

Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law

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Vast racial disparities plague the United States. Segregation persists in schools, workplaces, and neighborhoods. Almost every major city across the country contains a dilapidated, impoverished neighborhood populated largely by minorities. The per-capita income of whites is nearly double that of blacks.¹ The racial composition of the population living in poverty is similarly striking.² Due to residential segregation and state and local policies, such income differentials result in segregated schools, with impoverished areas receiving the fewest resources with which to educate their children.³ Because employment is the primary source of income for most people,⁴ the workplace is central to this complex web of racial and economic segregation. “Every measure of economic success reveals significant racial inequality in the U.S. labor market. Compared to Whites, African Americans are more than twice as likely to be unemployed. And when employed, they earn nearly 25% less than their white counterparts.”⁵

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¹ CARMEN DENAVAS-WALT & ROBERT W. CLEVELAND, MONEY INCOME IN THE UNITED STATES: 2001, at 4 (Census Bureau, U.S. Dep’t of Commerce, Current Population Rep. P60-218, 2002), available at www.census.gov/prod/2002pubs/p60-218.pdf (noting that the per-capita income for blacks is \$14,953, as compared to \$26,134 for whites). The median income for white households is \$44,517, as compared to \$29,470 for black households. *Id.*

² BERNADETTE D. PROCTOR & JOSEPH DALAKER, POVERTY IN THE UNITED STATES: 2001, at 3 (Census Bureau, U.S. Dep’t of Commerce, Current Population Rep. P60-219, 2002), available at www.census.gov/prod/2002pubs/p60-219.pdf. Hispanics and blacks are nearly three times as likely as whites to be living in poverty (the percentage of households living in poverty is 21.4%, 22.7%, and 7.8%, respectively). *Id.*

³ CLAUDE S. FISCHER ET AL., INEQUALITY BY DESIGN: CRACKING THE BELL CURVE MYTH 185 (1996) (“Learning in segregated inner-city schools is a difficult task. Many of the physical structures are in poor condition, educational supplies are inadequate, teachers are overwhelmed with disciplinary problems, and, more generally, the climate of pessimism weighs on the talented students as well.”).

⁴ See COUNCIL OF ECON. ADVISERS, CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN 29 (1998), available at <http://w3.access.gpo.gov/eop/ca/pdfs/ca.pdf> (“Earnings from the labor market are the primary source of income for the majority of families.”).

⁵ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, at 2, available at <http://gsb.uchicago.edu/pdf/bertrand.pdf> (Nov. 18, 2002); see also COUNCIL

The persistence of segregation in the American workforce may be attributed in part to purposeful discrimination and seemingly neutral employment criteria that have a disproportionate effect on potential employees of different races. With regard to the former, a recent study found that applicants with stereotypical white names received one callback for every ten résumés disseminated, whereas applicants with identical credentials but stereotypical black names had to send out fifteen résumés to receive a single callback.⁶ Debate continues over the source of such discrimination, but scholars cite “subtle, often unconscious forms of bias” as “today’s most prevalent type of discrimination.”⁷

The use of ostensibly neutral employment criteria also may result in a stratified workforce, thereby compounding the problem of intentional discrimination. In this vein, some standardized tests have come under fire due to results that differ according to the testtaker’s race.⁸ Socio-economic explanations for such results point to the cultural biases in these tests and to the relative dearth of mentorship, educational resources, and safety in many impoverished communities.⁹

Civil rights law has not yet developed a consistent and effective response to the complex causes of workforce segregation. Title VII of the Civil Rights Act of 1964 made discrimination against a protected class in hiring or allocating job benefits illegal.¹⁰ Legal theorists argued, however, that the original Title VII was insufficient to address subconscious forms of discrimination¹¹ and segregation caused by purportedly neutral employment practices. Consequently, over the ensuing decade, the judiciary and Congress expanded Title VII to include the “disparate impact doctrine,” a theory of liability that prohibits many facially neutral employment practices with a disproportionately adverse effect on protected groups, even in the absence of discriminatory intent.¹² Yet over the past two decades, courts have chipped away at the premises of the disparate impact doctrine and have confused “disparate impact” with “disparate treatment.”¹³ This dilution of the disparate impact doctrine is troubling in a society in which many practices that disproportionately harm a protected class can-

OF ECON. ADVISERS, *supra* note 4, at 30 (“Some of the differences in wages across racial and ethnic groups are linked to occupational differences.”).

⁶ Bertrand & Mullainathan, *supra* note 5, at 3.

⁷ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995).

⁸ See, e.g., FISCHER ET AL., *supra* note 3, at 189.

⁹ See *id.* at 6–9.

¹⁰ 42 U.S.C. § 2000e-2(a) (2000).

¹¹ See, e.g., Krieger, *supra* note 7, at 1164.

¹² The purpose of disparate impact law remains in dispute, with scholars split over whether it should serve as a proxy for intentional discrimination when there is insufficient evidence, or rather as a separate doctrine to address unequal results independent of intent. See *infra* Part III (discussing disparate impact as a separate doctrine); Part V (linking disparate impact back to intentional discrimination).

¹³ See *infra* Part IV.B.

not neatly be traced to intentional discrimination.¹⁴ As a result, civil rights law cannot address the bulk of discriminatory effects that plague America.

Notions of meritocracy influence how the legal community interprets and applies the disparate impact doctrine. According to one perspective, successful individuals have “earned” the right to live in a safe, affluent neighborhood by receiving promotions at work and, prior to that, achieving good grades in school. This justification of the status quo implicitly assumes that we live in a functioning meritocracy—that individual qualifications are quantifiable, separable from social context, and relevant for differentiating individuals. This view of meritocracy infuses American political rhetoric—the American Dream often is described as the ability of individuals to “pull themselves up by their bootstraps” and work their way to better lives.¹⁵

In contrast to this dominant view, others contend that segregated, impoverished neighborhoods provide inferior educational opportunities, which in turn makes the attainment of recognized employment credentials more difficult for the affected individuals. This line of reasoning challenges the premises of “American society as meritocracy” by arguing that achievement is more a product of social context than a reflection of individual ability. The status quo is thus defective and discriminatory, and it consequently must be challenged.¹⁶

This Article will explore how courts have drawn upon a narrow view of meritocracy, often implicitly, to dismantle the disparate impact doctrine in employment discrimination law. Federal case law has shifted from a prospective view of meritocracy to a retrospective view, thereby weakening disparate impact law. Whereas a prospective view of meritocracy identifies merit with the potential for future job performance, a retrospective approach blurs the distinction between past success, such as high scores on standardized tests, and actual merit. Part I gives a brief introduction to Title VII and disparate impact law. Part II explains the political appeal of describing civil rights law in the vocabulary of merit. This Part will explore the views of meritocracy invoked by the U.S. Supreme Court and explain how adopting a retrospective model can weaken the disparate impact doctrine. Part III examines models of meritocracy

¹⁴ See Krieger, *supra* note 7; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

¹⁵ See, e.g., Georgette C. Poindexter, *Beyond the Urban-Suburban Dichotomy: A Discussion of Sub-Regional Poverty Concentration*, 48 BUFF. L. REV. 67, 80 (2000) (“[O]ne suburban mayor stated, ‘My constituents have been able to pull themselves up by the bootstraps to be here. People resent it when government tries to make somebody their economic equivalent by subsidizing them.’”).

¹⁶ See Erin E. Byrnes, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535, 553 (1999); Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler’s Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223, 233 (2000).

used by the courts over time, starting with the birth of the disparate impact doctrine in *Griggs v. Duke Power Co.*¹⁷ and *Albemarle Paper Co. v. Moody*.¹⁸ The Court originally framed the doctrine as part of a larger view of meritocracy that was skeptical of casting past achievement as entitlement to future gain. Part IV describes the shift to a meritocratic model that does assume such entitlement. The end result is a line of cases—*New York City Transit Authority v. Beazer*,¹⁹ *Watson v. Fort Worth Bank and Trust*,²⁰ and *Wards Cove Packing Co. v. Atonio*²¹—that increases the procedural burdens on the plaintiff while reducing those on the defendant. Part V introduces the statutory amendments of the Civil Rights Act of 1991 and explains how the Act contributes to the doctrinal confusion. Although the amendments restored the burdens of proof and persuasion to their proper places, the now-prevailing retrospective view of meritocracy continues to undermine disparate impact law. In the concluding section, Part VI, I challenge the Court’s reliance on a flawed conception of meritocracy and recommend a departure from this paradigm.

I. BACKGROUND

Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice” for employers with fifteen or more employees to discriminate on the basis of race, color, religion, sex, or national origin.²² Title VII was expressly intended to further meritocracy. In the debates prior to its enactment, Senators Case of New Jersey and Clark of Pennsylvania (co-managers of the bill in the Senate) issued a memorandum describing Title VII as an Act designed to ensure that all individuals would have an equal opportunity to compete for jobs. They emphasized that Title VII would not stray from the meritocratic model and would encourage employers to select the most qualified applicants: “[Title VII]

¹⁷ 401 U.S. 424 (1971).

¹⁸ 422 U.S. 405 (1975).

¹⁹ 440 U.S. 568, 584 (1979).

²⁰ 487 U.S. 977, 994–1000 (1988).

²¹ 490 U.S. 642, 659 (1989).

²² 42 U.S.C. § 2000e-2(a) (2000). That section states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

Id.

expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."²³ Politicians focused exclusively on the value of equal employment opportunities, ignoring the issue of equal employment outcomes in the process.

In the years immediately following its enactment, Title VII was invoked only in disparate treatment cases—in other words, when employers discriminated intentionally. Discriminatory intent could be shown by direct “smoking gun” evidence, such as an employer's derogatory statements,²⁴ or by circumstantial evidence. The Supreme Court in *McDonnell Douglas Corp. v. Green*²⁵ explained the parties' respective burdens in cases involving circumstantial evidence: After the plaintiff introduces evidence to establish a prima facie case of intentional discrimination,²⁶ the burden then shifts to the employer to present a legitimate, non-discriminatory justification for its actions. If the employer proffers such a justification, the plaintiff then has an opportunity to show that the employer's reason is pretextual and masks discriminatory motives.²⁷

In 1971, *Griggs v. Duke Power Co.* changed the face of anti-discrimination law by introducing the doctrine of disparate impact discrimination under Title VII.²⁸ This doctrine greatly expanded the grounds on which a complainant could bring suit under Title VII because it rendered proof of an employer's discriminatory intent unnecessary. Essentially, if a plaintiff can establish a prima facie case of disparate impact by demonstrating an adverse effect on a protected group, then the employer-defendant must provide evidence that the practice leading to such a result is justified by “business necessity.”²⁹ Even if the employer is able to do so, the plaintiff

²³ MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 366–67 (5th ed. 2000) (quoting 110 CONG. REC. 7247 (1964)).

²⁴ See, e.g., *Slack v. Havens*, No. 72-59-GT, 1973 U.S. Dist. LEXIS 13625, at *14 (S.D. Cal. July 17, 1973) (noting a comment by an employer who assigned the heavy clean-up work to his black employees that “colored folks should stay in their place” and that “colored folks were hired to clean because they clean better”), *modified*, 522 F.2d 1091 (9th Cir. 1975).

²⁵ 411 U.S. 792 (1973).

²⁶ A complainant can establish a prima facie case of disparate treatment by proving that he or she (i) belongs to a racial minority, (ii) applied for and was qualified for a job, and (iii) was rejected for the position, and that (iv) others with similar qualifications were interviewed after he or she was rejected. *Id.* at 802.

²⁷ *Id.* at 793.

²⁸ 401 U.S. 424, 429–33 (1971).

²⁹ *Id.* at 431. As originally conceived, the “business necessity” defense was held to a more rigorous standard than the “legitimate justification” defense available under the discriminatory treatment doctrine. *Id.* As discussed below, however, the judiciary has since shifted from describing business necessity as an indispensable business practice to characterizing it as an employment practice that is merely job-related or justified by any legitimate business purpose. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

still may prevail by showing that there were comparable, less discriminatory practices that the employer refused to use.³⁰

An employer may successfully defend itself against a disparate impact claim on the basis of a professionally validated test.³¹ Such tests must be “appropriate for the selection of qualified applicants for the job in question.”³² Three types of validation studies are acceptable. In criterion-related validation, the testing expert compares performance on the test to performance on the job to determine the test’s reliability. In construct validation, the testing expert studies the job and then constructs tests based on her judgment of the skills necessary for the job. Finally, in content validation, the expert ensures that the test comprises a sample of the work actually done on the job—such as typing for a typist.³³

In theory, validation attests to a strong correlation between the employer’s tests and success on the job. In practice, however, standardized tests may serve as a poor measure of merit. Testing itself may favor the affluent because, for instance, they are more familiar with written examinations. Those raised in impoverished neighborhoods may possess equal potential but less opportunity to demonstrate such potential due to inadequate schooling or mentorship.³⁴ Validation does not take into account these socio-economic factors.

The remainder of this Article chronicles the declining force of disparate impact doctrine in light of a judicial shift in conceptions of meritocracy. After two decades of judicial wrangling over the substantive and procedural requirements for a disparate impact claim, Congress codified disparate impact doctrine—and much of its confusion—in the Civil Rights Act of 1991 (“the Act” or “CRA ’91”).³⁵ While the Act rehabilitated *Griggs* to some extent, it did not entirely negate the damaging effect of the *Wards Cove* line of cases that narrowly interpreted the doctrine.³⁶ Although the Act reversed some consequences of the narrow judicial view of meritocracy, the underlying judicial views and momentum remain, as does the potential for further weakening the disparate impact doctrine in the future.³⁷

³⁰ See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

³¹ The employer also may prevail by showing that it utilizes bona fide seniority and merit systems (i.e., systems that legitimately reward employees based on length of service to the employer or performance on the job), so long as these systems are not designed, intended, or used to discriminate against a protected group. 42 U.S.C. § 2000e-2(h) (2000); ZIMMER ET AL., *supra* note 23, at 472–78. Courts often view the professional development of a test as a proxy for business necessity rather than an exception to it. See, e.g., *Nash v. Consol. City of Jacksonville*, 895 F. Supp. 1536, 1546 (M.D. Fla. 1995), *aff’d*, 85 F.3d 643 (11th Cir. 1996).

³² *Washington v. Davis*, 426 U.S. 229, 247 (1976).

³³ ZIMMER ET AL., *supra* note 23, at 461–62.

³⁴ See David Miller, *Deserving Jobs*, 42 PHIL. Q. 161, 179 (1992); see also *infra* Part II.

³⁵ 42 U.S.C. § 2000e-2(k) (2000); see also H.R. REP. NO. 102-40 (II), at 2–4 (1991).

³⁶ See *infra* Part V.A; see also H.R. REP. NO. 102-40 (II), at 2–4 (1991).

³⁷ See *infra* Part V.B.

II. MERITOCRACY EXAMINED

A. *Meritocracy Defined*1. *Overview*

In its broadest sense, “meritocracy” describes a social order in which individuals are ranked according to some individual worth or merit.³⁸ In contrast to group-based egalitarian models,³⁹ meritocratic models assume that ability can be quantified, separated from the social context, and attributed to the individual. When operating within this framework, one can define merit in different ways. This is depicted by the Court’s shift from a prospective definition of merit, as evidenced by *Griggs* and *Albemarle*, to a retrospective definition, as represented by the *Wards Cove* line of cases.⁴⁰ Whereas a prospective model considers past achievements as relevant but imperfect proxies for future performance, a retrospective model accepts badges of success as the equivalent of merit itself.

Although the Court created the disparate impact doctrine under a prospective model of meritocracy, it shortly began to chip away at the doctrine’s precepts and shift to a retrospective model.⁴¹ As detailed in Part III, the Court originally established a low prima facie burden for a disparate impact claim. In *Griggs* and *Albemarle*, the Court was skeptical of placing too much emphasis on past achievements, such as standardized test scores or high school degrees. By merely showing the adverse effects of an employment practice, then, the plaintiff could shift the burden to the employer-defendant to prove that the practice was necessary for, or related to, the future functioning of the business.⁴²

Beaver, *Watson*, and *Wards Cove* abandoned this line of reasoning. In those cases, the Court adopted a retrospective view of meritocracy and stopped demanding that the employer justify the challenged practice in terms of business functions that reverberate into the future. Instead, the Court began deferring to the justifications advanced by the employer. This shift demonstrates the Court’s aversion to disrupting past allocations of employment opportunities that may be viewed as entitlements.⁴³ A more detailed examination of these models will demonstrate why this shift parallels a decline in the strength of the disparate impact doctrine.

³⁸ Norman Daniels, *Merit and Meritocracy*, 7 PHIL. & PUB. AFF. 206 (1978).

³⁹ For approaches to the concept of egalitarianism, see Andrew Mason, *Equality of Opportunity, Old and New*, 111 ETHICS 760, 762 (2001).

⁴⁰ See *infra* Parts III, IV.

⁴¹ See *infra* Parts III, IV.

⁴² See *infra* Part III.

⁴³ See *infra* Part IV.

2. *Retrospective Models of Meritocracy*

The retrospective model defines merit in terms of past achievements. In the employment context, prior accomplishments are the equivalent of merit. The most accomplished applicant has a right to a given position. Thus, rights in the retrospective model can vest *ex ante*, without further analysis relating past achievements to future performance.⁴⁴ When invoking the retrospective model, then, courts mediate between conflicting rights with trepidation: The court must consider both the vested right to the job benefit and the statutory rights created by Title VII. As a result, courts taking a retrospective view may be more concerned with issues of fairness and more preoccupied with the judiciary's proper role when disrupting the status quo.

A retrospective model often affects legal discourse implicitly. For example, one may argue that affirmative action is unfair because it deprives the most qualified applicant of her right to a position. Such a statement often rests on the retrospective presumption that entitlement to a job vests on the basis of past accomplishments. Furthermore, when the judicial or legislative branch deems intervention in employment matters an improper exercise of judicial or legislative authority, the hidden justification may be that status quo distributions are aligned with rights.⁴⁵ Exposing the underlying assumptions of retrospective meritocracy may encourage dialogue about the adequacy of such a conceptual framework, compelling its proponents to defend it or admit an unprincipled political preference for the status quo.

3. *Prospective Models of Meritocracy*

Under a prospective model, the person who is best suited for a position or limited resource is the individual who would most efficiently use that position or resource, thereby contributing to the overall productivity of society.⁴⁶ From this perspective, job benefits should be distributed based on predictions about who will be the most effective and efficient employee.⁴⁷ An individual is not entitled to an employment benefit simply because of her past accomplishments: "Past performance is not the basis of desert, but rather a source of evidence about who is now deserving."⁴⁸

When comparing rights that have vested under the retrospective model to more attenuated considerations of efficiency under the prospective model,

⁴⁴ This model presumes, of course, that accomplishments can be measured and that merit should serve as the basis for an employment decision.

⁴⁵ See *infra* Parts IV, V.

⁴⁶ See Daniels, *supra* note 38, at 209.

⁴⁷ See *id.* ("The principle I believe would be preferred for job placement makes use of the equivalence class of maximally productive arrays of job assignments.").

⁴⁸ Miller, *supra* note 34, at 167.

one can begin to understand how a shift to a retrospective model could affect the enforcement of Title VII. When, as under the retrospective model, a court is “faced with a case of pitting claims of right against other claims of right,” the stakes appear higher than under the prospective model, where the court must weigh “considerations of productivity against considerations of justice.”⁴⁹ Under a retrospective model, the judiciary must justify the role of the court in disrupting the status quo.

The prospective model faces the additional complication of determining how past accomplishments relate to future success. If past achievements are merely imperfect proxies, then the model must admit a degree of error. In the absence of other means of estimating future performance, however, employers must continue to rely upon credentials.⁵⁰ For example, a law firm generally acts prudently in hiring a graduate from a top-tier law school with straight As over a graduate from a lower-tier law school with straight Cs. Although some C students from lower-tier schools may prove to be better lawyers than some A students from top-tier schools, law firms reasonably rely on past achievements as a measure of future performance.⁵¹ The difficulty lies in separating out and eliminating those predictors that do not comport with the forward-looking goal.

Under the prospective model, predictors can be excluded for (i) inaccurately measuring ability, (ii) measuring ability that is insufficiently related to job performance, or (iii) disregarding social context. First, one may argue that the criteria themselves contain internal flaws. For example, one may attack intelligence tests by explaining how cultural biases in the questions influence the results.⁵² Second, even if one assumes that ability is accurately measured, the result may not be sufficiently correlated to job performance. Someone who graduated with straight As from law school may nevertheless have failed to establish the foundation necessary to become an effective associate or partner. The validation studies detailed in Title VII and in the EEOC Guidelines provide uniform standards for analyzing both the accuracy of employment criteria and their relevance to job performance.⁵³ (The requirement that validation studies be conducted has decreased, however, as judicial decisions have begun to reflect a retrospective view of meritocracy.)⁵⁴

⁴⁹ Daniels, *supra* note 38, at 215. Daniels notes, “Many will feel less concerned about such compromises of productivity than they would if a claim to merit a job was really a claim of right, a claim of justice.” *Id.*

⁵⁰ See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2416 (1994) (“Employers rely on proxies of various kinds, even though the proxies are overbroad generalizations and far from entirely accurate. Test scores, level of education, and prestige of college attended are all part of rational employment decisions.”).

⁵¹ See *id.*

⁵² See, e.g., FISCHER ET AL., *supra* note 3, at 189.

⁵³ See 42 U.S.C. § 2000e-2(h) (2000); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1407.4 (2002)

⁵⁴ See *infra* Part IV.

Finally, the prospective model discounts the significance of past achievements that fail to consider social context and thus inadequately portray the ability of whole segments of society. For example, the resources that facilitate accomplishment of certain goals may be distributed unequally:

Suppose it can be shown by empirical research that there are social groups whose members are generally disadvantaged by the treatment they receive in education and the job market. Suppose, for instance, that black children generally receive less attention and encouragement in schools than white children of comparable ability. It would follow that performance to date, in the form, say, of examination grades received, would underrepresent the potential of members of these groups.⁵⁵

Under a prospective model, employers might adjust their consideration of credentials to account for such divergence in opportunity. In this vein, the prospective model recognizes that egalitarianism overlaps with meritocracy—to some extent, parity in resource allocation, such as universally adequate public education, is a necessary precursor to a functioning meritocracy.⁵⁶

The American legal system has been unwilling to fully embrace this vision of meritocracy because egalitarianism is not a politically acceptable framework for viewing individual achievements. Instead, as Section B explains, images of a staunchly individualistic liberal democracy⁵⁷ prevail in the United States. Temporary transgressions from this ideal are routinely dismissed as undemocratic or un-American.⁵⁸

B. The Centrality of Meritocracy

Judges often invoke ideals of liberal democracy to imply the necessity of a meritocratic system.⁵⁹ As one scholar put it: “[T]he idea that the

⁵⁵ Miller, *supra* note 32, at 179.

⁵⁶ See *infra* Part VI.

⁵⁷ A liberal democracy is a government that provides a realm of privacy in which individual autonomy can flourish. See ROY C. MACRIDIS, *CONTEMPORARY POLITICAL IDEOLOGIES: MOVEMENTS AND REGIMES* 38–40 (4th ed. 1989).

⁵⁸ See *infra* Part II.B.

⁵⁹ My observations about the role of meritocracy in disparate impact law must be considered in light of two conditions. First, I am charting a judicial trend that may find exceptions among individual judges or courts (although such exceptions do not detract from the resurgence of retrospective views of meritocracy, which in turn parallels the decline of disparate impact theory). Second, I assume that the judiciary is striving to enforce the law within the framework of a functioning democracy. Some may argue that references to meritocracy are simply political and mask a preference for the status quo. In my attempt to critique the decline of the disparate impact doctrine, I will concede the strongest possible argument for relying on meritocracy—that democracy mandates it.

best-qualified candidate should be appointed” is “an idea that is widely held and deeply embedded in the practices of liberal democracies.”⁶⁰

Liberal democracy presupposes a certain degree of separation between the individual and the government.⁶¹ Many democratic theorists justify this separation by stressing the importance of the individual as an autonomous entity that precedes the State.⁶² The individual is the building block of the polity; thus, the polity is obliged to respect individual autonomy by preserving a realm of freedom from the State—making liberal democracy as much a normative as a descriptive model.⁶³

The liberal democratic model can be invoked to suggest that the appropriate role of civil rights law is to bolster a functioning meritocracy. This argument begins with the premise that government should invade the realm of privacy only to protect individual autonomy. Any other form of government intervention purportedly would threaten the realm of the individual. Whereas government action to protect autonomy furthers liberalism, invading this realm when autonomy is not threatened limits autonomy and liberalism. The appropriate role of civil rights law, then, is to bolster autonomy and prevent the attribution of group characteristics to individual activity—when discrimination causes individuals to be judged as part of a group, rather than on their own terms, legal remedies are appropriate. Indeed, in the Senate debate over Title VII, Senators Case and Clark found it necessary to emphasize that the “very purpose” of the legislation was to restore selection based on individual merit.⁶⁴ This focus on using civil rights law to ensure that an individual is judged according to her own merit introduces dialogue about meritocracy into this area of law.

While one may disagree with the argument linking meritocracy to liberalism, it gives a principled explanation of how and why politicians and judges emphasize an individual-centered meritocratic model over a group-based egalitarian model when discussing civil rights. If one begins with the assumption that individual autonomy is more important to democracy than is equality, models that focus on group distribution will be politically unpopular and legally untenable.

III. THE EARLY YEARS OF DISPARATE IMPACT: PROSPECTIVE VIEWS OF MERITOCRACY

One must understand the development of the current, dominant model of meritocracy in order to effectively challenge the model’s underlying as-

⁶⁰ Mason, *supra* note 39, at 764.

⁶¹ MACRIDIS, *supra* note 57, at 38–40.

⁶² *Id.* at 32.

⁶³ For example, liberal democratic theorists reject the notion that a democracy can become a totalitarian state by popular vote. *See, e.g.*, Michael Halberstam, *Totalitarianism as a Problem for the Modern Conception of Politics*, 26 POL. THEORY 459, 462 (1998) (opining that “[t]he totalitarian regime represents the antithesis to liberalism”).

⁶⁴ ZIMMER ET AL., *supra* note 23, at 366–67 (quoting 110 CONG. REC. 7247 (1964)).

sumptions and revive the disparate impact doctrine. *Griggs v. Duke Power Co.*, decided in 1971, represents the starting point of disparate impact theory. To be hired into most departments at Duke Power Company, prospective employees had to achieve satisfactory scores on two aptitude tests. For interdepartmental transfers, employees were required to have either a high school degree or a median high school score on the standardized tests.⁶⁵ Black applicants failed both of these requirements at a significantly higher rate than white applicants. Prior to the effective date of the Civil Rights Act of 1964, the employer had a longstanding practice of segregating employees. Black applicants were hired only into the Labor Department, which offered lower pay and fewer seniority benefits than the other departments.⁶⁶ Once the Civil Rights Act became effective (on July 2, 1965), the company instituted its high school equivalency requirements.⁶⁷ Although implementation of the new hiring and promotion policy at this particular time appears to have been more than a mere coincidence, the Court noted that the company financed two-thirds of tuition costs for undereducated employees and decided there was no proof of discriminatory intent.⁶⁸

In a radical departure from precedent, however, the Court recognized a Title VII claim nonetheless. It asserted that the “absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”⁶⁹ The Court justified this innovative shift by broadly describing the purpose of Title VII as the removal of “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification[s].”⁷⁰ The Court reasoned that any hiring practice with a tendency to rank one race above the other is suspect on its face because individuals of all races have the ability to excel. If the plaintiff can prove that an employment practice causes an adverse impact, then the burden shifts to the defendant to prove the job-relatedness or business necessity of the practice.⁷¹

In *Griggs*, the Court based its disparate impact doctrine on a prospective model of meritocracy, describing the test scores as inaccurate (or

⁶⁵ *Griggs v. Duke Power Co.*, 401 U.S. 424, 427–28 (1971).

⁶⁶ *Id.* at 426–27.

⁶⁷ *Id.* at 427–28. Beginning in 1955, Duke Power Company required a high school education for initial assignment to all departments except the Labor Department (the only department to hire black employees). *Id.* It was not until 1965, when the company abandoned formal segregation and employees in the Labor Department could apply for transfer, that a high school diploma or equivalency test also became a precondition for interdepartmental transfers. *Id.*

⁶⁸ *See id.* at 432.

⁶⁹ *Id.*

⁷⁰ *Id.* at 431.

⁷¹ *See id.*

at least insufficient) proxies for future job performance. Since individuals of all races have equal potential, the disproportionate racial outcome of the tests in question made such indicators suspect: "This consequence [of unequal test results] would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process."⁷² If the Court had adopted a retrospective model, drawing the same conclusions would have been more difficult. For example, if the Court had believed the scores themselves were qualifications rather than fallible indicators thereof, it would have been faced with an entirely different question: Does Title VII make it unlawful to hire white employees with superior qualifications over black employees with inferior qualifications? An affirmative answer to this question would have prioritized egalitarianism over meritocracy, and the Court was unwilling to take this step: "Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications."⁷³

The Court further noted in *Griggs* that defining merit in terms of past achievements when resources have been distributed inequitably is impossible.⁷⁴ The Court observed, for instance, that black students have received an education inferior to that received by whites throughout American history.⁷⁵ Consequently, the Court pinpointed the need for a prospective model that does not rely solely on past accomplishments:

History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.⁷⁶

This view was supported by empirical evidence in *Griggs*. Employees that did not complete the exam or receive a high school diploma still per-

⁷² *Id.* at 430.

⁷³ *Id.*

⁷⁴ With this logic, the Court cast itself in sharp opposition to later attempts by certain scholars to attribute the subordination of minorities to their purportedly inherent lack of ability. *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 480 (1994) (concluding that "after controlling for IQ, it is hard to demonstrate that the United States still suffers from a major problem of racial discrimination in occupations and pay."). Siding with the *Griggs* Court, other social scientists have criticized the premises of *The Bell Curve*, explaining that networks of social disadvantage remain intact: "Jim Crow was banished only one generation ago; its legacy will last much longer." FISCHER ET AL., *supra* note 3, at 181. Poverty remains one of the lasting marks of discrimination.

⁷⁵ *Griggs*, 401 U.S. at 430.

⁷⁶ *Id.* at 433.

formed satisfactorily on the job and were promoted at the same rate as those with “conventional badges of accomplishment.”⁷⁷

The Court’s description of business necessity and job-relatedness also alluded to a prospective model of meritocracy. Whereas the retrospective model assumes that past accomplishments entitle individuals to future gains, the prospective model assumes that measures of success with an adverse impact—such as high standardized test scores—are unfair criteria for distinguishing among employees. To successfully argue that the employment criteria are necessary or job-related, the employer would have to overcome this countervailing presumption. The Court in *Griggs* disapproved of the employer’s practice of adopting the tests “without meaningful study of their relationship to job-performance ability.”⁷⁸ The Court thus set a stringent standard for defendants by suggesting that the relevance of any test to future job performance must be validated.⁷⁹

The weight of an employer’s burden in asserting a job-relatedness defense was further explored in *Albemarle Paper Co. v. Moody*,⁸⁰ the Court’s second explication of the disparate impact doctrine. The facts in *Albemarle* resembled those in *Griggs*. To be hired or transferred into the more skilled lines of work in a paper mill—jobs traditionally reserved for white employees—an individual had to achieve certain scores on two standardized tests.⁸¹ The tests had a disproportionate effect on black applicants and employees, and thereby established a prima facie case of discrimination under Title VII. Turning to the defense’s burden, the Court in *Albemarle* invoked the EEOC Guidelines to detail the weighty standards for proving job-relatedness through professional validation studies:

The message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be “predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.”⁸²

Ultimately, in *Albemarle*, the Court found the employer’s validation studies to be inadequate.⁸³ Once more, the Court refused to accept tests as legitimate

⁷⁷ See *id.* at 431–32.

⁷⁸ *Id.* at 431.

⁷⁹ See Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1488 (1996).

⁸⁰ 422 U.S. 405 (1975).

⁸¹ *Id.* at 410–11.

⁸² *Id.* at 431 (quoting Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(c) (1970)).

⁸³ The Court found the defendant’s validation to be inadequate because it demonstrated only a weak correlation between the exams and certain lines of skilled work. *Id.* at 431.

badges of success unless they were sufficiently related to future job performance.

Even if an employer could meet the rigorous standards for business necessity or job-relatedness, the plaintiff still could prevail with a “surrebuttal.”⁸⁴ Through this procedure, the plaintiff could refute the employer’s defense by showing that the employer refused to adopt a less-discriminatory alternative practice.⁸⁵ The addition of the surrebuttal reflected the Court’s skepticism toward employment policies with adverse impacts.

In sum, *Griggs* and *Albemarle* created disparate impact law out of a jurisprudence favoring a prospective version of meritocracy. The Court adopted a strong presumption of discrimination when an employer held one racial group to be more meritorious for hiring or benefits than another group. In the doctrine’s original conception, the Court was skeptical of badges of success, like standardized tests, that imperfectly measured ability. For example, it noted that socio-economic factors skew the attainment of credentials. When the result of an employment practice was a disproportionate effect, then, the Court presumed that the proxy was inadequate, not that classes of individuals were divergently qualified.

IV. JUDICIAL RESHAPING OF DISPARATE IMPACT: RETROSPECTIVE VIEWS OF MERITOCRACY

In a series of cases culminating in *Wards Cove* in 1989, the Court’s conceptual framework shifted to reflect retrospective views of meritocracy, thus destabilizing the disparate impact doctrine. By presuming the legitimacy of credentials based on past accomplishments, a retrospective model idealizes and upholds the status quo. Having accepted this model, the Court no longer can discuss the unfair influence of socio-economic factors on achievement; rather, it must assume that badges of success are distributed “justly”—in other words, on the basis of merit.

New York City Transit Authority v. Beazer,⁸⁶ decided in 1979, marked the beginning of the end of a rigorous disparate impact doctrine. The plaintiffs in *Beazer* represented a class of past and future Transit Authority (“TA”) employees who had been or would be denied employment because of their methadone use. As part of its broader narcotics policy, the TA generally prohibited the use of methadone, a drug prescribed to overcome a heroine addiction. The plaintiffs argued that this policy had a disparate impact on black and Hispanic workers because “81% of the employees referred to TA’s medical director for suspected violations of its narcotics rule were either black or Hispanic,”⁸⁷ and “63% of the persons

⁸⁴ Linda Lye, *Title VII’s Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 324–25 (1998).

⁸⁵ *Albemarle*, 422 U.S. at 436.

⁸⁶ 440 U.S. 568 (1979).

⁸⁷ *Id.* at 569.

in New York City receiving methadone maintenance in *public* programs [were] black or Hispanic.”⁸⁸ Yet, in *Beazer*, the Court was less willing to attribute racially divergent results to an inaccurate measure of ability than it had been in *Griggs* and *Albemarle*.

By requiring exacting statistical evidence, the Court in *Beazer* raised the plaintiffs’ burden when building a prima facie case in Title VII disparate impact cases. As envisioned in *Griggs* and *Albemarle*, a prima facie case could be established without much difficulty, because the Court assumed that methods of screening job applicants often were mere proxies for determining merit. Under the prospective model, the Court was quick to suspect that a proxy was inadequate if there was evidence of a disparate impact. In contrast, the Court in *Beazer* moved away from its earlier skepticism of divergent results in *Griggs* and *Albemarle*.

The aforementioned statistics notwithstanding, the Court in *Beazer* decided that the evidence was insufficient to establish a prima facie case of discrimination against methadone users, even though the prohibition against methadone use was an explicit facet of the TA’s broader narcotics policy.⁸⁹ The Court further opined that the racial composition of methadone users in New York City is not indicative of the racial composition of methadone users in the applicant pool, and thus ignored the likelihood that the policy itself may have deterred prospective black employees from applying.⁹⁰ The Court reached this conclusion despite the fact that, just two years earlier, it had deemed a study of the applicant pool to be unnecessary: “The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.”⁹¹

Despite precedent accepting a much broader range of statistical evidence, the Court in *Beazer* demanded data based on the TA’s applicant pool.⁹² Such information often is quite difficult to retrieve, given the limited number of past employees discharged for methadone use and uncertainty about who might apply in the future. Consequently, this higher statistical standard effectively increased the plaintiff’s burden of proof in establishing a prima facie case. The tenor of the Court’s holding in *Beazer* resonates very differently from its *Dothard* decision, in which the Court asserted:

⁸⁸ *Id.* at 585.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977). The Court held in *Dothard* that complainants could establish a prima facie violation of Title VII by showing that height and weight requirements for correctional officers in Alabama’s prisons would exclude a disproportionate number of women in the United States. *Id.* at 339.

⁹² See *Beazer*, 440 U.S. at 585–86 (concluding that the statistical evidence “tells us nothing about the class of otherwise-qualified applicants and employees who have participated in methadone maintenance programs . . .”).

The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own.⁹³

By raising the bar for the complainant's prima facie case in *Beazer*, the Court implied that the exclusion of applicants and employees using methadone represented "just deserts," harkening back to the retrospective model of meritocracy.⁹⁴ In contrast, the Court in *Griggs* and *Albemarle* had avoided making independent judgments about the appropriateness of the employer's tests, and instead had shifted the burden to the defendant.⁹⁵ Perhaps the seemingly controversial nature of methadone use increased the Court's willingness in *Beazer* to presume the validity of restrictions in the absence of extremely compelling statistical evidence showing otherwise. Whatever the reason, the end result was the adoption of an imposing prima facie burden.

In *Beazer*, the Court not only increased the plaintiff's burden in Title VII disparate impact cases, but it also, in dicta, lightened the employer's burden of establishing business necessity to rebut the plaintiff's prima facie case.⁹⁶ Although the Court already had dismissed the plaintiff's claim for lack of evidence to establish a prima facie case, the Court went on to note that the employer easily could have defended its methadone policy: "[E]ven if [the plaintiff] is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is 'job related.'"⁹⁷ In a footnote, the Court articulated the job-relatedness of the TA's policy as serving "legitimate goals of safety and efficiency."⁹⁸ This lenient way of framing business necessity would allow an employer to conjure up any number of goals to serve as pretexts for employment practices with discriminatory impact, so long as those "goals are significantly served" by those employment practices.⁹⁹ The Court thus eliminated the defendant's need to prove that the policies in question are "required" to attain those goals. The new, lenient standard for business necessity may be satisfied by a lax causal connection between the policy and the stated

⁹³ *Dothard*, 433 U.S. at 331.

⁹⁴ *See Beazer*, 440 U.S. at 585–87.

⁹⁵ *See Griggs*, 401 U.S. at 430–33; *see also Albemarle*, 422 U.S. at 431.

⁹⁶ The Court later adopted this definition of business necessity in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

⁹⁷ *Beazer*, 440 U.S. at 587.

⁹⁸ *Id.* at 587 n.31.

⁹⁹ *Id.* ("Finally, the District Court noted that those goals are significantly served by—even if they do not require—TA's rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions.").

ends, and it permits those ends to be mere “goals” that may never be fulfilled. This new conception of business necessity obliterates the link to future job performance—the linchpin of the prospective model. Such a definition marks a dramatic departure from the Court’s prior understanding.¹⁰⁰

In adopting this lower standard of business necessity, the Court implicitly rejected a prospective model of meritocracy by dispensing with the requirement that a connection between the methadone policy and a relevant aspect of employment be clearly proven. No such connection to job performance was established in this case. The defendant claimed the policy was necessary to ensure that employees could perform safety-sensitive jobs. Yet, aside from speculations that individuals on methadone may experience altered moods, there was no clear evidence linking methadone use to reduced safety.¹⁰¹ Moreover, the TA excluded methadone users from jobs that were not safety-sensitive.¹⁰² Effectively, the Court reversed the presumptions outlined in *Griggs* and *Albemarle*. After *Beazer*, it would accept the employer’s reasoning as legitimate unless otherwise proven.

Generally, the complainant’s surrebuttal serves as a safety valve for overly lenient definitions of business necessity. Even if a court allows an employer to establish “business necessity” based on little more than a vague connection between a hiring policy and an employment consideration, a plaintiff still may prevail by showing a less-discriminatory alternative practice that the employer refuses to adopt.¹⁰³ This procedural device was designed to ensure that an employer would be excused only in cases in which its contested employment practice is essential. In *Beazer*, however, the Court disabled the surrebuttal by deeming it limited to disparate treatment cases. As the Court stated in dicta: “The District Court’s express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination.”¹⁰⁴

The Supreme Court continued to reallocate the disparate impact doctrine’s procedural burdens in *Watson v. Fort Worth Bank & Trust*.¹⁰⁵ In that case, the Court extended application of the disparate impact doctrine even to those cases in which the employer has “not developed precise and

¹⁰⁰ Lye, *supra* note 84, at 328 (“While the Court in *Dothard* had appeared to require that a challenged practice *directly* measure a quality *essential* to job performance, the Court’s *Beazer* footnote seemed to require only that a practice *significantly* serve a *legitimate* employment goal.”) (emphasis added).

¹⁰¹ *Beazer*, 440 U.S. at 576.

¹⁰² *Id.* at 587 n.31.

¹⁰³ See, e.g., Lye, *supra* note 84, at 324–25.

¹⁰⁴ *Id.* at 587. The Civil Rights Act of 1991 contradicted such dicta, however, by explicitly making the surrebuttal a part of disparate impact law. See 42 U.S.C. § 2000e-2(k) (2000); see also *infra* Part V.A.

¹⁰⁵ 487 U.S. 977 (1988).

formal criteria for evaluating candidates for positions.”¹⁰⁶ Yet what is most relevant about *Watson* for purposes of this Article is the standard the Court invoked to arrive at this conclusion. The *Watson* plurality continued to increase the weight of the plaintiff’s burden while reducing that of the defendant.¹⁰⁷

As in *Beazer*, the *Watson* plurality diverged from *Griggs* and *Albemarle* by requiring more than statistical disparities to establish a prima facie case.¹⁰⁸ First, the plurality demanded that the complainant identify “the specific employment practice that is challenged,”¹⁰⁹ even though forcing a plaintiff to isolate one culpable practice out of a web of inter-related policies might preclude success in complex cases. Second, the plurality would require the complainant to prove that the policy in question “caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.”¹¹⁰ On the one hand, requiring proof that a specific practice is the “cause” of exclusion exacerbates the problems enumerated above—plaintiffs are left with the impossible task of collapsing complex scenarios into simple causal chains. On the other hand, requiring plaintiffs to demonstrate disproportionate outcome “because of their membership in a protected group” is tantamount to requiring them to prove disparate treatment.

The requirements of identification and causation were adopted by the Civil Rights Act of 1991,¹¹¹ as discussed in the following Part. These additional requirements demonstrate a contemporary unwillingness, consistent with the retrospective model, to upset the status quo. Congressional and judicial discomfort over allowing the burden to shift to the employer can be traced back to the assumption that those individuals selected for jobs or promotions are simply the most qualified, despite disparate results. In other words, courts are wary of recognizing disparate impact claims because of the prevailing sense that persons currently occupying employment positions are somehow entitled to them.

Even if the plaintiff *could* establish a prima facie case, the *Watson* plurality has further impeded the plaintiff’s case by facilitating a relaxed business necessity defense.¹¹² Directly contradicting seventeen years of case law, the plurality asserted that the burden of persuasion remains with the plaintiff through every stage of the case, while the defendant merely has the burden of producing evidence tending to prove business necessity.¹¹³

¹⁰⁶ *Id.* at 982.

¹⁰⁷ Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 *FORDHAM L. REV.* 523 (1991).

¹⁰⁸ *Watson*, 487 U.S. at 994.

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *Id.*

¹¹¹ *See, e.g.*, 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000) (detailing a narrow exception to the identification requirement).

¹¹² *See Watson*, 487 U.S. at 998.

¹¹³ *Id.*

This procedural framework operates against the complainant by presuming the existence of a legitimate defense of business necessity. In fact, the plurality made this presumption quite explicit:

We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.¹¹⁴

Once more, the Court chipped away at the initial presumption underlying the disparate impact doctrine—that policies resulting in disparate impact ought to be closely scrutinized. Instead, the *Watson* plurality noted that once the defendant has “met its burden of producing evidence that its employment practices are based on legitimate business reasons,”¹¹⁵ the plaintiff can prevail only by establishing—through the burdens of both proof and persuasion—that the employer failed to use less discriminatory practices.¹¹⁶

Additionally, the *Watson* plurality showed greater deference to subjective criteria used by employers to screen out applicants. The Justices commented that validation is not possible with subjective criteria: “Some qualities—for example, common sense, good judgment, originality, ambition, loyalty, and tact—cannot be measured accurately through standardized testing techniques.”¹¹⁷ As a result, professional studies cannot be required to firmly root subjective employment criteria in a prospective conception of merit. Although subjective practices arguably deserve some deference, a weak definition of business necessity as “job-relatedness”¹¹⁸ leaves employers with no significant burden of production. With such a lenient standard, employers have the latitude to hire based on subjective factors unrelated to job performance and then to invent a connection *ex post*. The *Watson* plurality makes the plaintiff herself responsible for revealing and proving such duplicity.

In so doing, the plurality ignored a more appropriate middle ground—a strong definition of business necessity that obligates employers to come forward with compelling evidence (although not necessarily validation studies). An understanding of business necessity as true necessity, rather than mere job-relatedness, would encourage employers to build a strong record during trial. For example, in cases in which the employer had used subjective hiring criteria, the employer could present expert testimony, based

¹¹⁴ *Id.* at 992.

¹¹⁵ *Id.* at 998.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 991.

¹¹⁸ *See id.* at 997.

on a study of the work performed, that demonstrated a nexus between those criteria and the demands of the job. The employer's experts also could draw comparisons between the employer's subjective criteria and the criteria commonly invoked within the industry for that type of job. A more demanding standard for business necessity would not require courts to make independent judgments about the soundness of subjective criteria; rather, it would allow courts to analyze employment criteria with reference to evidence beyond the employer's conclusory statements. Nevertheless, the *Watson* plurality "suggested that the existence of a legitimate business reason might suffice."¹¹⁹

The *Watson* plurality also made the surrebuttal more difficult for plaintiffs. The plurality did not follow the dicta in *Beazer* indicating that the surrebuttal could be eliminated altogether.¹²⁰ Instead, the opinion limited its impact. The Justices noted that courts can consider "the cost or other burdens of proposed alternative selection devices" to determine if they would be "equally as effective as the challenged practice in serving the employer's legitimate business goals."¹²¹ Furthermore, the Justices instructed courts to defer to employers in order to ascertain which practices are more effective, unless the courts were otherwise directed by Congress.¹²² Such deference conflicts with disparate impact as envisioned under the prospective model; it leads to the affirmation of employment policies that cause disproportionate results without requiring proof of how those policies are relevant to the job in question. By not sufficiently challenging the grounds on which the employer determines who is most meritorious for hiring or benefits, the *Watson* plurality rejected the prospective model.

The Court's reasoning in *Beazer* and *Watson* culminated in *Wards Cove*. There, the Court decided that the plaintiffs had not established a prima facie case by demonstrating statistical disparities in the workplace. Complainants, a class of "nonwhite cannery workers,"¹²³ contended that the salmon canneries were violating Title VII by hiring white employees for higher-paying skilled non-cannery jobs and Filipino and Alaskan Natives for lower-paying non-skilled cannery positions. Although the statistical evidence was reminiscent of the stratified workforce in *Griggs*, the Court in *Wards Cove* continued to be skeptical of statistical evidence, declaring the evidence insufficient unless the "pool of *qualified* job ap-

¹¹⁹ Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1301 (1998).

¹²⁰ See *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979).

¹²¹ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988).

¹²² *Id.* at 999 ("In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that '[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.'") (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

¹²³ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 647 (1989).

plicants” or “*qualified* population in the labor force” were used as the basis for comparison.¹²⁴ In his dissent, Justice Stevens expressed his distaste for such reasoning: “Turning a blind eye to the meaning and purpose of Title VII, the majority’s opinion perfunctorily rejects a long-standing rule of law and underestimates the probative value of evidence of a racially stratified workforce.”¹²⁵

After rejecting the sufficiency of the plaintiffs’ statistical evidence, the Court dismissed their claim. The Court also went on to agree with the *Watson* plurality in dicta. First, the Court declared that plaintiffs must identify a specific employment practice and prove causation to establish a prima facie case. Second, the Court stated that only the burden of production shifts to the defendant in proving business necessity, while the burden of persuasion remains with the plaintiff at all times. The Court also made clear that a finding of business necessity or job-relatedness ought to be the norm rather than the exception: “[T]here is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business for it to pass muster.”¹²⁶ To underscore the deferential nature of this standard, the Court renamed the business necessity defense the “business justification” standard.¹²⁷

Finally, following *Watson*, the Court reduced the impact of plaintiffs’ surrebuttal, describing it as a mode of proving discriminatory intent:

If respondents, having established a prima facie case, come forward with alternatives to petitioners’ hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.¹²⁸

Ultimately, the *Wards Cove* line of cases restructured disparate impact doctrine in accord with an unjustifiably narrow view of meritocracy. In reallocating the burdens of proof and persuasion, the Court presumed that employment policies for deciding who deserves to be hired, transferred, or promoted are legitimate unless proven otherwise. Furthermore, by upholding employment policies with a disparate impact, the Court implicitly endorsed a line of reasoning, as presented in *The Bell Curve*, that touts racially divergent employment outcomes as justifiable.¹²⁹ Such an approach turns a blind eye to underlying social inequalities that make

¹²⁴ *Id.* at 651.

¹²⁵ *Id.* at 663 (Stevens, J., dissenting).

¹²⁶ *Id.* at 659.

¹²⁷ *Id.*; see also Lye, *supra* note 84, at 332–33.

¹²⁸ *Wards Cove*, 490 U.S. at 660–61.

¹²⁹ HERRNSTEIN & MURRAY, *supra* note 74.

attainment of traditional badges of success more difficult for members of some groups than for others.

V. STATUTORY AMENDMENTS: CONTINUED THEORETICAL DISCORD

The Civil Rights Act of 1991 purported to revive the disparate impact doctrine. Yet without a change in the visions of meritocracy held by politicians and judges, lasting reform was doubtful. The Act codified judicial confusion regarding legal terminology and gave the judiciary *carte blanche* to continue altering disparate impact law by infusing old terms with new meaning. Although the legislation mandated a return to pre-*Wards Cove* burden-shifting, it nonetheless granted the courts leeway to alter the substance of the procedural burdens. The past decade has witnessed the courts' continued willingness to demand exacting *prima facie* cases from plaintiffs while maintaining relaxed standards for defendants. In other words, recent case law has continued to implicitly embrace the retrospective model.

A. *The Civil Rights Act of 1991*

Wards Cove sparked a prompt political response that seemed to bode well for the future of disparate impact law. Soon after *Wards Cove* was handed down, Senator Kennedy introduced a bill “[t]o amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment.”¹³⁰ After two years of contentious political debate, marked by “wrangling and compromise,”¹³¹ the Civil Rights Act of 1991 was passed.¹³² The explicit purpose of the Act was “to respond 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.”¹³³ Nevertheless, the extent to which the amendments rejected the *Wards Cove* line of reasoning and strengthened the disparate impact doctrine is unclear. Indeed, CRA '91 perpetuates certain trends from the *Wards Cove* line, and thus contributes to the decline of the disparate impact doctrine.

Despite the Act's ambitious goal of reviving disparate impact law, the two primary changes it effected consisted of narrow reversals of *Wards Cove*. First, CRA '91 established that the burden of persuasion shifts to the defendant when claiming business necessity or job-relatedness. This enactment requires a court to presume a lack of business necessity when the evidence lies in a state of equipoise. Second, the Act reinstated the

¹³⁰ H.R. REP. NO. 120-40 (II), at 1 (1991).

¹³¹ Lye, *supra* note 84, at 334.

¹³² Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered titles and sections of U.S.C.).

¹³³ *Id.* § 3(1), 105 Stat. at 1071.

complainant's surrebuttal "as it existed on June 4, 1989 [the day before *Wards Cove* was decided], with respect to the concept of 'alternative employment practice.'"¹³⁴ Presumably, this reinstatement would distinguish the surrebuttal in disparate impact law from a showing of pretext in disparate treatment law, thus eliminating the confusion in *Wards Cove*.¹³⁵ Nevertheless, the Act left *Beazer* as good law, including its dicta that the plaintiff should have no opportunity for a surrebuttal if she cannot prove the defendant's discriminatory intent.¹³⁶

Although CRA '91 preserved certain elements of the disparate impact doctrine as developed in *Griggs*, the Act's language also manifests the enduring influence of *Wards Cove* and its predecessors. In fact, the Act's description of disparate impact doctrine incorporates the reasoning adopted in the *Wards Cove* line of cases. For instance, CRA '91 requires plaintiffs to prove causation and identification in order to establish a prima facie case; only if "the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis"¹³⁷ can the complainant proceed without specifying the employment practice to which the disparate impact may be attributed. Conspicuously absent from the Act is a discussion of the type of statistical evidence necessary to establish a prima facie case. This silence can be interpreted as an adoption of the skepticism towards statistics present in *Beazer*, *Watson*, and *Wards Cove*.

Moreover, CRA '91 contains ambiguous definitions of "business necessity" and "job-relatedness." The interpretive memorandum¹³⁸ explains that business necessity and job-relatedness "are intended to reflect the concepts enunciated" in *Griggs* and other pre-*Wards Cove* decisions.¹³⁹ But the Act did little to abate the confusion.¹⁴⁰ For instance, it provided that a plaintiff may establish a disparate impact claim if she proves a prima facie case and the employer "fails to demonstrate that the chal-

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

¹³⁵ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660–61 (1989). In cases involving circumstantial evidence of disparate treatment, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment practice once the plaintiff establishes a prima facie case. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The complainant then may argue that the employer's rationale is pretextual, i.e., is being used to mask underlying discriminatory motives. *Id.* at 804–05. Pretext in disparate treatment law can be distinguished from the surrebuttal in disparate impact law insofar as the former is concerned with the intent to discriminate.

¹³⁶ See *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979).

¹³⁷ 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000).

¹³⁸ In an attempt to erase from the official record the contentious debate surrounding its passage, the Act declared that "[n]o statements other than the interpretive memorandum" could be considered legislative history or relied upon in construing the Act. Civil Rights Act of 1991 § 105(b), 105 Stat. at 1075.

¹³⁹ 137 CONG. REC. S15,276 (1991).

¹⁴⁰ See *Lye*, *supra* note 84, at 335 ("In essence, the 1991 Act codified the confusion which formerly prevailed.").

lenged practice is . . . consistent with business necessity.”¹⁴¹ This language implies that “business necessity” is not really “necessary” because the defendant simply must proffer an explanation “consistent with” business necessity. The Act avoids using terms that would accord with the prospective model, such as “essential” or “indispensable,” and thus indicates that the defendant’s rationale must merely be reasonable. Indeed, recent case law confirms that statutory vagueness with regard to these terms enables courts to continue building upon *Wards Cove* despite the Act’s stated purpose to the contrary.¹⁴²

The Act also fails to reference the stringent validation requirements contained in the EEOC Guidelines, and thus further undermines the standards established in *Griggs* and *Albemarle*. Some scholars have endorsed this Congressional choice, arguing that the stringent requirements of the Guidelines could make the justification of hiring criteria excessively difficult and burdensome for employers. In this vein, the EEOC’s initial set of Guidelines (which were developed in 1970 and embraced in *Albemarle*) sparked disapproval:

Professional criticism of the 1970 Guidelines has been severe. The Psychological Corporation, a respected and long established developer of psychological tests, has taken the position that the 1970 Guidelines are “unreasonable, unrealistic and unworkable.” The Division of Industrial-Organizational Psychology of the American Psychological Association . . . has criticized the rigid application of the 1970 Guidelines as leading to “professionally unrealistic and effectively unattainable requirements.”¹⁴³

Although the imposition of unattainable validation requirements are cause for concern, that concern must be tempered by the countervailing need to maintain objective standards for establishing business necessity. When a vague and weak definition of business necessity is coupled with the absence of provisions for validation studies, the law does not encourage a vigorous review of the employer’s proffered reasons for rejecting particular candidates. Instead, CRA ’91 seems to endorse a retrospective approach to merit that hesitates to challenge the legitimacy of employment criteria. Under CRA ’91, business necessity does not require evidence of a link to future job performance. Consequently, the Act reflects a congressional rejection of the prospective model.

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

¹⁴² See *infra* Part V.B.

¹⁴³ Dean Booth & James L. Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121, 125 (1980).

B. Federal Case Law Post-CRA '91

With the procedural bar rising for disparate impact claims, plaintiffs feel increasing pressure to bring disparate treatment claims.¹⁴⁴ This trend is disturbing given the difficulty of proving discriminatory intent: “Typically, plaintiffs do not provide courts with ‘smoking gun’ type of evidence that proves the employer engaged in discriminatory practices against a protected group.”¹⁴⁵

Until courts change the lens through which they analyze disparate impact cases, the doctrine will be difficult to revive. The few circuit and district court cases that have addressed disparate impact claims since CRA '91 have affirmed the continued viability of the *Wards Cove* Court's reasoning and have implicitly rejected prospective notions of meritocracy.

For example, courts today are demanding exacting statistical proof and relying on the prima facie burden to bar many cases. In *Shah v. New York State Department of Civil Service*, the Southern District of New York held that the plaintiff could not establish a statistically significant prima facie case by calculating the adverse impact on all minority populations.¹⁴⁶ Yet in cases where one minority group is considered in isolation, courts frequently have dismissed the data because it was derived from an insignificantly small applicant pool. In *Chavez v. Coors Brewing Co.*,¹⁴⁷ the Tenth Circuit found no disparate impact when one of five Hispanic applicants was selected for a specialist position, as compared to nineteen out of forty-three non-Hispanic candidates. The court reasoned that “[t]he small number of overall applicants for the senior specialist positions renders a statistical analysis relatively unhelpful,”¹⁴⁸ while conced-

¹⁴⁴ In fact, many federal cases have rejected plaintiffs' disparate impact claims and have encouraged disparate treatment claims instead. See, e.g., *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1268 (11th Cir. 2000); *Rodriguez v. Beechmont Bus Serv.*, 173 F. Supp. 2d 139 (S.D.N.Y. 2001); *Buenrostro v. Flight Safety Int'l, Inc.*, 151 F. Supp. 2d 788 (W.D. Tex. 2001); see also Krieger, *supra* note 7; Sturm, *supra* note 14.

¹⁴⁵ *Kozlowski v. Fry*, 238 F. Supp. 2d 996, 1006 (N.D. Ill. 2002). Aside from the usual lack of direct proof of discriminatory intent, circumstantial evidence of disparate treatment also poses evidentiary difficulties.

¹⁴⁶ No. 94 Civ. 9193, 1997 U.S. Dist. LEXIS 19567, at *21 (S.D.N.Y. Dec. 9, 1997) (holding, more specifically, that the plaintiff could not consider his own class—applicants of East Asian descent—along with other minorities to prove a disparate impact), *aff'd*, 168 F.3d 610 (2d Cir. 1999).

¹⁴⁷ No. 98-1109, 1999 U.S. App. LEXIS 5300, at *13 (10th Cir. Mar. 25, 1999).

¹⁴⁸ *Id.*; cf. *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743 (10th Cir. 1991) (holding that purported discrimination against five employees was too statistically insignificant to support a claim of systemic disparate treatment under the Age Discrimination in Employment Act). By contrast, no minimum sample size is necessary to establish a disparate impact claim. Statistical significance depends on whether a court is looking for “a test [that] has a disparate impact on the actual applicants who took the test,” or a test that “has a disparate impact on otherwise qualified individuals in the general population.” *ZIMMER ET AL.*, *supra* note 23, at 414.

ing that “the absence of statistics makes plaintiff’s job more difficult.”¹⁴⁹ Such rulings demonstrate that plaintiffs continue to face imposing hurdles when using statistics to establish a prima facie case after CRA ’91.¹⁵⁰

In a rare situation in which the plaintiff did successfully establish a prima facie case, the Middle District of Florida blurred disparate impact with disparate treatment analysis.¹⁵¹ The court held that too few blacks applied for promotion to the position of fire captain to determine if the method for selecting applicants led to disproportionate results.¹⁵² When looking to non-statistical evidence to prove disparate impact, the court found that the fire department’s “pattern of past racial discrimination” could be invoked to establish a prima facie case.¹⁵³ Due to the high bar the court set for statistical evidence, the plaintiffs were forced to revert to evidentiary claims resembling disparate treatment arguments. The court went so far as to deny the validity of disparate impact claims in the absence of discriminatory intent: “In the end, a defendant may not be held liable on a claim of disparate impact on the basis of less evidence than is required to prove intentional discrimination.”¹⁵⁴

Another example of judicial denial of the independent existence of disparate impact claims is *EEOC v. Joe’s Stone Crab*.¹⁵⁵ Joe’s Stone Crab had no official policy excluding women from employment positions, but between 1950 and 1990 it hired almost no female servers.¹⁵⁶ Nonetheless, the court decided that this unequal outcome was inadequate to establish a prima facie case of disparate impact because few women had applied and because the employer had hired women in rough proportion to the applicant pool.¹⁵⁷ Aligning itself with *Beazer* rather than *Dothard*, the Eleventh Circuit refused to accept statistical proof of the disparity between the qualified pool of female servers in Miami and those hired by this particular restaurant.¹⁵⁸ In so doing, the court disregarded evidence that the

¹⁴⁹ *Chavez*, 1999 U.S. App. LEXIS 5300, at *13.

¹⁵⁰ See also *Bennett v. Matlin*, No. 96-C-6915, 1997 U.S. Dist. LEXIS 19227 (N.D. Ill. Nov. 25, 1997) (finding insufficient the plaintiff’s claim that the school district’s practice of (i) permitting school administrators to exclude applicants from the interviewing process for any reason, and (ii) allowing principals to determine which applicants to interview resulted in the employment of 11 black teachers out of a total staff of 655 teachers; to establish a prima facie case, the plaintiff needed to make comparisons with the qualified labor pool).

¹⁵¹ *Nash v. Consol. City of Jacksonville*, 895 F. Supp. 1536 (M.D. Fla. 1995), *aff’d*, 85 F.3d 643 (11th Cir. 1996).

¹⁵² Two of the 94 applicants were black. *Id.* at 1544.

¹⁵³ *Id.* at 1543.

¹⁵⁴ *Id.* at 1542 (quoting *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1314 (11th Cir. 1994)).

¹⁵⁵ 220 F.3d 1263 (11th Cir. 2000).

¹⁵⁶ *Id.* at 1268.

¹⁵⁷ *Id.* at 1275 (noting that “no statistically-significant disparity exists between the percentage of women who actually applied to Joe’s and the percentage of women who were hired as servers by Joe’s.”); see also *id.* at 1270–71.

¹⁵⁸ *Id.* (“Despite the fact that no women were hired during this period, Joe’s pre-charge hiring rate demonstrated no significant statistical disparity because so few women actually

applicant pool was misrepresentative because the restaurant's tradition of hiring male servers deterred women from even applying.¹⁵⁹ Manifesting a judicial aversion to challenging employment practices in the absence of evidence of discriminatory intent, the Eleventh Circuit overturned the plaintiffs' successful disparate impact claim and remanded the case to the trial court with instructions to consider only disparate treatment.

The Eleventh Circuit confirmed in *Joe's Stone Crab* that the standards of identification and causation codified in CRA '91 can be insurmountable barriers to establishing a prima facie case. First, the court held that the plaintiffs had failed to identify a specific practice. The plaintiffs pointed to the restaurant's Old World atmosphere and reputation for discrimination, but the court characterized these elements of the work environment as "images," for which the employer was not responsible, rather than discriminatory "practices."¹⁶⁰ The court rejected arguments that the Old World image could be considered a practice or policy (as the restaurant's "preferred" ambience) because that image was not "mandated by written policy or verbal direction."¹⁶¹ Second, the court dismissed the claim that the restaurant's word-of-mouth hiring procedures or its subjective hiring criteria caused the disparate impact. The court reasoned that women were adequately informed of vacancies and interview opportunities through word of mouth, even if they did not choose to apply. The court disregarded the contention that the lack of a public announcement inviting both men and women to apply may have bolstered the image of Joe's as a business that exclusively hired male servers.¹⁶² In contrast, the restaurant's near-total forty-year ban on hiring female servers likely would have satisfied the prima facie burden under *Griggs* and *Albemarle*.

If plaintiffs in the post-CRA '91 world successfully demonstrate the existence of a disparate impact, the burden of proof in establishing business necessity is technically shifted to the defendant. Yet the standard of business necessity is rarely exacting. In *Shah*, the New York State Office of Mental Health ("OMH") required applicants to have two years of managerial experience with mental health quality assurance programs to be eligible for the position of Director of Quality Assurance ("DQA"). DQAs were required to supervise quality assurance programs, issue policy guidance, and interpret agency policy.¹⁶³ The Southern District of New York

applied for food server positions.").

¹⁵⁹ *Id.* at 1291 (Hull, J., dissenting) ("The district court emphasized that Joe's did not advertise in the newspaper or elsewhere that it was an equal opportunity employer.").

¹⁶⁰ *Id.* at 1282 ("None of the district court's findings support the conclusion that a facially-neutral practice or policy of Joe's caused its reputation, and there is not a scintilla of evidence in the record to support this notion.").

¹⁶¹ *Id.* at 1295 (Hull, J., dissenting).

¹⁶² *Id.* at 1279 (arguing that there was "no evidence that Joe's word of mouth recruiting method caused any disparity between the percentage of women in the qualified labor pool and the percentage of women actually hired by Joe's as servers").

¹⁶³ *Shah v. N.Y. State Dep't of Civil Serv.*, No. 94 Civ. 9193, 1997 U.S. Dist. LEXIS

accepted the job requirements for this position as an acceptable “judgment decision made by OMH as to the skills necessary to fulfill the duties associated with the position” without any analysis of how the required qualifications actually were *necessary* to the job.¹⁶⁴ The court’s silence in this regard reveals a presumption that the employer’s reasoning is legitimate unless proven otherwise—a presumption that harkens back to *Wards Cove*. This weak definition of business necessity does not link employment practices to future job performance.

In sum, the trend in recent disparate impact case law is to combine a stringent standard for the plaintiff’s prima facie case with a lenient review of business necessity to solidify the status quo distribution of employment opportunities. Lost amidst such reasoning is the prospective view of meritocracy, which provided the foundation for disparate impact in the first place. As the retrospective approach to merit continues to hamstring the disparate impact doctrine, complainants find that they can only bring successful claims by proving the employer’s intent to discriminate. Reviving disparate impact requires challenging the theoretical presumptions underlying the judiciary’s present interpretation of Title VII.

VI. CONCLUSION: CHALLENGING THE MERITOCRATIC PARADIGM

The first step toward altering the judiciary’s current reasoning in disparate impact cases is to reveal its reliance on a faulty paradigm. The most obvious critique of the retrospective model of meritocracy is that it relies on circular justifications and does not adequately consider social context. Underlying this argument, however, is a critique of the judiciary’s very reliance on meritocracy in the first place, and an argument that another model—such as egalitarianism—ought to be used in its place. In examining routes for future legal reform, I will address each argument in turn.

First, the retrospective meritocratic model—the linchpin of contemporary disparate impact case law—must be rejected. This model is flawed because it leaves merit largely undefined, is impractical, and ignores social context. First, under a retrospective model, merit is an empty vessel to be infused with meaning by the employer. Merit becomes a proxy for status quo distributions, upholding social badges of success without espousing criteria for distinguishing what makes them meritorious. The effect of the model in practice is judicial deference to employers. Defining merit in terms of socially sanctioned qualifications precludes an independent examination of whether these qualifications enable a fair assessment of individuals and, thus, support individual autonomy.¹⁶⁵ The

19567, at *22 (S.D.N.Y. Dec. 9, 1997), *aff’d*, 168 F.3d 610 (2d Cir. 1999).

¹⁶⁴ *Id.* at *23.

¹⁶⁵ This issue is important because, as previously explained (*infra* Part II.B), liberal democracy only necessitates meritocracy to the extent that both principles emphasize individual autonomy.

end result is a model without a unifying principle—a model that cannot even be called democratic.

Second, the conception of merit as a reward for past actions is imbued with theoretical inconsistencies and faces practical constraints. David Miller explains that considering a job offer as a reward for past efforts is absurd: “When selecting the best-qualified candidate to hold a job, the employer is not in the business of rectifying a shortfall in the rewards that person received in previous employment.”¹⁶⁶ Miller notes that an individual already may have been rewarded for past achievement through previous employment or benefits. But even if such is not the case, a new job is “a particularly crude instrument for rewarding past achievement, since it represents an income stream of indeterminate size, depending on what the successful candidate chooses to make of it, how long he or she stays in it, etc.”¹⁶⁷ The retrospective notion of entitlement to future positions is thus riddled with practical difficulties. Judges who describe merit retrospectively may be using this definition because they favor the status quo rather than because they believe it accurately defines merit. Revealing the judiciary’s reliance on this conceptual framework will force judges to either defend this position or admit hypocrisy.

Third, the retrospective model applies its theory in a vacuum, ignoring social context. This model blindly assumes that social badges of success, such as scores on certain standardized tests, are indisputable qualifications rather than mere proxies for future potential. This model assumes that we live in a society where the resources necessary to earn these badges have been distributed equally. For example, if white children have disproportionate access to mentoring and coaching for standardized tests, higher test scores among white students would not indicate that these students are more meritorious, but merely that they have greater access to resources.¹⁶⁸ Yet the retrospective model fails to examine how social inequalities can construct the appearance of merit. Instead, it imparts a sense of entitlement to those with the greatest resources, thus reinforcing classism and the status quo. Indeed, some scholars have posited the existence of two standards for disparate impact—one for blue-collar workers and another for white-collar employees.¹⁶⁹

The flaws inherent in retrospective meritocracy may prompt the conclusion that the judiciary should revert to its prior notion of prospective meritocracy. Yet reliance on *any* meritocratic model in civil rights law precludes broader discussions about purely egalitarian goals. Such a limitation is unacceptable because, as previously mentioned, egalitarianism may be a necessary precursor to a functioning meritocracy. If une-

¹⁶⁶ Miller, *supra* note 34, at 166.

¹⁶⁷ *Id.* at 167.

¹⁶⁸ *Id.* at 179.

¹⁶⁹ See, e.g., Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982).

qual access to resources disrupts the accuracy of merit measures, a meritocracy can function properly only after egalitarian programs equalize access to resources. In analyzing problems of inequality in the United States, Cass Sunstein explains:

[C]ivil rights policy should concern itself first and foremost with such problems as lack of opportunities for education, training, and employment; inadequate housing, food, and health care; vulnerability to crime, both public and private; incentives to participate in crime; disproportionate subjection to environmental hazards; and teenage pregnancy and single-parent families. Policies of this kind suggest a major shift in direction from the more narrowly focused antidiscrimination policies of the past.¹⁷⁰

Temporarily distancing notions of meritocracy from the American Dream may be necessary until merit can be understood as a concept that does not disadvantage whole classes of citizens from the outset. Many public policies are necessary to this pursuit:

Targeted educational policies, including efforts to promote literacy and Head Start programs, provide promising models. At least partial successes have resulted from parental leave and “flex-time” policies. Certainly, employment-related policies are important insofar as job increases are closely connected with the reduction of poverty. In the area of voting rights law, the race-neutral remedy of cumulative voting might be preferable to racially explicit approaches.¹⁷¹

In the end, Americans will benefit from exploring different conceptions of the “ideal” society and incorporating favorable aspects into a mixed model. For example, an egalitarian objective can serve as one of many considerations in determining who is most meritorious for employment or job benefits. An egalitarian model can facilitate the development and discussion of broader conceptions of a “fair” society “rather than merely [a narrow examination of] selection procedures and access to qualifications.”¹⁷² A mixed-model vision infuses merit with purposive meaning: “[W]hat may count as a qualification for a job is constrained in some way by the aim of preventing people from suffering disadvantage for which they cannot legitimately be held responsible.”¹⁷³ In this manner, a quasi-meritocratic model that relies heavily on egalitarian ends in

¹⁷⁰ Sunstein, *supra* note 50, at 2450.

¹⁷¹ *Id.* at 2451.

¹⁷² Mason, *supra* note 39, at 762.

¹⁷³ *Id.* at 779.

defining merit has a direct link to justice. Rather than arbitrarily defining merit and hoping for just outcomes, this model links the meritocratic ideal to a larger vision of a just society.

In conclusion, contemporary case law is misguided in its treatment of disparate impact. Lost amidst the legal jargon is a tenable vision of a just society. The decline of the disparate impact doctrine can be linked to the predominance of a retrospective view of meritocracy that does not stand up to scrutiny. The model lacks a unifying principle, and its enforcement of civil rights law is inconsistent with democratic ideals. It centers around status quo distributions and vests entitlements in those individuals with the greatest resources. Nevertheless, so long as an alternative social order can still be imagined, the current state of the law is not immutable. Generating debate about a more appropriate theoretical context for civil rights law may spark judicial and legislative reforms at both the state and federal levels. A change in judicial perspective, stemming from increased dialogue, may be necessary to revive the full potential force of the disparate impact doctrine.