Notes

THE EXTENSION OF DISPARATE IMPACT THEORY TO WHITE MEN: WHAT THE CIVIL RIGHTS ACT OF 1991 PLAINLY DOES NOT MEAN

By: Kate L. Didech*

> "Great challenges still face religious, racial, and ethnic minorities and women in our society. Human nature has not yet advanced to the point at which individuals are measured by their humanity and not their gender or skin color. Achieving such a society requires the full measure of intellectual creativity and resources of . . . all Americans."[1]

> "The surest way to misread a law is to read it literally."[2]

I. INTRODUCTION

Impact Magazine was created by a close group of childhood friends to cater to urban-dwelling young adults interested in music and social issues salient to their age group and urban environment. As Impact's popularity and distribution began to grow, the magazine's creators decided to expand the scope of their magazine. In order to do so, they needed to hire new writers, photographers, and production assistants. As the creators of Impact enjoyed working amongst friends, they hired a few of their own friends as well as individuals referred to them by friends. The creators of Impact were pleased with the result of their hiring scheme, and thereafter always relied on their friends and word-of-mouth to fill new positions. Because the creators of Impact

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1. 137 CONG. REC. 29,007 (1991).

2. Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CAL. L. REV. 1749, 1754 (1997).

were people of color, as were most of their friends and their friends' friends, the vast majority of those employed by Impact were also people of color.

As time went on, Impact was "discovered" by and became increasingly popular with teenagers and young adults living in the suburbs. One such reader, Seth Monroe, wanted to write for Impact. Seth sent Impact a resume and cover letter in which he highlighted his experiences both majoring in music and working as a columnist for the student-run newspaper at the university from which he recently graduated. Although Impact's staff was struck by Seth's credentials, the creators of Impact did not want to deviate from their proven hiring scheme, as they thought it resulted in a collegial atmosphere and allowed individuals from similar backgrounds and similar life experiences to work together and publish a magazine that represented their tastes and views. Admittedly, if Seth had been referred to the creators of Impact by an Impact employee, he would have been hired immediately. One of Impact's creators responded to Seth by letter, explaining that although he was sure Seth was qualified and would prove to be a great asset, Impact could not hire him due to its policy of only hiring friends and individuals referred by friends. Seth reacted by filing suit against Impact under Title VII, alleging that Impact's hiring policy had a disparate impact on a group of individuals to which he belongs—white men.

Assuming this situation actually occurred, would Seth have a cognizable claim? Specifically, are individuals belonging to groups who have not historically been victimized by discrimination—such as white men—protected from disparate impact discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991? Under disparate impact theory, facially neutral employment practices that adversely affect protected groups are violative of Title VII if either (1) they cannot be justified by business necessity, or (2) there exists an alternative practice which does not cause as great a disparate impact and which the employer refuses to use.[3] Before the passage of the Civil Rights Act of 1991, it was not questioned that disparate impact theory only extended to women and minorities. However, the plain meaning of the Civil Rights Act of 1991, which codified disparate impact theory, a theory which previously existed only as a matter of judicial interpretation, suggests that protection from disparate impact discrimination extends to individuals belonging to all groups, irrespective of their groups' historical experience of employment discrimination.

This Note argues that disparate impact theory should not extend to white men. Part I chronicles the birth of disparate impact theory, made

3. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071; 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

possible by the Civil Rights Act of 1964 and announced by the Supreme Court in *Griggs v. Duke Power Co.*[4] Part II chronicles the Supreme Court's dismantling of disparate impact theory with its decision in *Wards Cove Packing Co. v. Atonio*[5] and Congress' subsequent attempts to undo the damage the Court had done, which ultimately resulted in the passage of the Civil Rights Act of 1991.[6] Part III presents the question of whether disparate impact theory should extend to white men and discusses instances in which courts have had the opportunity to address the question. Part IV argues that disparate impact theory, despite the plain meaning of the Civil Rights Act of 1991, should not extend to white men because protecting white men from disparate impact discrimination (a) is not demanded by the manner in which the Supreme Court has previously interpreted Title VII, often in direct opposition to its plain meaning, and would constitute a significant departure from the purpose of disparate impact theory, as indicated by legislative history and judicial interpretation; (b) would seriously hinder employers' ability to utilize any employment practice, as every employment practice adversely impacts some group; and (c) may undo much of the good effected by voluntary affirmative action plans, many of which are implemented by employers to avoid disparate impact liability.

I. DISPARATE IMPACT THEORY IS BORN

A. THE STAGE IS SET: THE CIVIL RIGHTS ACT OF 1964

The story begins with the passage of the Civil Rights Act of 1964. In the wake of non-violent protestors being met by police officers brandishing clubs, dogs, and fire hoses[7] and Governor George Wallace's pledge to "bar the schoolhouse door" rather than allow the Supreme Court-mandated desegregation of Alabama's schools,[8] President John F. Kennedy decided to present Congress with a new civil rights bill.[9] On June 11, 1963, the commander of the "federalized" Alabama National Guard ordered Governor Wallace to step aside and allow two African American students, escorted by Justice Department officials and U.S. Marshals, to register at the University of Alabama. That evening, President Kennedy spoke to the nation regarding the need for a civil rights bill.[10]

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4. 401 U.S. 424 (1971).
5. 490 U.S. 642 (1989).
6. Pub. L. No. 102-166, § 3(1), 105 Stat. 1071 (1991).
7. ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 12 (1990).
8. *Id.* at 16.
9. *Id.*
10. *Id.*

> If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who will represent him, if, in short, he cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place? Who among us would then be content with the counsels of patience and delay? [One hundred] years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. And this nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free.
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> . . . .
>
> Next week I shall ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law.[11]

Despite fierce resistance to the Act in both Houses of Congress, particularly from Southern Democrats,[12] and the addition of "sex" to the list of impermissible grounds for discrimination, an action meant as a joke and a means of preventing the Act's passage,[13] President Lyndon Johnson signed the Civil Rights Act of 1964 into law on July 2, 1964.[14]

The Civil Rights Act of 1964[15] prohibits discrimination on the basis of an individual's race, color, religion, sex, or national origin in several areas, including voting rights,[16] public accommodations,[17] and public education.[18] Title VII[19] of the Act proscribes employment discrimination by employers against employees and potential employees,[20] by employment agencies against clients,[21] and by labor

11. *Presidential Report: President Kennedy's Radio-TV Address on Civil Rights*, 21 CONG. Q. WKLY. REP. 971, 971 (1963).

12. *See* Donald O. Johnson, *The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism*, 47 U. MIAMI L. REV. 469, 474-75 (1992).

13. *See* Stephanie M. Wildman, *Privilege in the Workplace: The Missing Element in Antidiscrimination Law*, *in* PRIVILEGE REVEALED 25, 32 (Stephanie M. Wildman ed., 1996).

14. *See* Johnson, *supra* note 12, at 475.

15. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

16. *See* 42 U.S.C. § 1971 (2000).

17. *See id.* at § 2000a.

18. *See id.* at § 2000c.

19. *See id.* at § 2000e.

20. *See id.* at § 2002e-2(a).

21. *See* 42 U.S.C. § 2002e-2(b).

organizations against members or potential members.[22] Section 703 of Title VII provides that it is 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.[23]

B. DISPARATE IMPACT THEORY ANNOUNCED: *GRIGGS V. DUKE POWER*

In 1971, in the opinion of the unanimously decided case *Griggs v. Duke Power Co.*,[24] Chief Justice Burger wrote, "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was 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."[25] It was in *Griggs* that the Supreme Court first interpreted Title VII to not only prohibit intentional discrimination against individuals based on their race, color, religion, sex, or national origin, but also to prohibit facially neutral employment policies, even if implemented and applied without discriminatory intent, that have a disparate impact on individuals on the basis of these impermissible classifications.

Prior to the effective date of the Civil Rights Act of 1964, Duke Power Company openly discriminated on the basis of race in its hiring and assigning of employees, relegating African Americans to the lowest paying jobs.[26] After the Civil Rights Act of 1964 became effective, Duke Power ceased its intentional discrimination.[27] However, racial stratification of jobs continued.[28] The plaintiffs, a group of African

22. *See id.* at § 2002e-2(c).
23. *Id.* at § 2002e-2(a).
24. 401 U.S. 424 (1971).
25. *Id.* at 429-30.
26. *See id.* at 426-27.
27. *See id.* at 428.
28. Griggs v. Duke Power Co., 420 F.2d 1225, 1239 (4th Cir. 1970) (Sobeloff, J., concurring in part and dissenting in part), *rev'd in part*, 401 U.S. 424 (1971).

American employees,[29] alleged that the continued absence of African Americans from higher paying jobs was a result of Duke Power's placement and transfer requirements.[30] Specifically, Duke Power required that to be hired for all but the lowest paying, least desirable jobs, applicants must have graduated from high school and have received satisfactory scores on two professionally prepared aptitude tests.[31] In addition, employees who wanted to be transferred to higher paying, more desirable jobs were required to either have a high school education or pass two professionally designed tests, one measuring general intelligence, the other measuring mechanical comprehension.[32] These facially neutral requirements, fulfillment of which was not shown to have a relationship to improved job performance,[33] disqualified a greater proportion of African Americans than whites from being hired for or transferred to higher paying, more desirable jobs.[34]

The Supreme Court considered in *Griggs* whether Title VII prohibited Duke Power's use of facially neutral requirements, which had no significant, demonstrable relationship to job performance, and which, although not adopted with discriminatory intent, nevertheless limited employment opportunities for African Americans more than for whites.[35] The lower courts had held that, absent a showing of discriminatory intent, Duke Power could not be found to have violated Title VII.[36] In what has been described by many as a landmark decision,[37] the Supreme Court unanimously reversed, deciding that discriminatory intent was irrelevant to the decision of whether Duke Power violated Title VII.[38] The Court reasoned, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation,"[39] and "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in

29. *See Griggs*, 401 U.S. at 426.
30. *See id.* at 429.
31. *See id.* at 427-28.
32. *See id.* at 428.
33. *See id.* at 431-32.
34. *See Griggs*, 401 U.S. at 430.
35. *See id.* at 425-26.
36. Griggs v. Duke Power Co., 292 F. Supp. 243, 251 (M.D.N.C. 1968), *aff'd in part, rev'd in part*, 420 F.2d 1225 (4th Cir. 1970), *rev'd in part*, 401 U.S. 424 (1971).
37. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 665 (1989) (Stevens, J., dissenting); Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 224 (1990); Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 2 (1987); Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," A Codification of Griggs, A Partial Return to Wards Cove, or All of the Above?*, 43 CASE W. RES. L. REV. 287, 294 (1993); Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 30 (1993).
38. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").
39. *Id.* at 432.

headwinds' for minority groups and are unrelated to measuring job capability."[40]

In dismissing the requirement that discriminatory intent be shown in order to find a Title VII violation, the Court adopted disparate impact theory.[41] According to the disparate impact theory announced in *Griggs*, facially neutral employment practices, adopted and applied without discriminatory intent, violate Title VII if they have an adverse, disparate impact on a protected group and do not "have a manifest relationship to the employment in question."[42] The Court's adoption of disparate impact theory manifested the Court's belief, like that of Presidents Kennedy and Johnson and the majority of both Houses of Congress, that the Civil Rights Act of 1964 was a vehicle to correct "the long festering societal failure to resolve racial injustice and its increasingly visible polarization of society."[43] The Court's extension of *Griggs*' disparate impact theory to women in 1977[44] illustrates that the Court, like Congress, recognized and sought to ameliorate the poverty of women's employment opportunities that resulted from prejudice and stereotyping.[45]

Congress had not, however, provided for disparate impact theory in the language of Title VII.[46] The plain meaning of Title VII prohibits intentional discrimination and not "practices that are fair in form, but discriminatory in operation."[47] It is arguable that the Court, as opposed to Congress, provided for disparate impact theory because:

> At the time Title VII was adopted in 1964, passage of a statute that was explicitly based on the principles of impact analysis would have been unthinkable. Even in 1971, those principles remained highly controversial. The Supreme Court's decision in *Griggs* dramatically changed this situation, creating an environment in which impact analysis became a widely accepted norm in the law of employment discrimination.[48]

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40. *Id.*

41. *See, e.g.*, Blumrosen, *supra* note 37, at 3.

42. *Griggs*, 401 U.S. at 432. If the employment practice at issue is necessary to the employer's business, it will not be found to violate Title VII. *Id.* at 431 ("The touchstone is business necessity."). Later, the Court determined that even if the employer shows business necessity, the plaintiff may still prevail on his or her Title VII claim by demonstrating the availability of an alternative practice that has a less adverse effect. The plaintiff would also be required to show that the alternative practice would promote the employer's business needs and that the employer refuses to use the alternative practice. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

43. Johnson, *supra* note 12, at 480-81.

44. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977).

45. *See* Blumrosen, *supra* note 37, at 15-16.

46. *See* 42 U.S.C. § 2000e-2(a).

47. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

48. Earl M. Maltz, *The Legacy of Griggs v. Duke Power Co.: A Case Study in the Impact of a Modernist Statutory Precedent*, 1994 UTAH L. REV. 1353, 1366-67 (1994).

It was, in part, the Court's refusal to be constrained by the plain language of Title VII that made *Griggs* the most significant Title VII case decided by the Court.[49]

Also contributing to the significance of *Griggs* were the dramatic effects the decision had on workplaces in America.[50] "*Griggs*-based disparate impact litigation dramatically opened up employment opportunities for women, racial and ethnic minorities."[51] After *Griggs*, women and minorities saw improvements in their representation in higher job categories and their relative income as compared to white men.[52] While certainly the positions of women and minorities in the workplace improved because of several factors—better educational opportunities, changing attitudes, and economic forces—it is clear that Title VII, in general, and the disparate impact theory announced in *Griggs*, in particular, played a substantial role.[53]

II. THE DECLINE AND REDEMPTION OF DISPARATE IMPACT

A. THE NADIR OF DISPARATE IMPACT: *WARDS COVE PACKING CO. V. ATONIO*

Between the *Griggs* decision in 1971 and the *Wards Cove Packing Co. v. Atonio*[54] decision in 1989, the Supreme Court subtly chipped away at the disparate impact doctrine, weakening its effectiveness as a tool with which women and minorities could attack certain employment practices.[55] In *Wards Cove*, the Court explicitly dismantled *Griggs'* disparate impact theory.[56]

Wards Cove Packing Company employed workers to operate its salmon cannery in Alaska during the summer months.[57] Workers were hired for either "cannery jobs," generally lower paying, unskilled positions on the cannery line, or for "noncannery jobs," a hodgepodge of jobs, most of which were higher paying and classified as skilled positions.[58] Nonwhite workers, mostly Filipinos and Alaskan Natives,

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49. *See* Browne, *supra* note 37, at 294 ("If *Griggs* had come out the other way and had simply enforced the most obvious meaning of the statutory language and acted in apparent harmony with the drafters' purpose to eliminate intentional discrimination, it is unlikely that *Griggs* would have been considered a landmark case or even an important one.").

50. *See* Belton, *supra* note 37, at 225-26 ("The *Griggs* vision of equality helped create a workplace far more egalitarian than ever existed in the pre-*Griggs* era.").

51. Govan, *supra* note 37, at 33.

52. *See* Blumrosen, *supra* note 37, at 1-2.

53. *See id. Griggs* also laid the foundation for affirmative action, another factor which has improved employment opportunities for women and minorities since the case was decided, and which will be discussed later in the Note. *See infra* pt. IV(C).

54. 490 U.S. 642 (1989).

55. *See* Browne, *supra* note 37, at 301-02.

56. *See* Belton, *supra* note 37, at 240.

57. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 646 (1989).

58. *See id.* at 647.

were primarily hired for cannery jobs; cannery workers were recruited from the local villages around the cannery and hired through the International Longshoremen's and Warehousemen's Union.[59] White workers were mainly hired for noncannery jobs; noncannery workers were hired during the winter from the company's office in the Pacific Northwest and recruited by word of mouth and through family relationships.[60] Those who worked in cannery jobs were not promoted to noncannery jobs.[61] Therefore, "virtually all" of those who worked in noncannery jobs were white,[62] and "nearly all" of those with cannery jobs were nonwhite.[63] In addition, the company segregated cannery workers from noncannery workers by housing the two groups in separate dormitories and providing for separate mess halls.[64]

A class of nonwhite cannery workers brought suit against Wards Cove under Title VII, alleging that the company's hiring and employment practices were responsible for the racial stratification of the workforce.[65] In a 5-4 decision, the Supreme Court reversed the Ninth Circuit's decision that the plaintiffs had made out a prima facie case of disparate impact,[66] and, in doing so, reconfigured disparate impact theory in a way that made it more onerous for plaintiffs to prevail in their disparate impact claims.[67] First, the Court abandoned *Griggs'* premise that a facially neutral employment practice that has a disparate impact on a protected class violates Title VII unless the employment practice is a business necessity.[68] Instead, the Court in *Wards Cove* decided that such a practice would be upheld if it "serves, in a significant way, the legitimate employment goals of the employer,"[69] the touchstone of this inquiry being "a reasoned review of the employer's justification for his use of the challenged practice."[70] Second, the Court in *Wards Cove* decided that the burden of persuasion would always remain with the plaintiff,[71] whereas previously, the defendant bore the burden of persuading the jury that there was a business justification for its

59. *See id.*
60. *See id.*
61. *See id.* at 674 (Stevens, J., dissenting).
62. *Wards Cove Packing Co.*, 490 U.S. at 677 (Stevens, J., dissenting).
63. *Id.* at 675 (Stevens, J., dissenting).
64. *See id.* at 647.
65. *See id.* at 647-48.
66. *See id.* at 650.
67. *See* Belton, *supra* note 37, at 244.
68. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
69. *Wards Cove Packing Co.*, 490 U.S. at 659. In addition, the Court stated, "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business to pass muster." *Id.* Justice Stevens, in his dissent, expressed his astonishment at the Court's "casual—almost summary—rejection of the statutory construction that developed in the wake of *Griggs*." *Id.* at 671-72 (Stevens, J., dissenting). Justice Stevens also wrote that, prior to *Wards Cove*, the Court's "opinions always emphasized that in a disparate-impact case the employer's burden is weighty." *Id.* at 671 (Stevens, J., dissenting).
70. *Id.* at 659.
71. *See id.*

employment practice.[72] Third, whereas previously, a plaintiff could overcome a defendant's demonstration of business necessity by showing that an alternative practice would not have as great of a discriminatory effect,[73] the Court decided in *Wards Cove* that, in addition, such an alternative practice must be equally effective at meeting the employer's business needs and that the Court, when assessing the alternative practice's effectiveness, would consider its cost and other burdens on the employer.[74] Finally, the Court decided in *Wards Cove* that the plaintiff must specify the employment practice that caused the disparate impact,[75] whereas before *Wards Cove*, this requirement was unclear.[76]

The dissenters in *Wards Cove* vehemently spoke out against what one dissenter characterized as "a bare majority of the Court tak[ing] three major strides backwards in the battle against race discrimination."[77] Justice Stevens accused the majority of "[t]urning a blind eye to the meaning and purpose of Title VII" and "perfunctorily reject[ing] a longstanding rule of law."[78] Justice Blackmun wrote, "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[79]

B. DISPARATE IMPACT REVIVED: THE CIVIL RIGHTS ACT OF 1991

The dissenters were not the only ones who took issue with the Court's decision in *Wards Cove*. Members of Congress reacted quickly and negatively.[80] It is posited that Congress's intense negative reaction was due to the fact that *Wards Cove* "was seen as breaking a tacit understanding between the Court and Congress under which the former would advance the cause of equality of result, through preferential treatment or otherwise, without the need for action by the latter."[81] In February of 1990, eight months after the Court announced its decision in

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72. *See* LEX K. LARSON, CIVIL RIGHTS ACT OF 1991 19 (1992). In the pre-*Wards Cove* disparate impact cases, the defendant could put forth the affirmative defense of business necessity. *See id.*

73. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

74. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 660-61 (1989).

75. *See id.* at 657. In his dissent in *Wards Cove*, Justice Stevens stated, "This additional proof requirement is unwarranted. It is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable. Although the causal link must have substance, the act need not constitute the sole or primary cause of the harm. Thus in a disparate-impact case, proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities." *Id.* at 672-73 (1989) (Stevens, J., dissenting).

76. *See* LARSON, *supra* note 72, at 19.

77. *Wards Cove Packing Co.*, 490 U.S. at 661 (Blackmun, J., dissenting).

78. *Id.* at 663 (Stevens, J., dissenting).

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

80. *See* Govan, *supra* note 37, at 31.

81. Browne, *supra* note 37, at 295.

Wards Cove, Senator Kennedy introduced the Civil Rights Act of 1990 in the Senate.[82] The Act was, in part, designed to reverse *Wards Cove*[83] and restore the *Griggs* standard.[84] Despite arguments that passage of the Act would force employers to institute quotas to avoid suit,[85] the bill was passed by both the Senate[86] and the House of Representatives.[87] However, President George H. W. Bush, persuaded that the bill would lead to the establishment of quotas,[88] vetoed the bill in October of 1990.[89] There was insufficient support in the Senate to override the veto.[90]

The members of the 102nd Congress were not dissuaded by the failure of the members of the 101st to produce a civil rights bill that would be signed into law by President Bush, undoing the damage of *Wards Cove*. During the summer of 1991, the House passed one civil rights bill[91] and Senator Danforth offered a package of three civil rights bills to be considered by the Senate.[92] President Bush refused to consider any of the bills, once again, out of concern that they would force employers to institute quotas.[93] In September, Senator Danforth and others introduced Senate Bill 1745, a revised version of which would become the Civil Rights Act of 1991.[94] In the fall of 1991, the Civil Rights Act of 1991 was passed by both Houses of Congress,[95] "adopted by the largest margin of any civil rights statute in American history."[96] On November 21, 1991, President Bush signed the Civil Rights Act of 1991 into law.[97]

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82. S. 2104, 101st Cong. (2d Sess. 1990). The companion bill was introduced in the House of Representatives by Representative Hawkins. H.R. 4000, 101st Cong. (2d Sess. 1990).

83. *See* S. 2104 § 4.

84. *See* Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043, 1058 (1993) ("Both opponents and proponents agreed that the goal of the legislative process was restoring the *Griggs* standard. They simply had fundamentally different conceptions of what restoration meant.").

85. *See* Govan, *supra* note 37, at 54-57.

86. *See* 136 CONG. REC. 18,039 (1990) (passing the bill by a vote of 65 "yeas" to 34 "nays"); 136 CONG. REC. 29,606 (1990) (approving the second conference report).

87. *See* 136 CONG. REC. 22,173-74 (1990) (passing the bill by a vote of 272 "yeas" and 154 "nays"); 136 CONG. REC. 30,136 (1990) (approving the second conference report).

88. *See* 136 CONG. REC. 31,827-28 (1990); Govan, *supra* note 37, at 148, 159.

89. *See* 136 CONG. REC. 31,827-28 (1990).

90. *See* 136 CONG. REC. 33,406 (1990). Sixty-six Senators voted to override the veto, one fewer than the number of votes necessary to successfully do so. *See id.*

91. *See* 137 CONG. REC. 13,514-54 (1991).

92. *See* 137 CONG. REC. 13,134 (1991); Leibold et. al., *supra* note 84, at 1061-62.

93. *See* LARSON, *supra* note 72, at 6.

94. *See* 137 CONG. REC. 23,904 (1991); LARSON, *supra* note 70, at 6-7.

95. *See* 137 CONG. REC. 29,066 (1991) (Senate vote); 137 CONG. REC. 30,695 (1991) (House of Representatives vote).

96. Alfred W. Blumrosen, *Society in Transition IV: Affirmation of Affirmative Action Under the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 903, 905 & n.5 (1993).

97. *See* Govan, *supra* note 37, at 238. President Bush publicly declared that the Civil Rights Act of 1991 constituted a final compromise which "achieved his singular objective of a civil rights bill without quotas." *Id.* at 235. However, it is questionable whether the bill's final language completely quelled the President's concern that the bill required employers to implement quotas in order to avoid violating Title VII. *See id.* at 235-38. Rather, it is likely that President Bush signed

The Civil Rights Act of 1991[98] was worth the two-year struggle that preceded its passage. The need for such a civil rights bill, one that strove to eliminate discriminatory employment practices, whether or not they manifested discriminatory intent, was great in the late 1980s and early 1990s. While certainly a different time than that which saw the passage of the Civil Rights Act of 1964, when overt discrimination against women and minorities was arguably more pervasive and severe, these were still not easy times. In 1990, one-third of African Americans and one-half of African American children lived below the poverty line.[99] Although African Americans constituted approximately twelve percent of the total population in 1990, they constituted 43.2% of arrested rapists, 54.7% of accused murderers, and 69.3% of those arrested for robbery.[100] African Americans were six times more likely than whites to be victims of violent crime, and homicide was the leading cause of death for African Americans between the ages of eighteen and thirty-four.[101] In March 1991, an observer videotaped several officers from the Los Angeles Police Department beating Rodney King.[102] Also in 1991, the Senate Judiciary Committee heard and the nation watched as Anita Hill alleged that she had been sexually harassed by Clarence Thomas, then nominated to replace Thurgood Marshall as a Supreme Court Justice, when she served as his Special Assistant in the Office of the Chairman of the Equal Employment Opportunity Commission (EEOC) and in the Office of the Assistant Secretary for Civil Rights at the Department of Education.[103] The Senate voted to confirm Thomas's nomination, but the problem of sexual harassment in the workplace was catapulted into the nation's consciousness.[104]

The Senate's discussion of the Civil Rights Act of 1991 reveals Congress's hope that the Act would help create a more egalitarian workplace and fashion a strong tool with which women and minorities could attack employment discrimination. Senator Harkin expressed his desire that the Act would "send[ ] the clear message that discrimination in the workplace will not be tolerated" and emphasized the need for such a message with a litany of studies showing the extent of the discrimination faced by women and minorities in the workplace.[105] In

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the bill into law at least, in part, due to eroding Republican support for another veto. *See id.* at 229-30.

98. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C.).

99. *See* ROBERT COOK, SWEET LAND OF LIBERTY?: THE AFRICAN-AMERICAN STRUGGLE FOR CIVIL RIGHTS IN TWENTIETH CENTURY AMERICA 281 (1998).

100. *See id.*

101. *See id.*

102. *See, e.g., id.* at 284.

103. *See* Govan, *supra* note 37, at 223-25. *See generally Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong. (1991).

104. *See* Govan, *supra* note 37, at 224-26.

105. *See* 137 CONG. REC. 29,027-28 (1991) (statement of Sen. Harkin).

particular, Senator Harkin discussed studies finding a large wage gap between white men and African American men and women as well as a glass ceiling which prevented women and minorities from attaining management and executive level jobs.[106] Senator Metzenbaum advocated for the restatement of a disparate impact theory that would provide victims of discrimination an opportunity to obtain relief from the courts, and thereby remove the practices that deprive capable women and minorities of employment opportunities.[107] Senator Kennedy, one of the driving forces behind the Act, stated, "[t]he bill . . . restor[es] the right of employees to challenge practices which disproportionately exclude women or minorities from America's workplaces."[108]

The purposes of the Civil Rights Act of 1991, as announced in the Act itself, include (1) "provid[ing] appropriate remedies for intentional discrimination and unlawful harassment in the workplace,"[109] (2) "respond[ing] to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination,"[110] and (3) "confirm[ing] statutory authority and provid[ing] statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964."[111] The Civil Rights Act of 1991 confirmed the legitimacy of disparate impact theory, first announced in *Griggs* and which had

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106. *See id.* at 29,027. Senator Harkin cited the Bureau of the Census report entitled "The Black Population in the United States: March 1990 and 1989," which found that black men made 69% of the earnings of white men, while black women made only 52% of the earnings of white men. *Id.* The report also showed that of individuals with four years of college education, white men had a median earning of $41,090, black men had a median earning of $31,380, and black women had a median earning of only $26,730. *Id.* Senator Harkin also discussed the Department of Labor's "Report of the Glass Ceiling," released on August 8, 1991. *Id.* at 29,028. He stated, "The report found that among 94 large employers analyzed by the Department, women were 37% of 147,000 employees and minorities were 16%. But only 17% of women and 6% of minorities held any management job, and only 6.6% of women and 2.6% of minorities were at the executive level." *Id.* Another study discussed by Senator Harkin, this one conducted by the Urban Institute on Discrimination in the Workplace, refutes any assertion that the numbers previously discussed cannot at least in part be due to discrimination. In Senator Harkin's words, "The study sent matched pairs of white and black men to compete for the same jobs—men with the same qualifications and similar abilities. The study found that white applicants were three times as likely to receive a job offer and almost three times as likely to advance in the hiring process." *Id.* at 29,027-28. "Other findings of the study showed that black applicants were treated rudely or unfavorably in 50% of their employment efforts, while white men received unfavorable treatment in 27% of their job searches." *Id.* at 29,028.

107. *See* 137 CONG. REC. 28,720 (1991) (statement of Senator Metzenbaum). Senator Metzenbaum related the story of Brenda Berkman, a woman who was only hired as a New York City firefighter after winning her disparate impact claim, decided prior to *Wards Cove*. Before 1977, women were not eligible to become New York City firefighters. After changing the rule so that women who passed the physical exam would be considered eligible for employment as a firefighter, the gender composition of New York City firefighters did not change because all female applicants failed the exam. Brenda Berkman demonstrated that receiving a passing score on the physical exam was not related to successful job performance. *See id.*

108. 137 CONG. REC. 28,636 (1991) (statement of Senator Kennedy).

109. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(1), 105 Stat. 1071 (1991).

110. *Id.* at § 3(4).

111. *Id.* at § 3(3).

previously existed only as a matter of judicial interpretation, as a basis for recovery under Title VII.[112]

Section 105 of the Civil Rights Act of 1991 provided statutory authority for adjudicating disparate impact claims under Title VII and laid out the framework for arguing and defending against such claims by amending section 703 of the Civil Rights Act of 1964. The Civil Rights Act of 1991 added to Title VII the following:

> (k)(1)(A) An unlawful employment practice based on disparate impact theory is established under this title only if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.[113]

Put simply, the Civil Rights Act of 1991 amended Title VII so as to expressly provide that the use of an employment practice that adversely impacts a protected group violates Title VII if either (1) the employer cannot demonstrate that its practice is job-related and consistent with business necessity, or if (2) the employee or applicant can demonstrate the existence of an alternative employment practice that does not cause as great of a disparate impact, and the employer refuses to adopt the proposed alternative practice.

III. ARE WHITE MEN PROTECTED FROM DISPARATE IMPACT DISCRIMINATION?

What section 703(k) of Title VII, as amended by the Civil Rights Act of 1991, does not expressly provide is whether white men, in particular, can meritoriously claim protection from disparate impact discrimination under Title VII.[114] The plain meaning of the section

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112. LARSON, *supra* note 72, at 18-19.

113. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a). Subparagraph (C) provides, "The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'" *Id.*

114. *See* Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L.J. 473, 501 (1999).

seems to dictate that all persons, as long as they suffer an adverse impact on the basis of race, color, religion, sex, or national origin, are protected against disparate impact discrimination, whatever their race, color, sex, religion, or national origin may be.[115] However, a statute's plain meaning does not necessarily represent its purpose and its intended meaning, as indicated by its historical context, its legislative history, and the previous manner in which the statute has been interpreted. This Note argues that section 703(k) does not and should not be interpreted to extend disparate impact protection to white men, and is instead limited to women and minorities.[116]

The courts have had few opportunities to examine the question of whether under Title VII, as amended by the Civil Rights Act of 1991, protection from disparate impact discrimination extends to members of all races and both sexes or if protection is limited to racial minorities and women. While no court has held that white men are not eligible to bring disparate impact claims under Title VII, neither has a court decided, in a particular case, that white men have been the target of disparate impact discrimination and therefore able to prevail on their disparate impact claim.[117]

For instance, in *Foss v. Thompson*, the Ninth Circuit considered whether a white male made a prima facie case that the express preference that an individual filling the position of Managed Care Coordinator/Nurse Specialist possess a bachelor's degree in nursing had a disparate impact on men and, therefore, violated Title VII.[118] John Foss, who had worked as a social worker for the Portland Area Office of the Indian Health Service for over twenty years, had his position abolished during a reduction in force.[119] Indian Health Service's policy stated that during a reduction in force, an employee whose position is abolished may bump into a still-existing position for which he is qualified if the employee currently holding the position is less senior.[120] Foss's request to bump into the Managed Care Coordinator/Nurse Specialist position was denied, although the position was currently held

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115. *See id.*

116. *See id.* This Note does not argue that equal protection or Title VII disparate treatment, which both protect white men from intentional discrimination based on their gender or race, should not.

117. Cases not discussed infra but on point include *Hannon v. Chater*, 887 F. Supp. 1303 (N.D. Ca. 1995) and *Sims v. Montgomery County Comm'n*, 890 F. Supp. 1520 (M.D. Ala. 1995). In *Hannon*, a white male plaintiff, passed over for appointment as an Administrative Law Judge, failed to prevail as a matter of law on his disparate impact claim, because he could not establish the invalidity of the affirmative action plan of the Office of Hearing and Appeals within the Social Security Administration. *Hannon*, 887 F. Supp. at 1317-18. In *Sims*, the court found that the white male plaintiffs had prematurely claimed that the sheriff department's proposed promotion plan had a disparate impact on white men, because no specific selection criteria had yet been established or applied and no promotions had yet occurred. *Sims*, 890 F. Supp. at 1531.

118. Foss v. Thompson, 242 F.3d 1131, 1134 (9th Cir. 2001).

119. *Id.* at 1133.

120. *Id.*

by a person less senior, because Foss did not possess a nursing degree.[121] Foss alleged that because men are statistically less likely to possess a nursing degree, the preference that a Managed Care Coordinator/Nurse Specialist possess a nursing degree has a disparate impact on men.[122] The Ninth Circuit held that Foss did not make out a prima facie case because he failed to present the necessary statistical evidence showing that a greater proportion of men than women are otherwise qualified for the position but lack a nursing degree.[123]

In *Barnhill v. City of Chicago*, the District Court for the Northern District of Illinois considered whether a merit component of the Chicago Police Department's promotional exam constituted a subjective employment practice that adversely impacted white police officers, and therefore violated Title VII.[124] Officers vying for the rank of sergeant, after receiving a satisfactory score on a Written Qualifying Test, were required to take a written Assessment Exercise.[125] Based on their score on the Assessment Exercise, officers were ranked on the Assessment Eligible List, after which they participated in the Merit Component of the promotional examination process.[126] The Merit Component consisted of three parts: (1) exempt officers nominated eligible officers "on the basis of specific job-related assessment dimensions;"[127] (2) a board composed of Chicago Police Department deputy superintendents reviewed the nominated officers;[128] and then (3) the board recommended nominees for promotion to the Superintendent of Police, who ultimately decided who would be promoted.[129] The Police Department maintained that a maximum of thirty percent of promotions were based on the Merit Component; the remaining promotions were made according to the officer's ranking on the Assessment Eligible List.[130] Of those officers promoted to sergeant as a result of the 1998 promotion process, seventy-two percent were Anglo American, nineteen percent were African American, eight percent were Hispanic, and one percent were classified as other.[131] The court determined that the white plaintiffs were not significantly and discriminatorily impacted by the use of the Merit Component, because if the promotions were solely based on officers' rankings on the Assessment Eligible List, the racial make-up of the class of newly promoted sergeants would not be significantly altered; seventy-seven percent of those promoted would be Anglo American, fifteen

121. *Id.*
122. *Id.* at 1134.
123. *Foss*, 242 F.3d at 1134-35.
124. Barnhill v. City of Chicago, 142 F. Supp. 2d 948, 967-68 (N.D. Ill. 2001).
125. *Id.* at 949.
126. *Id.* at 949-50.
127. *Id.* at 950, 958.
128. *Id.* at 958-59.
129. *Barnhill*, 142 F. Supp. 2d at 959-60.
130. *Id.* at 950.
131. *Id.* at 969.

percent would be African American, six percent would be Hispanic, and one percent would be other.[132] The District Court held that "[a]bsent evidence that Plaintiffs, as Caucasian males, were significantly and discriminatorily impacted by the inclusion of the Merit Component in the 1998 Sergeant Exam, Plaintiffs' Title VII claim fails as a matter of law."[133]

IV. DISPARATE IMPACT THEORY SHOULD NOT PROTECT WHITE MEN

A. PLAIN MEANING CANNOT PREVAIL IF IT FAILS TO PRESERVE THE PURPOSE OF DISPARATE IMPACT THEORY

Perhaps the only defensible claim which white men can put forth as to why disparate impact theory should extend to them is that the plain meaning of the Civil Rights Act of 1991 suggests it.[134] However, the Supreme Court has, in the past, not been limited by Title VII's plain meaning. Indeed, the Supreme Court's most important decisions interpreting Title VII—*Griggs v. Duke Power Co., United Steelworkers v. Weber,* and *California Federal Savings & Loan Ass'n v. Guerra*—were those in which the Court interpreted Title VII contrary to its plain meaning.[135]

In *Griggs*, the unanimous Court did not consider the plain meaning of Title VII, which only prohibited the disparate treatment of employees because of his or her race, color, religion, sex, or national origin.[136] Instead, the Court based its interpretation of Title VII on Congress's purpose in enacting it, as evidenced by the history surrounding Title VII's passage and its legislative history,[137] and which was "plain from the language of the statute."[138] This purpose was "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."[139] In order for Congress's purpose to be fulfilled, the Court interpreted Title VII to prohibit disparate impact discrimination, and not merely disparate treatment discrimination as the plain meaning of Title VII would dictate.

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132. *Id.*

133. *Id.*

134. Those who espouse a textualist approach to statutory interpretation contend that the language of a statute, rather than the statute's legislative history or the intent of its authors, should determine how the statute is interpreted. *See* Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 819-20 (2002).

135. *See* Browne, *supra* note 37, at 295-96.

136. *See supra* notes 46-47 and accompanying text.

137. *See* Johnson, *supra* note 12, at 479-80.

138. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

139. *Id.* at 429-30.

In *United Steelworkers v. Weber*,[140] decided eight years after *Griggs*, the Court interpreted Title VII, "a statute whose plain meaning admits no exception to its command of nondiscrimination,"[141] to allow an employer to voluntarily implement and abide by a race-conscious affirmative action plan in order to eliminate a marked racial imbalance. As stated by Justice Stevens:

> In *Steelworkers v. Weber*, the Court rejected the argument that Title VII prohibits all preferential treatment of the disadvantaged classes that the statute was enacted to protect. The plain words of Title VII, which would have led to a contrary result, were read in the context of the statute's enactment and its purposes.[142]

The respondent in *Weber*, a white employee, challenged the legality of the affirmative action plan—collectively bargained by Kaiser Aluminum & Chemical Corporation and United Steelworkers of America—which provided that at least fifty percent of those selected to train for craft openings at a Kaiser plant be African American until the percentage of African American craftworkers approximated the percentage of African Americans in the local labor force.[143] The respondent argued that Kaiser's use of this affirmative action plan resulted in discrimination against white employees, in violation of the plain language of sections 703(a) and (d) of Title VII, which declare it unlawful "to discriminate . . . because of . . . race," and therefore prohibit all race-conscious affirmative action plans.[144]

The Court rejected the respondent's plain language argument, stating, "[i]t is a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.'"[145] The Court continued:

> The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action

140. 443 U.S. 193 (1979).

141. Browne, *supra* note 37, at 295.

142. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 293 (1987) (Stevens, J., concurring) (citation omitted).

143. United Steelworkers v. Weber, 443 U.S. 193, 198-200 (1979).

144. *Id.* at 201.

145. *Id.* (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

> would "bring an end completely at variance with the purpose of the statute" and must be rejected.[146]

The Court then discussed the legislative history and historical context of Title VII, concluding that Title VII's primary purpose was to open up employment opportunities, previously closed due to discrimination, to African Americans,[147] in order to allow for the eventual "integration of [African Americans] into the mainstream of American society."[148] The Court noted:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[149]

A condemnation of all voluntary race-conscious affirmative action would clearly disserve Title VII's primary purpose; therefore, the Court held, such condemnation is not mandated by Title VII, even though its plain meaning suggests otherwise.[150]

The Court was also not constrained by plain meaning in *California Federal Savings & Loan Ass'n v. Guerra*,[151] in which the Court interpreted Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 (PDA).[152] The PDA was passed by Congress to express its disapproval of and to remedy the Supreme Court's decision in *General Electric Co. v. Gilbert*,[153] which held that discrimination on the basis of pregnancy is not equivalent to discrimination on the basis of sex, and therefore Title VII is not violated when an employer's disability plan, which includes nonoccupational sickness and accident benefits, excludes disabilities arising from pregnancy.[154] The second clause of the PDA added to Title VII, in part, that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[155]

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146. *Id.* at 201-02 (citations omitted).
147. *See id.* at 202-04.
148. *Weber*, 443 U.S. at 202.
149. *Id.* at 204 (citation omitted).
150. *Id.* at 208.
151. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 293 (1987).
152. 42 U.S.C. § 2000e(k) (2000).
153. *Guerra*, 479 U.S. at 284.
154. General Electric Co. v. Gilbert, 429 U.S. 125, 145-46 (1976).
155. 42 U.S.C. § 2000e(k) (2000).

In *Guerra*, the petitioner argued that the second clause of the PDA unambiguously forbade treating pregnant employees differently than other disabled employees who were similarly able or unable to work.[156] Once again, the Court rejected the plain meaning interpretation of Title VII, and instead referred to the PDA's legislative history and historical context to determine Congress' purpose in passing the Act, and therefore how the Act should be interpreted.[157] And once again, the Court invoked the rule that "a thing may be within the letter of the statute and not within the statute, because not within its spirit, nor within the intention of its makers."[158] Instead, the Court stated that, "[r]ather than imposing a limitation on the remedial purpose of the PDA, we believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied."[159] The Court supported its position by citing the legislative history of the PDA, which made it "abundantly clear that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers."[160] This legislative history was "devoid of any discussion of preferential treatment of pregnancy, beyond acknowledgements of the existence of state statutes providing for such preferential treatment,"[161] and documented that "[o]pposition to the PDA came from those concerned with the cost of including pregnancy in health and disability-benefit plans and the application of the bill to abortion, not from those who favored special accommodation of pregnancy."[162] Consequently, the Court decided that Congress intended and the Court would interpret the PDA to set "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[163]

Likewise, while the plain meaning of the Civil Rights Act of 1991 suggests that disparate impact theory extends to all groups, including white men, such an interpretation is not within the statute, because it is not within the statute's spirit and the intention of its makers. Disparate impact theory, as announced by the Supreme Court in *Griggs*, was intended to provide to those historically denied employment opportunities a tool with which to attack employment practices that continue to deny them opportunities. As Senator Metzenbaum stated during the proceedings surrounding the passage of the Civil Rights Act of 1991, "the fundamental principle announced by the Supreme Court in the 1971 *Griggs* decision was that an employer would not be permitted to

156. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284 (1987).
157. *Id.*
158. *Id.* (citations omitted).
159. *Id.* at 285.
160. *Id.* at 285-86.
161. *Guerra*, 479 U.S. at 286.
162. *Id.*
163. *Id.* at 285 (citation omitted).

use hiring or promotion practices which disproportionately exclude *women and minorities* from employment opportunities unless the employer could show that the practices were related to job performance."[164]

The sum of its legislative history confirms that the Civil Rights Act of 1991 was not intended by Congress to extend disparate impact theory to men.[165] The debates and proceedings concerning the Civil Rights Act of 1991 stress the need to restore disparate impact theory to that which was announced in *Griggs*, in order to help ensure that women and minorities receive the employment opportunities they deserve and which they have been denied. [166] Congressmen discussed how glass ceilings still operate to prevent women and minorities from achieving their potential.[167] They did not discuss any concern about the effects of disparate impact discrimination on white men, the group that has traditionally been the privileged and the powerful in the workplace, the group that has been welcomed into the workplace without hesitation, and the group whose members occupy the highest ranks and the executive suites. The only concern Congressmen expressed remotely involving employment practices adversely affecting white men was the institution of quotas by employers as a preemptive strike against litigation.[168]

Also advancing the argument that disparate impact theory does not extend to white men is that each Title VII disparate impact case decided by the Court between *Griggs* and *Wards Cove*, on which the disparate impact theory codified in the Civil Rights Act of 1991 was based, involved a claim brought by a woman or a member of a minority group.[169] For example, in *Albemarle Paper Co. v. Moody*, the Court considered the disparate impact claim of former and present African American employees of a paper mill, specifically whether their employer had satisfactorily demonstrated the job relatedness of its testing program, which adversely impacted its African American employees.[170] In

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164. 137 CONG. REC. 21,858 (1991) (emphasis added).

165. *See supra* pt. II(B).

166. *See, e.g.*, 137 CONG. REC. 28,636 (1991) (statement of Sen. Kennedy) ("The bill overrules the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, restoring the right of employees to challenge practices which disproportionately exclude women or minorities from America's workplaces. One of the Civil Rights Act's fundamental purposes was to overrule *Wards Cove* and restore the law to its status under *Griggs v. Duke Power*. The agreement accomplishes that goal.").

167. *See e.g.*, 137 CONG. REC. 28,061 (1991) (statement of Sen. Cohen) ("For every Sandra Day O'Connor or Katherine Graham, there are millions of women who run smack into harassment or invisible walls that restrict the achievement of their potential."); 137 CONG. REC. 28,717 (1991) (statement of Sen. Seymour) ("The Department of Labor recently concluded that the 'good ol' boy' traditions of corporate management have systematically created a glass ceiling, blocking qualified minorities, and women from the executive suite.").

168. *See e.g.*, 137 CONG. REC. 28,717-18 (1991) (discussing fear that the Civil Rights Act of 1990 would result in quotas, which constitutes reverse discrimination and an insult to all Americans).

169. *See* Zimmer, *supra* note 114, at 501-02.

170. 422 U.S. 405, 408-10 (1975).

Dothard v. Rawlinson, the Court decided that the statutory height and weight requirements for correctional counselors in Alabama penitentiaries violated Title VII because they had a disparate impact on women and they were not shown to be job related.[171] In *Watson v. Fort Worth Bank & Trust*, an African American woman alleged that her employer's promotion system had a disparate impact on African American employees, restricting their opportunities for advancement, in violation of Title VII.[172] The fact that these cases only involved women and minorities complaining of employment practices that adversely affected them was not lost on those who drafted, debated, and passed the Civil Rights Act of 1991. Senator Robb described "so-called disparate impact cases" as being "cases . . . brought when an employer hires disproportionate numbers of white or male applicants from the qualified applicant pool."[173]

Furthermore, Title VII cases considered by the Court emphasize the importance of not extending disparate impact theory to claims brought by white men.[174] In *Griggs*, the Court stressed that the point of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[175] In *City of Los Angeles v. Manhart*, in which the Court found that the Los Angeles Department of Water and Power's requirement that female employees pay larger contributions to its pension fund than male employees violated Title VII,[176] the Court considered whether male employees could succeed in a Title VII disparate impact suit if required to make contributions to the pension fund equal to those made by their female counterparts.[177] Male employees would argue that, because they, as a group, live shorter lives than women, and therefore their average pension is not as costly, a gender-neutral pension plan has a disproportionately heavy impact on male employees.[178] According to the Court, the male employees would not prevail on their claim of disparate impact discrimination.[179] The Court stated, "Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences."[180] The Court thereby suggested that

171. 433 U.S. 321 (1977).
172. 487 U.S. 977, 982-84 (1988).
173. 137 CONG. REC. 29,007 (1991).
174. *See* Zimmer, *supra* note 114, at 501-2.
175. Griggs v. Duke Power Co., 401 US 424, 429-30 (1971).
176. City of Los Angeles v. Manhart, 435 U.S. 702, 704 (1978).
177. *Id.* at 710 n.20.
178. *See id.*
179. *See id.*
180. *Id.*

disparate impact theory is not available to men who are not members of a minority group.[181]

The Court has consistently stressed that if a statute's plain meaning is inconsistent with its spirit and the intention of its makers, plain meaning should be disregarded, and instead the purpose of the statute should govern its interpretation. As the plain meaning of Title VII, as amended by the Civil Rights Act of 1991, is inconsistent with its spirit and its intended purpose, Title VII's plain meaning should not hinder courts from declaring, as the Supreme Court has suggested and as Congress intended, that disparate impact theory does not extend to white men.

B. EVERY EMPLOYMENT PRACTICE ADVERSELY IMPACTS ONE GROUP OR ANOTHER

The argument voiced in *City of Los Angeles v. Manhart* is another powerful reason to limit disparate impact theory to those who have historically experienced discrimination in the workplace. Every employment practice can be said to adversely affect one group or another.[182] But surely not every employment practice should violate Title VII. However, under Title VII, as amended by the Civil Rights Act of 1991, an employment practice is unlawful if either the practice causes a disparate impact on a protected group and cannot be justified by job relatedness and business necessity or an alternative employment practice, which the employer refuses to adopt, would serve the employer's legitimate interest and not as greatly impact the group.[183] The threat that an employment practice may violate Title VII if it disproportionately affects any group, even white men, may substantially interfere with the operation of businesses and greatly intrude upon employer discretion.[184] Employers would be put in a difficult position if the Court had suggested that disparate impact protects all employees. What is an employer to do in such a situation? As Justice Blackmun recognized, "[i]f Title VII is read literally, on the one hand [employers] face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks."[185]

181. *See* Zimmer, *supra* note 114, at 502.

182. *See* City of Los Angeles v. Manhart, 435 U.S. 702, 710 n.20 (1978).

183. 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

184. *See* Zimmer, *supra* note 114, at 502 (discussing the most powerful argument against extending individual disparate impact discrimination to all employees).

185. United Steelworkers v. Weber, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring).

C. THE AFFIRMATIVE ACTION CONUNDRUM

The extension of disparate impact theory to white men would also drastically limit the situations in which employers could choose to implement affirmative action plans. After the Supreme Court decided that employers whose facially neutral employment practices adversely affected women and minorities were subject to suit under Title VII, employers, in an effort to avoid litigation, voluntarily implemented affirmative action programs.[186] Affirmatively hiring, promoting, and retaining women and minorities can avoid or remove the disparate impact, and thereby allow employers to avoid liability under Title VII's disparate impact theory.[187] In turn, affirmative action programs have been shown to improve the economic status of women and minorities[188] and are believed, by many businesses, to improve consumer relations and productivity.[189] Both Congress and the Supreme Court have supported an employer's voluntary use of affirmative action plans to avoid liability under Title VII for disparate impact discrimination.

Voluntary affirmative action programs were implicitly suggested by the Court in *Albermarle Paper Co. v. Moody* as a vehicle by which employers could avoid disparate impact liability.[190] In discussing the appropriateness of awarding backpay to those employees who were adversely affected by their employer's seniority system, Justice Stewart wrote for the Court, "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'"[191]

The Supreme Court expressly sanctioned employers' use of voluntary affirmative action plans to eliminate a manifest racial imbalance in *United Steelworkers v. Weber*[192] and to eliminate a manifest gender imbalance in *Johnson v. Transportation Agency*.[193] Justice Blackmun, concurring in *Weber*, discussed the voluntary implementation of affirmative action plans as a proper means for an employer to avoid disparate impact liability under Title VII; he stated, "to the extent that Title VII liability is predicated on the 'disparate effect' of an employer's past hiring practices, the program makes it less likely that such an effect could be demonstrated."[194]

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186. *See* Belton, *supra* note 37, at 232-33.

187. *See id.* at 232-33; Blumrosen, *supra* note 96, at 908-9.

188. *See* Belton, *supra* note 35, at 249.

189. *See* Note, *Rethinking* Weber*: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658, 658 (1989).

190. Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

191. *Id.*

192. 443 U.S. 193 (1979).

193. 480 U.S. 616 (1987).

194. United Steelworkers v. Weber, 443 U.S. 193, 211 (1979) (Blackmun, J., concurring).

The Civil Rights Act of 1991 also implicitly supports the use of affirmative action programs to remove the disparate impact of employment practices on women and minorities.[195] In Title VII, the "Glass Ceiling" provision of the Civil Rights Act of 1991, Congress announced its findings that "despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business"[196] and that "artificial barriers exist to the advancement of women and minorities in the workplace."[197] In light of these findings, Congress announced the establishment of a Glass Ceiling Commission[198] and of the National Award for Diversity and Excellence in American Executive Management[199] to "encourage United States companies to modify practices and policies to promote opportunities for, and eliminate artificial barriers to, the upward mobility of women and minorities."[200] Implicit is the encouragement of employers' use of affirmative action programs as a tool with which employers may eliminate artificial barriers to the advancement of women and minorities, such as facially neutral employment polices that disparately impact women and minorities.

Employers, as recommended by Congress and the Court, have voluntarily implemented affirmative action plans, partially to avoid being found liable for disparate impact discrimination against women and minorities under Title VII.[201] What will employers do if Title VII, as amended by the Civil Rights Act of 1991, is interpreted as extending disparate impact theory to white men?

One possibility is that employers, in order to avoid being attacked from all sides by disparate impact suits from women, minorities, and white men, would resign themselves to implementing quotas to ensure no group could successfully argue that they have been adversely impacted by an employment practice. Only if each group is represented proportionately to their presence in the employer's applicant pool can the employer be assured of being immune from liability for disparate impact discrimination.[202] But this is what those who drafted and supported the Civil Rights Act of 1991 sought to avoid: the creation of another bill that,

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195. *See* Blumrosen, *supra* note 96, at 913.

196. Civil Rights Act of 1991, Pub. L. No. 102-166, § 202(a)(1), 105 Stat. 1071, 1081 (1991).

197. *Id.* at § 202(a)(2).

198. *Id.* at § 203(a), 105 Stat. at 1082. A discussion of the research to be conducted by the Glass Ceiling Commission can be found in section 204, 105 Stat. 1084-85.

199. *Id.* at § 205(a), 105 Stat. at 1085.

200. *Id.* at § 202(a)(7)(A), 105 Stat. at 1082.

201. *See* Belton, *supra* note 37, at 232-33.

202. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1993), state that, "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or 80%) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact." These guidelines have been adopted by the EEOC and other federal civil rights agencies.

like the Civil Rights Act of 1990, would be thought to necessitate the use of quotas.[203]

As Justice Blackmun suggested, if Title VII is interpreted according to its plain meaning, protecting all groups from disparate impact discrimination, another possible result would be that "[t]he only way for the employer . . . to keep [its] footing on the 'tightrope' it creates would be to eschew all forms of voluntary affirmative action."[204] But this, too, is an undesirable option, as affirmative action plans—condoned by Congress, the Court, and not even condemned by the current presidential administration[205]—have, like disparate impact theory, opened up employment opportunities previously closed to women and minorities due to both overt and unconscious discrimination. In addition, affirmative action programs are still necessary today. Discrimination against women and minorities still exists, and "[s]ocial science studies demonstrate that vast inequalities remain between black and white America."[206]

But if an employer does determine that an employment practice adversely impacts white men, such as the hiring scheme used by the hypothetical Impact Magazine, should the employer then implement an affirmative action plan to increase white male representation in the workplace? The answer must surely be no. White men, both historically and currently, have been and are aided by their own program of affirmative action.[207] White men have benefited and continue to benefit, in terms of employment opportunities, from discrimination against women and minorities. Prejudices and stereotypes hinder many qualified women and minority applicants' ability to compete with white male applicants for employment opportunities. In addition, many white men are aided by a "good ol' boy" network, in which family relations, wealth,

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203. *See e.g.*, 137 CONG. REC. 28,718 (1991) (statement of Sen. Seymour) ("In short, last year's legislation would have left employers little choice but to implement hiring and promotion practices based on numerical quotas to avoid costly lawsuits and legal fees—quotas that result in people being hired and promoted primarily on ethnic group membership, not individual merit. Is that progress? Hardly.").

204. United Steelworkers v. Weber, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring).

205. *See* Linda Greenhouse, *Bush and Affirmative Action: News Analysis; Muted Call in Race Case*, N.Y. TIMES, Jan. 17, 2003 at A1. *But see* Oral Argument of Theodore B. Olson on Behalf of the United States as Amicus Curiae Supporting the Petitioners, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) (arguing against the use of race-based affirmative action programs in general). *See generally* Brief of Amicus Curiae The United States, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) (asking the Court to find the University of Michigan's admission program unconstitutional because it employed the functional equivalent of race quotas, but not asking the Court to find all race-based affirmative action programs unconstitutional), *available at* http://news.findlaw.com/hdocs/docs/gratz/gratzum11603brf.pdf.

206. Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1040 (1997).

207. *See* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222, 1225 (1991).

and power are more important qualifications than merit.[208] White men are no strangers to being bestowed with privilege and benefiting from societal discrimination; therefore, white men have no morally defensible claim to being preferred over women and minorities any longer.[209]

V. CONCLUSION

For two years, Congress battled to undo the damage to Title VII disparate impact theory that the Supreme Court wreaked in *Wards Cove Packing Co. v. Atonio*. In passing the Civil Rights Act of 1991, Congress sought to restore disparate impact theory, once again making it a strong tool with which women and minorities could attack employment discrimination. If courts now choose to abide by the plain meaning of the Civil Rights Act of 1991, extending disparate impact theory to white men, they will be doing so in defiance of the spirit and purpose of the Act and of Title VII. The courts will also, in extending protection from disparate impact discrimination to white men, put employers in the unenviable position of potentially having all employment practices they utilize be found to adversely impact some group, and thereby violate Title VII, as amended by the Civil Rights Act of 1991. Lastly, the courts, in extending disparate impact theory to white men, may force employers to implement quotas to avoid suit and surely will jeopardize employers' voluntary use of affirmative actions programs as a means to offset the effects of any employment practices that have a disparate impact on women and minorities. Courts must once again interpret Title VII contrary to its plain meaning, and in doing so, take a step forward, as opposed to three steps backward, in the battle against the still pervasive problem that is discrimination against women and minorities in the workplace.

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208. *See e.g.*, Michael Kinsley, *How Affirmative Action Helped George W.*, CNN.com, *at* http://www.cnn.com/2003/ALLPOLITICS/01/20/timep.affirm.action.tm/index.html (Jan. 20, 2003).

209. *See* Maltz, *supra* note 48, at 1359. However, I do concede that if, in the future, white men become a minority group, lose their political power, and experience systematic discrimination for a significant period of time, disparate impact discrimination under Title VII should be extended to them. In order for white men to be protected from disparate impact discrimination under Title VII, whites should be the minority in the United States, and white men should be able to demonstrate that they have, historically, been victimized by discrimination.