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Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?

Rosemary C. Hunter*
Elaine W. Shoben**

Griggs v. Duke Power Co. was a landmark United States decision because it recognized that barriers to equal employment opportunity need not be overt and that practices that appear neutral on their face may nonetheless have an unjustifiably exclusionary effect on protected groups. This American insight has not been lost on other Western legal systems in the context of their antidiscrimination statutes and opinions. This article explores the favorable reception that disparate impact analysis has had both in other countries with similar legal heritages and in international law.

Despite the wide acceptance of disparate impact analysis in the international marketplace of legal ideas, the concept remains controversial among scholars in the United States. Moreover, American courts have been retreating from any application of the doctrine beyond narrow bounds. The comparative law perspective offered by this article sheds light on the American debate over the legitimacy of the disparate impact theory of discrimination and over its proper scope. This perspective reveals that if the United States is out of step with respect to disparate impact, it is not aberrant in the way its critics have suggested, because the American interpretation and application of the theory are more restrictive than those of other nations.

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* Principal Researcher, Justice Research Centre, Sydney, Australia; Associate Professor of Law, The University of Melbourne, Australia. J.S.M. Stanford University; LL.B., University of Melbourne; B.A. (Hons.), University of Melbourne.

** Edward W. Cleary Professor of Law, University of Illinois. J.D., Hastings College of the Law; A.B., Barnard College.

INTRODUCTION

The disparate impact theory of discrimination is an American innovation. It is fundamentally different from the theory of intentional exclusion because motive is irrelevant under disparate impact analysis. This theory of discrimination, also known as indirect discrimination or adverse impact discrimination,\(^1\) refers to the disproportionate exclusion of individuals on a protected basis, such as race or gender. In the context of employment discrimination, it refers to an employer’s use of an unvalidated device, such as one for selection or promotion, that disproportionately excludes a protected group. Under current law, an employer’s use of a device such as a physical

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\(^1\) Disparate impact discrimination is a separate theory of discrimination, distinct from disparate treatment discrimination. The confusing similarity in the names of these two theories of discrimination is the unfortunate result of the Supreme Court’s nomenclature in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), where the Court drew the distinction between disparate impact claims and individual claims of intentional exclusion. The Court used the terms disparate impact and disparate treatment to make the distinction, and those terms have prevailed. The EEOC Guidelines, on the other hand, refer to “adverse impact,” and some cases refer to “disproportionate exclusion.” These latter terms are thus synonymous with “disparate impact.” The term “indirect discrimination” is used to refer to the same concept in most of the other jurisdictions cited in this paper.
agility test, an aptitude test, or an education requirement that more adversely affects a protected group is unlawful unless the requirement is demonstrably job-related.²

Scholarly debate concerning the proper scope of prohibited discrimination in employment has continued for more than thirty years, ever since Congress passed the Civil Rights Act of 1964³ without defining the term "discrimination." Although it was more than a quarter of a century ago that the Supreme Court held, in Griggs v. Duke Power Co.,⁴ that disparate impact discrimination in employment is covered by Title VII of that Act, the ruling remains controversial. The issue is whether the federal law should prohibit only intentional exclusions or whether "discrimination" is a broader concept. Various scholars have attacked the disparate impact theory over the years as a mandate for preferential treatment,⁵ as an unwarranted governmental restraint on contractual freedom,⁶ and as a wrong-headed attempt at common sense.⁷ Some also described it simply as "folly."⁸ Others, however, advocated it as faithful to the overall purposes of the Act.⁹

Congressional endorsement of disparate impact analysis under Title VII has not ended the debate. In the Civil Rights Act of 1991,¹⁰ Congress amended Title VII in several ways and specifically addressed disparate impact cases.¹¹ Express congressional approval of the concept, however, seems more to have fueled the debate rather than settled it. Thus, scholars still criticize Griggs as wrongly decided,¹² or attack providing relief under a

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2. See infra notes 21-32 and accompanying text.
11. Section 3 of the Civil Rights Act of 1991 enumerates the purposes of the Act. Those specific purposes are "to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964" Id.
disparate impact theory as a bad idea that leads to other social ills,\textsuperscript{13} especially racial proportionalism and quotas.\textsuperscript{14} Other scholars accept it as consistent with modern conceptions of equality\textsuperscript{15} or as a good example of federal common law addressing a practical need to implement the goals of the Act.\textsuperscript{16}

American scholars too often debate the wisdom of American legal concepts without the benefit of studying comparative law. The international marketplace of legal ideas provides a means of testing the value of a concept; information on comparative law is highly relevant and useful in the resolution of specific debates within the American legal system. Such is the case with the on-going debate about the merits of disparate impact discrimination. This article will examine the international reception of the disparate impact concept in order to provide a broader framework for the American debate. If other western countries have rejected the concept, then it may well be an American "folly." Conversely, if the concept thrives among our legal cousins, then such acceptance would reflect favorably on this American legal innovation and should help to legitimize and secure its reception at home.

As this article demonstrates, the disparate impact theory of employment discrimination has survived very well in the international marketplace of ideas. In the quarter century since the Supreme Court held that Title VII of the Civil Rights Act of 1964 embraces disparate impact discrimination as a form of prohibited exclusion, other common law countries have recognized this form of discrimination as part of their own statutory schemes prohibiting discrimination in employment.\textsuperscript{17} Moreover, some jurisdictions have applied the concept more expansively than American law allows. No-


\textsuperscript{14} See, e.g., MORENO, supra note 5, at 279 ("Disparate impact ensured that Title VII would not permit employers to lapse into token compliance that civil rights groups claimed marked pre-1964 fair employment law, but its mandate of preferential treatment ran the risk of encouraging racial proportionalism and quotas that fair employment advocates had assiduously avoided.").


\textsuperscript{17} See infra notes 33-75 and accompanying text.
tably, the European Community has applied the concept of indirect discrimination to differential wages in a manner that allows recovery more easily than American law, and Canada has applied the concept of indirect discrimination to cases arising under the equality clause of its Constitutional Charter of Rights and Freedoms.\(^1\)

By contrast, the United States Supreme Court has specifically limited the disparate impact theory of discrimination to statutory claims, and lower courts recently have been reluctant to permit such claims without express statutory authorization.\(^1\)\(^9\) By limiting the statutory bases and by refusing to allow constitutional claims of disparate impact discrimination, the United States has restricted the application of its own theory more than some other countries that have adopted it. American law has also narrowly defined the circumstances to which the theory applies. Even if the statute supports a disparate impact claim, courts rarely apply the concept to circumstances other than assessing criteria for hiring, promotion, and discharge.\(^2\)\(^0\) In these respects, the scholarly debate in the United States is reactionary; the proper issue may be whether to expand the application of disparate impact analysis as others have done, rather than whether to contract or eliminate it.

II. THE DISPARATE IMPACT CONCEPT

A. American Origins

The first federal statute that expressly prohibited discrimination in employment was the Civil Rights Act of 1964. Title VII of that Act prohibits “discrimination” on certain grounds, but the Act does not define the term. The Act simply provides that a covered employer may not “fail or refuse to hire or to discharge any individual, or otherwise to discriminate” against any individual in employment on the basis of “race, color, religion, sex, or national origin.”\(^2\)\(^1\) The debate that immediately ensued revolved around the meaning of “discriminate” in this provision. Although it was clear that invidiously motivated exclusions were covered by the Act, it was not clear that other conduct was. The question arose: What about the failure to treat groups equally for some reason that may not be “invidious,” such as pater-

\(^{18.}\) See infra notes 134-48 and accompanying text.
\(^{19.}\) See infra notes 76-106 and accompanying text.
\(^{20.}\) See infra notes 112-23 and accompanying text.
\(^{21.}\) Section 703(a) of Title VII provides that an employer may not:
(1) fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.
nalism? Courts accepted this type of discrimination under a theory of "unequal treatment" or "disparate treatment," and addressed it without regard to whether the intentional conduct was invidiously motivated. Thus, another question arose: What about the use of a device that adversely affects one group without any motive to injure, but also without any demonstrable business purpose? This type of conduct could be prohibited under a theory of disparate impact discrimination, which would require no intentional conduct except the use of the device.

In 1971, the Supreme Court considered this question in its landmark decision in Griggs v. Duke Power Co. The employer in Griggs required both a high school diploma and passing scores on general aptitude tests for placement in any department except the lowest one. The trial court had found no impermissible motive and, therefore, no violation of the Act. The Court of Appeals, however, focused on the unequal treatment of employees hired in the same year, and found a violation only with respect to this group. The Supreme Court went further, adopting the disparate impact theory of discrimination.

The unanimous opinion written by Chief Justice Burger stated that Title VII proscribes conduct that is "fair in form but discriminatory in operation." When an employer uses procedures or testing mechanisms unrelated to measuring job capability, the absence of discriminatory intent does not redeem the conduct. The Court found that the high school diploma requirement disproportionately excluded black applicants from the desirable jobs because the graduation rate in North Carolina reflected racial difference. The aptitude tests were also found to impact applicants on the basis of race. When such disparate impact occurs, it is incumbent upon the employer to demonstrate that such requirements are job-related and governed by principles of business necessity.

Six years later, in Dothard v. Rawlinson, the Court applied the disparate impact theory in a gender discrimination case involving prison guard positions in Alabama state penitentiaries. The plaintiff had been excluded by a minimum height requirement for the job. The plaintiff's statistics on height differences on the basis of sex were sufficient to establish a prima facie case of disparate impact discrimination and thus shifted the burden to the defendant to establish the business necessity of the requirement.

22. See, e.g., Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1227 (9th Cir. 1971) (explaining that state statute protecting women from heavy work would not prevent enforcement of Title VII).
25. See id. at 428-29.
26. Id. at 431.
27. See id. at 431-32.
As these cases demonstrate, in a disparate impact case the plaintiff does not need to establish the employer's motive in adopting any challenged selection device. Instead, the plaintiff must introduce specific proof to establish the disproportionate impact of the device. It is not sufficient simply to assert that a selection criterion has an impact, nor is it sufficient to show that the employer's workforce does not mirror the racial, ethnic, and gender composition of the surrounding population.\footnote{See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-52 (1989). Although the Civil Rights Act of 1991, 42 U.S.C. § 1981, altered several portions of the Court's holding in this case, the Act did not affect this aspect of the case.}

The fundamental idea of disparate impact discrimination is not a radical one, but rather a logical extension of the concept of unfair exclusion. Just as a physical barrier, such as a staircase, can unintentionally exclude someone in a wheelchair, a height requirement can unintentionally exclude on the basis of gender or national origin. A requirement of good eyesight without correction may have an unintended racial effect. A manual dexterity test may be unwittingly and unnecessarily designed for right-handed people. In all these situations the unjustified exclusions can be considered "discriminatory" without any reference to the intent of the actors because they unfairly deny particular groups access.

In these situations one can evaluate the wrongfulness of the exclusion by considering two factors: (1) whether the unintended consequence affects a group that we as a society have historically excluded; and (2) whether the unintended exclusion is justifiable by its necessity. Should left-handed people, for example, be protected as a matter of social policy from the effects of thoughtless design? If Congress were to consider a statute prohibiting discrimination against left-handed people, the debate would turn on how left-handedness has been treated historically.\footnote{See generally Donohue, supra note 15 (noting that numerous factors, sometimes sending conflicting signals, are relevant to determination of protected classes; in addition, extending protections to special interest groups such as smokers blunts the moral imperative of antidiscrimination laws).} If enacted, such a statute prohibiting "discrimination" against left-handed people should surely include the concept of unintended exclusions. A school or employer that does not provide left-handed scissors may not consider the impact on left-handed users; yet the result is discriminatory, and under the hypothetical statute that discrimination should be unlawful unless justified. A lack of intent to discriminate—thoughtlessness, in this context—should not be a defense to an act whose purpose is to remedy a general societal disadvantage.

As the following sections demonstrate, other jurisdictions have readily accepted this principle as part of modern discrimination law. It has also been accepted in the United States in the context of disability discrimination, as defined by the Americans with Disabilities Act.\footnote{42 U.S.C. §§ 12101-12213 (1990).} Unlike other jurisdictions the United States has generally resisted expanding the
application of this theory. It was originally an American idea to include unfair but unintended effects in a legal definition of discrimination, and that idea is flourishing in jurisdictions with similar legal traditions. At the same time, it is floundering at home.

B. International Reception

1. United Kingdom

The disparate impact concept was accepted in the United Kingdom shortly after its inception in the United States. In 1974 a Sex Discrimination Bill was introduced into Parliament. Its aim was to prohibit discrimination on grounds of sex or married status in a variety of areas, including employment. As originally introduced, the bill contained a statutory definition of discrimination which covered only the notion of disparate treatment discrimination, which is called “direct discrimination” in the United Kingdom. During the debate on the bill, the British Home Secretary visited the United States. As a result of his discussions regarding the operation of Title VII, it was decided that the bill should include a concept of disparate impact, or “indirect” discrimination. This act of reverse legal colonization was achieved by means of a new statutory definition, which recognizably captures the various elements of the Supreme Court’s decision in Griggs, although with some modifications. The same definition has also been incorporated into legislation in the United Kingdom dealing with racial discrimination, and legislation applying in Northern Ireland concerning both sex and religious discrimination. The concept of indirect discrimination


33. Sex Discrimination Act, 1975, s.1(1)(b) (U.K.):
A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if . . .
(b) he applies to her a requirement or condition which he applies or would apply equally to a man but:
(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
(iii) which is to her detriment because she cannot comply with it.

Section 2 of the Act applies the definition to discrimination against a man, with appropriate modifications. Section 3(1)(b) of the Act employs the same definition with respect to discrimination against married persons.

34. Race Relations Act, 1976, s.1(1)(b) (U.K.).

35. Sex Discrimination (Northern Ireland) Order, 1976, art.3(1) (U.K.). The Irish Republic also legislatively proscribes indirect discrimination on the grounds of sex or marital status. The Employment Equality Act, 1977, s.2(c) (I.), states that discrimination shall be taken to occur:
Where because of his sex or marital status a person is obliged to comply with a requirement, relating to employment . . . which is not an essential requirement for such employment . . . and in respect of which the proportion of persons of the other sex or (as the case may be) of a different marital status but of the same sex able to comply is substantially higher.

Section 3(2) of the Employment Equality Act further provides that:
has also been incorporated into the recent Disability Discrimination Act, in a way that is tailored to the particular features of disability discrimination.37

2. Australia

In Australia, antidiscrimination legislation was enacted at both the state and federal level beginning in the mid-1970s. These laws in general adopted the statutory definitions of discrimination developed in the U.K., including the definition of indirect discrimination. The notion of indirect discrimination, however, was not immediately embraced in all Australian jurisdictions. In some instances it was only included in bills or amendments as a result of intensive lobbying from women’s organizations and administrative agencies.38 At the present time all Australian legislatures have incorporated the notion of indirect discrimination into their antidiscrimination laws. In many cases this has been in the form of a statutory definition which is close to that adopted in the United Kingdom.39 In some cases,
much simplified statutory definitions have been enacted,\textsuperscript{40} and in others, a broad definition of discrimination encompassing both disparate treatment and disparate impact has been implemented.\textsuperscript{41}

3. New Zealand

While New Zealand and Australia are close geographical neighbors, antidiscrimination legislation has developed differently in each country. The New Zealand Race Relations Act of 1971 and Human Rights Commission Act of 1977 contained proscriptions of employment discrimination that were closer to Title VII in their wording. That is, the statutes incorporated general prohibitions rather than specific definitions of discrimination.\textsuperscript{42} In addition, the Human Rights Commission Act prohibited "discrimination by subterfuge," which applied where a requirement or condition had the effect of giving preference to persons of a particular race, sex, age, or other relevant status. In such a case, the person imposing the requirement or condition was required both to establish a good reason for its imposition and to show that its imposition was not a subterfuge to avoid complying with the Human Rights Commission or Race Relations Acts.\textsuperscript{43}

The concept of "discrimination by subterfuge" appears to be close to that of adverse impact, or indirect discrimination. It was not solely relied upon, however, in New Zealand’s first adverse impact case, \textit{The Proceed-
ings Commissioner v. Air New Zealand Limited. Air New Zealand concerned a seniority and promotion system that was neutral on its face but had a disparate impact on women because of past discrimination against them. In finding in favor of the plaintiffs, the New Zealand Equal Opportunities Tribunal followed the lead of the U.S. Supreme Court in Griggs in interpreting the general employment discrimination provision of the Human Rights Commission Act to include the concept of disparate impact discrimination.

In the alternative, the Tribunal held that the seniority system also violated the section concerning "discrimination by subterfuge." While it accepted that the system had not been adopted as a deliberate ploy to avoid compliance with the Act, it was not persuaded that there was any good reason for the imposition of the seniority and promotion criteria.

The Race Relations Act and Human Rights Commission Act have subsequently been replaced by the Human Rights Act of 1993. The Human Rights Act prohibits employment discrimination in substantially the same terms as its predecessors. The new Act also contains a provision similar to that concerning "discrimination by subterfuge." However, this provision removes the requirement for the defendant to show that her conduct, practice, requirement or condition was not designed to defeat the intentions of the Act by subterfuge, and it is now simply labeled "indirect discrimination."

In a decision interpreting this provision, the Complaints Review Tribunal has stressed that the defendant's intentions are irrelevant, rather "it is effect which counts."

46. See id.
47. Human Rights Act, 1993, s.22(1) (N.Z.):
   Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer . . .
   (a) To refuse or omit to employ the applicant on work of that description which is available; or
   (b) To offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description;
   . . .
   by reason of any of the prohibited grounds of discrimination.
48. Id. at s.65:
   Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part of this Act has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part of this Act other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.
4. Canada

Canadian law has also accepted the disparate impact concept of discrimination, though only after initial resistance. The geographical proximity and free trade between the United States and Canada has not regularly resulted in cross-border transfers of legal developments. While the Supreme Court decided *Griggs* in 1971, conservative superior courts in Canada resisted the adoption of disparate impact analysis for many years. Canadian federal and provincial human rights legislation tends to contain broad prohibitions of discrimination along the lines of Title VII. In most jurisdictions, Boards of Inquiry constituted to hear discrimination cases at first instance began to apply their own versions of disparate impact analysis from the mid-1970s. Superior courts consistently overturned these decisions on review, holding to the position that only intentional discrimination was unlawful.

The notion of disparate impact discrimination was finally endorsed by the Canadian Supreme Court in two 1985 cases involving religious discrimination. In one of these cases, *Bhinder & Canadian Human Rights Commission v. Canadian National Railway Co.*, the court held that the employment discrimination provisions of the federal Human Rights Act of 1976 extended to cover adverse effect discrimination. The other case, *Ontario Human Rights Commission & O’Malley v. Simpsons-Sears Ltd.*, brought under the former Ontario Human Rights Code, concerned a Seventh Day Adventist who was disadvantaged in her employment due to her inability to work Friday evenings and Saturdays. And although there was no intent to discriminate in this situation, the court held that the Human Rights Code also encompassed the notion of “adverse effect” discrimination. The court believed the aim of the Code was to remove discrimination,
primarily by providing relief for victims rather than by punishing discriminators. In this context, the result or effect of an action was more significant than the motive for it.

As stated by the court in *O'Malley*, adverse effect discrimination arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.\(^5\)

Notably, the defense of job relatedness or business necessity is not included in this formulation. Indeed, unlawful adverse effects discrimination could occur even where the contested rule or standard was adopted for "genuine business reasons." However, the court has referred to concepts of reasonable accommodation short of undue hardship\(^6\) and bona fide occupational requirements\(^7\) to mitigate the strict application of its adverse effects doctrine. In addition, a statutory definition of disparate impact discrimination in the new Ontario Human Rights Code, similar to the New Zealand definition of indirect discrimination, reintroduces the possibility of justification by the employer.\(^5\)

In a subsequent case brought under the federal Human Rights Act, *Action Travail des Femmes v. Canadian National Railway Co.*,\(^5\) disparate impact analysis was applied to a variety of objective and subjective criteria operating to exclude women from blue-collar railroad jobs. Chief Justice Dickson reaffirmed that "[t]he rejection of a necessity to prove intent and the unequivocal adoption of the idea of 'adverse effect discrimination' by

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57. See Bhinder, [1985] 2 S.C.R. at 561, 590. The Supreme Court's leading decision on bona fide occupational requirement is Ontario Human Rights Commission v. Etobicoke [1982] 1 S.C.R. 202: The requirement must be imposed honestly, in good faith, and in the sincerely held belief that its imposition is in the interests of adequate performance of the work with all reasonable despatch, safety, and economy. Furthermore, it must be objectively related to the performance of the job—that is, reasonably necessary to ensure its efficient and economical performance without endangering the employee, his or her co-workers, or the public.
58. Human Rights Code, 1981, s.4(1) (Ont.) (amended 1986), establishes a right to equal treatment in employment. Section 10 of the Code provides:
A right of a person . . . is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
(b) it is declared in this Act . . . that to discriminate because of such ground is not an infringement of a right.

the courts is the result of a commitment to the purposive interpretation of human rights legislation.”

5. Europe

The disparate impact concept has also received acceptance in the Treaty of Rome, the fundamental constitutional document of the European Economic Community (E.E.C.). There are two non-discrimination provisions in the Treaty: Article 7, which prohibits member states from discriminating against nationals of other member states, on the ground of nationality; and Article 119, which prohibits sex discrimination in the specific area of compensation. The relationship between E.E.C. law and the domestic law of member states is complex; but stated briefly, E.E.C. law has overriding force.

The European Court of Justice (E.C.J.) has applied disparate impact analysis to the issue of nationality discrimination under the Treaty of Rome since the mid-1970s. This analysis was extended to Article 119 in the

60. Id. at 1137.
61. The Treaty of Rome underpins the European Economic Community, while the more recent Maastricht Treaty created the entity now known as the European Union. Laws made under the Maastricht Treaty, however, do not have the same binding effect on member states as do laws made under the Treaty of Rome. See discussion infra notes 63-64.
62. Treaty of Rome, March 25, 1957, art.6: Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
63. Id. at art.119. Article 119 states that: Each member-State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

The Article goes on to define “pay” as “all consideration, received directly or indirectly, with respect to employment,” and finally states that:

Equal pay without discrimination based on sex means:
(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
(b) that pay for work at time rates shall be the same for the same job.

The Treaty of Rome, and Directives issued under it by the European Council of Ministers, are directly enforceable in relation to the actions of member states. More importantly, though, the domestic law of member states must implement and conform with E.E.C. standards. This applies both to domestic legal provisions and interpretations of them by domestic courts. If a question as to the applicability or interpretation of E.E.C. law arises in a case in a domestic court, the question may be referred to the European Court of Justice (E.C.J.) for decision. The E.C.J. is the highest court in the European judicial hierarchy, and the authoritative interpreter of the Treaty of Rome and its subsidiary Directives. See generally R. v. Secretary of State for Employment; ex parte Equal Opportunities Comm’n, [1995] 1 App. Cas. 1 (holding that U.K. employment protection legislation was inconsistent with E.C. law, as it indirectly discriminated against women workers by providing lesser protection to part-time workers, the great majority of whom are women); R. v. Secretary of State for Employment; ex parte Seymour-Smith, 1995 I.C.R. 889 (holding that a two-year statutory qualifying period for bringing an unfair dismissal complaint indirectly discriminated against women and was incompatible with E.C. law).

case of Jenkins v. Kingsgate (Clothing Productions) Ltd. Subsequent cases clarified the point that compensation policies having a disparate impact on women would contravene Article 119 even if the impact was unintentionally produced. The E.C.J. has also made clear that determining the question of justification in each case should be left up to the national court. Broadly speaking, the legal systems of the E.E.C.’s member states now must all provide protection against disparate impact discrimination on the specific grounds and in the specific areas covered by the Treaty of Rome.

6. International Law

Finally, the concept of disparate impact discrimination appears in the interpretation of various non-discrimination provisions in international law. These include the Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention) and the Convention on the Elimination of All Forms of Discrimination Against Women (the Women’s Convention), promulgated by the United Nations General Assembly. There are also several International Labor Organization conventions concerning employment discrimination. Where these international conventions define the concept of discrimination, they tend to employ a common formulation: Any distinction, exclusion, restriction, or preference, based on a protected ground, which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of any right with which the convention is concerned.

International conventions are administered by committees or supervisory bodies of the promulgating entity. Administering committees and supervisory bodies receive and analyze the national reports submitted periodically by states that are parties to the relevant convention and, in some cases, may also receive individual complaints under the convention. Dealing with both national reports and individual complaints provides committees and supervisory bodies with opportunities for interpreting the terms of these conventions. Various commentators have also discussed the meaning of international non-discrimination provisions. In all cases, committees
and commentators agree\textsuperscript{70} that the conventions’ concerns are as much with the effects of actions as with their purposes. Thus in international law as well, discrimination may be found in the disparate impact of policies or practices on a protected group. State parties to international conventions against discrimination therefore undertake to ensure the absence of disparate impact discrimination against their citizens.

In comparison to other nations, the United States has maintained a greater distance from international conventions. While the Race Convention and the Women’s Convention were signed by President Carter, only the Race Convention has been ratified. However, even with ratification, the Race Convention has been delared non-self-executing, meaning it has no domestic force in and of itself in the United States. Moreover, the U.S. is not a party to any of the I.L.O. conventions considered here. By contrast, Australia’s Racial Discrimination Act\textsuperscript{71} and Sex Discrimination Act\textsuperscript{72} were specifically enacted in order to implement Australia’s obligations under the Race Convention and Women’s Convention.\textsuperscript{73} Similarly, the purpose of New Zealand’s Human Rights Act is to implement international human rights norms in New Zealand.\textsuperscript{74} One consequence of such a nexus between


\textsuperscript{71} Racial Discrimination Act, 1975, (Cth.).

\textsuperscript{72} Sex Discrimination Act, 1984, (Cth.).


national and international non-discrimination provisions is that international interpretations may influence national jurisprudence on discrimination, and vice versa.

This summary account of discrimination law in numerous jurisdictions reveals the international success of the disparate impact concept. In the quarter century since the United States Supreme Court adopted the disparate impact theory of discrimination in *Griggs*, the theory has spread to every major common law jurisdiction and into Western Europe and the international arena. The concept has thrived and should be beyond challenge as a legitimate definition of discrimination.

The manner in which disparate impact has been applied may be the focus of further inquiry. In contrast to an expansive application, a narrow one would suggest a minimal acceptance of the concept. The next section explores this issue of the extent of the application of disparate impact theory in the many jurisdictions that have accepted it. In making this inquiry, it is interesting to note that while the United States has been instrumental in the development of law elsewhere through its contribution of the disparate impact theory, the evolution of the doctrine in other jurisdictions has had little effect on American law.

III. THE APPLICATION OF THE DISPARATE IMPACT CONCEPT

A. Applications in the United States

In the United States the disparate impact theory of discrimination has restricted application. The Supreme Court was the first to adopt the theory, but since the initial acceptance the Court has delineated carefully the scope of this theory of discrimination. It is applicable only to statutory claims, not constitutional ones. Moreover, the Court has not assumed that the theory may be applied to any statute addressing "discrimination."

1. Constitutional Exclusion of Disparate Impact Theory

The Supreme Court held in *Washington v. Davis* that disparate impact theory could not be used to challenge the use of an aptitude test to screen applicants for a police training program. Proof of impact alone, without proof of an intent to exclude on the basis of race, was insufficient for a prima facie case in a constitutionally-based claim.

The aptitude test in *Davis* was a general vocabulary and reading comprehension test. It had a disparate impact on the basis of race, and the department had not validated the test under the Title VII standards for test validation. Because the federal government was not an employer covered

75. 426 U.S. 229 (1976).
76. See id. at 238-44.
by Title VII until the 1972 amendments to the Act, the plaintiff class could not rely upon the statute at the time the suit arose and thus relied upon the due process guarantee of the Fifth Amendment.\textsuperscript{77}

The opinion of the Court of Appeals in \textit{Davis} had held that the \textit{Griggs} standard should apply to this constitutional claim.\textsuperscript{78} Hence, the plaintiffs had only to prove the racially disproportionate pass rate in order to shift the burden to the defendant to show the validity of the selection device. The Supreme Court, however, reversed on the grounds that the constitutional standard differs from the statutory standard.\textsuperscript{79} The Court reasoned that a neutral element does not become a "suspect" racial classification merely because there is an adverse impact on one race.\textsuperscript{80} A constitutionally suspect classification triggers strict scrutiny, under which the government can defend only by demonstrating a compelling state interest.\textsuperscript{81} Because the disparate impact of the test in \textit{Davis} did not create such a classification, it was necessary for the plaintiff to prove purposeful discrimination. In the absence of such evidence of invidious intent in this case, the employment practice that was adverse to black applicants was measured simply by its rationality.\textsuperscript{82} The Court found that the use of a standardized aptitude test to screen potential police officers easily met the rationality test.\textsuperscript{83}

The Court had earlier clarified the nature of the "motive" that is required for a constitutional violation and rejected the theory that knowledge of a disparate impact alone can suffice to show a constitutionally prohibited motive. \textit{Personnel Administrator of Mass. v. Feeney}\textsuperscript{84} involved an equal protection claim challenging a state statutory scheme that created an employment preference for veterans. The preference for veterans foreseeably had the effect of disadvantaging women because veterans were disproportionately male. The lower court had stated that the effect was so obvious that the legislature must have intended the result. The Supreme Court disagreed.\textsuperscript{85} For a constitutional violation, intent means doing something because of, not in spite of, a particular consequence. It is not sufficient simply to be aware of the indirect effect.

\textsuperscript{77} See \textit{id.} at 236-37.
\textsuperscript{78} See \textit{id.} at 238.
\textsuperscript{79} See \textit{id.} at 248.
\textsuperscript{80} See \textit{id.} at 245-47.
\textsuperscript{82} \textit{See generally} RONALD D. ROTUNDA \& JOHN E. NOWAK, \textit{TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE} § 18.3 (2d ed. 1992).
\textsuperscript{83} See \textit{426 U.S.} at 249-51.
\textsuperscript{84} \textit{442 U.S.} 256 (1979).
\textsuperscript{85} See \textit{id.} at 274-78.
2. Statutory Limitations

Congress has made express reference to the disparate impact theory of discrimination in only two employment discrimination statutes. The first is the Civil Rights Act of 1991,86 which added a number of amendments to Title VII. Congress passed this Act in part because of a Supreme Court case, Wards Cove Packing Co. v. Atonio,87 that had altered the relative burdens of the parties in a disparate impact case. The 1991 Act represents Congressional approval of the disparate impact theory, at least with respect to its historical application to Title VII.

The second statute to make express reference to effects of discrimination is The Americans with Disabilities Act of 1990.88 This Act includes the disparate impact concept in its definition of "discrimination."89 Section 12112 provides that the term "discriminate" includes "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability . . . ."90

The use of disparate impact analysis under other statutes related to employment discrimination law is either prohibited or questionable. First, the Supreme Court has precluded the use of disparate impact theory in a claim brought under Section 1981 of the Reconstruction era Civil Rights Acts.91 The Court held in General Building Contractors Association v. Pennsylvania92 that discriminatory intent must be shown in such a claim. Thus, only Title VII supports a disparate impact theory for a claim of race or national origin discrimination in employment.

Next, in County of Washington v. Gunther,93 the Court distinguished Title VII from the Equal Pay Act (EPA)94 and specifically mentioned Griggs in this context.95 The Court noted: "Title VII’s prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'"96 The Court continued:

The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth

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89. Id. at § 12112.
90. Id. at § 12112(b)(3).
94. 29 U.S.C.A. § 206. Section 206(d) of the Act provides: [N]o employer . . . shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions . . . .
95. See Gunther, 452 U.S. at 170-71.
96. Id. at 170 (quoting Griggs v. Duke Power Co., 401 U.S. 424 (1971)).
DISPARATE IMPACT DISCRIMINATION

affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination.\textsuperscript{97}

Although this case was not brought under the Equal Pay Act\textsuperscript{98}—and therefore this vague comment is dicta—at least one court has interpreted it to mean that disparate impact claims are not permissible under the EPA.\textsuperscript{99}

The use of disparate impact analysis under the Age Discrimination in Employment Act (ADEA) is a matter of current controversy. Although lower courts accepted this theory of discrimination in early cases,\textsuperscript{100} the Supreme Court has never addressed the issue. In a 1993 ADEA case, Hazen Paper Co. v. Biggins,\textsuperscript{101} the Supreme Court considered a challenge to an employee’s discharge that was based on the impending vesting of pension rights after ten years of service. The case was not a disparate impact case because the plaintiff was the first person so discharged, and the Court rejected the disparate treatment claim because employees under age forty could also complete the ten years of service necessary for the pension rights to vest.\textsuperscript{102} The Court expressly noted that it has never decided the applicability of disparate impact theory to the ADEA, but it further suggested in dicta that the age act only prohibits disparate treatment.\textsuperscript{103}

Subsequently, several lower court opinions have considered the matter, with some refusing to apply disparate impact analysis to age discrimination cases.\textsuperscript{104} In one notable case, Ellis v. United Airlines,\textsuperscript{105} the Court of Appeals for the Tenth Circuit held that disparate impact claims are not permissible under the ADEA. The opinion relied upon the dicta in Hazen, the similarity of the ADEA to the Equal Pay Act and therefore the comment in Gunther, and the failure of Congress to mention disparate impact when it was making other amendments to the Act in 1991.\textsuperscript{106}

\begin{flushleft}
\textsuperscript{97} Id.
\textsuperscript{98} See id. at 164. For general discussion of the Equal Pay Act, see infra notes 110-13 and accompanying text.
\textsuperscript{99} See American Fed’n of State, County & Municipal Employees v. Washington, 770 F.2d 1401, 1404-05 (9th Cir. 1985).
\textsuperscript{100} See, e.g., Abbott v. Federal Forge, Inc., 912 F.2d 867, 872 (6th Cir. 1990); Blum v. Witco Chemical Corp., 829 F.2d 367, 372 (3rd Cir. 1987); Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980).
\textsuperscript{101} 507 U.S. 604, 606-07 (1993).
\textsuperscript{102} See id. at 611-12.
\textsuperscript{103} See id. at 610 ("Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA.").
\textsuperscript{104} See DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 732 (3rd Cir. 1995); Lyon v. Ohio Education Ass’n, 53 F.3d 135, 139 (6th Cir. 1995); EEOC v. Francis W. Parker School, 41 F.3d 1073, 1077 (7th Cir. 1994). Other circuits have declined to interpret the dicta in Hazen as precluding disparate impact claims under the ADEA. See Smith v. DesMoiness, 99 F.3d 1466, 1470 (8th Cir. 1996); Houghton v. Sipco, Inc. 38 F.3d 953, 959 (1994).
\textsuperscript{105} 73 F.3d 999, 1007 (10th Cir. 1996).
\textsuperscript{106} See id.
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The scope of the application of disparate impact theory under Title VII is also statutorily limited. The Civil Rights Act of 1991 provides that the plaintiff must identify the particular practice that causes the impact, unless it is not possible to separate the employer’s practices for individual analysis. Section 703(k)(1)(B)(i) provides that complaining parties must “demonstrate that each particular challenged employment practice causes a disparate impact,” with the exception that “if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.”

If the plaintiff satisfies the court that the requirements are “not capable of separation,” then a reasonable interpretation of this provision would allow the plaintiff to demonstrate impact with the applicant flow throughout the entire process or perhaps by a general population comparison that would not otherwise be permitted. To date, however, courts have interpreted the particularity requirement as a very burdensome one for plaintiffs. The plaintiffs in Anderson v. Douglas & Lomason Co., for example, could not jump this hurdle even when a pre-trial agreement between the parties stipulated what practices were challenged. The court found that the plaintiffs had nonetheless failed to establish any causal connection between these practices and the disparity they claimed in the workforce.

3. Narrow Application of Disparate Impact under Title VII

Even under Title VII, courts have generally limited the application of disparate impact theory to cases involving selection criteria for hiring, promotions, and firing. The application of disparate impact theory to wage disparities, for example, has been extremely limited. Although Title VII prohibits intentional disparities in wages on the basis of race, national origin, or gender, disparate impact analysis generally has not been available. The Supreme Court has never squarely addressed the issue, but the lower courts have required intentional discrimination for wage claims involving the theory of comparable worth. Comparable worth theory is based on the premise that an employer should pay comparable wages for jobs that are of comparable worth, including jobs that typically receive lower wages because they are held predominantly by women. The plaintiffs in Lemons

109. See id. at 1302-03 (Johnson, dissenting).
110. See id. at 1284.
111. See Bazemore v. Friday, 478 U.S. 385, 387 (1986). In Bazemore the county employer had engaged in legal pre-Act discrimination by paying wages on the basis of race. After the Act the employer ceased the overt discrimination but did not correct the prior inequities. The Court held that the perpetuation of the previously intentional discrimination through each pay check was a continuing violation of the Act.
v. City & County of Denver, for example, sought unsuccessfully to show that the defendant city discriminated against nurses, who were predominantly female, by paying them lower wages than tree-trimmers, who were predominantly male, even though the jobs were comparable in worth to the employer.

The Supreme Court considered a Title VII gender-based wage claim in County of Washington v. Gunther. In that case plaintiffs established that the county intentionally discriminated against female matrons in the county jails by paying them less than their male counterparts. Their duties were not identical, and thus the jobs were not strictly "equal" within the meaning of the Equal Pay Act. Because the EPA did not apply, they pursued the suit as an intentional discrimination claim under Title VII. The employer defended on the grounds that Title VII provides that it is not an unlawful employment practice for employers to differentiate on the basis of gender in wages "if such differentiation is authorized by" the EPA. The issue before the Court was the interpretation of this proviso: Did it preclude Title VII coverage of wage disparities not covered by the EPA, or did it simply incorporate the EPA defenses into Title VII? The Court concluded only that the proviso did not incorporate the "equal work" standard into Title VII. Noting that this case was not one of "comparable worth," the Court declined to elaborate about Title VII coverage of wage claims.

Lower courts have generally declined to apply disparate impact analysis to gender-based wage claims. Moreover, plaintiffs have had difficulty establishing discriminatory intent in such cases. In American Fed'n of State, County & Mun. Employees v. Washington, the plaintiffs sued on the basis of a study undertaken by the employer itself that showed serious

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112. 620 F.2d 228, 229-30 (10th Cir. 1980), cert. denied, 449 U.S. 888 (1980).
116. The Court remarked that the incorporation of the EPA's fourth affirmative defense, differentiation in wages on a factor other than sex, "could have significant consequences for Title VII litigation," 452 U.S. at 170; see also Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 HARV. L. REV. 1728, 1746 (1986) ("Although Griggs was decided in the context of an employer practice that determined who would be hired into a particular job, it might seem plausible to apply the same approach to employer practices that determine the compensation to be paid for the job, practices that are also governed by section 703(a) of title VII.").
118. 770 F.2d 1401, 1406-07 (9th Cir. 1985).
wage disparities in jobs held predominantly by men and those held predominantly by women. After commissioning the study, the state employer failed to correct the situation. The court upheld a finding that the employer did not intentionally discriminate simply by setting wages at the market rate rather than on the basis of its own study.\textsuperscript{119}

Any disparate impact resulting from seniority systems is also immune from attack under American law. A seniority system that perpetuates the effects of past discrimination is not subject to challenge under disparate impact theory because of the Supreme Court's interpretation of a special proviso in Title VII. Section 703(h) provides that it is not unlawful for an employer "to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system."\textsuperscript{120} The Supreme Court first interpreted this provision to insulate bona fide seniority systems from attack on the grounds that pre-Act discrimination is perpetuated by the system after the Act. In \textit{International Brotherhood of Teamsters v. United States},\textsuperscript{121} the Court held that the proviso protects bona fide seniority systems from challenge on the same basis as other employment rules because the purpose of the provision was "to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII."\textsuperscript{122}

Neither the language of the Act nor the legislative history compelled the conclusion that the proviso exempts seniority systems from liability when the effect of their operation is discriminatory. Indeed, the Court acknowledged that there was "much support" for the view that the Act does not "immunize seniority systems that perpetuate the effects of prior discrimination" because numerous circuit courts had already so held.\textsuperscript{123} The requirement that a seniority system be "bona fide" to qualify for the exemption created a substantial question of interpretation. The Court easily could have decided \textit{Teamsters} the other way and thus agreed with the lower courts that had considered the issue. \textit{Griggs} was only at its sixth anniversary at the time, but already the Court was cautious about keeping the "effects" test contained.

Moreover, the Court interpreted the application of the exemption very broadly in subsequent seniority cases. \textit{California Brewers Ass'n v. Bryan}\textsuperscript{124} involved a claim that an employer's method of distinguishing between permanent and temporary employees had an impact based on race. The employer's system for layoffs and recall gave preference to employees who had worked over forty-five weeks in a single classification in one cal-

\textsuperscript{119} See id. at 1408.
\textsuperscript{120} 42 U.S.C.A. § 2000e-2(h).
\textsuperscript{121} 431 U.S. 324 (1977).
\textsuperscript{122} Id. at 352.
\textsuperscript{123} Id. at 346 n.28.
\textsuperscript{124} 444 U.S. 598, 602-03 (1980).
endar year. These employees were considered “permanent” and they were given preference over all “temporary” employees, regardless of the number of years that temporary employees had worked for the employer. The plaintiff class challenged these rules on the grounds that minorities disproportionately failed to satisfy the forty-five week minimum to become permanent employees.\textsuperscript{125} The Supreme Court held that the disparate impact of the practice was protected from challenge because the forty-five week requirement was part of a seniority system.\textsuperscript{126} The Court reasoned that rules governing eligibility for seniority were necessarily a part of the seniority system itself.\textsuperscript{127}

Although \textit{California Brewers} concerned rules that governed when a seniority system begins to operate, its expansive exemption of practices from disparate impact analysis has been influential in other types of cases in the lower courts. In \textit{Altman v. AT & T Technologies},\textsuperscript{128} for example, the plaintiffs were unsuccessful in challenging a layoff rule that disproportionately disadvantaged women. The employer’s practice during an economic downturn was to fill jobs with surplus workers from other departments rather than recalling the laid off workers who had previously held those jobs. The plaintiffs complained that the surplus employees were mostly male, whereas the disadvantaged laid off employees were primarily female.\textsuperscript{129} The Court of Appeals for the Seventh Circuit, following \textit{California Brewers}, found that this practice was insulated from attack under a disparate impact theory.\textsuperscript{130}

These limitations on the application of disparate impact analysis significantly curtail its usefulness. The federal antidiscrimination statutes to which the analysis applies have short statutes of limitation and complicated procedural requirements.\textsuperscript{131} Moreover, disparate impact claims have limited remedies; the court may grant only equitable relief and may not award compensatory or punitive damages.\textsuperscript{132} Finally, the apparent unavailability of the theory in comparable worth claims precludes an effective attack on gender-based wage disparities.

\textbf{B. International Applications}

The limitations imposed on the application of disparate impact analysis in the United States have not been reflected in international jurisdictions. The countries and supra-national entities examined in the first part of this
essay have variously incorporated disparate impact analysis into their constitutional jurisprudence of equality, have applied it to cases concerning equal pay, age discrimination, and seniority systems, and have taken a liberal approach to the identification of practices that cause a disparate impact. These jurisdictions have not only accepted the disparate impact concept, but they have given it wider application than has its country of origin.

1. Constitutional Applications

Although Canada was slow to accept the disparate impact theory of discrimination, it has nonetheless applied the concept expansively since its adoption. In recent years, the Canadian Supreme Court has had occasion to decide the scope of non-discrimination and equality guarantees not only in the context of provincial and federal human rights legislation, but also in a constitutional context, in interpreting the 1982 Charter of Rights and Freedoms. Section 15(1) of the Charter states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

Section 1 provides a potential limitation on this general statement: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

As section 1 in particular makes clear, the Canadian Charter applies in a carefully delimited area of state action. Its guarantees have not been extended to constrain the actions of ‘private’ organizations or individuals. That is, concerning equality and non-discrimination, the Charter covers discrimination in the formulation, application, or operation of law, while ‘private’ discriminatory actions are covered by human rights legislation.

Before section 15 of the Charter reached the Supreme Court, a number of lower court decisions interpreting the section employed some version of the concept of disparate impact discrimination. In addition, the Canadian Department of Justice considered that section 15 might apply to disparate impact discrimination, and its Charter conformity review sought to identify apparently neutral legislation that might have a disparate impact on one of

the listed grounds. The issue was eventually raised for the Supreme Court's consideration in *Andrews v. Law Society of British Columbia*.

In fact, the *Andrews* case was simply a case of disparate treatment, which concerned British Columbia's requirement that applicants for admission to practice law in the Province must be Canadian citizens. In an authoritative judgment supported by three of the four other members of the court, however, Justice McIntyre addressed more broadly the meaning of section 15 and its relationship with section 1 of the Charter.

In deciding how to interpret section 15(1), Justice McIntyre rejected any assistance from the jurisprudence of either the previous Canadian Bill of Rights or the United States Constitution. The former Canadian Bill of Rights had referred only to equality before the law, whereas section 15(1) of the Charter guarantees four equalities: equality before and under the law, and equal protection and equal benefit of the law. Thus, the limited jurisprudence which had developed around the notion of equality before the law was considered an inappropriate starting point in interpreting the much wider provisions of the Charter. The U.S. Supreme Court's constitutional interpretation was also considered an inappropriate guide, since the U.S. Constitution contains no equivalent of section 1 of the Canadian Charter. According to Justice McIntyre, the existence of section 1 suggests that it is intended to form the only restraint on the guarantees found elsewhere in the Charter. By contrast, the U.S. Supreme Court had developed internal limitations on the scope of the Equal Protection Clause which could not be imported validly into the Canadian Charter.

Having rejected these constitutional reference points, Justice McIntyre found a more appropriate source of interpretive guidance in recent Canadian human rights jurisprudence. The four equalities in section 15(1) of the Charter are to be enjoyed "without discrimination", with the meaning of "discrimination" having been considered and largely settled in the context of human rights litigation. Thus, it was open to the court to draw on its earlier decisions in *O'Malley* and *Bhinder* and to recognize, in particular,

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138. Wilson J. agreed with McIntyre J. on the interpretation and application of s.15 and on the interaction between s.15 and s.1. Dickson C.J.C. and L'Heureux-Dubé J. concurred with Wilson J. Lamer J. substantially agreed with his colleagues on the meaning of s.15 only so far as was relevant to the appeal.
140. See id. at 177.
141. See id. at 170.
142. See id. at 177.
143. See id. at 173. McIntyre, J., considered that in general, principles applied under human rights legislation would be equally applicable in considering questions of discrimination under s.15(1) of the Charter. Id. at 175.
that disparate impact discrimination was unlawful under the Charter.\(^{144}\)Justice for such discrimination may only be established under section 1, with the burden of proof resting on the state.\(^{145}\)

Justice McIntyre’s pronouncements in *Andrews* on the extent of section 15 provide a clear indication of the Canadian Supreme Court’s view that the broad equality guarantees in the Charter can only be fulfilled if disparate impact as well as disparate treatment discrimination is prohibited. Subsequent decisions have produced splits in the Court on the correct analysis and application of section 15,\(^{146}\) but none of these decisions has questioned the basic principle that adverse impact discrimination is recognized and prohibited in Canadian constitutional law.\(^{147}\)

In the case of *Street v. Queensland Bar Association*,\(^{148}\) the High Court of Australia arrived at a very similar conclusion to the Canadian Supreme Court in *Andrews*. The *Street* case involved facts remarkably similar to those of its Canadian counterpart. The Australian constitution is one of the few written constitutions which does not contain a Bill of Rights.\(^{149}\) It does, however, include a limited list of guarantees of freedom and non-discrimination. For example, section 92 prescribes absolute freedom of interstate trade and commerce.\(^{150}\) This and other prohibitions against economic discrimination were included in keeping with one of the aims of Australian federation, to create a free trade zone within the country. The only non-economic protections are section 80, which provides for jury trial for federal indictable offences,\(^{151}\) section 116, which guarantees religious

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144. See id. at 173. McIntyre, J., described “discrimination” as:
[A] distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.

Id. at 174; see also Kathleen E. Mahoney, *The Constitutional Law of Equality in Canada*, 24 N.Y.U. J. INT’L L. & POL. 759, 774 (1992) (noting that “[p]revailing opinion” had been that “notwithstanding the decisions rendered under human rights legislation, Canadian Courts would likely follow the American view that adverse-impact or unintended results are excluded from the definition of discrimination for the purposes of constitutional law.” In *Andrews*, however, the Supreme Court confounded this expectation).


149. The Australian Constitution was drafted in the 1890s, in a prevailing legal-philosophical climate of arid positivism. Attempts in the 1970s and 1980s to amend the constitution to include more extensive rights guarantees failed. See Hilary Charlesworth, *The Australian Reluctance About Rights*, 31 OSGOODE HALL L.J. 195 (1993).

150. AUSTL. CONST., s.92:
On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

151. Id. at s.80:
freedom, and section 117, which provides: "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

Street concerned a challenge under section 117 to regulations in the State of Queensland, which required that individuals seeking admission to practice as a barrister in Queensland take up permanent residence in Queensland and cease practicing in any other State. After the action was filed, the regulation was amended to require that applicants for admission have the intention of practicing principally in Queensland, and that they do so for a one-year period of conditional admission before gaining full admission. On their face, these requirements applied equally to both interstate and Queensland residents. Earlier High Court decisions had advanced an extremely narrow and literal construction of section 117, suggesting that such facially neutral requirements, and certainly the amended regulation, would not fall foul of the constitutional prohibition. This time, however, all seven members of the Court agreed that in determining whether a particular State provision contravened section 117, it was necessary to look not just at its form, but also at its factual impact in the circumstances.

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

An alternative argument based on s.92 was also advanced by the plaintiff, but the High Court's decision focussed on s.117.


In Davies, a reduced rate of estate duty was payable by beneficiaries who were "persons bona fide residents of and domiciled in Western Australia." Davies, (1904) 2 C.L.R. at 30-31. The High Court held that there was no discrimination between residents of Queensland and residents of Western Australia because the relevant discrimination was on the basis of domicile, which was not covered by s.117. Id. at 43. Only discrimination on the sole ground of residence in another State would be caught by the section. Id. at 47.

In Henry, legal practitioners who were admitted to practice in another State were required to reside continuously in South Australia for three months before they could apply for admission to practice in that State. Henry, (1973) 128 C.L.R. at 482. A further twelve-month period of continuous residence and conditional admission would then follow before the practitioner could receive full admission. See id. at 486. Again, the Court held that there was no discrimination within the scope of s.117. The rule did not subject the plaintiff (a lawyer resident and admitted to practice in Victoria) to any disability or discrimination which would not equally apply to him if he were a resident in South Australia. See id. at 490. Moreover, the period of residence in South Australia required by the rule was only a temporary one and did not discriminate against his permanent residence in Victoria. See id.

Clearly, both the original and amended Queensland provisions had a disparate impact on out-of-State residents, and they were ruled unconstitutional.

The decision in *Street* accords with recent High Court authority stressing substance over form in interpreting section 92. In addition, some of the judges linked their view of the constitutional meaning of discrimination with the concepts of discrimination employed in antidiscrimination legislation. Thus, like the Supreme Court of Canada, the Australian High Court was prepared to harmonize legislative and constitutional non-discrimination provisions, in both cases including the disparate impact theory of discrimination.

2. Applications to Various Grounds of Discrimination

Antidiscrimination legislation in Canada, in the Australian states and territories, and in New Zealand prohibits discrimination on a wide variety of grounds, including race, ethnicity, sex, disability, age, religious belief, and sexual orientation. The structure of the legislation is such that the concept of indirect or adverse effect discrimination applies equally to all grounds, without distinction. Thus, contrary to the United States, courts in these jurisdictions have not had any opportunities either to restrict the application of adverse impact discrimination to grounds covered by some statutes (e.g., as the United States has in the Civil Rights Act and the ADA) or to exclude it from others (e.g., as the United States has in the ADEA).

In Canada, the broad statutory application of adverse effect discrimination is mirrored in the Canadian Charter of Rights and Freedoms. Thus, the concept of adverse effect discrimination may be invoked in relation to the enumerated grounds on which discrimination is prohibited by section 15 of the Charter, as well as to analogous grounds. For example, the plaintiff challenged the constitutionality of Alberta legislation that restricted the right of gratuitous passengers to sue a negligent driver, on the basis that the legislation indirectly discriminated against (inter alia) children under the age of 14. The Alberta Court of Appeal held that there was insufficient evidence to establish that the legislation had a disproportionate effect on this group. However, the fact that plaintiff was able to make a claim of indirect discrimination based on age under section 15 of the Charter was not questioned.

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160. See *Street*, 168 C.L.R. at 487, 508, 566.
163. See id. at 687; See also *Brooks v. Flight West Airlines Pty. Ltd.* (1994) E.O.C. ¶ 92-629 (holding by Queensland Industrial Relations Commission that termination of employee because she was
In line with the European Court's interpretation of Article 119 of the Treaty of Rome, E.E.C. member states must also incorporate the concept of indirect discrimination into equal pay legislation. Thus, the E.C.J. has applied indirect discrimination analysis to cases brought under the United Kingdom Equal Pay Act 1970, for example. The use of disparate impact in pay equity cases is discussed further below.

3. Identifying the Particular Practice that Causes the Impact

Like the Civil Rights Act of 1991, antidiscrimination laws in many overseas jurisdictions require a plaintiff alleging adverse impact discrimination to identify the particular employment practice that causes the impact. Indeed, the United Kingdom and most Australian legislation impose the strict test that the plaintiff must have been subject to a "requirement or condition" that has a disproportionate impact on persons of the plaintiff's sex, race, or other protected status. Thus, the first step for a United Kingdom or Australian plaintiff in establishing his or her case is to identify the relevant "requirement or condition" that he or she claims has had a discriminatory effect.

The Australian High Court has taken a purposive approach to the notion of "requirement or condition", considering that "[u]pon principle and having regard to the objects of the Act, it is clear that the words 'requirement or condition' should be construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employees. Such qualification or prerequisite may be implicit rather than formally specified. Nevertheless, the court has noted that plaintiffs must "formulate the actual requirement or condition with some precision." In practice, the "requirement or condition" element of the statutory definition of indirect discrimination has not proved a major hurdle to Australian plaintiffs.

164. See supra note 62-64 and accompanying text.
166. See supra note 108 and accompanying text.
169. Banovic, 168 C.L.R. at 185; see also Waters, 173 C.L.R. at 393, 406; Hunter, supra note 38, at 194-201.
In the United Kingdom, on the other hand, after more than 10 years of antidiscrimination legislation, two commentators observed that "British courts and tribunals have frequently scuttled the indirect discrimination claim in a sea of semantic inquiries as to the meaning of particular words."\(^{171}\) The notion of "requirement or condition" has been given a particularly narrow meaning, with the Court of Appeal deciding that in order to fall within the scope of the legislation, the "requirement or condition" identified must constitute a necessary qualification or an absolute bar to selection. It is not sufficient if a criterion having an adverse impact is simply a preferred qualification or one of a number of factors that are taken into account in the selection process.\(^{172}\)

E.E.C. law, by contrast, has developed without any requirement that complainants identify a particular factor or practice causing a demonstrated adverse impact, and it certainly has not required that such a factor or practice constitute an "absolute must." In *Enderby v. Frenchay Health Authority*,\(^{173}\) the E.C.J. held that a prima facie case of sex discrimination exists wherever there is statistical evidence of a significant difference in pay between predominantly male and predominantly female jobs of equal value.\(^{174}\) The employer is then required to provide an objective justification for the difference.\(^{175}\) The plaintiff need not delineate any particular condition or criterion causing the disparity.\(^{176}\) An English Employment Appeal Tribunal has limited the application of the *Enderby* decision in U.K. law, holding that *Enderby* does not have the effect of relieving plaintiffs from the need to establish the existence of a (mandatory) "requirement or condition" in cases under the U.K. Sex Discrimination Act.\(^{177}\) In this area there are likely to be a number of further legal challenges aimed at harmonizing the U.K. law with the E.E.C. position.

4. Application To Gender-Based Wage Claims

As the previous discussion makes clear, disparate impact is a well-established element of gender-based wage claims in E.E.C. law. A series of
decisions of the E.C.J. have interpreted the requirement of equal pay for equal work under Article 119 of the Treaty of Rome to cover many forms of compensation, including overtime payments,178 sick pay,179 paid time off work for industrial relations training,180 severance payments,181 occupational pensions,182 and standard hourly rates.183

Moreover, there is only limited scope under E.E.C. law for employers to justify disparities in compensation between predominantly male and predominantly female jobs of equal value. An employer usually will attempt to justify the disparity by stating that it is a natural outcome of either collective bargaining or market forces. The major decision on this point is again the case of Enderby v. Frenchay Health Authority. In that case, speech therapists (predominantly female) employed under the British National Health Service were paid an annual salary significantly lower than (majority male) clinical psychologists and pharmacists. The salaries for each group were the product of separate negotiating structures within the National Health Service. The plaintiff argued that the work of speech therapists was of equal value to that of clinical psychologists and pharmacists. It was accepted that there had been no intentional discrimination against women in the course of the pay negotiations. Nevertheless, the plaintiff argued that the outcome of the negotiations had an adverse impact on women and was not justifiable.

The E.C.J. held that the fact that rates of pay for two jobs of equal value are arrived at by collective bargaining processes free of intentional discrimination is not in itself sufficient justification for a disparity between the two jobs. Where the collective bargaining processes have a disparate impact on women, the employer must demonstrate other objective factors justifying the pay difference.184 The court considered that the shortage of candidates for a particular job, and the need to attract them with higher salaries, may constitute an objectively justified ground for a difference in pay between predominantly male and predominantly female jobs. In such a

case, however, the national court must consider whether all or only some of the difference is accounted for by this factor.

Canadian cases have also applied the concept of adverse impact in the context of equal pay claims. In *Nishimura v. Ontario Human Rights Commission*, for example, the Ontario Divisional Court rejected an argument that the Ontario Human Rights Commission did not have jurisdiction to entertain a sex discrimination complaint involving a claim of equal pay for work of equal value under the Ontario Human Rights Code. The plaintiffs were inside advertising salespersons employed by a Toronto newspaper. Inside advertising salespersons, female-dominated positions, were paid considerably less than outside advertising salespersons, which were male-dominated positions. In deciding that an allegation of unequal pay for work of equal value could constitute sex discrimination contrary to the Ontario Human Rights Code, the court pointed out that discrimination under the Code could be "established by conduct that either directly or indirectly, intentionally or unintentionally, denies equal treatment to individuals on the basis of a prohibited ground..." The court rejected the employer's invitation to adopt principles from American case-law and instead relied upon Canadian Supreme Court decisions concerning adverse effects discrimination, such as *Andrews v. Law Society of British Columbia* and *O'Malley v. Simpsons-Sears Ltd.*

Finally, in *Re Manitoba Council of Health Care Unions and Bethesda Hospital*, the Manitoba Court of Queen's Bench held that a statute designed to remedy pay inequity, but which did so incompletely, had an adverse impact on female employees and thereby contravened section 15 of the Canadian Charter of Rights and Freedoms. The Manitoba Pay Equity Act required employers to provide equal pay to female employees for work of equal value, but limited the wage adjustments an employer was obliged to make to no more than four annual pay increases, each a maximum of one percent of the previous year's payroll. As a result of these limits, female employees in the health care sector were left with a continuing wage gap after all statutory adjustments had been made. The restrictions were held to be unconstitutional, since they sanctioned "continued discrimination against persons performing women's work, who, by definition, are for the most part women." This case demonstrates that gender-based wage claims in Canada may draw upon the concept of adverse impact, not just at the statutory level but also at the constitutional level.

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186. Id. at 556.
187. See id. at 560.
188. See id. at 558; see also supra notes 52 and 135 and accompanying text.
190. Id. at 67-68.
5. **Application to Seniority Systems**

The United States Supreme Court's broadly fashioned exception for seniority systems is not reflected in the legislation or practice of other countries. Cases in the U.K., New Zealand, Canada, and Australia demonstrate that seniority systems which perpetuate the effects of past discrimination are open to challenge under disparate impact theory.

The major U.K. case concerning a seniority system is *Steel v. Union of Post Office Workers*. Women postal workers in the U.K. were denied permanent employment status until 1975, when the U.K. Sex Discrimination Act came into force. Women’s seniority was then deemed to run from their date of permanent appointment, rather than their date of original employment. Some postal walks were allotted on the basis of seniority, and in bidding for one walk, a woman who had been employed since 1961 lost out to a man who was much younger than her, but who had greater employment seniority, having gained permanency in 1973. The Post Office conceded that its seniority requirement had a disparate impact on women employees, and the Employment Appeal Tribunal found that this was unjustified indirect discrimination contrary to the Sex Discrimination Act.

In New Zealand, *Air New Zealand*, discussed earlier, concerned a seniority system which also placed women flight attendants employed prior to 1975 at a disadvantage compared to their male peers. Before that date, the airline had operated separate rankings and career structures for male and female flight attendants. These rankings were merged between 1975 and 1979, by a process which significantly retarded women’s seniority status within the new rankings. The airline continued to base its system of promotion between ranks on seniority within ranks. Thus, the criteria for promotion had a disparate impact on women flight attendants employed pre-1975. This practice was held to be unlawful employment discrimination under the then New Zealand Human Rights Act. As a part of the remedies awarded to the plaintiffs, they were accorded their rightful places on the seniority ladder over the objections of co-workers who would lose rank as a result. The Equal Opportunities Tribunal noted that those aggrieved by the new arrangements “have enjoyed their current seniority position precisely because the [plaintiffs] have suffered unfair disadvantage.”

One of the leading Australian indirect discrimination cases, and one of only two indirect discrimination cases to have reached the High Court of Australia, *Australian Iron & Steel Pty. Ltd. v. Banovic*, revolved around the use of a seniority system to determine layoffs. Australian Iron & Steel

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192. See supra notes 44-46 and accompanying text.
is a subsidiary of B.H.P., Australia's largest company. For many years, its steelworks at Port Kembla in New South Wales had virtually refused to employ women, leaving them languishing on waiting lists for years while men were generally employed within a few weeks of application. As a result of a series of sex discrimination complaints, a number of women were hired in 1981. Towards the end of 1982, the company announced a program of layoffs on the basis of "last hired, first fired." Many of the women recently hired were now laid off because of their low seniority. The men who had applied for employment at the same time as the women retained their positions because they had sufficient seniority to resist retrenchment. The High Court agreed with the decision of the tribunal at first instance that the "last hired, first fired" criterion had a disparate impact on women employees and was unreasonable precisely because it operated to perpetuate the effects of the company's past discrimination against women. The plaintiffs were awarded constructive seniority for future purposes and a collective sum of damages in excess of $A1 million.¹⁹⁵

Seniority systems that have a disparate impact on protected groups of employees are open to challenge in these jurisdictions whether the disparate impact arises as a result of past discrimination or current conditions. In the Canadian case of Re Golden Manor Home for the Aged and Ontario Nurses’ Association,¹⁹⁶ for example, the plaintiff was a part-time nurse employed under a collective agreement which provided that part-time employees accumulated seniority according to hours worked. Due to a handicap suffered as a result of two motor vehicle accidents, the plaintiff was unable to work for a considerable period and, as a result, was unable to accrue seniority. Because it had an adverse impact on the basis of the plaintiff’s handicap, the seniority provision of the collective agreement was held to constitute "constructive discrimination" against the plaintiff under the Ontario Human Rights Code.¹⁹⁷ The employer was ordered to accommodate the plaintiff by crediting her with the seniority she would have accumulated but for her involuntary absences from work. Hence, in this situation the seniority system was modified to accommodate the handicap of a single employee, rather than being extensively revised due to its disparate impact on a large class of employees.

¹⁹⁷. See supra note 53.
IV.

Disparate Impact Theory: American "Folly" or Ingenuity?

A. American Criticism of Griggs

The United States Supreme Court's 1971 decision in Griggs encountered immediate criticism, primarily on the grounds that it did violence to the legislative history of the Civil Right Act of 1964. Professor Gold characterized the decision as such a departure from legislative intent as to be "folly," and Professor Epstein described Griggs as a perversion of both the language and the legislative history of the Act. Professor Maltz has characterized the Griggs decision as an example of the influence of independent, court-made policy judgments in statutory interpretation. Most recently, Professor Moreno has attacked Griggs as the product of undue deference to the extravagant interpretation of the EEOC "which had abandoned its statutory mandate of conciliation, and adopted an advocacy role in a series of amicus briefs on behalf of individuals or the Justice Department."

These arguments based on statutory interpretation are largely moot now that Congress has expressly endorsed disparate impact analysis in the Civil Rights Act of 1991. This recent statute was enacted in direct response to a series of Supreme Court decisions, notably including Wards Cove Packing Co. v. Atonio, which limited the application of disparate impact analysis and altered the burdens of proof in such cases so as to make it more difficult for plaintiffs to prevail. Despite this new and unequivocal basis for legislative approval of the concept, the criticism of Griggs as a historical perversion of statutory intention persists.

More importantly, the critics have never rested their arguments against Griggs solely on the basis of statutory interpretation. A more fundamental objection to the concept of disparate impact discrimination is that employers are not free to use the selection devices of their choice. Professor Epstein challenges the entire premise of all antidiscrimination law as an interference with freedom of contract, and he has particularly harsh words for disparate impact theory:

The main problem here is that the employment discrimination laws have made the question of whether tests may be used into a collective decision instead of a firm decision. But if the statute (or even the disparate impact doctrine) were wholly repealed, then each individual firm could decide whether to use the tests and how to interpret the results. If the tests are

198. Gold, supra note 8, at 587-88.
199. Epstein, supra note 6, at 197.
200. Maltz, supra note 12.
201. Moreno, supra note 5, at 271.
203. See generally Maltz, supra note 12.
worthless in some settings, they will be abandoned regardless of their ostensibly appealing .... The debate over testing and disparate impact again illustrates the central insight regarding Title VII: the question of who decides is in the long run more important than the question of what will be decided.204

The theme of governmental interference with freedom to test is also central to the argument propounded by Herrnstein and Murray in The Bell Curve.205 Herrnstein, a psychologist, and Murray, a political scientist, attack Griggs on the grounds that it interferes with testing applicants for intelligence, which they cite as the single greatest predictor of job performance. There are numerous legal inaccuracies in their account of Griggs, as well as the inexplicable failure of psychologist Herrnstein to acknowledge that the legal standards adopted for measuring the ability of a test to predict job performance were derived from the American Psychological Association’s guidelines for employee testing.206 Taking their argument as a whole, however, it is noteworthy that Herrnstein and Murray attack disparate impact analysis from a different angle than Epstein, but concur in the result. They agree that disparate impact theory is adversely affecting free enterprise and should be abandoned.

Most recently, some legal scholars have renewed the attack on Griggs because of its perceived connection with quota hiring and with affirmative action. Professor Pilon207 complains that the effect of Griggs has been to force “most employers” to hire “by the numbers” to avoid the costs and uncertainty of potentially endless litigation. He bases his comments on statements made at Congressional hearings prior to the passage of the Civil Rights Act of 1991.208 Professor Browne similarly argues that “[a]ny theory of discrimination that relies for its proof on statistical disparities” inevitably has the practical effect of imposing “pressures on employers to engage in affirmative action in order to avoid the statistical disparities that they otherwise would be called upon to defend.”209

The incongruity between the favorable international reception of the disparate impact concept and the persistent internal criticism of the American innovation is perplexing. Although the critics could be correct in their assessment that the doctrine hurts business, the comparative law evidence suggests that other nations have not found this argument to be persuasive. Moreover, there is no similar outcry abroad about the inevitable quota pressure produced by a theory of discrimination that relies on statistical disparities.

204. Epstein, supra note 6, at 241.
205. See supra note 7.
207. Pilon, supra note 13.
208. Id. at 785.
209. Browne, supra note 13, at 383; see also Moreno, supra note 5, at 280.
It is also noteworthy that the application of the disparate impact theory in the United States is far more restrictive than it is elsewhere. Many of the major decisions cited here as adopting and applying the disparate impact concept in other jurisdictions involve applications that are not permissible under disparate impact analysis in the United States. American law does not apply the effects test to seniority systems, to comparable worth wage claims, or to any claim based upon Constitutional rights. Why is this American innovation flourishing abroad and floundering at home?

B. Testing, Race, and Disparate Impact

The key to this incongruity between international acceptance and American resistance to its own innovation, we would argue, is related to American sensitivity to testing and racial issues. The primary focus of the American critics is on the use of disparate impact theory in testing situations. It is curious that very few testing cases have arisen in any of the jurisdictions in question other than the United States, and there has been little focus on them in particular.\(^\text{210}\) In contrast, the use of aptitude tests in employment was immediately the subject of litigation under Title VII and the racial issues surrounding those tests have been the subject of on-going public controversy.\(^\text{211}\)

The difference can be attributed to the greater American interest in testing issues. Notably, one of the rare examples of a disparate impact testing case in Canada produced a controversy in the United States but not, apparently, in Canada. In an unreported Canadian case, female plaintiffs challenged a test used by a municipality because it disproportionately excluded women. The case was described in an Ottawa law journal article that broadly surveyed developments in human rights law, but otherwise this unreported case was not treated as a particularly significant one in its coun-

\(^{210}\) Testing has apparently been the subject of only two Canadian and two Australian reported disparate impact cases. The Canadian case of Action Travail des Femmes v. Canadian National Railway, [1987] 1 S.C.R. 1114, involved a number of practices that were found indirectly to discriminate against women, including unvalidated mechanical aptitude tests and testing for higher trade qualifications than required for entry level positions. The tribunal’s orders included that C.N.R. do the following: cease the use of particular tests and requirements for job applicants; advertise all positions widely; change reception and interview practices; implement measures to eliminate all forms of sexual harassment and discrimination from the workplace; hire at least one woman in every four blue-collar positions filled until the proportion of women in blue-collar jobs in C.N.R.’s workforce matched their proportion in such jobs in the regional labor market; and submit specified employment data to the tribunal during the special hiring period so it could monitor the company’s performance.

The second Canadian case, Re Municipality of Metro. Toronto and Canadian Union of Pub. Employees Local 79, (1994) 42 L.A.C. 4th 370, concerned an employee grievance regarding the format of a written examination. The claim was rejected by the Court with one judge dissenting.


\(^{211}\) See supra notes 24-29 and accompanying text.
try of origin. However, it sparked interest among some American scholars. Indeed, an American statistical journal published an article singling out the case as an example of a judicial misuse of statistical evidence concerning the impact of tests.

The combination of American interest in testing issues and American sensitivity to racial issues makes aptitude testing an explosive topic. The use of disparate impact theory to attack the racial effect of such testing for employment has created controversy for the concept in the United States, ever since the Supreme Court used the theory in precisely that context in *Griggs*. One can only speculate whether the controversy surrounding *Griggs* would have been as great if the racial effect of testing had not been involved. Critics have not focused, for example, on the use of disparate impact analysis to attack an unjustified height requirement. This aspect of the Supreme Court’s decision in *Dothard v. Rawlinson*, decided shortly after *Griggs*, has gone largely unnoticed. To many people it seems inherently sensible that an employer should not be able to use such a device with an exclusionary effect on the basis of gender and national origin unless the restriction is job-related. If a pilot needs to be at least 5'5" tall to reach all the controls in an airplane, for example, an employer should not arbitrarily set a height minimum at 5'7". This kind of case has never attracted much attention, although it invades the employer’s prerogative like any other application of disparate impact theory.

American law might have developed very differently if the introduction of disparate impact analysis in *Griggs* had not involved testing. If this racially explosive topic had not become so strongly associated with the concept of unintentional but unjustified exclusion, then courts might have been more receptive in subsequent cases to applying disparate impact theory to seniority, comparable worth, and other issues. Instead, the history of the concept since the earliest cases has been one of confinement and retrenchment. One can only wonder whether a disassociation of the concept from racial issues in testing would have made the American experience


216. Boyd v. Ozark Air Lines, Inc., 419 F.Supp. 1061, 1064-65 (E.D.Mo. 1976) (airline’s 5’7” minimum for pilots unjustified when only 5’5” minimum needed for safe operation of the aircraft), aff’d, 568 F.2d 50, 52 (8th Cir. 1977).

217. See supra notes 121-31 and accompanying text.

218. See supra notes 113-20 and accompanying text.

219. See supra notes 132-33 and accompanying text.

220. See supra notes 76-86 and accompanying text.
with disparate impact analysis more similar to that of other countries that followed the American lead and then surpassed the originator in application.

History could easily have taken this different course because Griggs presented the Court with a variety of interpretative options. Notably, the Court could have endorsed the disparate impact theory of discrimination, but applied it only to the education requirement and not to the testing requirement.\textsuperscript{221} This result was plausible under the Act because Section 703(h) exempts employers from liability for the use of a “professionally developed ability test” provided that the test is not “designed, intended or used” to discriminate on prohibited grounds.\textsuperscript{222} The Justices in Griggs noted that the necessity of resolving the meaning of this provision affected only the employer’s test requirement and not the diploma requirement.\textsuperscript{223} Their unanimous opinion considered the ambiguous legislative history and concluded that a test that is not demonstrably job-related is not exempted by this provision if the test had an adverse impact.\textsuperscript{224}

Critics have assailed the Court for interpreting the testing proviso in Griggs to have no practical effect. A contrary ruling, exempting any bona fide test that was professionally developed and adopted by the employer, would have focused Title VII litigation on the employer’s state of mind in adopting tests. Only invidious uses would then be forbidden. Professor Epstein has expressed confidence that the self-interest of employers would lead them only to use tests that serve well the purpose of increasing productivity, and the testing proviso is arguably consistent with this kind of confidence.\textsuperscript{225}

Because Griggs did not exempt all professionally developed tests, there followed extensive litigation over the meaning of “business necessity.” The immediate post-Griggs litigation brought to light interesting examples of employers using selection criteria that, although professionally developed, were not professionally applied to particular work situations. Cases contain examples of employers using tests without first examining their validity, applying them irrationally, and continuing their use without regard to productivity.\textsuperscript{226} In one case,\textsuperscript{227} for example, the defendant’s own
expert witness admitted that the employer was improperly using a test which, for one job category, was negatively related to productivity even though the employer used the test as a positive predictor instead. The employer’s use of the test thus not only excluded otherwise qualified minority applicants, but it also excluded white applicants who were more qualified than the other whites who were hired. Such conduct is like a race horse owner knowing that weight has something to do with the effectiveness of a jockey, but nonetheless choosing the heaviest prospects instead of the lightest ones. If one has confidence in the rationality of the market, then this owner’s race horses will always lose, unless there is some strong social reason why all owners exclude the light jockeys. Like the ultimate integration of baseball, rationality probably will prevail sooner or later.

The question remains whether the law should protect the light jockeys who are waiting for market rationality. The answer obviously depends upon the social context. Like the left-handed workers tested unnecessarily for right-handed dexterity, the light jockeys may or may not need or deserve the protection of the law from this kind of unfair exclusion. Similarly, the employer who ignorantly uses a test as a positive indicator instead of a negative one unfairly excludes more qualified applicants of all races. Requiring tests to be job related benefits all qualified individuals; the only question is which groups deserve the protection of the law by allowing them to challenge unintentional, but unfair, exclusions. Once these groups are chosen, the only legal tool that allows an attack on unjustified exclusions of this type is disparate impact analysis.

This discussion has focused upon the unwitting use of tests that do not predict job performance, but the application of disparate impact discrimination can also be a means of probing the employer’s state of mind in select-

out professional assistance, contained questions unrelated both to job and general intelligence); United States v. Georgia Power Co. 474 F.2d 906, 912 (5th Cir. 1973) (undertaking study of validation only for litigation; legitimate use of test results not related to employer’s use); Vulcan Soc’y v. Civil Serv. Comm’n, 490 F.2d 387, 396 (2d Cir. 1973) (current events section added to firefighters exam only on basis of chief’s idea); United States v. Jacksonville Terminal Co., 451 F.2d 418, 456 (5th Cir. 1971) (undertaking study of validation for litigation; unexplained exemption of one group of employees from taking test for promotion); Young v. Edgcomb Steel Co., 363 F. Supp. 961, 965 (M.D.N.C. 1973) (general aptitude test added for first time in selecting workforce on idea of a manager who wanted “an additional factor” for hiring and who instituted test without consulting anyone knowledgeable about test selection or administration), aff’d in pertinent part, 499 F.2d 97 (4th Cir. 1974).


228. Id. at 913.

229. The Negro Leagues contained many superb players who were excluded from the white professional league until the Dodgers signed Jackie Robinson in 1947.

230. Compare the decades that it took to integrate professional baseball.

231. See supra note 30 and accompanying text.

232. See generally Donohue, supra note 15.

ing exclusionary devices. In one unusual case there was direct evidence that an employer adjusted a height requirement for the purpose of excluding a number of women applicants, but generally the employer's state of mind must be probed indirectly. There were a remarkable number of prominent early cases in which the adoption and implementation of tests followed closely upon the end of legal segregation and produced the result of preserving the best jobs for white workers. In virtually all of these cases, the judge as trier of fact did not find the racial effect was intentional. Observers of these cases might easily conclude that tests were not always neutral and that rational tools selected by employers were motivated only by productivity—that proof of any other motivation was exceptionally difficult.

Whatever one's belief about why an employer might select a device that unjustifiably excludes certain applicants, disparate impact analysis provides a valuable tool for analyzing whether exclusion exists and whether it is justified, without regard to the employer's motive. The paucity of cases involving a finding that an employer intentionally used a device to exclude suggests that there would be virtually no successful cases challenging employment devices if plaintiffs must prove motive. For instance, an airline would have no incentive to consider whether its height requirement for pilots was justified as long as there are ample numbers of tall qualified pilot applicants. When the law requires proof of the intentional exclusion of applicants on the basis of a prohibited dimension, then the airline would lack an incentive to care about the disproportionate exclusion of short qualified pilots even if that group includes more women and ethnic minorities. Disparate impact analysis provides that incentive.

C. Disparate Impact and Affirmative Action

American acceptance of disparate impact analysis has suffered not only from its association with racial issues in testing but also from an association with affirmative action. Although this theory of discriminatory exclusion does not necessarily lead to affirmative action, commentators have

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234. See Rutherglen, supra note 16, at 1299 (disparate impact analysis necessary to avoid pretextual uses of tests).

235. See Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670 (D. Md. 1979). In this case there was testimony that the police chief determined the minimum height requirement by seeing how many of the female applicants would qualify at each level. Id. at 711.


237. The facts of Griggs reveal that the company introduced the testing requirement on July 2, 1965, the effective date of Title VII. Griggs v. Duke Power Co., 401 U.S. 424, 427. The district court had found that the company did not introduce the testing requirement for the invidious purpose of preserving the segregated work force. 292 F. Supp. 243, 251 (M.D.N.C. 1968), rev'd, 401 U.S. 424 (1971).
often associated the two concepts. The unfortunate blurring of issues has caused many critics of affirmative action to reject disparate impact discrimination as well.

The reason for this coupling of concepts again relates to testing. Public differences in perceptions about the use of testing in the workplace have played out most notably in the context of affirmative action. Those people who believe that tests have served as tools of conscious or unconscious racism tend to support affirmative action as necessary to overcome that effect, and those people who believe that tests are necessary and legitimate tools for selection by merit typically find that affirmative action undermines legitimate employer interests in selecting productive workers. Because of this association between the adverse effect of tests and affirmative action, the controversy over affirmative action indirectly creates a controversy over the use of disparate impact as a theory of discrimination, particularly in the testing context.

The Supreme Court attempted to uncouple this association between affirmative action and disparate effect of tests in a 1982 opinion Connecticut v. Teal. In Teal, the Court held that an employer would not be excused from the necessity of defending an exclusionary test, even when the work force reflects the racial composition of the relevant labor pool. The state employer in this case had a large pool of employees who were eligible for promotion to supervisor. They were given a test which disproportionately excluded African American applicants. Rather than validating the test or replacing it, the employer attempted to eliminate the exclusionary effect through a process which the Court described as an affirmative action program. The result was that the new supervisors reflected the racial composition of the applicants. The Court held that a favorable “bottom line” is not a defense. Unless the test was valid, there were individuals who were unfairly excluded by it. It was not sufficient that other members

238. See generally supra notes 5-7.
243. See id. at 452-53.
244. See id. at 443.
245. See id. at 444.
246. See id. at 442.
of the same racial group were advantaged by the use of an affirmative action plan to make acceptable bottom line numbers.\textsuperscript{247}

The Court's effort to separate the two concepts by rejecting the bottom line defense has not disassociated disparate impact analysis from affirmative action for the critics of affirmative action. It is widely believed that disparate impact analysis results in the surreptitious use of quotas. Although a similar complaint has not arisen in other jurisdictions that endorse disparate impact discrimination, there is a strong American belief in the causal connection.\textsuperscript{248} Griggs, representing disparate impact analysis, thus remains a principle feature in the arguments both of those who oppose the pressure for quota hiring\textsuperscript{249} and of those who do not find preferences abhorrent.\textsuperscript{250}

The rhetoric of "equality of opportunity" versus "equality of result" which has been used to attack affirmative action also appears to undermine acceptance of disparate impact discrimination. Although some scholars correctly perceive that the two are completely distinguishable,\textsuperscript{251} others find that difference to be blurred. "Equality of result" implies quotas without regard to merit, whereas the disparate effect of a tool of opportunity is discriminatory only if the use of the tool cannot be justified as a predictor of performance. Merit is the very key to the claim of discrimination in a disparate impact case. Therefore, there is no apparent reason why both sides of the affirmative action debate should not accept the disparate impact theory of discrimination.\textsuperscript{252} Its acceptance abroad, in the absence of the affirmative action debate, should cause Americans to appreciate disparate impact discrimination as a separate and useful concept of discrimination. Regardless of the outcome of the affirmative action debate,\textsuperscript{253} disparate impact analysis is a useful concept that should not be lost.

\textsuperscript{247} See id.
\textsuperscript{248} See supra notes 5-7.
\textsuperscript{249} See, e.g., Browne, supra note 13, at 383.
\textsuperscript{250} See, e.g., Kahlenberg, supra note 242, at 83 (advocating class-based preferences).
\textsuperscript{251} Daniel A. Farber, The Outmoded Debate Over Affirmative Action, 82 CAL. L. REV. 893, 919 (1994) (revision of job qualifications occasioned by Griggs is a superior remedy to affirmative action since it avoids any implication that African Americans are obtaining jobs despite deficient qualifications); Ramona L. Paetzold and Steven L. Willborn, Deconstructing Disparate Impact: A View of the Model Through New Lenses, 74 N.C. L. REV. 325, 327-28 (1996) (disparate impact model is not completely consistent with either the equal achievement or equal treatment conception of equality).
\textsuperscript{252} Compare Robert D. Alt, Toward Equal Protection: A Review of Affirmative Action, 36 WASHBURN L.J. 179, 193 n.91 (1997) (anti-affirmative action article that cites Griggs as consistent with the notion that qualification should be the basis for employment selection, but criticizes the implementation of disparate impact theory as destroying merit-based hiring), with Deborah A. Ballam, Affirmative Action: Purveyor of Preferential Treatment or Guarantor of Equal Opportunity? A Call for a "Revisioning" of Affirmative Action, 18 BERKELEY J. OF EMP. & LAB. L., 1, 10 (1997) (pro-affirmative action article that approves of the result in Griggs but criticizes its neutrality standard).
\textsuperscript{253} Professor Farber argues that there is not likely to be an "outcome" to the affirmative action debate. He notes that "major changes in the level of affirmative action are unlikely, and that in any
V.
Conclusion

Griggs v. Duke Power Co. was a landmark decision from the United States Supreme Court because it recognized that barriers to equal employment opportunity for minority groups and women need not be overt or intentional. Policies, practices, and procedures that appear neutral on their face may nonetheless have an unjustifiably exclusionary effect on protected groups. Devices that are developed with only a dominant group in mind are likely to have an exclusionary effect on ‘other’ groups who do not share the characteristics of the dominant group. Thus, facially neutral practices, far from being immunized from scrutiny, should be subject to examination for possible disparate effects. Only in this way will antidiscrimination legislation be able to tackle the full range of discrimination that exists. This point has not been lost on other Western legal systems, in the context of their antidiscrimination statutes, and beyond. The comparative law perspective sheds light on the American debate on the legitimacy of the disparate impact theory of discrimination. This perspective reveals that if the United States is out of step with respect to disparate impact, it is not aberrant in the way that its critics have suggested. The American interpretation and application of the theory are more restrictive than those of other nations.

Unlike many other western democracies, the United States has not assumed international obligations to eliminate disparate impact discrimination. Neither has the concept of disparate impact been imported into constitutional interpretation. While the Supreme Court has retreated from much of its earlier disparate impact doctrine, an impressive array of foreign and international legal institutions have concluded that Griggs was not folly. Disparate impact theory is widely accepted as an essential element in giving substance to statutory, constitutional, and international promises of equality.

event, affirmative action has reached the limit of its ability to address our racial problems.” Farber, supra note 252, at 894.