hiring for entry-level positions across occupational lines, although more pronounced in white collar as contrasted with blue-collar positions).

It is up to the person who claims injury and who seeks judicial intervention to demonstrate cause for such intervention. Second, the consequences of litigation are necessarily distributive. The outcome of any litigation must total zero. Parties will always be aligned as victims or victimizers. By definition, the plaintiff claiming injury starts out as a victim. If causation rules are rigidly adhered to when the source of the plantiff's injury is speculative, chances are that she will remain a victim throughout the process because those rules will force her to bear the cost of her injury. If, on the other hand, the rules are more flexibly applied, the defendant, believing itself entitled to a presumption of the regularity of the status quo, becomes the victim of any departure from established process.[355] It is not the role of the courts, absent legislative enactments, to assign a priori victim/victimizer positions. Finally, causation rules protect institutional structures that have claims to legitimacy by virtue of the fact that they have survived and successfully emerged through the competitive selection processes of the market and the democratic processes. Such selection criteria as educational qualifications, seniority, and similar badges are, by this definition, efficient and meritocratic.

If these justifications sound appealing to a court conscious of its circumscribed role in a constitutional democracy, the basis for their embrace by the legislative branch is more equivocal. Transactional cost of the legislating process (i.e., the give-and-take of practical politicking), ambivalence as to the merit of the substantive law, and lack of comprehension of the highly technical judicial rules may be resorted to as explanations. As suggested by the maneuverings over the enactment of the Act, the preponderant influence of the presidential veto, even in the presence of overwhelming contrary legislative impulses, may be a significant factor in the process. This is particularly the case where the views are no less intense for being held by a minority.[356] Moreover, it would be an error to overlook the prevalence of significant opposition in the polity at large to a statistically-based definition of discrimination. Whether anchored to the dominant judicial and executive branches' hostility to that epitome of statistically-based inquiry, affirmative action, temporal distance from overt and/or de jure discrimination, or by fears of what the climate of economic uncertainties hold for them, much of the white population question the propriety of basing claims of discrimination in statistical analysis.

There remains, however, much discomfort in abandoning statistical imbalances as relevant aspects of the discrimination inquiry. That discomfort lies in the realization not only that, as cases like *Griggs* recognized, statistical imbalances may reflect systemic discrimination in a variety of

355. One might argue that repeated departures from the status quo should create no expectation of adherence to any particular procedure, and hence no sense of victimization. Such an argument, however, runs counter to the implied view of law as a predictably regularized process.

356. Attempts to override presidential vetoes fell short by very narrow margins. The Senate avoided an override of S2104 by a single vote, and House passage of HR1 fell short of a veto-proof majority by about fifteen votes.

ways. There is of course the easily understood causal link between past discrimination and current effects that might be measured in terms of denial to identifiable blacks and their children of the opportunity for self-enrichment. Here, numbers measure the continuing effects of past discrimination. Statistical imbalances may be, in addition, a measure of the contemporary incidence and effects of discrimination in a quite different sense. Institutional mechanisms developed with the best of intents, and even with neutral goals, may subtly perpetuate discrimination either because those institutions were developed at a time when it was customary to ignore their application to blacks, or because they do not reflect the residual effects of past discrimination on blacks.

A third approach, which has been accepted to an extent in more recent decisions, is that removal of statistical imbalances may well be a laudable goal in itself.[357] This is so because, whatever their causes, statistical imbalances run counter to the vision of society organized as a community of interdependent persons serving goals and interests that are mutually beneficial to all.[358] A stratification readily correlatable to race or other long-practiced distinctions among groups[359] detracts from this view of the community. In short, the striving for color-blindness should not be limited to the processes under which interaction is regulated, but should also be reflected in the concern shown for the end-result.

This approach to statistical imbalances is generally presented as being forward-looking and in contradistinction to the retrospective character of causation-based analysis.[360] Aside from its practical and political utility,[361]

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357. Judicial discussions of the legality of basing social and economic policies on the goal of numerical parity have generally arisen in the context of equal protection challenges to specific legislative acts. See, for example, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989), where there was not a single objection to Justice Scalia's suggestion that, had the City of Richmond enacted the same program with the class of beneficiaries identified on grounds other than race—even where blacks would benefit disproportionately—the statute would have survived the Court's strict scrutiny. It is unclear whether a classification based on gender would have received a different treatment. *Cf.* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Associated Gen. Contractors of California v. City and County of San Francisco, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992) (indicating affirmative action programs favoring women are to be subjected to less stringent scrutiny than those favoring blacks). *But see* Michigan Roadbuilders Ass'n, Inc. v. Milliken, 834 F. 2d 583 (6th Cir. 1987), *aff'd* 489 U.S. 1061 (1989) (stating strict scrutiny applies to preferences favoring women).

358. *Cf. Croson*, 488 U.S. at 492 (conceding that the government cannot be a passive bystander to private action that results in statistical disparities).

359. My purpose here is not to present any detailed prescriptive scheme, but to sketch in broad relief the outlines of a possible alternative that would require focusing on the substantive distributive questions at issue, rather than procedure. For the purpose of this project, Professor Fiss's definition of an identifiable group will suffice. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148-49 (1976) (groups "have an identity and exist wholly apart from the challenged state statute or practice . . . . [Such a group] has two other characteristics. (1) It is an entity having a distinct existence apart from its members . . . . (2) There is a condition of *interdependence*" between the identity of members of the group and the identity and wellbeing of the entity) (emphasis in original). *Id.* It is sufficient, then, that disparity can be established as to a conceptual entity whose members view themselves and are viewed by others as linked to one another by shared experiences, and distinguishable from others by those experiences.

360. *See* WILLIAM J. WILSON, THE TRULY DISADVANTAGED 118 (1987).

361. Because, on its face, such a program is potentially open to everyone in society, it has been

the claim purports to provide a morally acceptable and functionally effective alternative to the divisive use of race-conscious measures. It is morally acceptable because it avoids the stigmatizing consequences of benefitting or burdening individuals on account of group identification, notably race.[362] For such criteria, it substitutes a much more meaningful concept that is directly related to the cause for concern: the relative inaccessibility of economic resources to the underprivileged members of the community. It is said to be functionally effective because, while perhaps disproportionately benefitting members of a particular racial group such as blacks, it would not be overinclusive since only those who are truly needy would be benefitted, while deserving members of other groups would not be excluded.[363] Moreover, resort to this approach should lead to a clarification of what current society finds acceptable or disturbing about the use of proven statistical evidence. If the facts that blacks proportionately would be favored under such a program, that some whites who would have benefitted under the traditional standard would necessarily be burdened under the new statute, and that some hitherto built-up expectations would be disappointed are not viewed as grounds for invalidation, then the discussion may be rescued from the race-bound rhetoric in which it is currently trapped.

The delinking of causation from effects has significant implications for the generally accepted remedial conception of programs with significant disparate racial impact. If causation is unrelated to effects in the form of the distributive consequences of a facially race-neutral policy, legislative bodies may well have a good deal of latitude in developing the criteria—other than race—for the distribution of economic goods in society.[364]

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argued that it could form the basis for a progressive coalition that would include, among others, blacks, women, populists, liberals, and conservatives alike. *See, e.g., id.* at 115, 117-20. The support of such conservative republicans as Senator Simms of Idaho for disadvantaged business enterprise programs in highway construction lends some credibility to this claim. *See, e.g., The Disadvantaged Business Enterprise Program of the Federal Highway Act: Hearings Before the Subcommittee on Transportation of the Committee on the Environment and Public Works*, 99th Cong., 1st Sess. 1 (1985) (statement of Senator Simms, R. Idaho).

362. For a discussion of the multiplicity of concerns that the Court has advanced for disfavoring race-based classifications, see David Chang, *Discriminatory Impact, Affirmative Action and Innocent Victims: Judicial Conservatism or Conservative Justices*, 1991 COLUM. L. REV. 790; David Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989).

363. *See, e.g.*, JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY (1983); *cf.* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgment). *But see* David Chang *Discriminatory Impact, Affirmative Action and Innocent Victims: Judicial Conservatism or Conservative Justices*, 1991 COLUM. L. REV. 790, 804 n.42 (questioning the underlying ideology involved in acceptance of purportedly race-neutral programs aimed at benefiting small businesses).

Although Congress in recent years has adopted the concept of an all-race-inclusive program that creates preferences or set-asides favoring "Disadvantaged Business Enterprises," the resulting enactments have not been entirely race-neutral. They have included a presumption (albeit rebuttable) that membership in a racial or ethnic group or the status of being female is tantamount to being disadvantaged. *See, e.g.*, 15 U.S.C. § 637(d) (1990); National Defense Procurement Act, Pub. L. 100-656 (1988); Surface Transportation and Uniform Relocation Assistance Act, Pub. L. 100-17, § 106(c) (1987); Surface Transportation and Assistance Act of 1982, Pub. L. 97-424 (1982).

364. A test of the Court's commitment to the invalidation of those programs that are only superficially nonrace classificatory would depend on the standards it develops for ferreting out the existence of an illicit motive behind a seemingly race-neutral measure.

Such latitude may include the ability to fashion selection criteria that will assure reduction in the level of disparity between black and white participation in the national economy.[365] Furthermore, a severing of disparate effects from the underlying remedial conception is bound to have substantial impact on the rhetoric of burden allocation in Title VII lawsuits, as well as the Supreme Court's jurisprudence on affirmative action. For example, the Court in *Wards Cove* insisted that Congress, in enacting Title VII, required the plaintiff, as part of the prima facie case, to demonstrate a causal link between a specifically identified employment practice and a proven statistical disparity in the representation of members of the plaintiff's class in the work-force. Although this holding has generally been understood as expressing the Court's concern that a contrary rule would create an incentive for hiring by the numbers, an additional aspect was judicial sentiment that whatever the theory employed, a finding of violation of Title VII branded the defendant with the unsavory reputation of being a discriminator.[366] With acceptance of statistical disparities as worthy of attention on the basis of the future structure of the community, the inquiry would shift from assigning blames for past conduct to means of reconciling the demands for structuring a community that integrates normative concerns to available resources. This will not be a friction-free endeavor, but it would avoid the stigma of the defendant being branded a discriminator and the attendant judicial disinclination to permit such branding without substantial evidence in its support.

Adoption of a facially race-neutral model to tackle incidents of statistical disparities will, of course, not be without controversy. For one thing, like the causation-based approach, it is not value-free. It explicitly identifies some form of economic parity as a societal end worth striving for. Many will disagree with this goal, but the ensuing debate has the potential of focusing explicitly on the merit of the goal. The debate should result in the introduction of new terminology with force independent of worn-out cliches. It would most likely recognize and take cognizance of the fact that the forces that militate for and against economic disparity today are not identical to those that compelled legislative action in 1964.[367]

Concededly, the debate will not be tidy. It is bound to involve, among other things, defining the scale of economic parity demanded by the

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365. There is no lack of suggestions. They range from the use of directed efforts such as advertising in media likely to be read by blacks, technical assistance in the form of training programs, and waiver of difficult-to-comply-with requirements (such as bonding), to the use of market forces such as the creation of rating programs or tax credits. *See, e.g., Croson*, 488 U.S. at 509-10; Robert E. Suggs, *Rethinking Minority Business Development Strategies*, HARV. CR.-CL. L. REV. 101 (1990) (advocating use of market forces to promote broader business ownership by minorities).

366. *Compare* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 436 (1986) (noting application of special pleading rules to claims asserting civil rights laws).

367. Such debate would be different from the essentially undefined and indeterminate concepts currently at the heart of antidiscrimination discussions.

On the dynamic nature of conceptions of "discrimination" and "antidiscrimination," see John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

renewed vision of the community, the spheres in which it is laudable to have it and those from which it should be excluded, the difficulties of gathering and interpreting data, and the fit of concepts of "parity" to economic, political, and social ideologies.[368]

Moreover, dispensing with the fault-based underpinning of Title VII and affirmative action law in those instances where the system currently relies on disparate impact analysis would require society to wean itself away from a prevailing conception of morality that equates entitlement to social concern with victimization of some sort. While contemporary debate suggests that much of the moral force of this justification has been largely spent, its formal abandonment might be difficult to explain and justify—at least until alternative conceptions gain greater support.[369]

Finally, an approach oriented toward economic parity will require the creation or evolution of new mechanisms and institutions for adjudicating and enforcing applicable rights and interests. It may well result in the creation of new formulae and yardsticks, and of processes and means that may generate as much distortion and obfuscation as is currently the case.

The potential for these and other difficulties exist. On the other hand, with the experience of burden allocation as guide, there are means of resisting such entrenchment of procedure. We can call for constant re-examination and readjustment not just of means, but of ends as well. Rather than using the legislative process as a means of reversing the occasional controversial decision, a process of periodic re-examination could be institutionalized. In short, what the proposal offers is the need to re-examine explicitly fundamental notions at the heart of the current procedures employed to enforce Title VII and like claims. The rigidities of the current processes, the ritualized incantation with which they are presented, and the seeming scientific precision of the calibration of the yardsticks all mask substantive policies that should be openly examined. The procedural terminology and accompanying judicial constructions that have been so confusingly employed by the Supreme Court do not allow for the searching and candid discussion these questions deserve.

Ultimately, the strongest reason for examining statistical imbalance in terms other than causation is the need to free the discussion from the

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368. Notions of "parity" (sometimes derogatorily characterized as "quotas") have been severely criticized in the racial and gender contexts. *See* Morris B. Abrams, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986). It has never been clear whether the criticism is of parity in general or simply its application to a particular class of persons. For one attempt to defend parity as a goal, see Julianne Malvaux, *The Parity Imperative: Civil Rights, Economic Justice, and the New American Dilemma, in* THE STATE OF BLACK AMERICA 1992, 281 (1992).

369. The classic example is requiring blacks, despite a history of past discrimination, either to forego or to derive no greater benefit from societal programs than nonblacks who are statistically shown to be in a similar position. Thus, for example, justifying to an enterprising black the legality of denying her relief—even where she can demonstrate (say under current burden allocation formulae) the probability of past discrimination because she and other blacks in her position fail to meet some required measure of statistical disparity while granting relief to a recent Asian immigrant—might appear inequitable. Chances are that she is no more likely to find the system morally more acceptable than white males who charge "reverse discrimination" under current law.

procedural barnacles with which the search for color/gender-blind economic equality has become encrusted over the last twenty years. The interdependence of the various theories for relief would become more evident. Chances are that society's real concern over cost will emerge to the forefront,[370] and that such costs can be measured against not merely the efficacy of the processes used, but the end-results sought. The variety of responses bound to be generated should make the undertaking of a new enterprise worthwhile.[371]

V. CONCLUSION

The commands of laws are most sacrosanct when they are trumpeted as and clothed in the garb of procedure. These internal rules epitomize the classical legitimation of law as enshrining neutral principles. Expressing values embodied in the rules in neutral terms, society attempts to resolve demonstrated shortcomings in the rules by fine-tuning their use to meet particularized and discrete circumstances. Society is reluctant to consider that harmony lies not in reconciliation, but in reconceptualization of the problem, and perhaps even the jettisoning of established answers. No inherently compelling rationale exists for burdens of proof to have taken on the decisive role they have come to play in Title VII and equal protection analysis. The original framework reflected a broadly remedial vision of Title VII that was the hallmark of the Supreme Court's civil rights cases in the first half of the 1970s. Stare decisis maintained the shell of appearances even as the Court's substantive vision changed. The extent of the change in content, and the weakness of the shell, was demonstrated in *Wards Cove*.

Congress, in its recent efforts to respond to the *Wards Cove* decision while demonstrating recognition of the substantive character of the debate, failed to come to grips with it, and instead took umbrage in the discredited

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370. I do not minimize the substantial hurdles that will be raised by the need to deal with costs: personal and institutional, economic or social. It is also quite possible that obfuscating procedure might develop. Prior experience suggests, however, that courts are less likely to mask their underlying policy concerns when addressing issues of remedy than when attempting to ascertain liability. See, in the Title VII context, Memphis Firefighters v. Stotts, 467 U.S. 561, 583-89 (O'Connor, J., concurring); Franks v. Bowman Transp. Corp., 431 U.S. 747, 774-78 (1976) (confronting the claim that the award of retroactive seniority should be impermissible because it would be at the expense of "innocent majority" employees).

371. For example, plausible responses might include reexamination of adjudicatory litigation as a primary means for reducing inequality of access to economic resources. In this context, the Department of Labor's "Glass Ceiling Project" — under which a special section of the department has an ongoing task of (1) identifying systematic barriers to career advancement by women and "minorities," (2) working with employers to eliminate these problems, and (3) devising procedures and channels for ongoing communication and monitoring between the department and private employers — may be suggestive of future trends. *See generally* Civil Rights Act of 1991, Pub. L. No. 102-166, § 201 (1991). Likewise, appropriate structures for providing relief to the underrepresented might include discussion of public funding versus mandated private accommodations. *See, e.g.*, Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213. As to the issue of reliance on specific quantifiable relief (i.e., numerical goals, timetables, quotas, etc.) versus technical assistance, see City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989); Local 28 Sheet Metalworkers v. E.E.O.C., 478 U.S. 421 (1986); United States v. Paradise, 478 U.S. 149 (1986).

ritual of burden allocation.[372] Given the complete dependence of the statutory formula on judicial precedents, and the inability of Congress to marshall any other independent sources of ideas, congressional effort is likely to yield very limited results. This need not be the outcome, however. An important consequence of highly controversial decisions such as *Wards Cove* is that they ought to prompt a thoroughgoing and systematic appraisal of how and why the allocation of burdens of proof have come to play the dominant role in Title VII litigation. These decisions also lead to fresh looks at alternative mechanisms for realizing the substantive visions at stake. Proponents of the status quo ought to be required to justify it in terms of current objectives, not simply by pointing to tradition or even longevity. Similarly, proponents of a new substantive vision ought to be forced to develop and justify the contours of the vision. They ought to be made to take account of the transactional costs involved in creating the necessary political coalitions to transform the vision into legislation and to contemplate possible trimming or revision.[373]

In short, the *Wards Cove* decision, read against the backdrop of *Griggs*, offered up a route not taken. The explicit unmasking in the decision of the shroud of process over substantive choices suggested, at a minimum, the preceptoral value of re-examining the place of statistical disparities in the understanding and definition of the community. At the end of the day, Congress returned this important issue unexplored back into the cocoon of judicial process.

372. As explained in subpart IIA(4), *supra*, Justice O'Connor's plurality opinion in Watson v. Fort Worth Bank and Trust Co., 487 U.S. 977 (1988), and the Court majority in *Wards Cove*, make the case for replacing procedural formalism with substantive content.

373. Compare, however, the switch in the congressional selling of the Civil Rights Act of 1991 following the successful presidential veto of the 1990 amendments, from emphasis on the passage of provisions relating to the business necessity defense, to provisions involving monetary damage awards in gender discrimination cases. *See* J. Jennings Moss, *Civil Rights Bill Keys on Women*, WASH. TIMES, Mar. 13, 1991, at A1. *But see* Joan Biskupic, *Democrats Scramble for Cover Under GOP 'Quota' Attacks*, CONG. QUART., May 25, 1991, at 1378 (explaining softening of bill to accept cap on monetary damages recoverable by women as necesitated by the need to reach a veto-proof consensus in the legislature).