EMPLOYMENT DISCRIMINATION—TITLE VII—SIGNIFICANT BASES REQUIRED TO SUPPORT BUSINESS JUSTIFICATION DEFENSE TO DISPARATE IMPACT OF RESIDENCY REQUIREMENT AND PRIMA FACIE CASE PROPERLY DETERMINED BY STATISTICAL REFERENCE TO RELEVANT LABOR MARKET—*Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J.*, 940 F.2d 792 (3d Cir. 1991).

Congress enacted Title VII of the Civil Rights Act[1] (Act) in 1964 to prohibit employers from depriving any individual of employment opportunity on the basis of race, religion, gender, color or national origin.[2] Initially, the Act's aim was to prohibit disparate treatment,[3] but it was later interpreted to proscribe dis-

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[1] 42 U.S.C. § 2000e-2000e(17) (1988) (amended 1991).

[2] 42 U.S.C. § 2000e-2(a). *See* Mark S. Brodin, *Reflections on The Supreme Court's 1988 Term: The Employment Discrimination Decisions and The Abandonment of The Second Reconstruction*, 31 B.C. L. REV. 1, 1 (1989). The need for civil rights legislation arose because "black people were forced to confront this country's racist institutions without the benefit of equal access to those institutions." A. Leon Higginbotham, Jr., *An Open Letter To Justice Clarence Thomas From a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1016 (1991). Opponents to the Act included Ronald Reagan, then Governor of California, George Bush, who was then a United States Senator, and United States Senator Strom Thurmond. *Id.* at 1019. Title VII was born out of this struggle. MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION § 2.6(3)(c) 59-60 (1990). The Act meant an end to the discriminatory denial of job opportunities for minorities and women. *Id.* Title VII of the Civil Rights Act provided in relevant part:

> 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) 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.

42 U.S.C. § 2000e-2(a).

[3] International Bd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII."). Disparate treatment, the Court explained in *International Bd. of Teamsters*, occurs any time an employer treats some workers less favorably because of their race, religion, gender, color or national origin. *Id.*; *see* Emilie M. Meyer, Note, *United States Supreme Court Clarifies Standards for Statistical Evidence and Burdens of Proof in Private Litigation Under the Disparate Impact Theory*, 20 SETON HALL L. REV. 831, 831 n.3 (1990). Where a claimant alleges numerous examples of unlawful employment decisions against members of the same protected group, it is possible to pursue a claim under a disparate-treatment theory. ROSSEIN, *supra* note 2, § 2.2(10) at 27. A plaintiff's prima facie discrimination case must ordinarily show several elements: (1) that the plaintiff belongs to a protected

parate impact as well.[4] Disparate-impact cases—unlike disparate-treatment suits, which involve patently discriminatory employment practices—entail facially-neutral selection schemes that adversely and disproportionately affect minorities.[5] Underlying the disparate-impact model is the premise that certain employment

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class, has applied and qualified for a position that the employer was seeking to fill and despite the plaintiff's qualifications was declined and, (2) following the rejection, the job remained vacant and the employer continued to seek candidates with complainant's qualifications. Meyer, *supra*, at 831 n.3 (1990) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)). An employer may rebut the inference of intentional discrimination by producing evidence of a non-discriminatory reason for its decision. *Id.* at 832 n.3 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-54 (1981)). If the inference is successfully rebutted, the complainant must prove that the proffered reason is pretextual. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804). If the plaintiff establishes that race or another classification was a substantial factor in the employer's determination, the defendant is required to demonstrate that it would have arrived at the same decision regardless of the plaintiff's classification. *Id.* (citing Price Waterhouse v. Hopkins, 409 U.S. 228 (1989)). *See also* Linda W. Filardi, Note, *Once Plaintiff Demonstrates Illegitimate Factor Motivated Employment Decision, Defendant Must Show that Same Decision Would Have Been Made Absent the Unlawful Factor to Avoid Liability*, 20 SETON HALL L. REV. 860 *passim* (1990) (reciting the development of standards of proof in Title VII disparate-treatment cases).

Although Title VII details instances of illegal employment practices, the statute does not define the term "discriminate." ROSSEIN, *supra* note 2, § 2.1 at 2. Rather, the term's meaning has evolved from judicial interpretation of the proscribed acts listed within the statute. *Id.* (citing 42 U.S.C. §§ 2000e-2 and 3).

[4] The United States Supreme Court formulated the disparate impact analysis in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *See infra* text accompanying notes 36-43 for a discussion of *Griggs*. The focus of disparate-impact theory is upon the negative effects of certain employment practices on Title VII-protected groups. ROSSEIN, *supra* note 2, § 2.3 at 34-36. Proof of discrimination is not necessary. *Id.*

[5] ROSSEIN, *supra* note 2, § 2.3 at 34-35. Minority groups are subordinate groups that have substantially less control or power over their individual lives than do members of the dominant group. RICHARD T. SHAEFER, RACIAL AND ETHNIC GROUPS 5 (3d ed. 1988). Typically, a minority does not share in proportionate numbers those things a society values. *Id.* Those in the minority generally experience unfavorable treatment from the dominant majority group marked, for example, by prejudice, discrimination and segregation. *Id.*

Facially-neutral selection devices that make no reference to any particular group may involve subjective practices. *See, e.g.*, Watson v. Fort Worth Bank, 487 U.S. 977 (1988) (holding that employers may look to employee performance records). Some selection schemes condition hiring or advancement by requiring a high school diploma or the passing of an intelligence test. *See, e.g.*, *Griggs*, 401 U.S. at 427-28 (1971). In *Griggs*, the seminal Title VII disparate-impact case, the United States Supreme Court held that liability was established when a device that was both neutral on its face and in its intent measured "the person in the abstract" rather than the "person for the job." *Id.* at 436. This standard prevailed until recently when, faced with a multi-component selection system, the plaintiff had to identify the specific discriminatory device, as well as a nexus between the device and the statistical disparity. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 647-48 (adjudicating claims of discriminatory practices including personal referrals, nepotism, rehiring preferences, a lack of standardized criteria, separate hir-

practices, although neutral on their face, may operate in a manner as abhorrent as intentional discrimination.[6]

When disparate-impact controversies arise, courts undertake a three-tier analysis.[7] To make out a prima facie case, the disparate-impact plaintiff must identify the facially-neutral hiring practices that induced a statistically-significant disparity between the racial composition of the employer's work force and the relevant labor market.[8] Once a plaintiff successfully establishes a prima facie case, the burden of production[9] shifts to the employer to present a business justification[10] for the continued exercise of the

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ing criteria and failure to promote from within). *See infra* text accompanying notes 77-93 for a discussion of *Wards Cove*.

6 Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988). The cause of racial disparity in employment may be due to the use of apparently benign practices, such as personal referrals. *See* Howard Gleckman et al., *Race in the Workplace: Is Affirmative Action Working?*, BUS. WEEK, July 8, 1991, at 52 (advancing the theory that the "old-boy network" may hinder the growth of black corporate managers). One theory explaining the use of these common practices is the "interest theory of discrimination." Joe R. Feagin & Clarese B. Feagin, *Theories of Discrimination*, *in* RACISM AND SEXISM: AN INTEGRATED STUDY 41, 43 (Paula S. Rothenberg ed., 1988). The fundamental premise of this theory is that the motivating interest behind discrimination is the desire to protect one's own position. *Id.*

7 Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (identifying a tripartite approach in disparate-impact litigation: plaintiff states prima facie case, employer may then show challenged employment scheme is job related and, finally, plaintiff may show other, equally viable schemes are less discriminatory to minorities) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

8 *Wards Cove*, 490 U.S. at 650. The court must determine the relevant labor market on a case-by-case basis. *See, e.g.*, Williams v. Owens-Illinois, Inc., 665 F.2d 918, 927 (9th Cir. 1982) (defining employer's labor supply as question of fact); Hazelwood School District v. United States, 433 U.S. 299, 311-12 (1977) (enunciating that in full-time, fixed location employment, population of some portion of surrounding community usually taken as relevant labor supply); Domingo v. New England Fish Co., 445 F. Supp. 421, 433 (W.D. Wash. 1977) (stating that courts must utilize flexible approach in defining relevant labor market). Once the court determines the relevant labor market in a specific case, the court should compare the racial composition of the qualified population in that labor pool to the racial composition of the at-issue jobs. *Hazelwood*, 433 U.S. at 308. A prima facie case of disparate impact may be determined by a gross statistical disparity in the racial make-up of these two populations, but not by comparing the challenged work force to the population as a whole. *Wards Cove*, 490 U.S. at 650.

9 Filardi, *supra* note 3, at 861 n.5. The burden of production requires the plaintiff to present sufficient evidence of a violation to justify a finding in favor of the party asserting the allegation. *Id.* Most often, the burden of production falls upon the complainant. *Id.* The burden of persuasion, in contrast, puts the onus on the party required to introduce sufficient evidence to avoid an unfavorable ruling. *In re* Winship, 397 U.S. 358, 364 (1970). After all the evidence has been introduced, the trier of fact must rule against the party with the burden of persuasion unless otherwise convinced of the validity of the claim. *Id.*

10 Gleckman et al., *supra* note 6, § 2.4 at 37. The Court of Appeals for the Sev-

disputed practice.[11] If the defendant succeeds, the plaintiff may respond with proposals for non-discriminatory alternatives.[12] If the plaintiff offers an alternative strategy that would correct the disparity and meet the employer's legitimate business goals, the court may view the offending practice as a mere pretext for discrimination.[13]

Recently, in *Newark Branch, NAACP v. Town of Harrison, N.J.*,[14] the United States Court of Appeals for the Third Circuit addressed the relevant labor market and business-justification defenses to an apparently discriminatory hiring practice.[15] Despite the United States Supreme Court's increasingly restrictive interpretation of Title VII,[16] the Third Circuit approved application

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enth Circuit averred that the business necessity defense more appropriately would be termed the "issue of legitimate employer purpose." Allen v. Seidman, 881 F.2d 375, 381 (7th Cir. 1989), *quoted in* Newark Branch, NAACP v. Town of Harrison, N.J., 940 F.2d 792, 804 (3d Cir. 1991).

11 *Wards Cove*, 490 U.S. at 659.

12 *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Traditionally, because the employer had such a heavy burden to produce a legitimate business necessity, the third step, allowing the plaintiff to show alternative practices that are less discriminatory, was rarely reached. Gilda V. Boyer, Comment, *Redefining The Evidentiary Burdens in Title VII Disparate Impact Employment Discrimination Cases*, 15 J. CORP. L. 573, 579 n.54. *See* Mack A. Player, *Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio*, 17 FLA. ST. U. L. REV. 1, 10 (1989) (explaining traditional Title VII impact cases proceeded in two evidentiary stages, with initial burden on plaintiff, which, if successful, would require employers to present a business justification).

13 *Albemarle*, 422 U.S. at 475.

14 940 F.2d 792 (3d Cir. 1991).

15 *Id.* at 798-801. In Harrison, positions for non-uniformed civil servants were typically filled by word-of-mouth referrals. *Id.* at 796. Referrals are a typical constituent of the "old-boy network." Gleckman et al., *supra* note 6, at 52.

16 *See, e.g.*, West Virginia Univ. Hosp. v. Casey, 111 S.Ct. 1138 (1991) (ruling that expert witness fees, generally, cannot be recovered by successful Civil Rights plaintiffs); EEOC v. Arabian American Oil Co., 111 S.Ct. 1227 (1991) (holding federal job discrimination law does not protect U.S. citizens working for U.S. companies abroad); Price Waterhouse v. Hopkins, 409 U.S. 228 (1989) (finding causation language of Title VII simply requires discrimination to be a motivating factor); Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) (making employer's burden of proof a negative element of plaintiff's case); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to review governmental use of affirmative action); Independent Fed'n of Flight Attendants v. Zipes, 488 U.S. 1029 (1989) (holding attorney's fees may be awarded against intervenors only where intervention was frivolous); Lorance v. AT&T Technologies Inc., 409 U.S. 900 (1989) (finding Title VII plaintiff limited to administrative statutory period to attack intentional discriminatory seniority systems, whether or not practice has yet harmed anyone); Public Employees Retirement Sys. of Ohio v. Betts, 492 U.S. 158 (1989) (placing certain employment decisions beyond the reach of equal employment opportunity); Paterson v. McLean Credit Union, 484 U.S. 814 (1987) (limiting protection under § 1981 to hiring and promotion decisions).

of the relevant labor market inquiry to hiring practices and enforced the requirement that employers establish that their disputed practice serves legitimate employment goals "in a significant way."[17]

The Town of Harrison, New Jersey, hired civil servants in accordance with its residency requirement, Ordinance 747,[18] which it adopted in accord with the New Jersey Act Concerning Residence Requirements for Municipal and County Employees (New Jersey Residence Act).[19] Given the predominantly white

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[17] *Town of Harrison*, 940 F.2d at 800-01.

[18] NAACP, Newark Branch v. Town of Harrison, N.J., 749 F. Supp. 1327, 1330 (D.N.J. 1990). The Town of Harrison instituted Ordinance 747 on October 6, 1981. *Id.* Ordinance 747 provided, among other things, that eligible applicants for employment positions in the Town of Harrison must be residents, except in certain narrowly defined circumstances, and that any non-residents appointed to employment positions must become residents within a specified period of time as determined by the job classification. *Id.*

[19] *Town of Harrison*, 940 F.2d at 795. The New Jersey Residence Act provided in relevant part:

> Unless otherwise provided by law, the governing body of any local unit may by resolution or ordinance, as appropriate, require, subject to the provisions of this act, all officers and employees employed by the local unit after the effective date of this act to be bona fide residents therein.

N.J. STAT. ANN. § 40A:9-1.3 (West 1980). The Act further stated:

> Any local unit having adopted the provisions of Title 11 . . . by ordinance or resolution, as appropriate, may therein limit the eligibility of applicants for positions and employments in the classified service of such local unit to residents of that local unit. Upon receipt of a copy of such ordinance or resolution, as the case may be the Civil Service Commission thereafter shall not open such local unit's eligibility lists to anyone who is not a bona fide resident of the local unit at the time of the closing date following the announcement of examination. . . .

N.J. STAT. ANN. § 40A:9-1.4 (West 1980). The Act continued:

> The governing body of a local unit which has adopted a resolution or ordinance, as the case may be, pursuant to section 1 of this act, shall require therein that all nonresidents subsequently appointed to positions or employments shall become bona fide residents of the local unit within 1 year of their appointment. . . . Failure of any such employee to maintain residency in a local unit shall be cause for removal or discharge from service.

N.J. STAT. ANN. § 40A:9-1.5 (West 1980). According to the Third Circuit, a municipality cannot, consistently with the New Jersey Residence Act, require its police and firemen to live within its borders; but, under N.J. STAT. ANN. § 40A:14-1231.1a, it may limit applicants for those jobs to its own residents. *Town of Harrison*, 940 F.2d at 795 n.1 (citing *NAACP*, 749 F. Supp. at 1330). The extent of the Act is limited in that it must conform to state and federal discrimination in employment laws. *Id.* at 795.

Applicants for uniformed employee positions in Harrison were required to undergo a State examination process. *Id.* at 796. The examination was administered by the State Department of Personnel, and was used to fill positions for uniformed

demographics in Harrison—only .2% of Harrison's population was Black[20]—the Town had never employed a black worker under the residency requirement.[21] The Town's private work force, however, was more than twenty-two percent Black primarily due to Harrison's proximity to the City of Newark, and its accessibility from Bergen, Essex, Hudson and Union Counties.[22]

The Newark, Paterson, Passaic and Jersey City, New Jersey branches of the National Association for the Advancement of Colored People (NAACP)[23] instituted a Title VII suit on July 31, 1989, alleging that Harrison's enactment and enforcement of the residency requirement unfairly disadvantaged Blacks.[24] The United States District Court for the District of New Jersey dis-

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civil servants. *Id.* In 1988, the examination forms indicated that cities with residents-only eligibility lists would not consider hiring non-residents. *Id.* It had been Harrison's policy to direct the Department of Personnel to classify employment hopefuls for civil service positions by municipal residency. *Id.* The applications for municipal police forces stated in bold-face type: " 'IN ALL CASES, APPLICANTS MUST BE RESIDENTS OF THE MUNICIPALITY AS OF THE ANNOUNCED CLOSING DATE IN ORDER TO BE PLACED ON THE RESIDENT ELIGIBLE LIST. THOSE MUNICIPALITIES MARKED (*) [Harrison was marked with an *] REQUIRE THAT YOU ALSO BE A RESIDENT AT THE TIME YOU ARE APPOINTED.' " *See NAACP*, 749 F. Supp. at 1336 (quoting the Town of Harrison's official examination applications). From the aforementioned list the Town would create its pool of candidates. *Town of Harrison*, 940 F.2d at 796.

20 *NAACP*, 749 F. Supp. at 1328. At the author's request, nouns referring to specific groups or people are capitalized; *see, e.g.*, HARBRACE COLLEGE HANDBOOK 104-05 (11th ed., 1990) (allowing capitalization when referring to peoples and their languages).

21 *Id.* at 1337. One exception was noted: a non-resident black woman had been hired for a highly-skilled teaching position. *Id.* at 1338 n.6; *Town of Harrison*, 940 F.2d at 795.

22 *NAACP*, 749 F. Supp. at 1328. The civilian labor force in these four counties totalled 1,353,555, of which 214,747 were Blacks. *Id.* at 1338. Of the 391,612 civilian laborers in Essex County, approximately 33% were Black and the population of Newark was approximately 60% Black. *Id.*

23 The NAACP is a civil rights organization, founded in 1909, dedicated to the civic, economic, political and social betterment of minorities. 17 FUNK & WAGNALLS NEW ENCYCLOPEDIA 131 (1979). Paramount among the accomplishments of the NAACP was its role in bringing about the Supreme Court decision declaring racial segregation in public schools unconstitutional. *Id. See* Brown v. Board of Education (Brown I), 347 U.S. 483 (1954) (announcing that segregated schools are inherently unequal); Brown v. Board of Education (Brown II), 349 U.S. 294 (1954) (ordering desegregation of public schools). The NAACP continues to work for equality by defending the right of all citizens to have equal opportunity in employment, housing and education. *Id.*

24 NAACP, Newark Branch v. Township of Harrison, N.J., No. 89-3239 (D.N.J. filed July 31, 1989). In addition, six similar suits were filed in the same court against municipalities with residency requirements similar to those of Harrison. *See Town of Harrison*, 940 F.2d. at 796 n.3. The defendants in these suits were Bayonne, Clifton, Fort Lee, Kearny, Millburn and West Orange. *Id.*

missed the complaint, finding that the plaintiffs lacked standing because of their failure to allege harm to their individual members.[25] The district court denied the plaintiffs an opportunity to cure the complaint.[26]

The United States Court of Appeals for the Third Circuit upheld the dismissal, but reversed the denial of plaintiffs' motion to amend their complaint.[27] During the pendency of the appeal in the Third Circuit, the Newark branch of the NAACP filed a second suit advancing identical claims and relief.[28] Upon consolidation of these two actions, the NAACP filed an amended complaint alleging that individual members of its organization were denied employment because of the residency requirement.[29] The district court, after a bench trial, asserted that Harrison's residency requirement had a substantial and adverse impact on Blacks.[30] The district court held a separate hearing on remedies and entered a decree forbidding the Town of Harrison from relying further on Ordinance 747, and requiring the Town to take affirmative steps to recruit municipal employees from the relevant labor market.[31] Thereafter, the Town of Harrison appealed this judgment.[32]

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25 *See NAACP*, 749 F. Supp. at 1328-29 (articulating the case's procedural posture). Specifically, the court based plaintiffs' lack of standing on their failure to allege, as a threshold matter, the injury-in-fact requirement of standing. *See id.* at 1328.

26 *Id.* at 1328-29.

27 Newark Branch, NAACP v. Town of Harrison, N.J., 907 F.2d 1408, 1416-17 (3d Cir. 1990). The court held that an order dismissing a complaint without prejudice was distinct from a dismissal of the action and, therefore, was not a final and appealable order. *Id.* at 1416. *Cf.* Welch v. Folsom, 925 F.2d 666, 668 (3d Cir. 1990) (citing *Town of Harrison*, 907 F.2d 1408, for proposition that order of dismissal is not final when plaintiff has opportunity to cure deficiencies and refile); Communications Workers of Am. v. American Tel. and Tel., 932 F.2d 199, 205 (3d Cir. 1991) (discussing final order as relates to collateral order doctrine—citing the venerable case, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)).

28 *See* Newark Branch, NAACP v. Town of Harrison, N.J., 940 F.2d 792, 797 (3d Cir. 1991).

29 *Id.* The NAACP argued that even though Harrison's population was less than 1% Black, black representation among civilian employees was more than 22% in 1988. *NAACP*, 749 F. Supp. at 1331. All but a few of these persons commuted to Harrison from neighboring communities. *Id.*

30 *NAACP*, 749 F. Supp. at 1337. The Third Circuit opined that in light of Harrison's extended history of residents-only hiring, "reliance on affirmative recruitment efforts was appropriate to 'dissipate the lingering effects of pervasive discrimination.' " *Id.* (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 476 (1985)).

31 *See Town of Harrison*, 940 F.2d at 797.

32 *See id.* The provisions of the lower court's decree required the cessation of all discriminatory hiring practices, including adherence to Ordinance 747, personal

On appeal, the Third Circuit addressed the relevant labor market and business-justification defenses, as refined by *Wards Cove Packing Co. v. Atonio*.[33] Judge Mansmann affirmed the district court's definition of the relevant labor market,[34] and held that the employer bore the burden of producing evidence that a challenged practice served legitimate employment goals "in a significant way."[35]

Recognizing plaintiffs' inherent difficulties with proving intent in employment discrimination, the United States Supreme Court, in 1971, forged the disparate-impact challenge in *Griggs v. Duke Power Co.*.[36] *Griggs* involved a class action suit brought by Blacks who were adversely affected by Duke Power's requirement of either a high school diploma[37] or passing standardized general-intelligence tests before employment in specific depart-

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referrals and all other selection efforts limited to town residents. *Id.* at 805. Harrison was permitted to give preference to residents of Hudson and Essex Counties when filling vacancies for uniformed positions, as well as requiring fire and crime fighters to reside within a fifteen mile radius of the town. *Id.* Applicable to all municipal positions, the decree provided in relevant part:

> Harrison shall in good faith seek to recruit and employ qualified black applicants in numbers reflecting their availability in the relevant labor market. To achieve that objective, Harrison shall adopt and implement affirmative recruitment activities directed towards potential black applicants in addition to recruitment directed at other potential applicants and shall use fair and non-discriminatory hiring and other employment procedures.

*Id.* at 805-06 (quoting Decree at 4). The relief granted in Sheet Metal Workers v. EEOC, 487 U.S. 421 (1986), was more expansive than that ordered by the district court in *NAACP. Town of Harrison*, 940 F.2d at 807. In *Sheet Metal Workers*, the Court imposed strict quotas, setting a goal of 29.23% non-white membership. *Sheet Metal Workers*, 478 U.S. at 437 (1986).

[33] *Town of Harrison*, 940 F.2d at 798.

[34] *Id.* at 812. The United States District Court for the District of New Jersey defined Harrison's relevant labor market as a four-county geographical area, which included Hudson, Bergen, Essex and Union Counties. *NAACP*, 749 F. Supp at 1338.

[35] *Town of Harrison*, 940 F.2d at 804 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989)). Cases in which employer justifications for discriminatory employment practices prevailed include: New York Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979) (approving the district court's holding that the city's regulation against hiring illegal drug users was a legitimate employment safety goal, even where those enrolled in methadone treatment programs were similarly excluded); EEOC v. North Hills Passavant Hosp., 466 F. Supp. 783, 799 (W.D. Pa. 1979) (expressing that the employer's requirement that its workers have available private transportation to reduce tardiness and enable employees to remain at work until their shifts are completed was justified).

[36] 401 U.S. 424 (1971). The Court decided *Griggs* on the heels of Fourteenth Amendment precedents. *See* Linda L. Holdeman, *Civil Rights in Employment: The New Generation*, 67 DENV. U. L. REV. 1, 33-34, 34 n.187 (1990) (citations omitted).

[37] *Griggs*, 401 U.S. at 424. According to the 1960 census reports for North Caro-

ments.[38] The Court found these two tests, which operated to exclude Blacks from higher paying positions, to be unrelated to the performance of those jobs.[39]

In the landmark *Griggs* opinion, Chief Justice Burger interpreted Title VII as prohibiting employment practices that excluded minorities at a disproportionate rate when the practice bore no demonstrable relationship to job performance.[40] The Chief Justice emphasized that the employer retained the burden of establishing a manifest relationship between the disputed practice and the sought-after employment.[41] The touchstone of the case, articulated Chief Justice Burger, was business necessity.[42] Applying this principle, the Court found that the employer violated Title VII by conditioning employment in the higher-paying jobs upon criteria not shown to bear an exhibited relationship to the performance of those positions.[43]

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lina, 34% of white males received their high school diplomas, whereas only 12% of black males had achieved the degree. *Id.* at 430 n.6.

38 *Id.* at 427-28. The employer overtly practiced racial discrimination before the onset of the Civil Rights Act, but ceased to do so following the Act's ratification. *Id.* at 426-28. The employer had, however, merely adopted new and apparently neutral policies with "a markedly disproportionate" discriminatory effect upon "Negroes." *Id.* at 429.

39 *Id.* at 431.

40 *Id.* at 429-33. The Justice concluded that Title VII proscribed the elimination of "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431. In so stating, the Justice deferred to the EEOC Guidelines, which provided in relevant part:

> The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

*Id.* at 433 n.9 (quoting EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966). Where intelligence tests have demonstrated a statistically significant correlation with other accepted indicators of job performance, the Court upheld the validity of those personnel examinations. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 411 (1974).

41 *Griggs*, 401 U.S. at 432. The Court stated that Congress placed this burden upon the employer. *Id.*

42 *Id.* at 431.

43 *Id.* Special efforts expended by the defendant appeared to belie discriminatory intent. *Id.* at 432. For instance, the company offered to aid undereducated employees by financing two-thirds of the cost for high school training. *Id.* Chief Justice Burger expressed, however, that good intentions were not a formula for redemption where employment practices or testing mechanisms perform as "built-in headwinds" for minorities. *Id.* Thus, the Justice stated that the thrust of the Civil

The Supreme Court again applied the disparate-impact inquiry in *Albemarle Paper Co. v. Moody*.[44] At issue was the legitimacy of the employer's seniority system and employee testing program, which the respondents contended hampered the advancement of black employees beyond lower-paying jobs.[45] Despite Albemarle's validation study, which ostensibly established the job relatedness of the testing program, the Court indicated that it remained unconvinced.[46] The Court observed, however, that the employer had recently begun to amend its testing practices, perhaps bringing those practices within the provisional use of testing authorized by the Equal Employment Opportunity Commission (EEOC).[47] Accordingly, Justice Stewart, writing for the Court, remanded the matter to the district court for further consideration in light of the EEOC Guidelines.[48] While conceding that the appropriate standard for proving a manifest relationship between the disputed practice and job performance had not yet been clarified, the Court nevertheless held that the employer failed to prove its challenged program was job-related.[49]

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Rights Act was to prevent the consequences of such prejudicial requirements. *Id.* The *Griggs* Court responded to the company's assertion that their practices were sanctioned under § 703(h) of the Civil Rights Act by stating that Congress had commanded that such requirements bear an apparent relationship to the job in question. *Id.* at 433-36.

44 422 U.S. 405 (1975).

45 *Id.* at 405-07, 409 n. 57. Respondents, plaintiffs in the district court, were past and present black employees of the defendant's paper mill in Roanoke Rapids, North Carolina. *Id.* at 408. The employees sought permanent injunctive relief against all policies, practices and customs alleged to be in violation of Title VII. *Id.* at 409. Similar to the employer in *Griggs*, Albemarle employed two distinct tests, the Revised Beta Examination, which purported to test nonverbal intelligence, and the Wonderlic Personnel Test (also involved in the *Griggs* litigation), which allegedly measured verbal skill. *Id.* at 410-11. The test, which affected only those employees hired after the exams were adopted, required workers seeking to transfer to more lucrative jobs to have a high school diploma and pass the Beta and Wonderlic exams, even though some white incumbents could not pass the tests. *Id.* at 411, 429.

46 *Id.* at 435-36.

47 *Id.* at 436. The EEOC was established under 42 U.S.C. § 2000e-4, which empowered the Commission to prevent unlawful employment practices as defined by 42 U.S.C. §§ 2000e-2 & 3 of the Civil Rights Act. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1008 (1988) (Blackmun, J., concurring in part). The five members are appointed by the President, with the Senate's consent, for a five-year term. *Id.* The President can choose one member to chair the Commission and another to serve as vice chairman. *Id.* Of the five members, not more than three are ever members of the same political party. *Id.*

48 *Id.* The EEOC Guidelines are cited at 29 C.F.R. § 1607 (1991).

49 *Id.* at 435-36. Albemarle attempted to establish a business-justification defense by retaining a private expert to validate its tests. *Id.* at 429-30. The study entailed the collection of test scores from 105 incumbent employees, all but four of

The *Albemarle* Court reaffirmed that the *Griggs* disparate-impact analysis parallels the disparate-treatment model.[50] Justice Stewart stated that evidence proving the racial composition of an employer's workforce is significantly different from the applicant pool sufficed to establish a prima facie discrimination claim.[51] Further, the majority held that the employer also needed to prove that existing employment practices were related to a legitimate business goal.[52] If the employer successfully met its bur-

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whom were white. *Id.* at 430 & n.25. Although the company adopted a Wonderlic test score of 18 as the minimum passing grade for new job applicants, some of the control group members scored as low as 8. *Id.* at 428 & n.24, 429 n. 25. These surveys, according to the district court, proved the job relatedness of the personnel tests. *Id.* at 430. The court of appeals, as well as the United States Supreme Court, disagreed. *Id.* The Supreme Court invoked the EEOC Guidelines available to employers that seek to substantiate their employment tests. *Id.* at 430-31. The *Albemarle* Court emphasized the standard for job relatedness:

> [D]iscriminatory tests are impermissible unless shown, by professionally accepted 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.'

*Id.* at 431 (quoting 29 C.F.R. § 1607.4(c)). These guidelines, the Court noted, constituted the administration's interpretation of the Civil Rights Act of 1964, "and consequently they are 'entitled to great deference.' " *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971)). The Court pronounced that a test in violation of Title VII can only survive scrutiny if it is shown, by acceptable methods, to be significantly related to job performance. *Id.* (citing 29 C.F.R. § 1607.4(c)).

Justice Blackmun, in a separate concurrence, stated that courts should not strictly adhere to EEOC Guidelines because they may leave employers with little choice other than expensive validation studies or subjective quota systems for employment selection. *Id.* at 449 (Blackmun, J., concurring).

[50] *See id.* at 436.

[51] *Id.* at 425.

[52] *Id.* Regarding the respondents' claim for lost wages, which had not been properly pleaded in the initial action, the Court admitted that Title VII provided no discernable solution in a situation where, as here, the employer may have been prejudiced by the respondents' "eccentric" manner of prosecution. *Id.* at 424. The Court left the question open for the district court to resolve upon remand. *Id.* at 424-25. Concurring in the judgment, Justice Marshall agreed with the Court that Title VII did not present a legal bar to claims for back pay. *Id.* at 440 (Marshall, J., concurring). The Justice referred to the doctrine of laches as one possible bar, but noted the difficulty of establishing such a defense. *Id.* In a separate concurrence, Justice Rehnquist articulated that respondents should not have been denied back pay on the grounds that the employer's Title VII violation was in "good faith." *Id.* at 444 (Rehnquist, J., concurring). The Justice stated that a recurring difficulty in this area was confirming a nexus between the employer's wrongful conduct, which had be deemed a violation of Title VII, and a discernable amount of wages lost as a result of that conduct. *Id.* at 445 (Rehnquist, J., concurring) (citing United States v. St. Louis S.F.R. Co., 464 F.2d 301, 311 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973)). Justice Blackmun also concurred with the Court's opinion, stressing the statutory support for awards of back pay in Title VII suits:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged

den, the Court continued, the plaintiff was permitted to show that other available selection mechanisms were less prejudicial.[53]

Establishing the high water mark of Title VII interpretation, the United States Supreme Court, in *Connecticut v. Teal*,[54] rejected the "bottom line" defense to Title VII liability.[55] Connecticut required its employees to pass a written test that disproportionately denied Blacks consideration for promotion.[56] Although the examination screened out a higher percentage of Blacks than Whites, among the employees who passed the test, black candidates received promotions in greater proportions than did their white counterparts.[57] Nevertheless, the Court posited that Congress did not intend to permit discrimination against some Blacks merely because other Blacks were treated favorably.[58] The Court

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> in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action *as may be appropriate, which may include*, but is not limited to, reinstatement or hiring of employees, *with* or *without* back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (1988) (amended 1991) (quoted in *Albemarle*, 422 U.S. at 447 (Blackmun, J., concurring) (emphasis added)). Justice Blackmun emphasized the Court's discretionary power. *Id.* Alternatively, the Justice questioned whether an employer's good faith is relevant when deciding to award back pay. *Id.* (citations omitted).

In a partial dissent, Chief Justice Burger declared that the Congressional purpose for empowering courts with discretionary authority as to back-pay awards in Title VII cases was counterproductive. *Id.* at 450-51 (Burger, C.J., concurring in part and dissenting in part). The Chief Justice reasoned that an employer who acts in good faith would have little incentive to adhere to the law until bound by a judicial decree. *Id.* at 451 (Burger, C.J., concurring in part and dissenting in part).

53 *Id.* at 425.

54 457 U.S. 440 (1982).

55 *Id.* at 451-53. If an employer justifies a prejudicial selection mechanism by offering evidence that its work force is racially balanced, the employer has relied upon the bottom line defense strategy. Boyer, *supra* note 12, at 577 n.41.

56 *Teal*, 457 U.S. at 443. The examination was given to 259 white and 48 black candidates. *Id.* Because Blacks had a lower mean score that any of the other candidates—including Whites, Hispanics and Indians—the passing score was lowered in an attempt to reduce the disparate impact on the black group. *Id.* at 443 n.3. The black passing rate of 54.17% represented 68% of the passing rate for white candidates, which was 79.54%. *Id.* at n.4.

57 *Id.* at 443-44.

58 *Id.* at 455. Connecticut argued that an employer's good faith efforts to realize a nondiscriminatory work force, coupled with a look to the bottom line, rebutted the inference of discriminatory intent. *Id.* at 453-54. Regardless of the form of discriminatory practice, the Court articulated, an employer's favorable approach to certain members of the plaintiff's class is of little comfort to the victims. *Id.* (citing Teamsters v. United States, 431 U.S. 324, 342 (1977)). The Court stated: "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." *Id.* at

maintained that an identifiable impediment that denies employment opportunity to a disproportionate number of minorities must be job-related.[59] The Court, therefore, held that a seemingly nondiscriminatory bottom line is neither an answer nor a defense to a prima facie claim of Title VII employment discrimination.[60]

In *Watson v. Fort Worth Bank & Trust*,[61] the Supreme Court expanded the disparate-impact analysis to encompass subjective employment criteria.[62] Clara Watson, a black employee who had been denied four promotions,[63] contended that the bank's employment practices unlawfully discriminated against Blacks in areas of hiring, advancement and compensation.[64] Watson's employer, Fort Worth Bank, had not utilized formal criteria to evaluate candidates for promotion, relying instead on the subjectively-based opinions of its supervisors.[65] Although divided on other issues, a unanimous Court responded by extending disparate-impact analysis to subjective employment practices, reasoning that Title VII's proscription against insidious discrimination

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451. Title VII seeks to ensure an equal opportunity for each and every applicant, without regard to whether other members of the applicant's protected class overcame insidious barriers. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 570 (1978). In Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), the Court recognized that fair treatment to female employees on the whole does not justify the unlawful treatment of even one woman merely because the focus of a statute on individuals was unambiguous. *Los Angeles*, 435 U.S. at 708. Similarly, in the *per curiam* opinion of Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), the Court professed that a rule barring employment of married women with young children could be violative of Title VII if not "demonstrably . . . relevant to job performance." *Phillips*, 400 U.S. at 544. The Court, in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972), intimated that standards that result in a disparate impact are some of the more subtle, yet more pervasive, of the intolerable devices that foster racial stratification within the labor force. *McDonnel*, 411 U.S. at 800 (citations omitted).

59 *Teal*, 457 U.S. at 445.

60 *Id.* at 456.

61 487 U.S. 977 (1988).

62 *Id.* at 991.

63 *Id.* at 982. Watson, who was hired in 1973, was promoted from a position as proof operator to teller in 1976. *Id.* In 1980, Watson sought a promotion to supervisor but was denied. *Id.* Subsequently, Watson aspired to another management position, but was again denied. *Id.* Thereafter, Watson was turned down for two more promotions. *Id.* All of the chosen candidates for the positions Watson sought, as well as the supervisors involved in the selection process, were white. *Id.* After exhausting all available administrative remedies, Watson turned to the judiciary. *Id.* at 983.

64 *Id.*

65 *Id.* at 982.

should apply equally to these practices.[66]

*Watson*, a plurality decision,[67] attempted to restructure the disparate-impact model.[68] The plurality would have revised the first tier of the analysis by increasing the plaintiff's burden of proof in two respects.[69] First, the plurality posited that plaintiffs should be required to go beyond merely showing a statistical disparity, and also should be required to identify a specific discriminatory tool and demonstrate its nexus to the disparity.[70] With regard to the causal connection, the plurality expressed that neither courts nor defendants need assume the validity of a plaintiff's statistical evidence, and instead suggested that employers should be at liberty "to raise countervailing evidence of their own."[71] Second, the plurality asserted that the onus of proving job relatedness should rest with the plaintiff, not the employer.[72]

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66 *Id.* at 991, 999. Justice O'Connor, joined by Chief Justice Rehnquist and Justices White, Scalia, Brennan, Marshall and Blackmun noted that failure to extend the analysis to subjective practices may encourage employers to forego merit-based policies in favor of subjective decision-making. *Id.* at 989-90. *See* Brodin, *supra* note 2, at 7 (observing that *Watson* blurred the distinction between cases alleging deliberate bias and those challenging apparently neutral practices).

67 *See Watson*, 487 U.S. at 981. Justice O'Connor, announcing the judgment of the Court, was joined by Chief Justice Rehnquist and Justices Scalia and White with regard to the applicable evidentiary standards. *Id.* at 982, 991-95. Justice Blackmun wrote a separate opinion, concurring in part and in the judgment, and was joined by Justices Brennan and Marshall. *See id.* at 1000-10 (Blackmun, J., concurring in part and in the judgment). Justice Stevens joined in the conclusion, but suggested deferring any discussion on the evidentiary standards. *Id.* at 1011. Justice Kennedy held the definitive vote necessary to solidify the plurality, but took no part in the adjudication or decision. *Id.* at 1000.

68 *See id.* at 986-99.

69 *See id.* at 994.

70 *Id.* The Court had not previously mandated this causal-link requirement. Boyer, *supra* note 12, at 579 n.49. Indeed, the Court had relied, on several occasions, on plaintiffs' statistics in finding a prima facie case of discrimination. *Id.*

71 *Watson*, 487 U.S. at 996 (quoting Dothard v. Rawlinson, 433 U.S. 320, 331 (1976) (Rehnquist, J., concurring in part)).

72 *Id.* at 997. The shifting of the burden of proving job relatedness from the employer to the plaintiff essentially redefined the business-necessity defense and arguably attenuated the employer's burden of proof. *See* Brodin, *supra* note 2, at 8. Originally, the *Griggs* model required the employer to show that any given requirement had a direct relationship to the employment in question. *Watson*, 487 U.S. at 997. The plurality's suggestion, however, would require the employer only to produce a legitimate business reason, leaving the employee to refute the presence of a business necessity or to present an alternative non-biased test or selection device that would serve the employer's goals as effectively. *Id.* at 998; *see also* Brodin, *supra* note 2, at 8. The plurality justified its position by stating that placing the burden of proof on the plaintiff would avoid forcing employers to adopt quotas or other preferential treatment as a means of circumventing costly litigation. *Id.* at 999. Title VII, however, does not require quotas or command employing any individual because of his minority status. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430-31

Concurring in part and in the judgment, Justice Blackmun stated that the plurality's re-allocation of the applicable burdens of proof and production in Title VII disparate-impact suits was "flatly contradicted" by established caselaw.[73] The Justice conceded that the plaintiff bears the initial burden of proving that a facially-neutral hiring practice has a significantly adverse and disproportionate impact upon his group.[74] Justice Blackmun, however, vehemently opposed the plurality's dilution of an employer's burden from one of proof to mere production of a legitimate business necessity.[75] Moreover, the Justice concluded that the plurality's concern for the defendant was misplaced because employers could protect themselves by complying with the EEOC record-keeping requirements and by relying on the Court's judgment.[76]

On the same day it issued the *Watson* opinion, the Court granted *certiorari* in *Wards Cove Packing Co. v. Atonio*[77] to confront questions similar to those presented in *Watson*.[78] Ultimately, *Wards Cove* expanded disparate-impact theory to include multi-component selection systems and endeavored to eliminate doubt regarding an employer's burden of proof.[79] In *Wards Cove*, cannery workers alleged deliberate racial stratification between skilled and unskilled employees.[80] Wards Cove operated salmon canneries in Alaska.[81] The jobs at the canneries were generally of two kinds: unskilled cannery positions and skilled non-can-

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(1971); *see also* Meyer, *supra* note 3, at 858-59 (indicating that the Court's antipathy toward affirmative action reflects a misinterpretation of the purpose of the Civil Rights Act).

73 *Watson*, 487 U.S. at 1000-01 (Blackmun, J., concurring in part). The Court raised the issue of burden allocation *sua sponte*. *Id.* at 984 n.1.

74 *Id.* at 1001 (Blackmun, J., concurring in part) (citing Dothard v. Rawlinson, 433 U.S. 320, 329 (1977)).

75 *Id.* (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (employer has the burden of proving job relatedness); *Dothard*, 433 U.S. at 329 (same); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (same)).

76 *Id.* at 1008 (Blackmun, J., concurring in part).

77 490 U.S. 642 (1989).

78 *See id.* at 649-50.

79 *See id.* at 658, 661; Brodin, *supra* note 2, at 8 n.40; Boyer, *supra* note 12, at 583-84 n.100. The Court, however, did not eliminate the doubt surrounding the employer's burden of proof because the issue was raised in Newark Branch, NAACP v. Town of Harrison, N.J., 940 F.2d 792 (3d Cir. 1991).

80 *Wards Cove*, 490 U.S. at 647-48. These Title VII plaintiffs asserted that several of Wards Cove's employment practices induced racial segregation within the work force. *Id.* The plaintiffs presented claims under both disparate-impact and disparate-treatment theories of liability, demonstrating the level of racial stratification between the cannery and non-cannery workers. *Id.* at 648-50.

81 *Id.* at 646.

nery positions.[82] The cannery positions were predominantly filled by Alaskan natives and Filipinos, while Whites were prevalent in the higher-paid, skilled assignments.[83] Present and former employees brought a class action suit alleging employment discrimination based on race.[84]

Justice White, leading the Court's attack upon the plaintiffs' statistical evidence, stated that the plaintiffs incorrectly compared the racial composition between the unskilled and skilled workers.[85] Noting that the plaintiffs' comparison did not reflect the qualified applicant pool, Justice White articulated that a proper comparison would have been between members of the jobs at issue and the relevant labor market.[86] The *Wards Cove* majority then adopted the *Watson* plurality opinion, and found that the burden of persuasion necessarily remained with the plaintiff as the originator of the suit.[87]

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82 *Id.*

83 *Id.* at 647.

84 *Id.*

85 *Id.* at 650. The purpose of statistical comparisons is to identify and evaluate the effect of an employer's discriminatory practice by separating out any extraneous factors that may influence or cause a racial imbalance in the work force. Holdeman, *supra* note 36, at 37.

86 *Wards Cove*, 490 U.S. at 650 (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977)).

87 *See id.* at 656, 660. The Court observed that "the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force." *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)). By adopting the *Watson* plurality opinion, some commentators believe that the majority misinterpreted Congress's intent, as well as the *Griggs* case and its progeny, all of which had long stood for the proposition that a disparate-impact plaintiff need only identify the discriminatory practice and provide evidence of a disproportionate impact to establish a prima facie case. Brodin, *supra* note 2, at 9. Plaintiffs, the *Watson* Court stated, must show that the complained of disparity is the result of the challenged employment practices. *Watson*, 487 U.S. at 656.

In adopting *Watson*, Justice White reasoned that the Court's approach with regard to the employer's burden was consistent with the Federal Rules of Evidence and the evidentiary proceedings in disparate-treatment cases. *Wards Cove*, 490 U.S. at 659-60. In so doing, the Court focused on the second tier of the disparate-impact inquiry, the business justification issue. *Id.* at 658. As explained by the Court, this phase includes two components: i) the presentation and consideration of justifications offered by the employer; and ii) the existence of alternative practices that achieve the same legitimate ends with fewer racially deleterious consequences. *Id.* at 658. Some commentators consider the advancement of alternative practices as a separate and distinctive third level of analysis. *See, e.g.*, Boyer, *supra* note 12, at 579 n.54. Some commentators also warn that shifting to the plaintiff the burden of proving a business justification will, given the resources attributable to a typical Title VII plaintiff, prove to be an insurmountable burden. ROSSEIN, *supra* note 2, at 2-3. *See, generally*, Holdeman, *supra* note 36 (contending that *Wards Cove* drastically increased the burden of proving a disparate-impact case, rendering some employ-

In an impassioned dissent, Justice Stevens castigated the majority's discussion of causation and evidentiary standards.[88] The Justice focused upon the employer's burden of proof under the disparate-impact and treatment analysis, thus foregoing any substantial analysis of the majority's statistical approach.[89] Justice Stevens criticized the majority for disregarding the distinctions between the burdens of proof in disparate-treatment and disparate-impact cases.[90] The Justice explained that the employee's burden in disparate-treatment cases is one of forwarding evidence of a legitimate business purpose, whereas the burden in disparate-impact suits traditionally required proof of a business necessity.[91]

Justice Stevens referred to the Court's redefinition of the employee's burden of proof as unwarranted.[92] Conceding the plaintiff's obligation to connect its injury to the defendant's act as an elementary notion, the Justice stated that the majority discounted the difficulty of identifying the specific employment practices that caused the plaintiff's injury.[93] Although acknowledging that liberal discovery rules would generally aid the development of a plaintiff's case, the Justice noted that the respondents would not be able to benefit from that practice because their employers did not preserve their records.[94]

Justice Blackmun caustically reviewed the Court's opinion, criticizing it for dismantling the established delegation of Title VII burdens of proof.[95] The Justice disapproved of the Court's stringent causation requirement, recognizing that in many cases the required demonstration of statistical causation would be virtually impossible to attain.[96] The Justice questioned whether the

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ment practices immune from traditional disparate-impact analysis). *But see* Player, *supra* note 12, at 46 (advancing that the shift in burdens was dramatic only in appearance).

88 *Wards Cove*, 490 U.S. at 663 (Stevens, J., dissenting). Justice Stevens characterized the majority's opinion as a "sojourn into judicial activism" and a "facile treatment of settled law." *Id.* at 663, 664 (Stevens, J., dissenting).

89 *Id.* at 667-73 (Stevens, J., dissenting).

90 *Id.* at 668-69 (Stevens, J., dissenting).

91 *Id.* at 668 (Stevens, J., dissenting).

92 *Id.* at 672 (Stevens, J., dissenting). In an amicus brief, the Solicitor General argued that a decision for selection may be multi-faceted. *Id.* at n.19 (Stevens, J., dissenting). Where the factors produce a single decision and it is not possible to challenge each component, that conclusion should be challenged as a whole. *Id.*

93 *Id.* at 672, 673 n.20 (Stevens, J., dissenting).

94 *Id.* at 673 n.20 (Stevens, J., dissenting).

95 *Id.* at 661 (Blackmun, J., dissenting).

96 *Id.* at 662 (Blackmun, J., dissenting).

majority realized that race discrimination was, and continues to be, a problem of grave concern in our country.[97]

Against this background of Civil Rights jurisprudence, the Third Circuit Court of Appeals decided *Newark Branch, NAACP v. Town of Harrison, N.J.*.[98] Among the questions presented to the court, the most arresting were the definition of the relevant labor market and the scope and extent of evidence required to fulfill the defendant's burden of production with respect to the business justification defense.[99]

Writing for the court, Judge Mansmann set forth the district court's finding that the labor market that served Harrison contained a large number of Blacks qualified and willing to serve as municipal employees in Harrison.[100] The court therefore affirmed the district court's conclusion that the plaintiff's had established a prima facie case based on the overwhelming disparity between the racial composition of the municipal work force and that of the four surrounding counties.[101] The judge agreed that the NAACP had adequately demonstrated that Harrison's facially-neutral hiring practice—imposing a residency requirement—nonetheless resulted in a disparate impact.[102]

The circuit court then rejected the town's argument that the New Jersey statute[103] that authorized the adoption of residency requirements mandated broadening the composition of the relevant labor market to include all of New Jersey.[104] Judge

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97 *Id.*

98 940 F.2d 792 (3d Cir. 1991).

99 *Id.* at 794-95.

100 *Id.* at 799-800 (citing *NAACP*, 749 F. Supp. at 1338).

101 *Id.* at 800 (citing *NAACP*, 749 F. Supp. at 1340). The district court concluded that the geographical area from which Harrison draws employees includes the four surrounding counties by reason of its location and the flow of transportation facilities. *Id.* The court viewed Harrison as a component of the City of Newark, the population of which is 60% Black. *Id.* at 799. The court stated that there must be substantial numbers of Blacks in the surrounding Hudson, Bergen, Essex and Union multi-county labor market who are "qualified to serve as police officers, fire fighters, clerks, typists and laborers." *Id.* Moreover, the court stated that as Harrison has not employed even one Black and the total work force in the relevant labor market contained at least 214,747 Blacks, "disparity is at least suggested." *Id.* at 799 (citing *NAACP*, 749 F. Supp. at 1338).

102 *Id.* at 800. Judge Mansmann stated that where there are no Blacks in a town's labor force, the specific level of disparity is of little significance. *Id.*

103 N.J. STAT. ANN. § 40A:9-1.3 (West 1980).

104 *Id.* at 800. The Town of Harrison neither presented evidence of the racial ramifications of its policies nor produced any evidence to support its allegations that residency requirements were uniform to municipal and county governments. *Id.*

Mansmann also rebuffed Harrison's assertion that a residence requirement transcended racial lines and applied evenly to all applicants, thereby enhancing employment opportunities for Blacks within their own urban centers.[105] Relying on *Teal*[106] and *Wards Cove*,[107] the court emphasized that a racially-balanced "bottom line" was an insufficient defense to a disparate-impact claim when individual employment practices produced a disparate impact.[108]

Turning to the question of business justification, the court held that the initial inquiry was whether the challenged practice facilitated the legitimate employment goals of the employer "in a significant way."[109] Judge Mansmann dismissed Harrison's contention that the New Jersey statute allowing residency requirements automatically satisfied Harrison's burden of producing a business justification.[110] The court stated that although *Wards Cove* may have attenuated the employer's burden as imposed under prior caselaw,[111] the production must still involve a significant business goal.[112] Thus, the court held that an employer

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105 *Id.* at 800. The Town argued that a uniform state-wide system of residency requirements would further the objectives of Title VII by treating all persons equally. *Id.* Minorities would, the Town contended, enjoy enhanced opportunities in their own urban municipalities. *Id.* *See* J. FEAGIN & B. FEAGIN, *supra* note 6, at 45-46 (suggesting that such a system typically allows the majority group to monopolize basic resources by implementing systems that maintain their positions).

106 *Town of Harrison*, 940 F.2d at 800. *See supra* text accompanying notes 54-60 (discussing *Teal*, which rejected the bottom-line defense to Title VII violations).

107 *Town of Harrison*, 940 F.2d at 801. *See supra* text accompanying notes 77-93 (discussing *Wards Cove*, which similarly rejected the bottom-line defense).

108 *Town of Harrison*, 940 F.2d at 800-01.

109 *Id.* at 801 (quoting *Wards Cove*, 490 U.S. at 659). Harrison offered several business justifications for its residency requirement, contending that under *Wards Cove* an employer need only assert a rational basis to justify its disputed practice. *Id.* at 803. The Town advanced four rationales in support of its residency requirement. *Id.* at 804-05. These included the requirement of deploying off-duty emergency workers rapidly, knowledge of the community, loyalty, reducing the expense of conducting pre-employment investigations and reduction of tardiness and absenteeism. *Id.* Judge Mansmann deemed Harrison's arguments insufficient to justify the discriminatory impact of Harrison Ordinance 747. *Id.* at 806-07.

110 *Id.* at 801-02 (citing N.J. STAT. ANN. § 40A:9-1.3 (West 1980).

111 *Id.* at 803.

112 *Id.* (citing *Wards Cove*, 409 U.S. at 659). *Wards Cove*, the court stated, had been interpreted to require more than an articulation of a rational basis for a discriminatory practice. *Id.* at 803. *See* EEOC v. J.M. Huber Corp., 927 F.2d 1322, 1328-29 at n.24 (5th Cir. 1991) (stating that under disparate-impact theory employer must show more than some non-discriminatory reason for policy; employer must show that policy is significantly related to legitimate business purpose such as successful job performance); Nash v. Consolidated City of Jacksonville, 905 F.2d 355, 358 (11th Cir. 1990) (holding city failed to meet burden of producing evidence that exam was job-related and served the asserted business justification of promoting most qualified fire fighters); Green v. USX Corp., 896 F.2d 801, 805 (3d Cir. 1990)

must forward substantial factual evidence of a manifest relationship between the disputed practice and a legitimate business goal.[113]

Subsequent to establishing the boundaries of the defendant's burden, the court addressed Harrison's proffered justifications.[114] The court rejected each of the Town's assertions, and noted that although requiring police officers and firefighters to reside within their respective communities presents a valid business concern, there were less injurious means of ensuring the availability of these personnel during emergencies.[115] Accordingly, the court affirmed the district court's finding that the claimed business justifications were insufficient.[116]

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(finding that *Wards Cove* does not require courts to accept at face value employer's explanation of the adverse impact of its hiring practices on Blacks); Davis v. City of Dallas, 748 F. Supp. 1165, 1171 (N.D. Tex. 1990) (holding that defendant bears the burden of producing a clear, reasonable, specific, legitimate non-discriminatory reason for each of its challenged hiring decisions).

113 *Town of Harrison*, 940 F.2d at 803-04. The court affirmed that, in its view, an employer has met its burden of showing a manifest relationship between challenged employment practices and legitimate employment goals when the employer has presented evidence demonstrating that the challenged practice significantly serves the specified goal. *Id.* at 804.

114 *Id.*

115 *Id.* at 804-05. The court recognized that allowing an employer to avoid Title VII liability by simply advancing a legitimate, nondiscriminatory purpose for its practices when plaintiffs' evidence showed a disparate impact would remove Title VII's vitality. *Id.*

116 *Id.* at 805. The court, having determined that the district court's decree did not pose any equal protection problems, turned to challenges raised against the decree in an *amicus curiae* brief. *Id.* at 808. The court found that the *amici*, Harrison residents who held positions on a hiring eligibility list for municipal fire fighters, had no cognizable property interest in their ranking on the list. *Id.* at 810. Accordingly, the court held that the district court's decree presented no due process concerns. *Id.* at 812. In considering whether the terms of the district court's decree were narrowly tailored to redress the disparate effects of Harrison's residency requirement, the court examined statistical information, corroborated by testimony from witnesses, that Harrison had never employed a non-resident or a Black. *Id.* at 807. Statistical information provided by the plaintiffs revealed that of the 51 police officers, 58 fire fighters and 80 non-uniformed employees serving the Town of Harrison, none were Black. *Id.* (citing NAACP v. Town of Harrison, N.J., 749 F. Supp. 1327, 1337 (D.N.J. 1990)). In light of the exclusionary effects of the defendant's practices, the Third Circuit supported the district court's imposition of affirmative recruitment efforts. *Id.* The decree provided in relevant part:

> Harrison shall immediately cease filling municipal employment vacancies from lists created while a policy and practice of classifying applicants according to their residency and granting a preference in selection and hiring to residents of Harrison was in effect; and shall re-advertise and retest or request the New Jersey Department of Personnel to re-advertise and retest for any vacancies previously advertised but not yet filled.

In *Newark Branch, NAACP v. Town of Harrison, N.J.*, the United States Court of Appeals for the Third Circuit rendered a decision consistent with the essential policies historically underlying the United States Supreme Court's disparate-impact jurisprudence.[117] Although in *Wards Cove Packing Co. v. Atonio* the United States Supreme Court appeared to stray from its formerly staunch guardianship of civil liberties, the Third Circuit has demonstrated that the *Wards Cove* model need not be interpreted to safeguard employers from Title VII[118] liability.[119] To the contrary, the court enhanced the rights of disparate-impact plaintiffs by recognizing that, even under *Wards Cove*, an employer whose hiring practice is disputed retains the serious burden of justifying the practice through appeal to an overwhelmingly legitimate

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*Id.* at 809 (quoting Decree at 2 and 6). The circuit court further stated that district courts are directed, in determining whether there is a need for affirmative action, to evaluate the presence of past discrimination, the type of relief sought, alternative remedies, the relevant labor market and the rights of third parties. *Id.* at 807 (citing United States v. Paradise, 480 U.S. 149, 171 (1986)).

The court's proposed use of affirmative measures is supported by the aim of Title VII to remove unnecessary barriers to employment that discriminate on the basis of impermissible classifications. *See* 42 U.S.C. § 2000e-2 (1988) (amended 1991). Affirmative measures are equitable where a reasonable plan mirrors this Title VII goal. Tangren v. Wackenut Serv., Inc., 480 F. Supp. 539 (D.C. Nev. 1979).

117 *See Town of Harrison*, 940 F.2d at 806-07 (citing cases). Although our history is replete with systemic discrimination, the United States Supreme Court has historically been a guardian of liberty upon which those in need of equal protection could rely. Higginbotham, *supra* note 2, at 56-57 (positing that in light of the Supreme Court's makeup, the only recourse is Congressional response). Indeed, the extremely conservative posture of the President and the Court must remain a subject of concern in a society that arguably continues to suffer from 350 years of inequality, economic suppression and segregation.

118 42 U.S.C. § 2000e-2000e(17) (1988) (amended 1991). President Lyndon Johnson signed the Civil Rights Act of 1964 into law for the purpose of eradicating discrimination from the work place. *See* Gleckman et al., *supra* note 6, at 52. President Johnson and Congress bestowed the responsibility of administering Title VII upon the federal courts and, in the first 24 years following its adoption, the courts have conscientiously furthered the Act's objective. *Id.* We have since witnessed a fundamental change in the judicial attitude toward employment discrimination—the putative result of a tide of right-wing Supreme Court appointments that has swept back the gains made during the years in which the courts expanded civil liberties. The new politically "conservative" Court, some commentators argue, has ignored the imbalance of competing interests against protected class members, and has instead catered to the interests of employers and advantaged employees. *See, e.g.*, William P. Murphy, *Supreme Court Review*, 5 THE LABOR LAWYER 679, 680 (1989) (likening this professed new judicial attitude to a perceived retreat from civil rights by the White House and the Court following the end of Reconstruction in 1877).

119 *Town of Harrison*, 940 F.2d at 800. It is important to recognize, however, that employers may not be disposed to giving up hiring practices that have a potentially discriminatory effect as long as the practice remains unchallenged and apparently lawful. Holdeman, *supra* note 36, at 53.

business necessity.[120] Further, because the Third Circuit avoided shifting the burden of persuasion to the plaintiff, the court obviated the need for disparate-impact plaintiffs to engage in time-consuming and costly fact-finding to state a valid cause of action.[121]

Additionally, the *Town of Harrison* decision will provide valuable guidance to employers who wish to impose a system limiting their applicant pool without running afoul of the law. It is important to appreciate, however, that other circuits may set forth less restrictive guidelines. As a result, the Supreme Court may in the future be called upon to resolve a conflict in the circuits concerning the parameters of an employer's decision-making where a hiring practice is shown to disadvantage minorities. If that happens, the increasingly conservative judicial stance of the Court may dictate a holding that would undermine the Third Circuit's position.[122]

The impact of the *Town of Harrison* decision will take effect immediately—most notably in Harrison. Consequently, the direction the court followed will, without delay, influence not merely the judiciary, but the general attitude of people who, whether or not conscious of this specific case, guide themselves by the rule of law. Because attitudes eventually take root and mold the thinking of others, the ultimate effect of the *Town of Harrison* decision may have even greater potency than thus far imagined.

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120 The reader should note that Congress has since codified the burdens of proof as they existed prior to *Wards Cove*, on June 4, 1989. *See* 42 U.S.C. § 2000e-2(k)(c) (1991).

121 *See, e.g.*, Tarver v. City of Houston, No. CIV.A. 730H-1487, 1987 WL 46893 (S.D. Tex. 1987) Yet, when plaintiffs suggest less racially harmful alternatives to an employer's disputed scheme, the plaintiffs retain the burden of proving that their suggested alternatives support the employer's legitimate business goals. ROSSEIN, *supra* note 2, at 2-38.

122 According to the politically-conservative view prevalent in the 1980's, the Civil Rights movement and affirmative action had gone too far. *See* William Bradford Reynolds, *The Reagan Administration*, 42 VAND. L. REV. 993, 994-95 (1989) (discussing racial discrimination that has been "condoned" because it was beneficial to minorities). President Reagan's conservative Supreme Court nominations were followed by the confirmation of President Bush's similarly conservative nominations. Some commentators premonish that a wholly conservative Supreme Court will favor employers over employees, thereby further disadvantaging minorities. *See, e.g.*, Holdeman, *supra* note 36, at 52 (positing that today's conservative Supreme Court is partial to employers).