DISPARATE IMPACT
IN THE
PRIVATE SECTOR:
A THEORY GOING HAYWIRE

ROGER CLEGG
PREFACE

Can employers be held liable for discriminating without having the intent to discriminate? The answer is yes. This may make little sense, but the disparate-impact theory of discrimination holds that when an action has a disproportionate effect on a group, it can be challenged as illegal discrimination. Unlike disparate treatment, where intent is required, a perfectly innocent employer can be held liable for discrimination.

One possible basis for this legal theory is the fear that a qualification imposed by an employer is simply being used as a proxy for discriminating against a group. While this is a legitimate fear, the disparate-impact theory continues to be used in a manner that far exceeds the legitimate purpose of countering hidden discrimination.

Civil rights protections are absolutely necessary, and those that discriminate intentionally should be liable. Our society is premised on inclusion and equal opportunity. However, disparate impact is being used to ensure equal results, not equal protection under the law. This legal theory is being used in various lawsuits, from employment to voting rights cases, thereby pervading every aspect of our society.

In this important monograph, the author, Roger Clegg, explains in detail the disparate-impact theory. He illustrates how the doctrine has been applied to the private sector, discusses arguments both in favor and in opposition to the doctrine, and recommends how this approach to civil rights law can be curtailed.

This book, like all of the monographs published by the National Legal Center, is presented to encourage greater understanding of legal issues. It is not intended to influence legislation but to enlighten its readers through the thought, experience, and knowledge of others. The views expressed in this monograph are those of the author and do not necessarily reflect the opinion or position of the advisors, officers, or directors of the National Legal Center. This publication is presented purely as an educational public service.

Ernest B. Hueter
President
National Legal Center
TABLE OF CONTENTS

PREFACE
ERNEST B. HUETER ............................................. Inside Front Cover

EXECUTIVE SUMMARY ............................................. v

DISPARATE IMPACT IN THE PRIVATE SECTOR:
A THEORY GOING HAYWIRE
ROGER CLEGG

I. INTRODUCTION .................................................. 1
II. THE DISPARATE-IMPACT APPROACH IN GENERAL ............... 1
    Definition .................................................. 1
    Areas of Application ....................................... 3
    Arguments for and against the Disparate-Impact
    Approach .................................................. 8
    Predictable, Bad Consequences of the
    Disparate-Impact Approach ................................ 10
    The Unintended Impact of Disparate Impact ................. 12
III. DISPARATE IMPACT AND TITLE VII OF THE 1964
    CIVIL RIGHTS ACT .......................................... 15
IV. DISPARATE IMPACT, ALEXANDER V. SANDOVAL, AND
    NON-TITLE VII ISSUES .................................... 18
V. CONCLUSION: FIGHTING THE DISPARATE-IMPACT
    APPROACH TO CIVIL RIGHTS LAW ....................... 24

APPENDIX A
EXCERPTS FROM THE EQUAL PAY ACT
AND TITLE VII .................................................. 27

APPENDIX B
POSSIBLE LEGISLATION .......................................... 29

ABOUT THE AUTHOR ............................................. 37

THE MISSION OF THE
NATIONAL LEGAL CENTER ..................................... Inside Back Cover
EXECUTIVE SUMMARY

As with all National Legal Center authors, Roger Clegg provides readers a detailed analysis of major issues of concern to the private sector. The following executive summary offers a roadmap to this monograph and also presents the monograph’s key points regarding the issue of disparate impact in the private sector.

The Definition of Disparate Impact

- Disparate impact is a theory of discrimination.
- Disparate-impact theory holds that when an action has a disproportionate effect on a group, it can be challenged as illegal discrimination.
- Neither intent nor actual disparate treatment is required to prove discrimination under a disparate-impact theory.

Origin of Theory

- The original Civil Rights Act of 1964 does not mention disparate impact.
- Civil rights advocates and the federal government have pushed the theory in courts.
- The Supreme Court ratified the approach in 1971 (Griggs v. Duke Power Co.).
- The Clinton administration greatly expanded the use of disparate impact.
- Title VI of the Civil Rights Act of 1964, which prohibits racial or ethnic discrimination in any program or activity that receives federal financial assistance, is frequently the basis for regulations banning actions with a disparate impact.

Arguments for Disparate Impact (which Clegg answers)

- Because there is so much racism and because it is so skillfully hidden, it does not make sense to require plaintiffs to produce a smoking gun of discriminatory intent.
Important Case Law

- The seminal case is the Supreme Court’s 1971 decision in *Griggs v. Duke Power Co.* The Court held that the employer had to show a "business necessity" for requiring a high-school diploma or passing of off-the-shelf intelligence tests for employee applicants; otherwise, the employer would be in violation of Title VII.

- In 1989, the Supreme Court in *Wards Cove* held that "the dispositive issue is whether a challenged practice, serves, in a significant way, the legitimate employment goals of the employer." The civil rights lobby continues to attack this decision.

- The Civil Rights Act of 1991 makes the definition of "business necessity" unsettled and controversial, as evidenced by several cases since passage of the statute.

Author’s Conclusions

- Most of the worst abuses that have resulted from civil rights laws can be traced directly to the disparate-impact doctrine.

- The disparate-impact approach deserves to be attacked at every opportunity. It has both the purpose and the effect of coercing private and public actors alike into making all decisions with an eye on the racial and ethnic bottom line, in particular. This ensures more discrimination and less efficiency and productivity.

- Specifically, companies should argue for a broad definition of "business necessity," and challenge the applicability of the disparate-impact approach outside the employment context. Finally, Clegg includes draft legislation that would limit or eliminate the use of the disparate-impact approach in civil rights law.
DISPARATE IMPACT IN THE PRIVATE SECTOR: A THEORY GOING HAYWIRE

ROGER CLEGG

I. INTRODUCTION

This Briefly is divided into four parts. Part II is a general discussion of the disparate-impact approach to civil rights law: its definition, origins, applications, justifications, and problems. Part III discusses in more detail the application of the doctrine in the arena to which it was first applied to the private sector and continues to be of primary interest: the workplace under Title VII of the Civil Rights Act of 1964. Part IV discusses the way in which the recent Supreme Court decision in Alexander v. Sandoval may limit the doctrine’s applicability, particularly in areas outside the Title VII context. Part V provides some concluding suggestions for stemming the growth of this pernicious approach to civil rights law—and even cutting it back. There are two appendices: the first excerpts the relevant language from Title VII and the Equal Pay Act, and the second sets out two bills that would help implement some of the reforms discussed in Part V.

II. THE DISPARATE-IMPACT APPROACH IN GENERAL

Definition

The “disparate impact” theory of discrimination holds that when an action has a disproportionate effect on a group, it can be challenged as illegal discrimination because of race, ethnicity, sex, age, whatever—even if it is neither alleged nor proved that there was discriminatory intent. This is different from a conventional, “disparate treatment” lawsuit, where the plaintiff must prove that the defendant treated him worse because of a particular characteristic. The results of this approach to civil rights law frequently generate controversy. For instance, the

---

1. 42 U.S.C. § 2000e et seq.
DISPARATE IMPACT IN THE PRIVATE SECTOR

Office for Civil Rights in the United States Department of Education (OCR), during the Clinton administration, relied on the approach in a "guide" it circulated to various college officials (and others). The guide put colleges on notice that relying on standardized tests, like the SAT and ACT, can place them in legal jeopardy under OCR's interpretation of the civil rights laws. When the draft guide was first circulated, it prompted indignant protests from the normally compliant academic community.

To give another recent example, Judge Ronald L. Buckwalter recently ruled from his federal chambers in Philadelphia that the National Collegiate Athletic Association's (NCAA) "Proposition 16" illegally discriminated against African Americans. Proposition 16, and its predecessor Proposition 48, were designed to ensure that students accepted into college athletic programs had some likelihood of eventually graduating. By requiring students to have achieved some minimal combination of high-school grades and standardized test scores, the NCAA hoped to raise student-athlete graduation rates and end horror stories of collegiate exploitation of young athletes. OCR did not assert that the SAT and ACT judge students of different races according to different standards, and Judge Buckwalter did not rule that Proposition 16, by its terms, treated blacks differently from whites. Nor did OCR suggest that those designing standardized tests are deliberately discriminating against certain races or ethnicities, and Judge Buckwalter did not find that the NCAA intended to discriminate against blacks. But if a selection criterion has neither discriminatory terms nor discriminatory intent, then in what sense can it be said to be discriminatory?

Nonetheless, because a disproportionate number of black students were disqualified by Proposition 16, Judge Buckwalter ruled that it was illegally discriminatory. And because the officials at OCR know that blacks and, to a lesser extent, Hispanics have performed below

whites and Asians on the ACT and SAT, they are prepared to accuse colleges of civil rights violations if they rely too heavily on these tests.

Areas of Application

The disparate-impact idea is not found in the original Civil Rights Act of 1964, and, indeed, it is clear from the act's text and history that this approach was not what Congress had in mind. But it was adopted by the courts at the behest of federal bureaucrats and the civil rights establishment. The Supreme Court itself ratified the approach in 1971, in an employment case challenging a high-school diploma requirement and the use of off-the-shelf aptitude tests by a North Carolina utility. Twenty years later, in 1991, Congress belatedly codified the approach for employment law.

Ironically, the popularity of disparate-impact lawsuits in the employment area, where the concept began, may actually have declined since its codification in 1991 (as discussed in Part III, infra, the trend may change if a June 29, 1999, decision by the U.S. Court of Appeals for the Third Circuit, misapplying the 1991 act, is widely followed). That's because the same amendments made highly lucrative compensatory and punitive damages available in cases where actual intentional discrimination is shown. This has proved to be an irresistible attraction for plaintiffs and their lawyers.

Outside the workplace, in any event, disparate-impact claims are exploding. And as problematic as they have been in the employment arena, they raise even more problems outside it.

This new growth first became apparent in housing-discrimination lawsuits. During the Reagan administration, the Justice Department had opposed expansion of disparate-impact doctrine to the housing area, and filed a Supreme Court brief arguing that there was no statutory authority for such claims (in that case, the Court expressly declined to decide the issue one way or the other, and it remains unresolved). When he signed amendments to the Fair Housing Act into law, President Reagan declared that the statute "speaks only to


4The decision was overturned on appeal on other grounds. Cureton v. NCAA, 37 F. Supp. 2d 687 (E.D. Pa.), rev'd on other grounds, 198 F.3d 107 (3d Cir. 1999).
intentional discrimination.” The Bush administration also declined to bring housing lawsuits under the disparate-impact theory.

The Clinton administration, however, aggressively pursued these claims, as political scientist Robert Detlefsen has documented. An internal memorandum dated December 17, 1993, written by the Department of Housing and Urban Development (HUD) Assistant Secretary, Roberta Achtenberg, and addressed to “all regional directors” of the agency’s Office of Fair Housing and Equal Opportunity, instructed that Fair Housing Act cases should now be analyzed using a disparate-impact analysis. The memorandum further stated that, if a housing practice had a disproportionate effect, it could be justified only “by a business necessity which is sufficiently compelling to overcome the discriminatory effect,” and that such defenses were to be viewed skeptically. Thus, for example, a landlord who decided that he would not rent to drug addicts could be sued if it turned out that, in his community, this decision had a disparate impact on racial minorities. He would be liable unless he could prove to HUD’s or a federal judge’s satisfaction that this practice was a “necessity.”

The Clinton administration extended the disparate-impact theory not only to the actual providers of housing, but to lenders and insurers for housing as well. Thus, banks and insurance companies that turned down a “disproportionate” number of some racial or ethnic group were sued. In the wake of one such lawsuit by the administration, Nationwide Insurance Company, one of the largest property and casualty insurers, agreed it would no longer make underwriting decisions on the basis of such objective factors as the age or market value of a home. The administration claimed that these policies had an illegally discriminatory effect on minorities. Allstate and State Farm also caved in to this pressure.

The Clinton administration also applied the disparate-impact doctrine to, of all things, pizza delivery, arguing that a company’s policy of not making door-to-door deliveries in high-crime areas had a discriminatory effect on the basis of race, in violation of Title II of the Civil Rights Act of 1964 (covering public accommodations). The case was eventually settled.

But it is Title VI of the 1964 Civil Rights Act that has really caught the creative fancy of the civil rights bar in the last few years. Title VI prohibits racial or ethnic discrimination in any program or activity that receives federal financial assistance. The Supreme Court has held that the statute itself prohibits only intentional discrimination, but, unfortunately, the federal bureaucracy’s regulations frequently ban actions with a disparate impact as well.

Here, too, the Clinton administration was eager to push the disparate-impact approach. On July 14, 1994, Attorney General Janet Reno sent a memorandum to all “heads of departments and agencies that provide federal financial assistance,” instructing them to “ensure that the disparate impact provisions in your regulations are fully utilized.” Where federally funded programs have disproportionate effects, “[t]hose policies and practices must be eliminated unless they are shown to be necessary to the program’s operation and there is no less discriminatory alternative.”

OCR’s draft guide and Judge Buckwalter’s decision are only two of the more recent examples of disparate-impact applications under Title VI. Another federal judge struck down Alabama’s refusal to administer driver’s license tests in a language other than English as illegal discrimination on the basis of national origin; the U.S. Court of Appeals for the Eleventh Circuit upheld the ruling; the Supreme Court reversed, but not on the merits, ruling that the plaintiffs had no right to file a private right of action enforcing Title VI regulations.

---


7Id. at 8 (quoting HUD Memorandum to All Regional Directors, Office of Fair Housing and Equal Opportunity, on “Applicability of Disparate Impact Analysis to Fair Housing Cases,” Dec. 17, 1993).


12Alexander v. Sandoval, 121 S. Ct. 1511 (2001). This decision is discussed in more detail in Part IV, infra.
The Clinton administration supported the challenge; the ramifications of the Supreme Court’s decision for the disparate-impact approach generally are discussed in Part IV.

The University of California at Berkeley’s alleged overreliance on SAT scores and advanced-placement courses was challenged on February 2, 1999, by the ACLU and other civil rights groups as illegally discriminatory against blacks, Hispanics, and Filipinos. The Clinton administration had already said it would investigate a complaint by a similar set of civil rights groups, challenging California’s decision to end preferences as illegal because of the effect it will have on some college-bound minority groups.

The argument that ending a system of deliberate discrimination—as California had done by passing Proposition 209—might somehow violate the civil rights laws because of its disparate impact on certain groups is breathtaking, but it spotlights where the logic of the disparate-impact approach leads. University of Texas law school professor Samuel Issacharoff, a defender of affirmative action, said that he “is not aware of any legal support for the idea that would say that Harvard Law School, for example, cannot accept only the cream of the crop if doing so would have an impact on a minority group.” But what’s good for General Motors or a mom-and-pop business ought to be good for Harvard.

In another matter involving the application of disparate-impact law to education, the NCAA recently decided not to recommend that college basketball players be made ineligible for competition during all or part of their freshman season. The stated goal had been to give freshmen a chance to get a foothold on campus both academically and socially, but it was rejected at least in part by a fear that such an action would prompt another disparate-impact lawsuit, since this set of athletes is disproportionately black. “We’re not going to do anything stupid legally,” said one member of the special NCAA committee that had been studying the issue.14

Even pollution has been challenged as illegally discriminatory. Environmental groups recently challenged a market-oriented pollution-control initiative allowing oil companies to forgo cleaning up emissions from certain facilities in exchange for buying older, high-polluting vehicles and taking them off the highways. The initiative was said to have the effect of subjecting certain minority neighborhoods to disproportionately high levels of pollution. The Clinton administration also weighed in on behalf of “environmental justice,” as the movement combining civil rights and environmental activism is called. On February 11, 1994, President Clinton signed Executive Order 12,898, declaring that “each Federal agency shall make achieving environmental justice part of its mission . . . .”15

Bill Lann Lee, who headed the Justice Department’s civil rights division during the latter part of the Clinton administration, was among the environmental justice pioneers. When he headed the NAACP Legal Defense and Education Fund’s Los Angeles office, for instance, he challenged the extension of the Long Beach Freeway by 4.5 miles on the grounds that it would have a discriminatory environmental effect on Latino neighborhoods. But the predictable effect of environmental justice has been to block economic development in minority areas. Worse, as discussed by Brookings Institution senior fellow Christopher H. Foreman, Jr., in The Promise and Peril of Environmental Justice, it has distracted minority communities from the real health threats they face, such as substance abuse and poor diets. One can acknowledge that poor communities often face environmental problems without believing that racial discrimination is the cause or that civil rights litigation is the way to address them.

It was ironic that the Clinton administration supported preferences based on race, ethnicity, and sex, which clearly violate the letter and spirit of the original Civil Rights Act, while aggressively challenging .


actions with a disparate impact, which do not. It remains to be seen whether the Bush administration will reverse these policies. Ominously, however, Christine Todd Whitman, head of the Environmental Protection Agency (EPA), recently endorsed the agency’s commitment to champion “environmental justice.”

Arguments for and against the Disparate-Impact Approach

Most people would not consider it to be “discrimination” if, for example, an employer lacking nondiscriminatory intent adopts a neutral selection device. Indeed, they would find it objectionable if a law forced employers, schools, banks, or anyone else to choose selection devices or to apply them so as to meet a predetermined demographic mix of some sort.

In Reaching Beyond Race, Paul M. Sniderman and Edward G. Carmines conducted a polling experiment to assess support for affirmative action where its justification is responding to disparate impact. It found that this justification “has no persuasive power among whites. They were no more likely, if the justification for affirmative action was described in terms of [correcting] disparate impact, to support it than they were when presented with no justification whatever . . . .” Thus, “almost 80 percent opposed racial quotas despite the disparate impact of a company’s hiring policies.”

Given this, how is the disparate-impact approach justified to begin with, and why has it not only survived, but thrived?

The short answer is that anyone who attacks disparate-impact lawsuits is sure to be accused of wanting to “turn back the clock” on civil rights. Thus, when the Supreme Court tried to clarify—certainly not end—disparate-impact law in 1989, NAACP leader Benjamin Hooks likened the justices to Klansmen. But demagogy aside, what are the underlying arguments to be made for these lawsuits?

Those defending the disparate-impact approach make several closely related arguments. The first is that, because there is so much racism and because it is so skillfully hidden, it does not make sense to require plaintiffs to produce a smoking gun of discriminatory intent. The second is that no one should object to a defendant having to defend a selection device with a disparate impact and, if he cannot justify it in court, being forced to get rid of it. The third justification is that integration is a very important social end, and so it makes sense to require any device—no matter how innocent and innocently contrived—that thwarts this end to jump through some narrow hoops.

Part of the answer to the first argument is empirical: that “institutional racism” actually does not abound, and that where racism does exist it is usually not particularly well hidden. But of course it is hard to persuade people inclined to disagree on this point. It also is true, however, that requiring proof of discriminatory intent does not require the production of a “smoking gun” memorandum or admission that racism is afoot. The Supreme Court has made clear that there can be circumstantial proof of discrimination, just as there can be for any other offense. It’s just that the ultimate question ought to be whether there is actually discrimination, not whether there is nothing more than the failure to achieve proportional representation. The fact that an offense is difficult to detect would not in any other context justify redefining the offense. For example, the fact that drug smugglers are hard to detect would not justify a conclusive presumption that all illegal entrants into the United States are carrying drugs.

Nor is it true that there is no social cost to requiring defendants to get rid of selection devices that they cannot justify. In the first place, the defendant is not just told to get rid of the offending device: He also must pay his lawyers, the other side’s lawyers, and the plaintiffs’ back wages, besides hiring or promoting someone he thinks will not be the most productive person for the job. Worse, there are the inevitable economic costs attendant to letting inexpert bureaucrats, judges, and plaintiffs’ lawyers determine—through litigation or the threat of litigation—the selection devices that ought to be used. Finally, it is simply not the case that only bad selection devices will be shied away from. Being confident in the device does not necessarily mean that you
are willing to “bet the company” in an uncertain lawsuit that will be decided by a judge or jury who knows much less about a business than you do.

It is the third argument that one suspects is really behind the adamant defense of the disparate-impact approach. Yes, there will be economic costs to getting rid of perfectly good selection devices, but the social benefits justify them. Integration is very important, and so is the closely related goal of helping ensure the upward mobility of women and minorities. There is, in this, the usual leftist impatience with anyone’s fear of losing money, even though lost money means lost jobs. But let us concentrate instead on the noneconomic costs and benefits. The trouble is that this no longer is an argument against discrimination, but an argument in its favor. The justification is not that the disparate-impact approach will end deliberate discrimination against some groups, but rather an acknowledgment that it will increase discrimination against others. And the institutionalization of discrimination is a serious social cost indeed. Integration achieved at the price of white resentment and minority stigmatization is not worth it.

**Predictable, Bad Consequences of the Disparate-Impact Approach**

Disparate-impact theory has always been a bad idea. The focus of a civil rights suit ought to be on whether people of different races are treated differently because of their race. That is the commonsense and dictionary meaning of “discrimination,” and that is what the 1964 act clearly said and meant. The question of intent, rather than incidental effect, ought to be at the heart of every lawsuit.

Defendants in disparate-impact suits do have the opportunity to rebut the plaintiffs’ case by proving that their challenged policies are justified by some “necessity.” But it is risky to go to court, trying to prove to a judge or jury—who will know nothing about one’s enterprise—that the challenged practice is a “necessity.” The technical “validation” frequently insisted on by civil rights plaintiffs, enforcement bureaucrats, or federal judges is often impossible. And, conversely, it almost always is possible that a plaintiff in one group can come up with somewhat different criteria that will diminish the impact on that group while still serving the defendant’s end, even if not as well. That’s what happened in the NCAA “Proposition 16” case.

And so—surprise—many defendants will simply ensure that the disparate impact does not occur in the first place, by taking steps to guarantee that their numbers come out right. Indeed, once the Supreme Court recognized the disparate-impact cause of action, the federal government and the private sector argued that it must also allow reverse discrimination so that employers could comply with the law, and the Court so ruled in 1979. William Coleman, a principal author of the disparate-impact legislation that President Bush vetoed, was candid in a White House meeting about what he wanted: “What I need is a generation of proportional hiring, and then we can relax these provisions.”

Thus, potential defendants and bureaucrats have adopted surreptitious quotas, dual standards, and preferential treatment. Or society can simply lower its standards across the board, which is the immediate result of the NCAA ruling and seems to be the object of OCR’s intimidating “guide.” Either approach is just fine with the civil rights lobby. By pushing companies and other actors to substitute quota-driven decisions for merit-based, color-blind ones, disparate-impact lawsuits have two bad results: less efficient and productive policies, and the institutionalization of race-consciousness. And that is not just the effect of disparate impact. That is its intent.

In many cases, the use of the disparate-impact approach will result in a federal agency dictating the selection device. OCR’s guide, for instance, points a litigation revolver at a college’s head. Any college will want to choose students in a way that will not be challenged by the deep-pocketed grantors and litigators from the federal government. Only they can determine what selection device will meet their approval, and they will be very happy to share their advice.

But what is really rotten at the core of disparate-impact theory is this: Under the guise of combating the problem of “unintended discrimination,” the theory demands deliberate discrimination. It requires selection devices to be chosen with an eye on the racial,

---

ethnic, and gender bottom line that such devices will create. Such a practice would be condemned as discriminatory under any other circumstances—and rightly so. If a bigoted Los Angeles employer determined that he had been hiring “too many” Asians and Jews by giving a particular test, and therefore deliberately discards the test for one that he knows will result in fewer of them being hired, all would agree that this violates the law. And yet it is precisely this kind of calculation that disparate-impact theory applauds.

The Unintended Impact of Disparate Impact

The use of quotas and the lowering of standards are unlikely to offend the civil rights establishment. But there are other consequences of the disparate-impact approach that might give its supporters some pause.

If it is true, for instance, that Hispanics fail in disproportionate numbers to finish high school, then it makes more sense to address this problem directly rather than sweep it under the rug by requiring employers to ignore it. Theoretically, of course, it might be possible to solve the underlying problem while prohibiting practices with a disparate impact, but as a practical matter, the latter will undermine the former.

A number of educational reforms in California were precipitated when, but only when, the ballot initiative there prohibited the state’s use of preferences based on race, ethnicity, and sex. Similarly, C. Boyden Gray, who led the Bush administration’s opposition to those seeking to expand the disparate-impact approach in 1989-91, has argued that its position was motivated principally by a desire to ensure that educational performance and accountability improved. If the private sector cannot demand high-school diplomas and good grades, they are less likely to be earned.

Conversely, when the Mexican American Legal Defense and Education Fund, on behalf of the GI Forum, recently—but unsuccessfully—challenged Texas’s requirement that all students pass a standardized test in order to graduate from high school, asserting that this has had a disparate impact on Hispanic and black students, it was fair to ask whether the success of such a claim would really serve the long-term interests of Hispanic children. Even more dubious for the interests of schoolchildren was a disparate-impact lawsuit in Alabama, which since 1985 has blocked the state from testing prospective teachers there. A recent proposal by the National Alliance of Business that companies encourage high-school students to take their studies seriously, by demanding that their transcripts be included with job applications, is likely to result in disparate-impact lawsuits. And recall that the purpose of the NCAA rule that Judge Buckwalter struck down was to protect young athletes from being exploited by college athletic programs.

The fact that crack cocaine penalties disproportionately affect blacks is cited as proof of discrimination. But easing these sentences will not improve the quality of life in many predominately African American communities. The threat of a disparate-impact firing lawsuit will, according to research by two Yale Law School professors, discourage some employers from hiring minorities in the first place.

The winners and losers in a disparate-impact lawsuit are not always predictable. Consider the hiring of policemen and firefighters. Frequently, there will be both a physical-fitness and a paper-and-pencil test, and it also is frequently the case that the former will have a disparate impact on women. If a lawsuit successfully challenges a physical-fitness test, then the paper-and-pencil test is likely to be weighed more heavily. Unfortunately, however, this often is likely to have a disparate impact on Hispanics and blacks. Of course, had they sued first, they might have succeeded in forcing the employer to place more emphasis on the physical-fitness test—to the disadvantage of women.

The point is that just about any selection device is likely to have a disparate impact on some group, whether because of race (remember: whites can sue, too), sex (men also can sue), ethnicity, religion, age, or disability—any of which could be asserted as the basis of a federal lawsuit. And that lawsuit is unlikely to be in the interests of every historically aggrieved group.

---

21 This litigation is discussed, with lengthy excerpts from the record, in Testing in Texas: Accountability for Bilingual Students, in READ PERSPECTIVES (Fall 2000) (available from the Center for Equal Opportunity).
DISPARATE IMPACT IN THE PRIVATE SECTOR

The “ability grouping” of students on the basis of aptitudes frequently results in the “underrepresentation” of blacks and the “over-representation” of Asians. Further complicating matters is the fact that either group might challenge these groupings as discriminatory. The blacks’ complaint is standard, but George Will has explained that U.S. Civil Rights Commissioner Yvonne Lee, a Clinton appointee, says that this practice also “discriminates against” Asians by preventing them from “being exposed to other courses of studies.” 22 That is, says Lee, the discrimination hurts not only “students who are stuck at the bottom rung. It also affects students who get labeled as whiz kids and they get stuck in the upper rank and never get exposed to other opportunities.” 23

The disparate-impact approach also encourages the already widespread tendency, on the right and left, to view every social problem through a racial lens. If a disproportion exists, then it must be caused by race (right) or racism (left), and the solution must therefore be a race-conscious one. But racism is not the problem, on the one hand, nor is there “something in the blood” that predisposes some groups toward antisocial behavior or underachievement. True, there are cultural causes, but race does not equal culture any more than it equals criminality. Most blacks are law-abiding, for instance, and the lifestyles of many whites reflect a nationwide cultural and moral decline.

The mind-set that sees the world in minority-versus-white terms is bad for race relations generally, of course, but the biggest losers when this approach holds sway are minorities. When standards must be lowered and quotas imposed because of “them,” it breeds resentment and stigmatization, and it hinders rather than hastens integration. 24

III. DISPARATE IMPACT AND TITLE VII OF THE 1964 CIVIL RIGHTS ACT

The disparate-impact doctrine was first applied to the private sector in employment-discrimination cases brought under Title VII of the Civil Rights Act of 1964, and that continues to be perhaps the most common kind of action in which the approach is used against companies.

The seminal case is the Supreme Court’s 1971 decision in Griggs v. Duke Power Co., 25 in which plaintiffs had challenged a company’s requirement of a high-school diploma or passing of off-the-shelf intelligence tests. The Court held that, because of the disparate impact this requirement had on black applicants, the company had to show a “business necessity” for it or it would be in violation of Title VII, even absent a showing of discriminatory intent.

In the years from 1975 to 1982, the Court handed down 10 more Title VII disparate-impact decisions, including Albermarle Paper Co. v. Moody, 26 Washington v. Davis, 27 General Electric Co. v. Gilbert, 28 Dohard v. Rawlinson, 29 Nashville Gas Co. v. Saty, 30 United States v. South Carolina, 31 New York City Transit Authority v. Beazer, 32 California Brewers Association v. Bryant, 33 American Tobacco Co. v. Patterson, 34 and Connecticut v. Teal. 35 Then, in 1988, a plurality of four justices in Watson v. Fort Worth Bank and Trust, 36 concerned about abuse of the approach, sought to clarify its limits, and, a year later, a majority of the justices issued a similar opinion for the Court in Wards Cove Packing Co. v. Atonio. 37

23 Id.
24 Parts of the discussion in Part I are drawn from my article, Roger Clegg, The Bad Law of "Disparate Impact," PUBLIC INTEREST (Winter 2000), at 79, and are included here with its permission.

26 422 U.S. 405 (1975).
33 444 U.S. 598 (1980).
34 456 U.S. 63 (1982).
In *Wards Cove*, the Court held that, for purposes of showing a disparate impact, the “proper basis for the initial inquiry” is “between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs,” rather than between one part of the employer’s workforce and another. This part of the Court’s holding, which seems unassailable by any commonsense standard, remains the law, although it is worth noting that the lower court in *Wards Cove* and the four dissenting justices rejected it.

The Court went on to address three additional issues, which proved to be much more controversial. First, “[a]s a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.” In other words, the plaintiff cannot simply point to a racial imbalance and then require the employer to justify everything he does that may contribute to that imbalance. Second, with respect to business necessity, “the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.” Thus, the employer need not show that the challenged term or condition—which, bear in mind, is not alleged to have been intentionally discriminatory, but only to have had a disparate impact—is absolutely essential to the business. Third, the Court held that, while “the employer carries the burden of producing evidence of a business justification for his employment practice,” nonetheless, “[t]he burden of persuasion . . . remains with the disparate-impact plaintiff.”

The civil rights lobby attacked the *Wards Cove* decision (as well as other Supreme Court decisions handed down at around that time), and a furious legislative fight ensued, leading ultimately to the Civil Rights Act of 1991. The law addressed, among other things, the disparate-impact cause of action under Title VII and is reprinted in Appendix A infra. The “particularity” requirement is left intact; the “business necessity” showing is now an affirmative defense; and the definition of “business necessity” remains unsettled and controversial.

That muddle is reflected in the post–1991 act decisions by the federal courts of appeals (the Supreme Court itself has so far issued no decisions interpreting this part of the 1991 act). In *Fitzpatrick v. City of Atlanta*, the Eleventh Circuit found that Atlanta’s policy of banning beards for its firefighters—which had a disparate impact on African Americans because they are more likely to suffer from a bacterial disorder that causes men’s faces to become infected if they shave them—met the business necessity test because of safety concerns that oxygen masks are more likely to leak on faces with beards. In *Allen v. Entergy Corp.*, the Eighth Circuit upheld the use of aptitude tests—which had a disparate impact on African Americans—to determine which employees would survive a layoff precipitated by a reduction-in-force at an energy plant. But an earlier Eighth Circuit case, *Bradley v. Pizzaco of Nebraska, Inc.*, ruled that another employer had failed to show a business necessity for its no-beard policy. And, in *Lanning v. Southeastern Pennsylvania Transportation Authority*, the Third Circuit ruled that a physical-fitness test for transit police with a disparate impact on women had not been justified by business necessity.

---

38See Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 La. L. Rev. 1459, 1460-61 (1994) (the symposium of which this article was a part was published separately by the National Legal Center for the Public Interest).

39See generally id.
DISPARATE IMPACT IN THE PRIVATE SECTOR

It is of critical importance to the private sector—and to state and local government employers subject to Title VII, for that matter—that courts interpret the “business necessity” defense generously. That interpretation is very much up for grabs, and companies ought to litigate aggressively in this area. Conservative commentators have argued persuasively that “business necessity” ought to be defined generously under the 1991 act.47

IV. DISPARATE IMPACT, ALEXANDER v. SANDOVAL, AND NON–TITLE VII ISSUES

On April 24, 2001, the Supreme Court handed down a 5-4 decision in Alexander v. Sandoval. By highlighting the skepticism of five justices about the “disparate impact” theory of discrimination, it invites aggressive litigation challenging this approach in the private sector.

Sandoval involved a class-action claim that the refusal of the state of Alabama to administer driver’s license exams in languages other than English violated U.S. Department of Transportation regulations that forbid recipients of federal funds from practices that have a disproportionate effect on the basis of national origin.

The equation of an English-only policy with national-origin discrimination is dubious. After all, there are many, many nationalities that do not have English as their mother tongue—and, conversely, there are many, many people with their roots in those nationalities who speak English perfectly well.48 But there’s nothing in the Supreme Court’s opinion about this conundrum.

Instead, the Supreme Court’s 5-4 majority opinion, written by Justice Scalia, concluded that under Title VI of the 1964 Civil Rights Act there is no private right of action to claim disparate-impact violations of federal regulations. Scalia argued that the Court’s most recent decisions make clear that private rights of action will not be lightly implied and, “Having sworn off the habit of venturing beyond Congress’s intent, we will not accept respondents’ invitation to have one last drink.”49 He found neither Supreme Court precedent nor statutory authority for a private right of action here. Justice Stevens wrote a vigorous dissent, objecting in particular to Scalia’s “[o]verwrought imagery” about the fatal glass of beer.50

But, alcoholic allusions aside, the most intriguing part of Justice Scalia’s opinion for employment-discrimination lawyers is an issue he rather pointedly reserves. He noted that Title VI itself has been interpreted by the Court to forbid only intentional discrimination, but the regulations at issue here go beyond that, banning actions that have only a disproportionate effect. Still, Scalia continued, Alabama didn’t challenge the validity of the regulations in this case, and so the Court will assume “for the purposes of deciding this case” that the government had the authority to issue these regulations.

Along the same intriguing lines, Scalia’s opinion later says in passing that Title VI “limits agencies to ‘effectuat[ing]’ rights already created by” it and states in a footnote that, while the agencies’ regulatory authority is “beside the point” in this case, “[w]e cannot help observing . . . how strange it is to say that disparate-impact regulations” implement Title VI when the statute “permits the very behavior that the regulations forbid.”51

So, for private-sector lawyers, the most important parts of the Sandoval decision are those inklings in the Court’s discussion of what it determined not to decide: whether a disparate-impact regulation promulgated under Title VI was valid in the first place, in light of the Court’s earlier holdings that the statute itself bans only disparate


48The argument that fluency and language requirements violate federal employment-discrimination laws was challenged in Roger Clegg, Tongue Tied, LABOR AND EMPLOYMENT NEWS (Winter 1998); see also Barnaby Zall, English in the Workplace: The EEOC’s Abuse of Its Authority (November 2000) available at <www.ceousa.org>.

49121 S. Ct. at 1520.

50Id. at 1533. Justice Stevens suggested, among other things, that 42 U.S.C. § 1983 might still be available as a vehicle for a private right of action enforcing Title VI regulations. Id. at 1527.

51Id. at 1516-17, 1519 n.6, 1521.
treatment. The majority sees that there is a big difference between the two—that is, between a guarantee of nondiscrimination and a guarantee of racial and ethnic proportionality.

The Supreme Court’s decision is significant good news already, because it holds that private causes of action cannot be brought against companies to enforce agency disparate-impact regulations. Companies still have to worry about agency enforcement actions, of course. But the Court’s decision indicates that even agency actions may be held invalid. What Scalia and the rest of the Court’s majority have done is invite a challenge in some future case to the authority of an agency to issue Title VI regulations that rely on the disparate-impact approach. If the Court then ruled that all such regulations are invalid, this would strike a devastating blow against the insistence of the civil rights establishment on de facto quotas in all federal programs. It also would make it impossible to challenge most English-only provisions.

The points to be made in such a challenge are straightforward:

(1) The Court has acknowledged in cases like Washington v. Davis, that the difference in disparate-impact versus disparate-treatment causes of action is one of kind, not just degree. Because intent is irrelevant in a disparate-impact case, that cause of action is fundamentally different from a disparate-treatment claim. Just as a regulator cannot ban even intentional discrimination without statutory authority, see NAACP v. FPC, so it is acting ultra vires if it redefines discrimination in such a fundamental way without a statutory basis.

(2) The Court disallowed Congress’s attempt to transform a disparate-treatment standard into a disparate-impact standard in City of Boerne v. Flores. If Congress, which has authority to enforce the Fourteenth Amendment under Section 5, has been barred from making this transformation, then surely an agency should be as well.

(3) Especially troubling in this regard is the fact that, in the non-discrimination context, a ban on disparate impact will in fact encourage race-consciousness and disparate treatment—the very behavior Congress sought to ban. An agency’s rewriting of the statute can raise other problems as well. In Sandoval itself, for instance, the regulations were being applied to a state government in a manner that Congress has not approved at all, let alone approved “unequivocally.” Furthermore, if Congress has given agencies such broad authority to write regulations, then problems are raised under the non-delegation doctrine.

Justice Scalia and the four brethren who joined his opinion have indicated their continuing skepticism about the disparate-impact approach. This is not surprising. Four of them were part of the majority in the Wards Cove case; the fifth in Sandoval, Justice Thomas, is likely to be even more skeptical than the fifth in Wards Cove, Justice White.

These five members of the Court are likely to reject interpretations of employment-discrimination statutes that would incorporate a disparate-impact approach, and, where outright rejection is not possible, are likely to interpret the reach of disparate-impact actions narrowly.

As an example, consider the Age Discrimination in Employment Act (ADEA). The courts of appeals are divided with regard to whether a disparate-impact claim may be brought under the ADEA. The Supreme Court has—a la Sandoval—rather pointedly reserved the question. In Hazen Paper Co. v. Biggins, Justice O’Connor wrote that “we have never decided whether a disparate impact theory of liability is available under the ADEA,” and we need not do so here. In his concurrence in Hazen Paper, Justice Kennedy also cited Geller in

56507 U.S. at 610.
questioning the extension of disparate-impact analysis to the ADEA, and was joined by Rehnquist and Thomas.

Likewise, the Supreme Court has never recognized a disparate-impact cause of action under the Equal Pay Act (EPA), and in County of Washington v. Gunther, the relevant text of the EPA is set out in Appendix A. The proponents of the so-called Paycheck Fairness Act are trying to smuggle a disparate-impact cause of action into the EPA by their amendments to it.

The Court also has yet to decide whether disparate-impact claims may be brought under the Immigration Control and Reform Act. When he signed this bill, President Reagan issued a statement that people filing complaints under it must prove the employer acted with discriminatory intent, but some members of Congress contested that reading of the new law.

42 U.S.C. § 1981 is a civil rights statute that the Court has already determined is limited to disparate treatment. In General Building Contractors Association v. Pennsylvania, the Court wrote: “We hold, therefore, that § 1981 . . . can be violated only by purposeful discrimination.”

Where an agency has promulgated disparate-impact regulations and it is not clear that the underlying statute defines discrimination this way, then those regulations are vulnerable to the kind of challenge invited by Justice Scalia’s Sandoval opinion. For example, the Equal Employment Opportunity Commission (EEOC) believes that disparate impact applies under the ADEA.

On the other hand, two employment-discrimination statutes—Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (discussed in Part III, supra), and the Americans with Disabilities Act (ADA)—expressly do recognize a disparate-impact cause of action. Even so, however, Sandoval would indicate that five of the justices are not likely to want to stretch these provisions very far. In particular, for instance, they may be reluctant to equate language discrimination with national-origin discrimination.

Because a majority of the Court seems inclined to draw a sharp distinction between disparate treatment and disparate impact cases, the possibility exists that Congress itself may be limited in the extent to which it can ban practices that only have a disparate impact if there is no disparate treatment. After all, if an agency cannot ban disparate impact when the statute only bans disparate treatment, then why should Congress be able to ban disparate impact if the Constitution only bans disparate treatment? As noted earlier, in City of Boerne v. Flores, the Court struck down a statute that Congress had enacted to ban laws with a disparate impact on the free exercise of religion, in the teeth of a Court decision that the Free Exercise Clause bans only disparate treatment. Likewise, the Court this year in Board of Trustees of the University of Alabama v. Garrett ruled that only irrational discrimination against the disabled could be addressed under Section 5 of the Fourteenth Amendment.

This tack will not, however, always be available to defendants with respect to statutes aimed at the private sector. There, the enumerated power on which Congress is drawing is not Section 5 of the Fourteenth Amendment but, instead, the Commerce Clause. Still, even the Commerce Clause may not save a statute like the ADA. The Court in recent years has shown a willingness to put teeth in its requirement that a “substantial effect” on interstate commerce be shown. The Court in Garrett unfavorably compared the ADA to earlier race-antidiscrimination statutes in its Section 5 analysis, and it could do so again under the Commerce Clause. It is plausible that racial discrimination had a substantial and deleterious effect on commerce and that the Civil Rights Act of 1964 strengthened the national economy in good Hamiltonian fashion. The ADA, on the other hand, has resulted, according to one estimate reported in the Washington Post, in a “$5 billion price tag for businesses forced to comply with the law.” Even if the courts do not conclude that Congress lacked authority to pass the ADA, there

---

65See ROGER CLEGG, COMPARABLE WORTH: THE BAD IDEA THAT WILL NOT DIE 20 (Aug. 1999 Brief).]
629 C.F.R. § 1625.7(d) (1993).
is no reason why Congress itself should not revisit the statute in light of its excesses and subsequent Supreme Court case law.

At any rate, the constitutionality arguments make it appropriate for judges to exercise some caution in construing the breadth of disparate-impact statutes and regulations. An overbroad construction would open them to constitutional challenge, and courts are supposed to avoid interpretations that create constitutional problems.66

Title VI itself can be applied to employers if they receive federal money or participate in federal programs. Other civil rights statutes affecting the private sector, but not as employers, include the Equal Credit Opportunity Act, Fair Housing Act, Title IX of the Education Amendments of 1972, and Title II of the Civil Rights Act of 1964. The Supreme Court has not recognized a disparate-impact cause of action for any of the policies and, as noted earlier, in Town of Huntington v. NAACP67 chose to avoid "the question whether the [disparate impact] test is the appropriate one" under the Fair Housing Act.68 Thus, any private-sector defendant sued on a disparate-impact theory under these statutes or, especially, a regulation promulgated under them should challenge the propriety of the cause of action.69

V. CONCLUSION:
FIGHTING THE DISPARATE-IMPACT APPROACH TO CIVIL RIGHTS LAW

The disparate-impact approach deserves to be attacked at every opportunity. It has both the purpose and the effect of coercing private and public actors alike into making all decisions with an eye on the racial and ethnic bottom line, in particular. This ensures more discrimination and less efficiency and productivity. The Sandoval decision indicates that there are probably five justices who agree.

68The Justice Department had argued against a disparate-impact approach in Town of Huntington, and President Reagan had indicated in signing the 1988 amendments to the act that the statute "speaks only to intentional discrimination."
APPENDIX A

EXCERPTS FROM THE EQUAL PAY ACT AND TITLE VII

Equal Pay Act
29 U.S.C. § 206(d)

(d)(1) [3] No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment and for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991
42 U.S.C. § 2000e-2(k)

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (c) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
DISPARATE IMPACT IN THE PRIVATE SECTOR

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

APPENDIX B

POSSIBLE LEGISLATION

Bill to Bar the Disparate-Impact Approach Unless Explicitly Codified

To amend the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Equal Credit Opportunity Act, the Age Discrimination in Employment Act, the Fair Housing Act, Title IX of the Education Amendments of 1972, the Equal Educational Opportunities Act of 1974, the Age Discrimination Act of 1975, the Immigration and Reform Control Act of 1986, and other Acts of Congress to clarify that certain provisions of such measures prohibit disparate treatment, not conduct that has a disparate impact on covered persons without disparate treatment, and to clarify that rules and regulations issued under those provisions must not proscribe conduct that has a disparate impact on covered persons but does not constitute disparate treatment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.
This Act may be cited as the "Civil Rights Clarification Act of 2001."

SECTION 2. AMENDMENT TO EQUAL PAY ACT OF 1963
PROHIBITION OF SEX DISCRIMINATION.- Section 3 of such Act (29 U.S.C. 206(d)) is amended by adding at the end the following new subsection:

"(5) This subsection proscribes conduct that constitutes disparate treatment on the basis of sex and not conduct that has a disparate impact on the basis of sex without disparate treatment. No regulation shall be issued to effectuate the provisions of this subsection that proscribes conduct that has a disparate impact on the basis of sex but does not constitute disparate treatment on the basis of sex."
SECTION 3. AMENDMENT TO CIVIL RIGHTS ACT OF 1964.

(a) PLACES OF PUBLIC ACCOMMODATION.— (1) Section 201 of such Act (42 U.S.C. 2000a) is amended by adding at the end the following new subsection:

“(f) Disparate treatment

“This section proscribes conduct that constitutes disparate treatment on the ground of race, color, religion, or national origin and not conduct that has a disparate impact on the ground of race, color, religion, or national origin without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has a disparate impact on the ground of race, color, religion, or national origin but does not constitute disparate treatment on the ground of race, color, religion, or national origin.”

(2) Section 202 of such Act (42 U.S.C. 2000a-1) is amended by adding at the end “This section proscribes conduct that constitutes disparate treatment on the ground of race, color, religion, or national origin and not conduct that has a disparate impact on the ground of race, color, religion, or national origin without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has a disparate impact on the ground of race, color, religion, or national origin but does not constitute disparate treatment on the ground of race, color, religion, or national origin.”

(b) FEDERALLY ASSISTED PROGRAMS.— (1) Section 601 of such Act (42 U.S.C. 2000d) is amended by adding at the end “This section proscribes conduct that constitutes disparate treatment on the ground of race, color, or national origin and not conduct that has a disparate impact on the ground of race, color, or national origin without disparate treatment.”

(2) Section 602 of such Act (42 U.S.C. 2000d-1) is amended by adding at the end “No such rule, regulation, or order shall be issued to effectuate the provisions of section 601 of this title (42 U.S.C. 2000d) that proscribes conduct that has a disparate impact on the ground of race, color, or national origin but does not constitute disparate treatment on the ground of race, color, or national origin.”

SECTION 4. AMENDMENT TO AGE DISCRIMINATION IN EMPLOYMENT ACT.

PROHIBITION OF AGE DISCRIMINATION.— (a) Section 4 of such Act (29 U.S.C. 623) is amended by adding at the end the following new subsection:

“(n) Disparate treatment

“This section proscribes conduct that constitutes disparate treatment on the basis of age and not conduct that has a disparate impact on the basis of age without disparate treatment.”

(b) Section 9 of such Act (29 U.S.C. 628) is amended by adding at the end “No such rule or regulation shall be issued to carry out this chapter that proscribes conduct that has a disparate impact on the basis of age but does not constitute disparate treatment on the basis of age.”

SECTION 5. AMENDMENT TO EQUAL CREDIT OPPORTUNITY ACT.

CREDIT TRANSACTIONS.— (a) Section 701 of such Act (15 U.S.C. 1691) is amended by adding at the end the following new subsection:

“(f) This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract) and not conduct that has a disparate impact on the basis of race, color, religion, national origin, sex or marital status, or age without disparate treatment.”

(b) Section 703(a) of such Act (15 U.S.C. 1691b(a)) is amended by adding at the end the following new subsection:

“(6) No regulation prescribed to carry out the purposes of this subchapter shall proscribes conduct that has a disparate impact on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract) but does not constitute disparate treatment on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract).”
SECTION 6. AMENDMENT TO FAIR HOUSING ACT.

FAIR HOUSING.—(a) Section 804 of such Act (42 U.S.C. 3604) is amended by adding at the end the following new subsection:

"(g) This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, sex, familial status, or national origin and not conduct that has a disparate impact on the basis of race, color, religion, sex, familial status, or national origin without disparate treatment."

(b) Section 805 of such Act (42 U.S.C. 3605) is amended by adding at the end the following new subsection:

"(d) This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, sex, familial status, or national origin and not conduct that has a disparate impact on the basis of race, color, religion, sex, handicap, familial status, or national origin without disparate treatment."

(c) Section 806 of such Act (42 U.S.C. 3606) is amended by adding at the end "This section proscribes conduct that constitutes disparate treatment on the basis of race, color, religion, sex, handicap, familial status, or national origin and not conduct that has a disparate impact on the basis of race, color, religion, sex, handicap, familial status, or national origin without disparate treatment."

(d) Section 815 of such Act (42 U.S.C. 3614a) is amended by adding at the end "No such rule made to carry out this subchapter shall proscribe conduct that has a disparate impact on the basis of race, color, religion, sex, handicap, familial status, or national origin but does not constitute disparate treatment on the basis of race, color, religion, sex, handicap, familial status, or national origin."

SECTION 7. AMENDMENT TO TITLE IX OF EDUCATION AMENDMENTS OF 1972.

PROHIBITION OF SEX DISCRIMINATION.—(a) Section 901 of such Title (20 U.S.C. 1681) is amended by adding at the end the following new subsection:

"(d) This section proscribes conduct that constitutes disparate treatment on the basis of sex and not conduct that has a disparate impact on the basis of sex without disparate treatment."

(b) Section 902 of such Title (20 U.S.C. 1682) is amended by adding at the end "No rule, regulation, or order of general applicability shall be issued to effectuate the provisions of section 901 of this title (20 U.S.C. 1681) that proscribes conduct that has a disparate impact on the basis of sex but does not constitute disparate treatment on the basis of sex."

SECTION 8. AMENDMENT TO EQUAL EDUCATIONAL OPPORTUNITIES ACT OF 1974.

PROHIBITION OF DENIAL OF EQUAL EDUCATIONAL OPPORTUNITY.—Section 204 of such Act (20 U.S.C. 1703) is amended by adding at the end "This section proscribes conduct that constitutes disparate treatment on the basis of race, color, sex, or national origin and not conduct that has a disparate impact on the basis of race, color, sex, or national origin without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has a disparate impact on the basis of race, color, sex, or national origin but does not constitute disparate treatment on the basis of race, color, sex, or national origin."

SECTION 9. AMENDMENT TO AGE DISCRIMINATION ACT OF 1975.

PROHIBITION OF DISCRIMINATION BASED ON AGE.—(a) Section 303 of such Act (42 U.S.C. 6102) is amended by adding at the end "This section proscribes conduct that constitutes disparate treatment on the basis of age and not conduct that has a disparate impact on the basis of age without disparate treatment."

(b) Section 304(a)(1) of such Act (42 U.S.C. 6103(a)(1)) is amended by adding at the end "No general regulation shall be published to carry out the provisions of section 303 of this title (42 U.S.C. 6102) that proscribes conduct that has a disparate impact on the basis of age but does not constitute disparate treatment on the basis of age."

SECTION 10. AMENDMENT TO IMMIGRATION AND REFORM CONTROL ACT OF 1986.

PROHIBITION OF DISCRIMINATION BASED ON NATIONAL ORIGIN OR CITIZENSHIP STATUS.—(a) Section 102(a) of such Act
DISPARATE IMPACT IN THE PRIVATE SECTOR

(8 U.S.C. 1324b(a)) is amended by adding at the end the following new subsection:

"(7) Disparate treatment

"Paragraph (1) proscribes conduct that constitutes disparate treatment on the basis of national origin or citizenship status and not conduct that has a disparate impact on the basis of national origin or citizenship status without disparate treatment. No regulation shall be issued to effectuate the provisions of this section that proscribes conduct that has a disparate impact on the basis of national origin or citizenship status but does not constitute disparate treatment on the basis of national origin or citizenship status."

SECTION 11. APPLICABILITY TO OTHER ANTI-DISCRIMINATION LAWS.

For any and all Acts of Congress that are not expressly amended by this Act, which contain provisions that prohibit discrimination by proscribing conduct that constitutes disparate treatment but do not explicitly state that they proscribe conduct that has a disparate impact on covered persons without disparate treatment, those provisions shall not be construed to proscribe conduct that has a disparate impact on covered persons but does not constitute disparate treatment and no regulation shall be issued to effectuate those provisions that proscribes conduct that has a disparate impact on covered persons but does not constitute disparate treatment.

Bill to Allow Nondiscriminatory Intent As Affirmative Defense in Disparate-Impact Actions Brought under the Voting Rights Act and Title VII of the Civil Rights Act

To amend the Civil Rights Act of 1964 and the Voting Rights Act of 1982 to allow nondiscriminatory intent as an affirmative defense in claims brought under those statutes that do not allege disparate treatment.

SECTION 1. SHORT TITLE

This Act may be cited as the “Good Faith Civil Rights Act of 2001.”

SECTION 2. AMENDMENT TO THE CIVIL RIGHTS ACT OF 1964

In any action brought under 42 U.S.C. 2000e-2(k), no respondent shall be found liable if it can demonstrate that the challenged practice was neither adopted with the intent of discriminating on the basis of race, color, religion, sex, or national origin nor applied unequally on the basis of race, color, religion, sex, or national origin.

SECTION 3. AMENDMENTS TO THE VOTING RIGHTS ACT OF 1982

(a) For any allegation or part thereof under 42 U.S.C. 1973 that does not assert discriminatory intent, no defendant shall be held liable if it can demonstrate that the challenged voting qualification or prerequisite to voting or standard, practice, or procedure was neither adopted with the intent of discriminating on the basis of race, color, or membership in a language minority group nor applied unequally on the basis of race, color, or membership in a language minority group.

(b) In any matter or part thereof before the Attorney General or the United States District Court for the District of Columbia under 42 U.S.C. 1973c in which discriminatory intent is not at issue, the State or subdivision shall not be prevented from enacting or administering any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting, if it can demonstrate that in making a change it lacks an intent to discriminate on the basis of race, color, or membership in a language minority group.
ABOUT THE AUTHOR

ROGER CLEGG is Vice President and General Counsel of the Center for Equal Opportunity, a Washington, D.C.-based research and educational organization that studies civil rights, bilingual education, and immigration issues (<www.ceousa.org>). He has a regular column in Legal Times and is a contributing editor to National Review Online, in addition to writing for a wide variety of other legal and popular publications. Mr. Clegg served as deputy in the U.S. Justice Department’s civil rights division from 1987 to 1991; has taught employment discrimination law at George Mason University School of Law as an adjunct professor; and, from 1993 to 1997, was Vice President and General Counsel of the National Legal Center for the Public Interest. He is a graduate of Rice University and Yale Law School.