Volume 63 | Number 5 Article 2

6-1-1985

Superficially Neutral Classifications: Extending Disparate Impact Theory to Individuals

D. Don Welch

SUPERFICIALLY NEUTRAL CLASSIFICATIONS: EXTENDING DISPARATE IMPACT THEORY TO INDIVIDUALS

D. DON WELCH†

In Connecticut v. Teal *the United States Supreme Court broke the conceptual barrier between the disparate impact and disparate treatment theories of employment discrimination. Although previous decisions had limited application of the disparate impact theory to cases involving the effect of an employment practice on a protected group, the* Teal *Court emphasized that the theory can be used to remedy individual claims of discrimination and also to eliminate employment practices that limit the employment access and opportunities of a protected individual. Subsequent lower court decisions have encountered great difficulty applying this theoretical realignment. Dean Welch attempts to end this confusion by developing a new framework for applying the disparate impact theory to individual claims of discrimination. He first proposes that courts recognize a category of "superficially neutral" employment practices—practices that consistently have an adverse impact on groups protected by Title VII. An individual plaintiff then could make a prima facie disparate impact case by demonstrating the loss of an employment opportunity because of one of these "superficially neutral" practices. This framework would create a mechanism for fulfilling the mandate in* Teal *that the benefits of the disparate impact theory be extended to the individual.*

Cases interpreting and enforcing Title VII of the Civil Rights Act of 1964[1] have proceeded along two widely recognized theories of employment discrimination: disparate treatment and disparate impact. The first theory, disparate treatment, has been characterized as focusing on a concern for fairness to the individual; the second theory, disparate impact, has been treated as dealing with the effect of employment practices on groups.[2] Each theory has its own authoritative statement in a venerable Supreme Court decision—*McDonnell Douglas Corp. v. Green*[3] and *Griggs v. Duke Power Co.*,[4] respectively—and each has developed through the distinctive progeny of these landmark cases.

On June 12, 1982, the Supreme Court breached this theoretical barrier in its

† Assistant Dean and Lecturer, Vanderbilt Law School. B.A. 1969, Baylor University; M.A. 1975, Ph.D. 1976, Vanderbilt University. The author wishes to thank Professors Robert Belton and Robert N. Covington for their useful suggestions and comments, and to acknowledge the contribution of Joseph Hinchliffe, who served as his research assistant.

1. 42 U.S.C. §§ 2000e-3 to -17 (1982).

2. *See, e.g.*, Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531, 542-68 (1981).

3. 411 U.S. 792 (1973).

4. 401 U.S. 424 (1971).

decision in *Connecticut v. Teal*.[5] One aspect of the *Teal* decision—that an employer's "bottom line"[6] does not provide immunity from liability for the discriminatory impact of particular employment practices—has been the subject of extensive commentary[7] and has been followed by lower courts.[8] This Article does not address that issue, but rather examines two other aspects of the decision that potentially reach further: the need for courts that are adjudicating disparate impact cases to focus on employment opportunities rather than results and the need to consider the effects of employment practices on individuals rather than groups.

The majority opinion in *Teal* recasts employment discrimination theory in a manner that both mandates a new approach to disparate impact analysis and holds promise for the development of a unitary theory of employment discrimination. Except for a few suggestive references, pursuit of the *Teal* promise of a single analytic approach is beyond the scope of this Article. The Article, however, will demonstrate that the *Teal* Court moved significantly away from the traditional dual analytic framework that has guided the development of employment discrimination law for more than a decade. The Article also will show that the reasoning in *Teal* can be incorporated into future adjudication of certain disparate impact claims only through the formulation of a new analytic framework.

Part I of the Article briefly discusses the disparate impact and disparate treatment theories. Over time, these approaches so frequently have been described by commentators and confirmed by the Court that the recitation of their component parts has become an almost mindless routine. Part II recounts the disruption of this routine by the *Teal* Court. Although the Court could have decided the case according to the traditional disparate impact model, the *Teal*

---

5. 457 U.S. 440 (1982).

6. The "bottom line" concept refers to the overall result of an employment policy or practice. A bottom-line analysis measures the ultimate consequences of the employer's hiring or other personnel practices taken as a whole. The test is whether there is a nondiscriminatory balance in the group of persons actually hired or promoted.

7. *See, e.g.*, Blumrosen, *The "Bottom Line" after* Connecticut v. Teal, 8 EMPL. REL. L.J. 572 (1983); Chamallas, *Evolving Conceptions of Equality under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983); Thompson & Christiansen, *Court Acceptance of Uniform Guidelines Provisions: The Bottom Line and the Search for Alternatives*, 8 EMPL. REL. L.J.. 587 (1983); Note, *The Bottom Line Concept in Title VII Litigation*: Connecticut v. Teal *and the Relevance of End Results*, 15 CONN. L. REV. 821 (1983) [hereinafter cited as Note, *The Bottom Line Concept*]; Note, *The Bottom Line Defense in Title VII Actions: Supreme Court Rejection in* Connecticut v. Teal *and a Modified Approach*, 68 CORNELL L. REV. 735 (1983); Note, *Erasing the "Bottom Line"*: Connecticut v. Teal, 6 HARV. WOMEN'S L.J. 175 (1983); Note, *An Interpretation of the Bottom Line Defense—Statutory Interpretation Versus Theoretical Purity*—Connecticut v. Teal, 27 HOW. L.J. 681 (1984); Note, *The "Bottom Line" Defense in Disparate Impact Cases*: Connecticut v. Teal, 6 U. ARK. LITTLE ROCK L.J. 475 (1983); Note, Connecticut v. Teal: *Extending* Griggs *Beyond the Bottom Line*, 44 U. PITT. L. REV. 751 (1983); Note, *The Supreme Court Looks at the "Bottom Line"*—Conneticut v. Teal, 5 W. NEW ENG. L. REV. 785 (1983) [hereinafter cited as Note, *The Supreme Court*].

8. *See, e.g.*, Walls v. Mississippi State Dep't of Pub. Welfare, 730 F.2d 306 (5th Cir. 1984); Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984); Williams v. Vukovich, 720 F.2d 909 (6th Cir. 1983); Bell v. Bolger, 708 F.2d 1312 (8th Cir. 1983); Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Peters v. Lieuallen, 693 F.2d 966 (9th Cir. 1982).

majority took the occasion to scrutinize the reasoning with which the legal community had become so comfortable. The result was an opinion that focused on the individual rather than the group in a disparate impact setting and that found a statutory basis for emphasizing the employment *process* rather than the *outcome*.

The task after *Teal* is to articulate a conceptual framework that will make the Court's findings available for use in similar disparate impact cases. The proposition advanced in Part III is that *Teal* suggests a two-stage analysis that makes disparate impact theory available to individual plaintiffs. This new approach, incorporating a newly defined category of "superficially neutral" classifications, preserves established legislative and judicial understandings while making use of the emphasis in *Teal* that disparate impact cases should focus on the employment opportunities for individuals rather than on results for groups.

I. Disparate Impact and Disparate Treatment Theories

The Title VII provisions that establish employment discrimination liability are sections 703(a)(1) and 703(a)(2), which state:

> 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.[9]

The courts consistently have held that section 703(a) provides a statutory foundation for two distinct theories of employment discrimination: disparate treatment and disparate impact.[10] The Supreme Court summarized the differences between the two theories in *International Brotherhood of Teamsters v. United States*.[11]

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .
>
> Claims of disparate treatment may be distinguished from claims

9. 42 U.S.C. § 2000e-2(a) (1982).

10. These theories have been described in a similar fashion by dozens of commentators and observers. *See, e.g.*, B. Schlei & P. Grossman, Employment Discrimination Law 1-12 (2d ed. 1983); Belton, *supra* note 2, at 538-60; Chamallas, *supra* note 7, at 314-23; Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 237-49 (1971).

11. 431 U.S. 324 (1977).

> that stress "disparate impact." The latter involve 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 . . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.[12]

As these theories have developed, disparate treatment has focused on fair treatment for individuals, whereas disparate impact is concerned with fairness for groups.[13] Further, while disparate impact claims can be established by evidence of the effects of an employment practice on a protected group, a finding of liability under the disparate treatment theory requires a showing of intentional discrimination in the employment process.[14]

The essence of a disparate impact claim is the use of an employment practice to control employment opportunity when the use of that practice adversely and disproportionately affects the employment opportunities of a group protected by the statute. Thus, in *Griggs*, the landmark case on the disparate impact theory, the Court found minimum education and test requirements to be violations of Title VII. The Court noted that neither requirement was shown to be "significantly related to job performance," both requirements operated to disqualify blacks from transfer and promotion at a "significantly higher rate" than whites, and the employer had a history of pre-Title VII discrimination.[15]

The Court in *Griggs* held that "[g]ood intent or the absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in head winds' for minority groups and that are unrelated to measuring job capacity."[16] The Court reasoned that Congress, by enacting Title VII, intended to achieve equality of employment opportunity and not merely to punish discriminatory motivation.[17] Thus, for disparate impact cases proof of discriminatory intent is unnecessary. The Act was intended to remove "artificial, arbitrary, and unnecessary barriers to employment"; an employment practice that is fair in form but discriminatory in effect is prohibited unless the practice is a "business necessity."[18] The job requirements at issue in *Griggs* were prohibited because they were not shown to be job related or mandated by business necessity.

In *Abermarle Paper Co. v. Moody*[19] the Court affirmed the *Griggs* standard for a prima facie case—disproportionate adverse impact on a protected group—and delineated the essence of the business necessity/job-relatedness defense. The *Moody* decision granted "great deference" to the Equal Employment Opportunity Commission guidelines in defining job relatedness:

> The message of these Guidelines is the same as that of the *Griggs*

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

13. Belton, *supra* note 2, at 558; Chamallas, *supra* note 7, at 316-17.

14. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); *McDonnell Douglas*, 411 U.S. at 805.

15. *Griggs*, 401 U.S. at 426.

16. *Id.* at 432.

17. *Id.*

18. *Id.* at 431.

19. 422 U.S. 405 (1975).

> case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[20]

The Court also identified a "pretext" inquiry in *Moody*, stating that even if defendants demonstrate that tests are job related, plaintiffs still should be given an opportunity to present evidence that the use of these tests is a pretext for discrimination, given alternative selection procedures available to the company.[21] The *Teal* court affirmed the standard formulation of the *Moody* three-part analysis of a disparate impact claim:

> To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. . . . Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.[22]

Disparate impact theory has been linked to section 703(a)(2) since *Griggs*.[23] The language of section 703(a)(2) prohibits employment practices that "deprive or tend to deprive" an individual of an employment opportunity.[24] The Court affirmed that section 703(a)(2) was the statutory basis for the disparate impact theory in *General Electric Co. v. Gilbert*,[25] distinguishing such a claim from that appropriate to a disparate treatment analysis under section 703(a)(1).

The disparate treatment approach covers acts that constitute purposeful discrimination by an employer. This theory addresses intentional, unequal treatment of particular individuals and also calls for a three-stage analysis. In *McDonnell Douglas* the Supreme Court specified the elements of a prima facie case for employment discrimination;[26] the court cautioned, however, that the facts will vary from one Title VII case to another and that the prima facie proof required in this particular case was not necessarily applicable in every respect to

---

20. *Id.* at 431 (quoting 29 C.F.R. § 1607.4(c) (1974)).

21. *Id.* at 436.

22. *Teal*, 457 U.S. at 446-47 (quoting *Griggs*, 401 U.S. at 432).

23. *See* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225 (1976); Blumrosen, *Stranger in Paradise*: Griggs v. Duke Power Co. *and The Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

24. 42 U.S.C. § 2000e-2(a)(2) (1982).

25. 429 U.S. 125, 137 (1976).

26. *McDonnell Douglas*, 411 U.S. at 802. The *McDonnell Douglas* prima facie case showing required (1) membership in a protected class, (2) application and qualification for an employment opportunity, (3) rejection of the application, and (4) continued availability of the opportunity to others. *Id.* In later cases the Supreme Court explained that these elements were sufficent to establish a prima facie case because of the presumption that the acts in question were based on some motivating reason and that if all legitimate reasons for the acts have been eliminated, it is likely that the employer based its decision on an impermissible consideration such as race. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

differing factual situations.[27] In the *McDonnell Douglas* context, a presumption of discrimination arises if a plaintiff is a member of a protected group and qualified for a given job, yet is not hired by an employer for an admitted vacancy.[28]

If a plaintiff proves a prima facie case, the employer must "articulate"[29] a legitimate nondiscriminatory reason for its conduct,[30] although the employer also remains free to attack the plaintiff's prima facie case. If an employer introduces a legitimate nondiscriminatory reason into evidence, the plaintiff may challenge the employer's evidence on its intent by demonstrating that the reason given was a "pretext" for intentional discrimination or that it was applied in a discriminatory manner.[31]

The emphasis on individuals in disparate treatment cases is clear in the Supreme Court decisions on section 703(a)(1) claims that followed *McDonnell Douglas*. The Court has highlighted the fact that section 703(a)(1) prohibits discriminatory treatment of "any individual";[32] it noted in *Furnco Construction Corp. v Waters*[33] that Title VII imposes an obligation "to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."[34] The Supreme Court's clearest statement on the priority of individual claims, as opposed to group considerations, appears in *Los Angeles Department of Water & Power v. Manhart*.[35] Dealing with a generalization about men and women that was accepted as "unquestionably true"—that women, as a class, live longer than men—the Court stated that section 703(a)(1) "precludes treatment of individuals as simply components of a racial, religious, sexual or national class . . . . [T]he basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes."[36]

In summary, the focus of the disparate treatment theory has been on the way an individual has been treated, while disparate impact theory has focused on protected groups.[37] The former has emphasized fair treatment in the employment process for each individual involved, while the latter has been concerned with results and the outcome of employment policies and practices for specified groups.

---

27. *McDonnell Douglas*, 411 U.S. at 802 n.13.

28. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 n.6 (1981).

29. *McDonnell Douglas*, 411 U.S. at 802.

30. *Id.* The *Burdine* Court clarified the meaning of the "articulation" standard. The burden on the defendant is to produce evidence that the decision was made "for a legitimate nondiscriminatory reason." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). "[T]he defendant must clearly set forth, through the production of admissible evidence, the reasons for the plaintiff's rejection." *Id.* at 255. "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." *Id.* at 255 n.9.

31. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); *McDonnell Douglas*, 411 U.S. at 804-05.

32. MacDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

33. 438 U.S. 567 (1978).

34. *Id.* at 579.

35. 435 U.S. 702 (1978).

36. *Id.* at 708-09.

37. *Furnco*, 438 U.S. at 581-82 (Marshall, J., concurring in part).

II. *CONNECTICUT V. TEAL*

A. A Disparate Impact Decision

In *Teal* four black employees of the Connecticut Department of Income Maintenance were promoted provisionally to the position of welfare eligibility supervisor and served in that capacity for almost two years. To obtain permanent status as supervisors these employees had to participate in a selection process that required as a first step a passing score on a written examination. This exam was administered to 329 candidates, 48 of whom identified themselves as black and 259 as white.[38] The passing rate on the exam for the black candidates was 54.17%, approximately 68% of the passing rate for white candidates.[39] The four employees were among the blacks who failed the examination; thus, they were excluded from further consideration for permanent supervisory positions.[40]

These employees brought an action alleging that the State of Connecticut, two state agencies, and two state officials had violated Title VII by requiring, as an absolute condition of consideration for promotion, that applicants pass a written test which disproportionately excluded blacks and was not job related. Promotions were made from the eligibility list generated by the written test. In choosing persons from that list, the Department considered past work performance, recommendations of the candidates' supervisors, and to a lesser extent, seniority. Forty-six persons were promoted to permanent supervisory positions, eleven of whom were black and thirty-five of whom were white.[41] Thus, the overall result of the selection process was that 22.95% of the identified black candidates in the selection process were promoted while only 13.5% of the identified white candidates were promoted.[42] The State urged that this "bottom-line" result, more favorable to blacks than to whites, should be considered a complete defense to the suit.[43]

The district court held that while the comparative passing rates for the examination indicated adverse impact, the result of the entire hiring process did not. Consequently, the court concluded that these bottom-line percentages precluded the finding of a Title VII violation and that the employer was not required to demonstrate that the promotional examination was job related. The United States Court of Appeals for the Second Circuit reversed,[44] holding that the district court had erred in ruling that the results of the written examination alone were insufficient to support a prima facie case of disparate impact.[45] The Supreme Court affirmed the court of appeals' decision, ruling that a nondiscriminatory bottom-line neither precluded the establishment of a prima facie case nor

38. *Teal*, 457 U.S. at 443.
39. *Id.*
40. *Id.* at 443-44.
41. *Id.* at 444.
42. *Id.*
43. *Id.*
44. Connecticut v. Teal, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 457 U.S. 440 (1982).
45. *Id.* at 134-35.

provided a defense to such a case.[46]

The issue in *Connecticut v. Teal* was whether the use of the test administered by the state agency violated section 703(a)(2), which prohibits the limitation, segregation, or classification of employees in a manner that deprives, or tends to deprive, any individual of an employment opportunity because of his or her race, color, religion, sex, or national origin.[47] The facts conformed to the disparate impact model that the Court had developed in *Griggs*, *Moody*, and *Dothard v. Rawlinson*.[48]

Teal presented no contest when viewed simply as raising two questions. First, did the test exclude blacks disproportionately from the promotion pro-

---

46. *Teal*, 457 U.S. at 452. This ruling came as a considerable blow to those who had accepted the growing consensus in the lower courts and legal literature on the meaning of the bottom-line concept. The Court's decision, however, was not contrary to any of its earlier findings and, in fact, simply filled a void that often had been overlooked.

The bottom-line theory gained prominence when it was included in the Uniform Guidelines on Employee Selection Procedures in 1978.

> If . . . the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process.

29 C.F.R. § 1607.4(C) (1984). This language led to some assumptions about the use of the bottom-line concept in the law. Alfred W. Blumrosen stated a widely held perspective when he wrote: "This principle means that the law will 'let alone' those employers whose practices produce an acceptable number of minorities and women in various job categories." Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C. CENT. L.J. 1, 4 (1980) [hereinafter cited as Blumrosen, *The Bottom Line Concept*]. Professor Blumrosen further wrote: "Once the bottom line is 'satisfied' employers should be free to operate personnel systems on principles which do not take into account race or sex." *Id.* at 20.

As *Teal* makes clear, these are only agency guidelines. Writing later on the history of the Uniform Guidelines (now issued jointly by the EEOC, the Civil Service Commission, the Department of Labor, and the Department of Justice), Blumrosen recalled that the phrase "in the exercise of their administrative and prosecutorial discretion" was put into the guidelines to ensure that this section was understood as an exercise of discretion, not agency interpretation of the law. "It was meant to prevent the courts from treating this section of the Guidelines as the Commission's interpretation of the Statute." Blumrosen, *The Bottom Line in Equal Employment Guidelines: Administering a Polycentric Problem*, 33 AD. L. REV. 323, 335 n.32 (1981) [hereinafter cited as Blumrosen, *Polycentric Problem*].

These distinctions perhaps were best preserved in a 1978 overview of the Guidelines written by Blumrosen, which were known at the time as the "English version."

> Employers have argued that as long as their "bottom-line" shows no overall adverse impact, there is no violation at all, regardless of the operation of a particular component of the process.
>
> Employee representatives have argued that rights under equal employment opportunity laws are individual and the fact that an employer has hired some minorities does not justify discrimination against other minorities. Therefore, they argue that adverse impact is to be determined by examination of each component of the selecting procedure, regardless of the "bottom-line." This question has not been answered definitively by the courts. There are decisions pointing in both directions.
>
> These Guidelines do not address the underlying question of the law. They discuss only the exercise of prosecutorial discretion by the Government agencies themelves . . . .
>
> The individual retains the right to proceed through the appropriate agencies, and into Federal court . . . .

43 Fed. Reg. 38290, 38291 (1978). The *Teal* Court answered this question definitively. *See Teal*, 457 U.S. at 456.

47. 42 U.S.C. § 2000e-2(a)(2) (1982).

48. 433 U.S. 321 (1977).

cess? The answer to this question was yes under the traditional *Griggs* disparate impact analysis. That fact was not in dispute. Second, was the test job related? The answer was no. No attempt was made to demonstrate any relationship between the test and the supervisory positions. A violation of Title VII was clearly established.

Defendants contended that the bottom line—the final result of the promotion process—was not discriminatory. Blacks indeed were promoted at a higher rate in the final accounting.[49] Consequently, Justice Powell, in a dissent joined by Chief Justice Burger and Justices Rehnquist and O'Connor, argued that "our disparate impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group."[50] Because the total selection process did not have an adverse impact on blacks, Justice Powell found in favor of the State of Connecticut.[51]

A fundamental point that divided the *Teal* Court was whether the Court's previous disparate impact decisions had focused on the total selection process. Justice Brennan, the author of the majority opinion, answered this question in the negative: "This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted."[52] The Supreme Court never had dealt explicitly with the adverse impact by one element of a hiring or promoting process when this im-

---

49. *See supra* text accompanying note 42.

50. *Teal*, 457 U.S. at 458 (Powell, J., dissenting).

51. *Id.*

52. *Id.* at 450. One commentator has claimed that the *Teal* Court overlooked prior bottom-line decisions. Rigler, Connecticut v. Teal: *The Supreme Court's Latest Exposition of Disparate Impact Analysis*, 59 NOTRE DAME L. REV. 313 (1984). Although most of these prior decisions were discussed in the *Teal* opinions, neither the majority nor the dissent cited Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). In that case, plaintiff challenged a citizenship requirement for employment on the ground that it constituted discrimination based on national origin. The Court rejected the claim, not because of the company's acceptable overall bottom line, as is argued by Blumrosen, *see* Blumrosen, *The Bottom Line Concept*, *supra* note 46, at 8, but because the concept of "national origin" did not embrace citizenship. "Nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage." *Espinoza*, 414 U.S. at 95. Furthermore, the Court treated *Espinoza* basically as a disparate treatment case. The bottom-line figures—that 97% of those who worked at Farah in the job for which Mr. Espinoza applied were of Mexican ancestry—were cited by the Court in a treatment context.

> While statistics such as these do not automatically shield an employer from a charge of unlawful discrimination, the plain fact of the matter is that Farah does not discriminate against persons of Mexican national origin with respect to employment in the job Ms. Espinoza sought. She was denied employment, not because of the country of her origin, but because she had not yet achieved United States citizenship. In fact, the record shows that the worker hired in the place of Ms. Espinoza was a citizen with a Spanish surname.

Id. at 93. Plaintiff could not establish a prima facie case using a disparate treatment analysis. Farah's act was based not on an intent to exclude persons of Mexican ancestry, but an intent to exclude noncitizens. Under Title VII, citizenship does not constitute a protected category. Further, since a person of Mexican-American ancestry was hired, plaintiff could not establish a prima facie case following the *McDonnell Douglas* inference-of-discrimination formula.

Following *Teal*, however, the Court might give a different judgment if a similar case were presented as a disparate impact case. If it could be demonstrated that this component of the hiring process had an adverse impact on Mexican-Americans regardless of the bottom line, the Court could not repeat its finding in *Espinoza* that "[t]here is no indication in the record that Farah's policy against employment of aliens had the purpose or *effect* of discriminating against persons of Mexican national origin." *Id.* at 92 (emphasis added).

pact did not exist at the bottom line as well. Thus, there was no direct precedent in support of either the majority opinion or the dissent.

Nonetheless, some language used by the Court in prior disparate impact cases—even though these cases had involved employment practices with a discriminatory bottom line—supported the majority opinion. The *Teal* Court quoted the following language from *Griggs*: " 'If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.' "[53] If there is some ambiguity whether "an employment practice" refers to a single test or to the total process, that ambiguity appeared to have been resolved a few paragraphs later: "Congress has placed on the employer the burden of showing that *any given requirement* must have a manifest relationship to the employment in question."[54] *Dothard* also was clear on this point: "The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates *a job requirement's* grossly discriminatory impact."[55] Therefore, *Teal* is consistent with the previously espoused view that section 703(a)(2) applies to a single test or requirement, as well as the total process. Indeed, even Justice Powell lapsed into this language in his dissent: "Such [disparate impact] claims necessarily are based on whether the group fares less well than other groups under *a policy, practice, or test.*"[56]

The Court could have based its ruling on this traditional disparate impact analysis, varying from the bottom-line approach only by insisting that disparate impact must be gauged for each component of a selection process and not simply for the process as a whole.[57] The majority opinion, however, ranged far beyond this narrow basis. Apparently confronted with circumstances that revealed inadequacies in the way employment discrimination theory had been formulated, the Court broke new ground, pointing the way toward the development of a more adequate approach to this problem.

B. Process as Well as Outcomes

The Supreme Court's rejection of the bottom-line defense signaled that the outcome of a decisionmaking process could not be considered apart from an analysis of the components of that process.

> The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria. Title VII strives to achieve equality of opportunity by rooting out "artificial, arbitrary, and unnecessary" employer-created barriers to professional development that have a discriminatory impact upon individuals. Therefore, respondents' rights

53. *Teal*, 457 U.S. at 446 (quoting Griggs, 401 U.S. at 431).
54. *Griggs*, 401 U.S. at 432 (emphasis added).
55. *Dothard*, 433 U.S. at 331 (emphasis added).
56. *Teal*, 457 U.S. at 462 (Powell, J., dissenting) (emphasis added).
57. This interpretation of *Teal* can be found in Note, *The Supreme Court*, *supra* note 7.

> under § 703(a)(2) have been violated, unless petitioners can demonstrate that the examination given was not an artificial, arbitrary, or unnecessary barrier, because it measured skills related to effective performance in the role of Welfare Eligibility Supervisor.[58]

If the Court had spoken only about the need to assess the outcome of the individual tests in addition to the collective outcome of a total process, the reasoning would have fallen squarely within the traditional disparate impact emphasis on the results of employment practices or policies on a group. Rather than follow the established argument that section 703(a)(1) deals with process and section 703(a)(2) deals with results, however, the Court reexamined the language of Title VII and stood the traditional distinction on its head.[59] The Court emphasized that section 703(a)(2) was concerned with employment opportunities, while at the same time pointing out the references in section 703(a)(1) to the outcome of employment practices.

The manner in which the Court used section 703(a)(2) terminology concerning "limitations," "classifications," and "opportunities" focused on the employment process, not its result:

> Petitioners' examination, which barred promotion and had a discriminatory impact on black employees, clearly falls within the literal language of § 703(a)(2), as interpreted by *Griggs*. The statute speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*. A disparate-impact claim reflects the language of § 703(a)(2) and Congress' basic objectives in enacting that statute: "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."[60]

The Court found support for this emphasis on the opportunities and barriers within the employment process in *Griggs*[61] and the disparate impact cases that followed it:

> The decisions of this Court following *Griggs* also support respondents' claim. In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted.[62]

---

58. *Teal*, 457 U.S. at 451.

59. As noted in Rigler, *supra* note 52, at 325, "The *Teal* Court's substantial reliance on the literal language of section 703(a)(2) marks a significant departure from its previous decisions."

60. *Teal*, 457 U.S. at 448 (quoting *Griggs*, 401 U.S. at 429-30).

61. "We found that Congress' primary purpose was the prophylactic one of achieving equality of employment 'opportunities' and removing 'barriers' to such equality." *Id.* at 449 (citing *Griggs*, 401 U.S. at 429-30).

62. *Id.* at 450. In support of this statement the majority opinion made reference to *Dothard*, a case in which the Court had stated that the focus was not on the bottom line of the composition of the workforce but on the effect of height and weight standards in classifying far more women than

On the other hand, the Court offered new insight into the relationship between section 703(a)(1) and disparate impact claims:

> In contrast, the language of § 703 (a)(1), . . . if it were the only protection given to employees and applicants under Title VII, might support petitioners' exclusive focus on the overall result. The subsection makes it an unlawful employment practice "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."[63]

It is section 703(a)(1) that identifies the locus of discrimination as the outcome of an employment practice. Although section 703(a)(2) speaks to the manner in which employees are treated (unlawful to "limit, segregate, or classify") and the relation of that treatment to the rest of the employment process ("opportunities"), section 703(a)(1) addresses the results (failure to hire, "discharge") of employment practices and policies.

C. *Focus on Individuals*

The Supreme Court ruled that *Teal* was governed not only by a concern for process rather than outcome, but also by a concern for individuals rather than groups. The majority opinion rejected the argument that the bottom-line outcome for the group creates an exception—either in the nature of an additional burden on the plaintiffs or an affirmative defense—because of Title VII's focus on the individual.[64] Furthermore, this focus on the individual was ascribed specifically to section 703(a)(2), not just to Title VII as a whole:

> Section 703(a)(2) prohibits practices that would deprive or tend to deprive "*any individual* of employment opportunities." The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee.[65]

This focus on the individual traditionally has been associated with disparate treatment theory and with cases presented as violations of section 703(a)(1).[66] Moreover, the three cases cited by the *Teal* majority in support of a focus on the individual were *Furnco*,[67] *Manhart*,[68] and *Phillips v. Martin Marietta Corp.*,[69] all

---

men as ineligible for employment. *Dothard*, 433 U.S. at 329-30 & n.12. The *Teal* Court also referred to *Moody*:

> Similarly, in *Albemarle Paper Co. v. Moody* . . . the action was remanded to allow the employer to attempt to show that the tests he had given to his employees for promotion were job related. We did not suggest that by promoting a sufficient number of the black employees who passed the examination, the employer could avoid this burden.

Teal, 457 U.S. at 450.

63. *Teal*, 457 U.S. at 448 n.9.

64. *Id.* at 452-53.

65. *Id.* at 453-54.

66. *See supra* notes 9-37 and accompanying text.

67. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). *See supra* notes 33-34 and accompa-

disparate treatment cases.

In his dissenting opinion, Justice Powell called attention to the fact that, although the Court had been sensitive to the difference between disparate treatment and disparate impact cases, the majority opinion in *Teal* ignored the distinction between these two approaches.[70] The Court's decision, Justice Powell argued, "confuses the distinction—uniformly recognized until today—between disparate *impact* and disparate *treatment*."[71]

---

nying text. The *Teal* Court referred to *Furnco* in maintaining that liability exists for specific acts of discrimination even within a racially balanced work force:

> "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. See *Griggs v. Duke Power Co.*, 401 U.S. at 430; *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976)."

Teal, 457 U.S. at 454-55 (quoting *Furnco*, 438 U.S. at 579).

68. Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978). *See supra* notes 35-36 and accompanying text. Fairness to women employees as a whole could not justify unfair treatment of an individual employee because the "statute's focus on the individual is unambiguous." *Id.* at 708, *quoted in Teal*, 457 U.S. at 455.

69. 400 U.S. 542 (1971) (per curiam). The *Teal* Court noted:

> Similarly, in *Phillips v. Martin Marietta Corp.*, . . . we recognized that a rule barring employment of all married *women* with preschool children, if not a bona fide occupational qualification under § 703(e), violated Title VII, even though female applicants without preschool childeren were hired in sufficient numbers that they constituted 75 to 80 percent of the persons employed in the position plaintiff sought.

Teal, 457 U.S. at 455.

70. *Teal*, 457 U.S. at 456 (Powell, J., dissenting).

71. *Id.* at 462 (Powell, J., dissenting).

Any confusion caused by the failure of the majority to draw a distinct line between the disparate impact and disparate treatment theories pales in comparison to that caused by the reasoning of the dissenters. Justice Powell stated that in disparate impact cases "the plaintiff seeks to carry his burden of proof by way of *inference*," *Teal*, 457 U.S. at 458 (Powell, J., dissenting), and that "the employer's presentation of evidence showing that its overall selection procedure does not operate in a discriminatory fashion certainly dispels any inference of discrimination." *Id.* at 459 n.3 (Powell, J., dissenting). The language of inference, however, is totally inappropriate in the prima facie and defense stages of a disparate impact case. Carrying a burden of proof by way of inference has had a place in disparate impact cases only at the pretext stage established in *Moody*, 422 U.S. at 425, and *Dothard*, 433 U.S. at 329. *Teal* never reached this stage because defendants failed to satisfy their burden of proving job relatedness.

Justice Brennan's opinion properly describes the dissent's decision to draw an inference from bottom-line results as a confusion of "unlawful discrimination with discriminatory intent." *Teal*, 457 U.S. at 454. While claiming to maintain the distinction between disparate treatment and disparate impact theories, Justice Powell introduces a concept from disparate treatment analysis into this disparate impact case. Inferring discrimination from facts such as those in *Teal* is a process appropriate to disparate treatment cases. In distinguishing the disparate treatment and disparate impact approaches in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Court observed that in disparate treatment cases "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Id.* at 335 n.15. In Title VII claims inference has a place only in ascertaining intent, a task taken up in disparate treatment cases. The facts in *Teal* do not merely infer a prima facie case for a violation of Title VII, they establish it.

The argument in the dissent is reminiscent of the *Furnco* decision in which the Court ruled that "proof that [an employer's] work force [is] 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." *Furnco*, 438 U.S. at 580. Intent, however, was not an issue in *Teal*. *Teal* follows *Griggs* not only in that it is a disparate impact case, but also in that both cases contained evidence of nondiscriminatory intent. This evidence in *Teal* was the bottom line produced by defendant's actual promotion decisions. In *Griggs* the defense argued that the company's lack of discriminatory intent was suggested by the company's financing of two-thirds of the cost of high school

Justice Brennan's response to this charge, a charge also asserted by petitioners, was an admission of the fact with an added comment to the effect that if departure from previously accepted theoretical constructs is necessary to address discriminatory practices, then that is what the Court will do:

> Petitioners point out that *Furnco, Manhart,* and *Phillips* involved facially discriminatory policies, while the claim in the instant case is one of discrimination from a facially neutral policy. The fact remains, however, that irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' 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. Every *individual* employee is protected against both discriminatory treatment and "practices that are fair in form, but discriminatory in operation."[72]

Justice Powell's dissent clarified what was at stake in *Teal* in another way. He complained that the majority confused the aims of Title VII with the methods of proof through which those aims had been achieved. He did not take issue with the statement that the aim of Title VII is to protect individuals rather than groups, but he objected to a pursuit of those aims through an approach that departed from established theory:

> The Court, disregarding the distinction drawn by our cases, repeatedly asserts that Title VII was designed to protect individual, not group, rights. It emphasizes that some individual blacks were eliminated by the disparate impact of the preliminary test. But this argument confuses the *aim* of Title VII with the legal theories through which its aims were intended to be vindicated. It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct methods of proof.[73]

The fallacy in the Court's reasoning, Justice Powell argued, was the confusion of "the individualistic *aim* of Title VII with the methods of proof by which Title

---

training for undereducated employees. *Griggs* made clear, however, that such evidence was irrelevant: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs,* 401 U.S. at 432.

72. *Teal,* 457 U.S. at 455-56 (quoting *McDonnell Douglas,* 411 U.S. at 800). To make the circle complete, the language in *Teal* subsequently has been appropriated in disparate treatment proceedings. *See* Bell v. Bolger, 708 F.2d 1312, 1318 (8th Cir. 1983) (citing *Teal* as supporting: "Merely because other members of a protected class—in this case, black or older persons—were recommended by the review committee does not demonstrate an absence of discrimination."); Peters v. Lieuallen, 693 F.2d 966, 970 (9th Cir. 1982) (relying on *Teal* to conclude that "the fact that a particular screening device admits some members of a protected class does not demonstrate an absence of discrimination"); Harrison v. Lewis, 559 F. Supp. 943, 947 (D.D.C. 1983) ("The Supreme Court has only recently reaffirmed the basic distinction between the issues of 'bottom line' racial balance in the employer's entire work force and discriminatory treatment of individuals.").

73. *Teal,* 457 U.S. at 458 (Powell, J., dissenting).

VII rights may be vindicated."[74]

It is difficult to understand the reasoning of the *Teal* Court in this regard as being anything other than an assertion that the purpose of Title VII is of more significance than the theories or methods of proof that had developed in earlier litigation. Upon encountering a situation in which the aim of Title VII could not be fulfilled by the continued use of old theories, the Court was willing to accept an alternative approach to accomplish the purposes of the original legislation.

D. The Questions That Remain

The focus on opportunities and individuals in *Teal* raises a number of questions that must be answered before the case can become meaningful precedent. The courts of appeals' decisions that have attempted to follow *Teal* exhibit a lack of certainty about how to assess both the significance of the distinction between opportunities and results and the meaning of the emphasis on individuals when facially neutral practices and policies are at issue.

Turning to the first distinction, what is the practical consequence of the emphasis on opportunities and process rather than outcomes in a disparate impact case? In any employment process that contains elements that have not been validated as job related, an employer's contention that all minorities are given an opportunity to compete carries little weight if no minorities actually are promoted. Of course, Title VII is not only concerned with opportunities, but also with "the *opportunity* to compete equally."[75] Under the disparate impact approach, the prima facie evidence of equal opportunity has focused on whether the results were equal.[76] Title VII does not require equal results, but it does require a demonstration of job relatedness when the results are unequal.

A first step in providing substance to this emphasis on opportunity is to reject the idea that *Teal* and Title VII deal only with "pass-fail barriers."[77] This issue was addressed directly in *Wilmore v. City of Wilmington*.[78] In *Wilmore* the district court acknowledged that the administrative experience obtained through selective assignment to "administrative jobs" probably helped firefighters obtain higher scores on a promotional exam.[79] Because the exam was not a "pass-fail barrier to completion of the selection process," however, the court held that the assignment of these jobs on the basis of race did not create the kind of barrier to professional development that violated petitioner's right to equal employment

74. *Id.* at 459-60 (Powell, J., dissenting).

75. *Id.* at 451; *see Moody*, 422 U.S. at 417; *McDonnell Douglas*, 411 U.S. at 801; *Griggs*, 401 U.S. at 429-30.

76. Belton, *supra* note 2, at 547-48.

77. A suggestion to limit *Teal* to this kind of factual situation makes a prima facie case dependent on circumstances in which "one component of the selection process has a disparate impact on a protected group *and* constitutes a pass-fail barrier beyond which the failing candidate cannot continue . . . ." Note, *The Bottom Line Concept*, *supra* note 7, at 840.

78. 533 F. Supp. 844 (D. Del. 1982), *rev'd*, 699 F.2d 667 (3d Cir. 1983).

79. *Id.* at 857.

opportunities under Title VII and *Teal*.[80]

The United States Court of Appeals for the Third Circuit reversed.[81] Citing the emphasis in *Teal* on "Title VII's focus on equal employment opportunities," the court stated: "We believe that the exclusion of minority firefighters from 'administrative jobs' because of their race with consequent detrimental effect on their promotional test scores is the kind of 'artifical, arbitrary, and unnecessary employer-created barriers to professional development' the Court found in *Teal* to be prohibited by Title VII."[82] *Wilmore* construed *Teal* as reaching beyond distinct pass-fail barriers to include any element of a decision process that adversely affects members of protected groups. This decision applies the *Teal* logic to other employment practices that subsequently influence a candidate's performance in a hiring or promotion process.

Not all lower courts have incorporated this focus on opportunities into their reasoning. In *Costa v. Markey* (*Costa II*)[83] the United States Court of Appeals for the First Circuit, sitting en banc, reversed a ruling of a panel of that court.[84] At issue was a requirement that all persons hired as police officers meet a minimum height requirement of five feet, six inches. Plaintiff was a woman who was competing for two positions that at the outset of the appointment process had been reserved for women. The court concluded that, "[a]lthough the height requirement would, in other contexts, have a disparate impact on women, . . . the height requirement could have had no such impact in this case because only women were in competition for the job."[85]

The court distinquished *Teal* in the following way:

> In *Teal*, the employer sought to remedy the effects of a discriminatory barrier by affirmatively hiring members of the disadvantaged minority group. In this case, although plaintiff was discriminated against on the basis of her height, there was *never* any discrimination of the type for which Title VII provides a remedy. Because the sexes were not in

---

80. *Id.* at 857 n.33.

81. Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983).

82. *Id.* at 671-72 (quoting *Teal*, 457 U.S. at 451). A district court in California also brought the opportunity-result distinction to bear in rejecting a pass-fail restriction on the meaning of *Teal*:

> Supreme Court authority, *Teal* included, holds that Title VII applies to job "opportunities." *Teal*, 102 S.Ct., at 2531-32; Griggs v. Duke Power Co., 401 U.S. 424, 429-30, 3 F.E.P. Cases 175 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405, 10 F.E.P. Cases 1181 (1975); Dothard v. Rawlinson, 433 U.S. 321, 15 F.E.P. Cases 10 (1977). Thus, Court [sic] must apply Title VII to steps in a hiring process if those steps have an impact on an individual's opportunity to get a job, even if the step is not absolutely determinative. In this case, although the written test did not completely eliminate any applicant, it could have had a major impact on an individual's opportunity to be favorably considered for promotion. Thus, under *Teal* and its predecessors, the written test must be considered as a separate part of the hiring process.

Williams v. City of San Francisco, 31 Fair Empl. Prac. Cas. (BNA) 885, 887 (N.D. Cal. 1983).

83. 706 F.2d 1 (1st Cir. 1982) (en banc), *cert. denied*, 104 S. Ct. 547 (1983).

84. A panel of the United States Court of Appeals for the First Circuit originally had reversed the district court and ruled in favor of defendants. Costa v. Markey (*Costa I*), 677 F.2d 158 (1st Cir. 1982), *cert. dismissed*, 103 S. Ct. 2076 (1983). The court granted a rehearing to examine the effect of the *Teal* decision on this case. A panel of the court found that *Teal* mandated a reversal of the prior opinion, *Costa II*, 706 F.2d at 2-10, but the court sitting en banc reversed the panel. *Id.* at 10-12.

85. *Costa II*, 706 F.2d at 10.

> competition, the height requirement had no disparate effect on women.[86]

The court's argument rests on the assumption that the reservation of these positions for women and the fact that two women were hired prohibit the establishment of a prima facie case of disparate impact.

Although it is true that no adverse impact can be shown by the hiring result, it is obvious that the opportunity for many women to compete for these positions was frustrated by the barrier of a five-foot-six-inch height requirement. When the court ruled that "[p]laintiff simply failed to make it over the initial hurdle of demonstrating that the challenged barrier had a discriminatory effect on women,"[87] the court could only be interpreting "effect" to apply solely to the results of the decision process, not to the opportunity afforded to participate in that process.[88]

Another decision that does not take into account the *Teal* Court's distinction between opportunities and results is *Massarsky v. General Motors Corp.*[89] This case dealt with General Motors' practice of immunizing employees enrolled as students in the General Motors Institute (GMI) from layoffs, which otherwise were handled on a seniority basis. Fifth-year GMI students were assigned to the sponsoring plant on a full-time basis. When it became necessary to furlough employees, Massarsky, protected under the Age Discrimination in Employment Act of 1967,[90] was laid off while students with less seniority were not. The student-nonstudent division arguably segregated employees along age lines,[91]

---

86. *Id.* at 11. In *Costa I*, Judge Coffin, writing the majority opinion, had characterized this case as a "mirror image" of *Teal*. Costa v. Markey (*Costa I*), 677 F.2d 158, 161 n.3 (1st Cir. 1982), *cert. dismissed*, 103 S. Ct. 2076 (1983). Once the Supreme Court settled the issue in *Teal* with a result different from that rendered by the court of appeals, Judge Coffin admitted the confusion caused by the use of the term "mirror image," stating that the term was intended to highlight "the differences rather than the similarities between the two cases." *Costa II*, 706 F.2d at 11 n.11.

87. *Costa II*, 706 F.2d at 12.

88. In this case opportunity is not a vague concept to be applied to potential applicants. As the court acknowledged, but for the height requirement, plaintiff would have been hired as a police officer. *Id.*

89. 706 F.2d 111 (3d Cir.), *cert. denied*, 104 S. Ct. 348 (1983). Although *Massarsky* is an age discrimination case, the United States Court of Appeals for the Third Circuit carried out its analysis within the Title VII disparate impact framework:

> Although the Second Circuit has expressly recognized the disparate impact doctrine in the ADEA context, *see Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed. 2d 332 (1981), this court has never ruled on whether a plaintiff can establish violation of the Act by showing disparate impact alone. But even assuming, without deciding, that the disparate impact theory does apply to age discrimination suits, the district court correctly ruled that Massarsky is not entitled to any relief.

Id. at 120. Subsequent discussions of age discrimination in *Massarsky* presume the applicability of Title VII disparate impact analysis.

90. 29 U.S.C. §§ 621-634 (1982).

91. There was an evidentiary problem about the composition by age of the student and nonstudent groups. It was established that applicants for GMI "are primarily high school students, and the typical beginning student is from 18-20 years of age." *Massarsky*, 706 F.2d at 115 n.4. Although the dissent claimed that the record in this case supported a finding "that virtually 100% of the protected class is in the disfavored group because the favored student group is under 40," *id.* at 130 (Sloviter, J., dissenting), the majority opinion argued that this assertion was not supported by the record. *Id.* at 121. The reasoning of the majority on this point, however, provides further evidence of its failure to account for the distinction made in *Teal* between opportunity and result. The majority wrote: "Even if all laid off employees were older than GMI students who received special treatment, the

and Massarsky filed suit for age discrimination. In finding for defendant, the court reasoned:

> [T]here was no tangible impact until it actually became necessary for the company to lay off a process engineer, and it was then—and only then—that Massarsky was adversely affected. The reason Massarsky was selected for layoff was that he possessed the least seniority of all employees eligible for layoff. Thus, unlike *Teal*, where plaintiff was affected by the discriminatory practice at the moment she was excluded from further consideration for promotion, Massarsky was not adversely affected until his low seniority identified him for layoff when in-plant force reductions became necessary.[92]

The key phrase in this statement is "eligible for layoff." Under the contested policy, a group of younger employees—GMI students—had been declared ineligible for layoff. This policy seems to have affected significantly Massarsky's opportunity to avoid furlough. As Judge Sloviter stated in a dissenting opinion, "Massarsky established a *prima facie* case of disparate impact by showing that the policy to retain students, even if not facially discriminatory, in effect preferred younger employees, and was the reason for his layoff."[93] By limiting its consideration to the results of this practice, the majority found otherwise.

Judge Rosenn, writing the majority opinion in *Massarsky*, followed an attempt made by the *Costa I* court to distinguish these circumstances from those in *Teal*. "*Teal* stands for the proposition that an employment practice must be analyzed at 'the first step in the employment process that produces an adverse impact on a [protected group], not the end result of the employment process as a whole.' "[94] The relevant issue in this analysis is the point at which employees first were affected by these employment practices. To claim that they were not affected until these practices resulted in Massarsky's layoff and in Costa's not being hired is to focus on results rather than opportunities contrary to the focus explicitly adopted in *Teal*. Immunizing students from layoff procedures and requiring a minimum height of five feet, six inches, are business practices that adversely affect the opportunities of older employees and female applicants from the moment they are established.[95]

Clearly, questions remain about how the concept of "opportunities" can be the focus of a disparate impact inquiry. The *Teal* Court's emphasis on the individual has not been incorporated uniformly into section 703(a)(2) analysis. Again, the *Massarsky* opinions sharpen the contested issue. The majority rea-

---

Act would not be violated unless those age 40 to 70 were disproportionately represented *among the laid off* employees." *Id.* at 121 (emphasis added).

92. *Id.* at 122.

93. *Id.* at 131 (Sloviter, J., dissenting) (emphasis added).

94. *Id.* at 122 (quoting Costa v. Markey, 694 F.2d 876, 880 (1st Cir. 1982) (opinion withdrawn due to granting of rehearing)).

95. In the *Costa* cases it is somewhat curious that plaintiff was allowed to complete the entire application process—not once, but twice—when any possibility of her being hired already had been foreclosed by the height requirement. The reasoning of the *Costa II* court seems to indicate that the result in *Teal* should have been different if the persons failing the exam had not been notified of their failure until the end of the selection process.

soned that "[a]n adverse effect on a single employee, or even a few employees, is not sufficient to establish disparate impact."[96] This language reflects the thinking of the *Teal* dissenting opinion. Justice Powell asserted that "[t]here can be no violation of Title VII on the basis of disparate impact in the absence of disparate impact on a *group*."[97]

> Our cases . . . have made clear that discriminatory-impact claims cannot be based on how an individual is treated in isolation from the treatment of other members of the group. Such claims necessarily are based on whether the group fares less well than other groups under a policy, practice, or test. Indeed, if only one minority member has taken a test, a disparate-impact claim cannot be made, regardless of whether the test is an initial step in the selection process or one of several factors considered by the employer in making an employment decision.[98]

Judge Sloviter's dissent in *Massarsky* issued a strong challenge to this assumption.

> The majority's holding that it was not enough for Massarsky to prove an impact on Massarsky alone ignores the directly applicable language in *Connecticut v. Teal*. . . . There, Justice Brennan, writing for the Court, rejected the claim that there was no violation of Title VII because other employees in the protected group were favorably treated. . . . Justice Brennan made explicit that the focus on the individual adversely affected by the employer's policy or action should be applied in all Title VII cases, whether brought under the discriminatory treatment theory or under the disparate impact theory.[99]

What meaning could the *Teal* Court's contention that the principal focus of section 703(a)(2) is on the individual rather than on the group have, unless Judge Sloviter is correct? On the other hand, how could disparate impact be demonstrated if only a single individual was affected adversely by an employment practice or policy?

In both *Costa II* and *Massarsky* the appellate courts rendered split decisions because a theoretical framework was not available for incorporating the *Teal* concepts into the adjudication of claims by individuals that the disparate impact theory was applicable in their cases. In each case the majority decision ran counter to the emphasis in *Teal* on opportunities and individuals because the appellate courts resorted to the traditional approach to disparate impact theory.

---

96. *Massarsky*, 706 F.2d at 121.

97. *Teal*, 457 U.S. at 459 (Powell, J., dissenting).

98. *Id.* at 462-63 (Powell, J., dissenting).

99. *Massarsky*, 706 F.2d at 130 (Sloviter, J., dissenting). The issue of focusing on the individual rather than the group also is pertinent to the *Costa* cases. As the majority opinion in *Costa II* stated, women, *as a group*, were not affected adversely by the hiring process, *Costa II*, 706 F.2d at 3. Two positions were open and two women were hired. An individual woman, however, was affected adversely by a requirement that does have a disparate impact on women as a group. *Id.* at 5.

III. A New Conceptual Framework

A. The Proposition

The issue raised in *Teal* can be addressed only by the formulation of a new analytic approach. The proposed approach and its reasoning are directed only at the establishment of a prima facie case in a disparate impact context. At certain points in this discussion, however, it will be obvious that the door has been opened for a more sweeping review of employment discrimination theory.[100]

The crux of the problem is the position taken by the majority in *Massarsky*—and arguably implied by Justice Powell's dissent in *Teal*—that a violation of Title VII cannot be based on a disparate impact theory when only a single employee or small group of employees have been adversely affected.[101] The implication of this approach is that the same policy, administered in the same manner, may be discriminatory if six persons are dismissed, but not discriminatory if only three are terminated. Under this analysis, the reach of Title VII is dependent on factors extrinsic to the employment policies and practices under scrutiny. If the economy had been worse and General Motors had laid off ten people over age forty instead of only one, would Massarsky have prevailed? When the New Bedford Police Department fills an opening with a male, can Costa again assert a Title VII claim on the same grounds and win? Exactly how many people does it take to make out a disparate impact case?

Even asking these questions seems to violate the Supreme Court's holding in *Teal* that the focus of section 703(a)(2) is on the individual. These and other related concerns can be addressed by application of a two-stage analytic framework in disparate impact cases—a new theoretical approach that will incorporate the traditional use of statistics in making out a prima facie disparate impact case, afford an opportunity for a single individual to find protection under section 703(a)(2), respond to the objections of Justice Powell in his *Teal* dissent, at least in a literal reading of his dissent, and accomplish the purposes of Title VII more fully than does the traditional framework.

The first stage of the proposed analysis examines employment practices and policies in light of the *Teal* Court's identification of policies that are "facially neutral but practically discriminatory."[102] It may be helpful to think of such policies and practices as "superficially neutral." Although some facially neutral requirements are revealed as discriminatory only within the confines of a partic-

100. Even before the *Teal* decision, observers found evidence that the Supreme Court's decisions represented an evolution toward the merger of the disparate impact and disparate treatment approaches. *See, e.g.*, Furnish, *A Path through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. Rev. 419, 440-45 (1982). The *Teal* Court's use of the concepts of individuals, groups, opportunities, and results in relation to § 703(a)(1) and § 703(a)(2) can only increase speculation in this area.

101. *See Teal*, 457 U.S. at 459, 462-63 (Powell, J., dissenting); *Massarsky*, 706 F.2d at 121. The literal wording of Powell's dissent does not necessarily lead to the conclusions drawn by the *Massarsky* court. *See infra* notes 144-47 and accompanying text. As noted previously, this issue also is pertinent to the *Costa II* decision. *See supra* text accompanying note 87.

102. *Teal*, 457 U.S. at 455.

ular work setting, others almost always have an adverse impact on members of protected groups. A category of policies and requirements that are not only facially but also superficially neutral should be created to enhance the identification of discriminatory employment practices. The inclusion of employment practices and policies in this category should be based on the disparate impact that they have on groups as a whole—not necessarily the impact on a particular group of employees or applicants. The utilization of practices and policies that fall within this category creates a presumption of discriminatory behavior. Because the test of whether a criterion is superficially neutral is based on its effect on an entire group, rather than the individuals in a specified work place, the scope of this category would become fairly stable over time. Prime candidates for such categorization would include height and weight requirements, tests on which members of protected groups historically have a poor performance record, status as a student, education requirements, and matters associated with family background. In each of these instances the classifications and criteria usually have an adverse impact on women, minority groups, or older persons.

This categorization in effect renders suspect the classification of such tests and requirements as facially neutral. Their relationship to the general population demonstrates that they are only superficially neutral. Following the language of section 703(a)(2), the superficially neutral policies and practices would be those that tend to deprive individual members of protected groups of employment opportunities.

The second stage of the analysis focuses on any individual who claims that she has been affected adversely by the use of such policies, practices, or tests. At this stage, unlike the first step, impact on a single individual should be the focus of inquiry.[103] This analysis, of course, takes place as the plaintiff is attempting to establish a prima facie case. The employer's use of requirements that are directly linked to race, sex, or age is not necessarily prohibited. Their utilization, however, places the burden of job relatedness on the employer even in circumstances in which only one member of a protected group is affected. Through this approach, the traditional view that disparate impact is understandable only in relation to groups and the *Teal* emphasis that disparate impact analysis should focus on individuals both can be accommodated.

B. Statistics in a Disparate Impact Case

One possible objection to the proposed analysis is that the method used to demonstrate disparate impact violates the theoretical approach that has been established in the courts.[104] On the contrary, however, this conceptual framework is theoretically at one with the Supreme Court's reasoning that has supported the use of statistical evidence in disparate impact cases and actually is

103. "It is not sufficient for an individual plaintiff to show that the employer followed a discriminatory policy without also showing that plaintiff himself was injured." Coe v. Yellow Freight Sys., Inc., 646 F.2d 444, 451 (10th Cir. 1981).

104. *See, e.g.*, New York Transit Auth. v. Beazer, 440 U.S. 568, 585-86 (1979) (actual applicant pool provides basis for comparison); Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977) (standard for testing impact is relevant labor market).

foreshadowed in these prominent decisions.[105]

Use of general population statistics in a particular case must be examined. Is it appropriate to apply such undifferentiated statistics to develop a category of superficially neutral employment practices before the facts of a particular case have been established? There is a thread of precedent that appears to support an objection to this general use of undifferentiated statistics.

In *Hazelwood School District v. United States*[106] the Supreme Court took care to sort out which statistical comparisons were appropriate and which were not. The Court ruled that a comparison of the composition of a school district's teacher work force to its student population was not appropriate,[107] but a comparison between that work force and the qualified public school teacher population in the relevant labor market was proper.[108] The Court's decision also left to the district court, on remand, the determination whether proof could be adduced from the comparison of the composition of the work force with that of those persons who actually had applied for teaching positions—a comparison the Court indicated would be "very relevant."[109]

Similarly, in *Albemarle Paper Co. v. Moody* the Court concluded that the burden on defendant to demonstrate a test's relationship to employment arises "only after the complaining party or class had 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 the pool of applicants."[110] A focus on the actual applicant pool when evaluating work force statistics also appeared in *New York Transit Authority v. Beazer.*[111] When faced with an employment practice that excluded methadone users and with statistics about the racial composition of methadone users in public methadone programs in New York City, the Court was not impressed: "We do not know, however, how many of these persons ever worked or sought to work with TA [New York Transit Authority]. This statistic therefore reveals little if anything about the racial composition of the class of TA job applicants and employees receiving methadone treatment."[112]

This reasoning, however, cannot sustain a challenge to the proposed creation of a category of superficially neutral practices. The mainstream of precedent, including the cases just cited, has held that statistical evidence of discriminatory impact need not be confined to the specific employment situation at hand. This broader view of the use of statistics in disparate impact cases is set forth clearly and unmistakably in *Dothard v. Rawlinson*:[113]

105. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

106. 433 U.S. 299 (1977).

107. *Id.* at 308.

108. *Id.*

109. *Id.* at 308 n.13.

110. 422 U.S. 405, 425 (1975).

111. 440 U.S. 568 (1979).

112. *Id.* at 585.

113. 433 U.S. 321 (1977)

> The appellants argue that a showing of disproportionate impact on women based on generalized national statistics should not suffice to establish a prima facie case. They point in particular to Rawlinson's failure to adduce comparative statistics concerning actual applicants for correctional counselor positions in Alabama. There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants. . . . The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory. . . . A potential applicant could easily determine her height and weight and conclude that to make an application would be futile. Moreover, reliance on general population demographic data was not misplaced where there was no reason to suppose that physical height and weight characteristics of Alabama men and women differ markedly from those of the national population.[114]

Reliance on general population statistics was judged to be appropriate in *Dothard* if there was no reason to believe that more refined statistics would differ markedly.[115] The undifferentiated statistics were viewed as preferable to "actual applicant" numbers because of the way the challenged employment standard might have skewed the application process.[116]

The same theme is contained in the Court's decision in *Teamsters*. The Court rejected defendant's contention that statistics comparing an employer's work force with the population at large should not be given decisive weight in a Title VII case.[117]

> The argument fails in this case because the statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent 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 and ethnic composition of the population in the community from which employees are hired . . . . Considerations such as small sample size may, of course, detract from the value of such evidence, . . . and evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant.[118]

Neither the *Teamsters* decision nor that in *Dothard* gives a blanket endorsement of the use of general population statistics. Such statistics, however, are judged to be appropriate "absent explanation" unless there is evidence showing

114. *Id.* at 330.
115. *Id.* at 331.
116. *Id.* at 330.
117. *Teamsters*, 431 U.S. at 339-40 n.20.
118. *Id.*

that the pool of qualified applicants has a different composition[119] or unless there is reason to suppose that more refined statistics would produce different results.[120] In a Title VII context, when looking at the impact of an employment practice, what kind of explanation or reason justifies the use of only differentiated statistics? A closer look at *Hazelwood* and *Beazer* indicates the Court's answer to this crucial question.

Just as *Teamsters* and *Dothard* do not endorse the universal use of generalized statistics, neither do *Hazelwood* and *Beazer* call for a consistent rejection of them. The *Hazelwood* Court distinguished its ruling on general population statistics from that in *Teamsters* by focusing on the nature of the jobs in question. In *Teamsters* the job skill required (driving a truck) was a skill that many people possessed or could easily acquire. Thus, the use of areawide population figures was appropriate.[121] Reliance on a similar statistical base in *Hazelwood*, however, was not proper because it failed to take into account the special qualifications for the position in question. "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."[122]

The majority opinion in *Beazer* explicitly followed the rulings in both *Dothard* and *Teamsters*. "Although 'a statistical showing of disproportionate impact need not always be based on an analysis of the characteristics of actual applicants,' . . . 'evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants' undermines the significance of such figures."[123] Citing several problems with the figures that plaintiff presented, the Court ruled that the statistical showing was at best weak,

---

119. *Id.* at 339-40. The *Teamsters* Court, however, did articulate the point, picked up in the *Dothard* decision, that the pool of actual applicants may not adequately reflect the composition of the group affected by a discriminatory practice. "When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." *Id.* at 365-66.

120. General state-wide population statistics also were found to be relevant in *Griggs*. *Griggs*, 401 U.S. at 430 n.6. In that same footnote, the *Griggs* Court also pointed to pass-fail statistics for the specific tests at issue. In Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975), the United States Court of Appeals for the Eighth Circuit demonstrated the flexibility with which statistics can be used to establish a disparate impact prima facie case.

> A disproportionate racial impact may be established statistically in any of three ways. The first procedure considers whether blacks as a class (or at least blacks in a specified geographical area) are excluded by the employment practice in question at a substantially higher rate than whites . . . .
>
> The second procedure focuses on a comparison of the percentage of black and white job applicants actually excluded by the employment practice or test of the particular company or governmental agency in question . . . .
>
> Finally, a third procedure examines the level of employment of blacks by the company or governmental agency in comparison to the percentage of blacks in the relevant geographical area.

Id. at 1293-94.

121. *Hazelwood*, 433 U.S. at 308 n.13.

122. *Id.*

123. *Beazer*, 440 U.S. at 586 n.29 (quoting *Dothard*, 433 U.S. at 321; *Teamsters*, 432 U.S. at 340 n.20).

and even if capable of establishing a prima facie case, it was rebutted by a demonstration that the requirement was job related.[124]

It still remains to be determined whether it is appropriate to apply undifferentiated statistics to develop a category of superficially neutral employment practices prior to reviewing the facts of a particular case. The logic of the Supreme Court's decisions suggests an affirmative answer. General population statistics can be used properly unless there is evidence showing that they should not be so used.[125] Reliance on undifferentiated demographic data is not misplaced when no reason is given to the contrary.[126] Information about special job skills or about the composition of a specific application pool eventually may negate any probative force a superficially neutral requirement may have in a particular case. The burden, however, should be on those who wish to rebut the showing made by such undifferentiated data. Absent explanation, the composition of the population at large is an appropriate yardstick by which to measure the impact on employment practices and policies.[127]

C. A "Superficially Neutral" Classification and the Purposes of Title VII

The establishment of a category of superficially neutral employment policies and practices would enhance the achievement of the purposes of Title VII. At one level, this claim is easily supported by simple reference to the language of the statute.[128] Business standards that would be prime candidates for classification as superficially neutral are precisely those requirements that tend to limit or classify individuals because of their race, color, religion, sex, or national origin. Moreover, the statistical method that would link superficially neutral policies to section 703(a)(2) has a long and established place in disparate impact analysis; it regularly has been applied to the traditional category of facially neutral requirements.

More specific evidence of the compatibility of this proposal with congres-

124. *Beazer*, 440 U.S. at 584-87. Opinions may vary about the strength of the statistical evidence presented and the manner in which precedent was applied to the facts of this case. The Court, however, construed its findings to be consistent with the *Dothard-Teamsters* treatment of statistical evidence. *Id.* at 586 n.29.

125. *See supra* text accompanying notes 117-18.

126. *See supra* text accompanying notes 113-16.

127. The presumptive validity of general population figures suggested in this Article also was advocated by one commentator as an approach to specific cases following *Hazelwood*. *See* Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 19 (1977) ("Plaintiff's prima facie case is established by the basic comparison of defendant's work force with the general population. It should then be defendant's task to rebut the inference of discrimination by showing that the proper comparison is with a particular segment of the population."). For a contrary view, see Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 SUP. CT. REV. 17; *see also* Lamber, Reskin, & Dworkin, *The Relevance of Statistics to Prove Discrimination: A Typology*, 34 HASTINGS L.J. 553, 585-95 (1983) ("appropriate comparison population" is a disputed issue); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 NEB. L. REV. 345, 347-48 (1980) ("statistics on the general population should not inevitably be considered definitive for purposes of Title VII litigation").

128. It is unlawful under § 703(a)(2) for an employer "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 . . . ." 42 U.S.C. § 2000e-2(a)(2) (1982).

sional intent can be found in the legislative response to the use of one particular superficially neutral category: pregnancy. In *General Electric Co. v. Gilbert*[129] the Supreme Court, in essence, held that pregnancy was a facially neutral category. Specifically, the majority determined that denying coverage in an employer's insurance program for disabilities arising from pregnancy did not violate section 703(a)(1) because "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all."[130]

This treatment of pregnancy as a facially neutral classification was confirmed by the Court the next year in *Nashville Gas Co. v. Satty*:[131] "Petitioner's decision not to treat pregnancy as a disease or disability for purposes of seniority retention is not on its face a discriminatory policy."[132] Accordingly, the exclusion of pregnancy from disability coverage again was ruled not to be a violation of section 703(a)(1). The *Satty* Court, however, did find a disparate impact resulting from the employer's policy that denied accumulated seniority to female employees returning from pregnancy leave. This finding was sufficient to establish a prima facie case under section 703(a)(2).[133]

What would the results in *Satty* have been if only one pregnant employee had been involved? Could the disparate impact case have been established if only one employee actually had been affected adversely by the policy? Congress did not wait for the Court to answer these questions. The 1978 amendments to Title VII overruled the *Satty* decision. Section 701(4) now provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .[134]

Although pregnancy technically is a facially neutral classification, Congress recognized that it is only transparently so and included it in the language of Title VII. The proposal in this Article, incorporating the superficially neutral category into Title VII jurisprudence, simply involves the identification of similarly transparent facially neutral employment practices and policies.

Our judicial system has recognized the need for wide-ranging inquiries into the purposes of Title VII. When confronted with the dual reality that few employers openly express their discriminatory intentions and that much discrimination takes institutionalized forms, the courts have accepted other indicators, pointers, and signs of discriminatory employment practices. For example, the use of statistics has become routine in Title VII cases not because the law man-

129. 429 U.S. 125 (1976).
130. *Id.* at 136 (making reference to the ruling in Geduldig v. Aiello, 417 U.S. 484 (1974)).
131. 434 U.S. 136 (1977).
132. *Id.* at 140.
133. *Id.* at 141-42.
134. 42 U.S.C. § 2000e (1982).

dates proportional outcomes[135] but because of what disproportionate outcomes tell us about discriminatory behavior. A statistical imbalance "is often a telltale sign" of purposeful discrimination.[136] Similarly, nonobjective hiring standards are "always suspect" because of their capacity for masking bias.[137] A lack of objective guidelines and the failure to post notices of job vacancies have been called "badges of discrimination."[138]

One more "sign" of discriminatory practice—a "badge of discrimination"—should be recognized. The use of a superficially neutral standard that adversely affected an individual member of a protected group should prompt an inquiry. The following questions would be asked: Are there reasons why undifferentiated statistics are not appropriate in this specific case? Is there a job-related reason for using this standard, even though it is only superficially neutral? If affirmative answers could not be given to either question, then a presumption of discrimination would exist similar to that recognized in *Furnco Construction Corp. v. Waters*:[139] "[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not [that] the employer, whom we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race."[140]

The Court repeatedly has asserted that "Congress' primary purpose [in enacting Title VII] was the prophylactic one of achieving equality of employment 'opportunities' and removing 'barriers' to such equality."[141] The proposed framework fits firmly within these stated purposes of Title VII. The language of the statute, the congressional response to the Court's handling of the transparently neutral classification of pregnancy, and the utilization of other devices to provide evidence of discrimination all provide firm support for the creation and application of a category of "superficially neutral" employment practices within the theoretical framework that has been suggested.

---

135. Title VII forbids requiring employers to grant preferential treatment to assure proportionate results.

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer . . . .

42 U.S.C. § 2000e-2(j) (1982).

136. *Teamsters*, 431 U.S. at 340 n.20. In a *Griggs*-type case, however, intent is not necessary to find unlawful discrimination.

137. Barnett v. W.T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975).

138. Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1383 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972).

139. 438 U.S. 567 (1978).

140. *Id.* at 577.

141. *Teal*, 457 U.S. at 449; *see also Moody*, 422 U.S. at 417 (aim of Title VII was to " 'achieve equality of employment opportunities and remove barriers that have operated in the past' " (quoting *Griggs*, 401 U.S. at 429-30)).

D. Teal *Revisited*

The *Teal* decision has been identified as the impetus for developing this two-stage analytic framework for use in disparate impact cases. A review of that ruling, measuring the adequacy of this proposal by the decision that produced it, demonstrates that the revised theory not only serves the needs revealed in the majority opinion, but also responds to the major objections expressed in the dissent. The task at hand following *Teal* is to find a way to incorporate the Court's emphasis on employment opportunitites and on the individual into disparate impact analysis. Although traditional disparate impact theory had relied on the results of employment practices for groups, the Court clearly interpreted section 703(a)(2) as including—even focusing on—the effect of such practices on employment opportunities for individuals. In this two-step procedure, the first step addresses the concern for opportunities and the second singles out the individual.

The majority opinion in *Teal* stressed the fact that Title VII guarantees all persons "the *opportunity* to compete equally . . . on the basis of job-related criteria."[142] Equal opportunity is possible only when artificial, arbitrary, and unnecessary barriers that have a discriminatory impact have been removed. The Court also stated that determining which barriers produce an adverse impact is not dependent on the ultimate results that those barriers yield in an employment process.

The first part of the proposed analysis—the identification of certain employment practices and policies that generally discriminate against members of a protected group—follows precisely the Court's expressed intent. These superficially neutral requirements are those barriers that are artificial, arbitrary, and unnecessary, unless they are shown to be job related. They are barriers that have a disparate impact at the opportunity stage on those persons whom Title VII was designed to protect.

As the Supreme Court found in *Dothard*, it makes sense to try to measure opportunity by use of undifferentiated statistics because the mere existence of the standards being challenged may skew the composition of actual applicant pools.[143] The purpose is to ascertain the impact certain policies and practices have on employment opportunity, not to describe the results that flow from their use. Unless reasons can be given why reliance on general population statistics is misguided in a particular case, the comparative opportunities for men and women to enter into competition for a job or promotion is reflected by this kind of statistical analysis.

Whereas the first step of the proposed analysis responds to the *Teal* focus on opportunity, the second stage incorporates the Court's concern for the individual. Following this theoretical framework, a prima facie case is established when an individual is disadvantaged by the use of a superficially neutral crite-

142. *Teal*, 457 U.S. at 451. As *Griggs* states, standards should "measure the person for the job and not the person in the abstract." *Griggs*, 401 U.S. at 436.

143. *Dothard*, 433 U.S. at 330.

rion. It is not sufficient to prove that an employer used a standard that is generally discriminatory for the population at large. A plaintiff also must demonstrate that she has been affected while attempting to pursue an employment opportunity. Through such a process, the emphasis in the *Teal* decision on both opportunity and the individual is accommodated.

This framework also addresses major objections raised by Justice Powell in his dissent—at least on their face. Justice Powell argued that "[t]here can be no violation of Title VII on the basis of disparate impact in the absence of disparate impact on a *group*."[144] He noted that "discriminatory-impact claims cannot be based on how an individual is treated in isolation from the treatment of other members of the group."[145] These statements, in themselves, are accurate. The first stage of the proposed analysis applies this reasoning to an individual's opportunity to compete. Disparate impact on a group is precisely what the category of superficially neutral standards is intended to encompass. This category places the individual into the context of the broader group.

Justice Powell could not bring himself to agree with the majority's focus on the individual in a disparate impact context: "Indeed, if only one minority member has taken a test, a disparate-impact claim cannot be made . . . ."[146] Citing cases in which courts have ruled that the value of statistics varies with the sample size, he concluded that "[a] sample of only one would have far too little probative value to establish a prima facie case of disparate impact."[147] The statistical determination that a test is superficially neutral, however, is based on a very large sample. Powell's statement that a disparate impact claim cannot be made when only one person takes a test illustrates the alternative to the analytic framework proposed here: the use of a particular test on which minorities achieve demonstrably lower results than whites is ruled discriminatory in one setting but not in another simply because one employer has more persons in a position to take the test than another employer. Title VII, however, was not intended to offer protection to employers on the ground that they have minimized the number of minority candidates competing in an employment process.

The application of the superficially neutral criterion to employment policies and practices and the examination of the impact of those standards on particular individuals provides a mechanism for considering Justice Powell's concerns with sample size and group results, while not losing sight of the majority's emphasis on the opportunity each individual is afforded in the employment setting.

IV. CONCLUSION

The lesson from *Connecticut v. Teal*[148] is the same as that put forward so clearly in *Griggs*: If an employer is using a test, selection device, or other employment standard that has an adverse impact on a protected group, it should

144. *Teal*, 457 U.S. at 459 (Powell, J., dissenting).
145. *Id.* at 462 (Powell, J., dissenting).
146. *Id.* at 462-63 (Powell, J., dissenting).
147. *Id.* at 463 n.7 (Powell, J., dissenting).
148. 457 U.S. 440 (1982).

either validate that test as job related or cease using it. Interpreted in this light, the *Teal* decision simply reaffirms the most established principle in employment discrimination law.

The majority in *Teal* advanced a second working hypothesis. If the analytic methods that have been used in the past to evaluate employment practices and policies do not fit a new fact situation, the Court will not be bound by them. The purposes of Title VII—to achieve equality of employment opportunity and to remove barriers to such equality—take precedence over the specific devices that have been used in the service of that purpose. The Court moved beyond the neat division that had arisen through the adjudication of earlier cases—that one theory addresses only individuals and process and that another concerns itself only with groups and results—when it became clear that such a division frustrates rather than promotes the purposes of Title VII.

The *Teal* Court, however, did not sweep away a decade of precedent. Rather, its focus on the individual and on employment opportunity in a disparate impact case adds to the established "rules" for identifying Title VII violations. The *Costa II* and *Massarsky* cases illustrate the types of cases that can slip through the gap between the traditional approaches of disparate impact and disparate treatment. These decisions also are evidence that, while the *Teal* Court provided the directive to close this gap, there is a need for a conceptual framework to guide lower courts as they attempt to incorporate the *Teal* holding into their future deliberations.

Such a framework has been developed in this Article. The proposed two-stage analysis, making use of the category of superficially neutral classifications, is designed to promote enforcement of the *Teal* mandate. Building on established precedent, this approach guarantees that any individual who is unfairly denied an employment opportunity will not be without recourse simply because the facts of her case do not follow the guidelines in the traditional theories of discrimination.

The intent in proposing this approach is to follow the *Teal* Court in promoting a basic premise: When a plaintiff is denied relief, that denial should be based on a finding that the employment practice in question does not violate the purposes of Title VII, rather than on a finding that the facts of a particular case do not conform to those cases that have shaped the existing framework for analyzing the problem. As new fact situations present themselves, the courts have three options: construe all of them as fitting within the contours of those cases that shaped existing theories; recognize the uniqueness of new circumstances and address them outside the articulated conceptual framework; or modify established analytic procedures or develop new ones. The first option entails an unwarranted assumption that the facts of the first cases adjudicated under a statute will define the statute's reach. The second option poses obvious problems for judicial consistency. This Article has chosen to pursue the third option. The Court's argument in *Teal* makes it difficult to see how the choice could be otherwise.