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When the Supreme Court announced its decision in *Connecticut v. Teal*,[1] it may have provided the final impetus for significant change in employment decision-making. The Court concluded that use of a written examination which has a disparate impact on black candidates in the promotion process constitutes a prima facie case of a Title VII violation, even though the ultimate promotion decisions do not result in overall underrepresentation of blacks. Furthermore, an employer's favorable "bottom line" statistics will not provide a valid defense to such a prima facie showing. Because *Teal* subjects each component of a selection process to challenge and review, employers should now be extremely reluctant to rely on criteria which have not been established as job-related in making their employment decisions.

More than ten years ago, the Supreme Court held that facially neutral employment tests which have a substantially disparate impact on members of minority groups constitute prima facie evidence of a Title VII violation.[2] *Teal*'s holding that an employer risks suit even though he sought to ameliorate the disparate impact by ultimately hiring or promoting blacks in proportion to their representation in the work force effectively forecloses employers' use of any tests. This article will analyze *Teal* and discuss its implications for future litigation, focusing on the new conceptual approach to Title VII which the Court's decision suggests.

I. The *Teal* Decision

Employees of the State of Connecticut's Department of Income Maintenance brought the lawsuit in *Teal*. Each employee had been provisionally promoted to the position of welfare eligibility supervisor and had served in that capacity for almost two years.[3] In order to

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1 457 U.S. 440 (1982).

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

3 457 U.S. at 442-43.

attain the permanent status of supervisor, Connecticut mandated participation in a selection process which required, as a first step, a passing score on a written examination.[4] Of the candidates who identified themselves as black, 54.17% passed the exam while 79.54% of the white candidates passed. Thus, the blacks' passing rate was 68% of the whites'. None of the plaintiffs passed the exam.[5]

In promoting its employees, the department considered past work performance, recommendations of the candidates' supervisors, and seniority.[6] Additionally, in order to ensure that a significant number of welfare eligibility supervisors were members of minority groups, the department utilized an "affirmative action" plan.[7] This procedure resulted in the final selection of eleven blacks (22.9% of the black candidates) and thirty-five whites (13.5% of the white candidates). The actual promotion rate of blacks was therefore almost 170% of the actual promotion rate of whites.[8]

At trial,[9] the plaintiffs based their allegation of a Title VII violation on both the disparate impact and disparate treatment theories of discrimination.[10] The United States District Court for the District of Connecticut concluded there was no evidence of an intent to discriminate and thus no disparate treatment.[11] Using the four-fifths rule[12] to determine impact, the court found that although the comparative passing rates for the exam indicated a prima facie case of adverse impact on blacks, the entire promotion process reflected no discrimi-

4 *Id.* at 443.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at 444 & n.6.

9 The district court's opinion is not officially reported, but the Memorandum of Decision from the court was appended to the Petition for Writ of Certiorari. Petition for Cert. app. 18a, Connecticut v. Teal, 457 U.S. 440 (1982).

10 *Id.* at 21a-22a. The disparate treatment theory involves allegations that the employer "simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can . . . be inferred from the mere fact of differences in treatment." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)(citations omitted). The disparate impact theory involves "employment practices that are facially neutral in their treatment of different groups but . . . in fact fall more harshly on one group than another . . . . Proof of discriminatory motive . . . is not required under a disparate impact theory." *Id.*

11 Petition for Cert. app. 18a, *Teal*.

12 The rule provides that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5)(or eighty percent) of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 C.F.R. § 1607.4D (1982). Courts are not bound by Equal Employment Opportunity Commission Guidelines, but the Supreme Court has said that they should be given "great deference." Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

nation.[13] Because the court concluded that the bottom line percentages precluded the finding of a Title VII violation, the court held that the employer was not required to demonstrate the exam's job-relatedness.[14] The plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which reversed the district court, stating that when "an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process," the barrier must be job-related.[15]

Justice Brennan wrote the decision for the five-member Supreme Court majority.[16] The question before the Court, according to Justice Brennan, was "whether an examination that bars a disparate number of black employees from consideration for promotion, and that has not been shown to be job related, presents a claim cognizable under Title VII."[17]

The majority founded its analysis on section 703(a)(2)[18] of Title VII, as well as its 1971 decision in *Griggs v. Duke Power Co.*[19] Reaffirming *Griggs*, the Court stated that a plaintiff must demonstrate that the facially neutral employment practice had a significantly discriminatory impact. If the plaintiff makes this showing, a prima facie case is established, and the "employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question' in order to avoid a finding of discrimina-

13 Petition for Cert. app. 18a, *Teal*.

14 Once a prima facie case of discriminatory impact has been established, the employer must demonstrate that the requirement is job-related in order to avoid a finding of discrimination. *Griggs*, 401 U.S. at 432. The plaintiff may still prevail if he or she shows that the employer was using the practice as a pretext for discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Validation of tests is a very expensive and time-consuming process. For one attempt, see Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981). It has been asserted that an employer "seeking to validate the job-relatedness of a single employee characteristic such as an arithmetic test for machinists could expect to incur validation costs ranging from $20,000 to $100,000." Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 NOTRE DAME LAW. 633, 643 (1979).

15 Teal v. Connecticut, 645 F.2d 133, 138 (2d. Cir.), *cert. granted*, 454 U.S. 831 (1981).

16 Justices White, Marshall, Blackmun, and Stevens joined in Justice Brennan's majority opinion.

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

18 42 U.S.C. § 2000e-2(a)(2) (1976). Section 703(a)(2) provides:

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

19 401 U.S. 424 (1971).

tion."[20] The Court recognized that Congress enacted Title VII to remove the " 'artificial, arbitrary, and unnecessary barriers to employment' and professional development that had historically been encountered by women and blacks as well as other minorities."[21]

The Court placed particular emphasis on the language of section 703(a)(2), stressing that the "statute speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*."[22] Interpreting this language, the Court concluded that the use of non-job-related barriers which deny minorities or women job opportunities, "ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria."[23] Thus, the Court rejected the argument that disparate impact should be measured at the bottom line.

The defendants in *Teal* had placed substantial reliance on the Uniform Guidelines on Employee Selection Procedures, which state that, as a general rule, the EEOC and the Department of Justice will not take enforcement action based on the disparate impact of any component of a selection process, so long as the total selection process results in no adverse impact.[24] Yet the *Teal* Court concluded that this policy had little significance for determining the issue before it.[25]

The Court acknowledged that a nondiscriminatory bottom line might assist an employer in rebutting the inference that it had intentionally discriminated. However, in *Teal* the employer's intent was

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

21 *Id.* at 447 (citing *Griggs*, 401 U.S. at 431).

22 *Id.* at 448 (emphasis in original).

23 *Id.* at 451 (emphasis in original). The State of Connecticut also argued that an acceptable bottom line should constitute a defense to a prima facie case of discrimination. But the Court, reaffirming *Griggs*, held that § 703(h) of the Act permits only tests which are job-related. The Court stated:

> A non-job-related test that has a disparate racial impact, and is used to "limit" or "classify" employees, is "used to discriminate" within the meaning of Title VII, whether or not it was "designed or intended" to have this effect and despite an employer's efforts to compensate for its discriminatory effect.

Teal, 457 U.S. at 452.

24 29 C.F.R. § 1607 (1982).

25 457 U.S. at 453 n.12 (citing 43 Fed. Reg. 38291 (1978)). Justice Brennan pointed out that the

> agencies made clear that the "guidelines do not address the underlying question of law," and that an individual "who is denied the job because of a particular component in a procedure which otherwise meets the 'bottom line' standard . . . retains the right to proceed through the appropriate agencies, and into Federal court."

Id.

not at issue.[26] Finally, the Court observed that Title VII was enacted to protect the individual employee, rather than the minority group as a whole: "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired."[27]

Justice Powell's dissent[28] accused the majority of blurring the distinction between the disparate treatment and disparate impact theories.[29] Powell opined that the *Teal* plaintiffs had sought to prove a violation of Title VII "by reference to group figures," thus they could not "deny petitioner the opportunity to rebut their evidence by introducing figures of the same kind."[30] Because there was "no adverse effect on the group"[31] in *Teal*, Justice Powell asserted that Title VII was not violated.[32]

II. Prior Bottom Line Decisions

The *Teal* majority gave virtually no consideration to the Court's earlier decisions which had arguably sanctioned the bottom line analysis. While they did not deal directly with the issue addressed in *Teal*, these decisions had indicated that if employers' work forces re-

26 *Id.* at 454.

27 *Id.* at 455. The majority concluded, "[r]equirements and tests that have a discriminatory impact are merely some of the more subtle, but also the more pervasive of the 'practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.' " *Id.*

28 Chief Justice Burger, Justice Rehnquist, and Justice O'Connor joined Justice Powell in dissent.

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

30 *Id.* at 460.

31 *Id.*

32 Although there is some appeal to Justice Powell's attack on the majority position, close scrutiny reveals that his view is inconsistent with the *Griggs v. Duke Power Co.* precedent. Powell, however, did not indicate that he favored abandoning *Griggs*. *Griggs* was founded upon the Court's recognition of a pragmatic reality: to require a strict showing of an intention to discriminate would undermine the purpose of Title VII. Motive and intent are easily disguised. Allegedly neutral selection criteria are often used to accomplish subtle discrimination on the basis of race, color, sex, religion, or national origin. Moreover, many truly neutral selection criteria actually deprive individuals of equal employment opportunities simply because of previous discrimination. Consider, for example, the lingering effects of previous segregation in the nation's schools. Thus, the *Griggs* Court allowed an employment practice's adverse impact on a group to constitute a prima facie case of discrimination. The *Teal* plaintiffs employed this theory to establish their prima facie case.

Additionally, the Court had never directly reviewed a selection process in which only a part of the process had an adverse impact. Therefore, Powell's assertion that "our disparate impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group," 457 U.S. at 458 (Powell, J., dissenting) (emphasis in original), lacks foundation.

flected the racial and sexual composition of their labor markets, virtual immunity from Title VII suits would follow.[33]

In 1973, the Court decided *Espinoza v. Farah Manufacturing Co.*[34] In *Espinoza*, a resident alien of the United States challenged an employer's requirement of American citizenship as a condition for employment. The Court rejected the plaintiff's argument that discrimination on the basis of citizenship constituted illegal discrimination on the basis of national origin, defining "national origin" as the place from which an individual or his ancestors came.[35] The Court acknowledged that a citizenship requirement could be used as a subterfuge for national origin discrimination, but pointed out that such was not the case in *Espinoza* since 97 percent of the employees were of Mexican-American ancestry.[36] The Court failed to consider whether the employer's rule might have eliminated proportionately more Mexican-Americans than Caucasians; instead, the Court was persuaded that because 97 percent of the employees were Mexican-Americans, this figure—the "bottom line"—precluded finding a Title VII violation. The *Teal* Court did not deem *Espinoza* relevant.

In *General Electric Co. v. Gilbert*,[37] the Court considered whether a private employer's nonoccupational disability benefit plan, which excluded all pregnancy-related disabilities from coverage, violated Title VII. Many thought the *Gilbert* majority's analysis of the disparate impact issue was also an adoption of the bottom line defense.[38] Although excluding pregnancy-related disabilities from coverage would obviously have a disparate impact on women, the Court concluded that Title VII had not been violated because the entire fringe benefit scheme did not have that effect. Justice Rehnquist wrote for the *Gilbert* majority: "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women dis-

33 Professor Alfred Blumrosen was the leading proponent of this view. *See* Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C. CENT. L.J. 1 (1980). *See also* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 954-55 (1982)("The Supreme Court's approval in . . . *Weber* [United Steelworkers of America v. Weber, 443 U.S. 193 (1979)] of a race-conscious employment scheme was the logical consequence of the *Griggs* doctrine. Employers—compelled by *Griggs* to eschew policies that had an unnecessary adverse impact on blacks—could not be penalized for adopting policies designed to ensure that blacks were employed on a proportionate basis.").

34 414 U.S. 86 (1973).

35 *Id.* at 89.

36 *Id.* at 92-93.

37 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977).

38 *See* C. SULLIVAN, M. ZIMMER, & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 152 (1980).

abled as a result of pregnancy do not receive benefits. . . ."[39] In other words, at the bottom line, there was no discriminatory effect, and therefore no prima facie case. The *Teal* majority did not even mention *Gilbert*.

The third case in which the Supreme Court arguably sanctioned the bottom line defense was *Furnco v. Waters*.[40] This case employed both the disparate treatment and disparate impact theories. Black plaintiffs alleged that they were the victims of intentional racial discrimination because a job superintendent refused to hire them. Additionally, they alleged that the employer's practices of refusing to hire "at the gate," and only hiring individuals known to the superintendent, had a disparate racial impact.[41] Nonetheless, the overall composition of the employer's work force reflected that proportionately more blacks were employed than were represented in the relevant geographic labor market. The *Furnco* majority considered only the disparate treatment theory.[42] It stated that courts should consider the racial mix of the work force when making a determination of the employer's motivation.[43] Since the appellate court had required the employer to adopt the "best hiring procedure," the Supreme Court remanded *Furnco* so the employer could attempt to prove that the employment practice at issue was based on a legitimate consideration.[44]

Justices Marshall and Brennan concurred and dissented. They believed that the *Furnco* majority's failure to consider the disparate impact issue was a tacit acceptance of the bottom line defense. Justice Marshall argued that the Court should have explicitly considered the disparate impact issue, and he asserted that "it is at least an open question whether the hiring of workers primarily from a list of past employees would, under *Griggs*, violate Title VII where the list contains no Negroes but the company uses additional methods of hiring to increase the number of Negroes hired."[45]

The *Teal* majority treated *Furnco* as a pure disparate treatment case.[46] *Teal*'s conclusion that Connecticut's bottom line afforded it no protection reflected the Court's judgment that the overall racial

39 429 U.S. at 138.
40 438 U.S. 567 (1978).
41 *Id.* at 572.
42 *Id.* at 575.
43 *Id.* at 571-72, 580.
44 *Id.* at 577.
45 *Id.* at 584 (Marshall, J., concurring in part and dissenting in part) (footnote omitted).
46 457 U.S. at 454-55.

mix in an employer's workforce is irrelevant in a disparate impact case.

In light of these decisions,[47] many employers viewed affirmative action plans as means of avoiding Title VII liability without the necessity of abandoning tests or other requirements which had disparate impacts on minorities and women. *Teal* destroyed this bottom line protection, however.

III. Application of *Teal*

The facts presented to the Court in *Teal* were quite conducive to the Court's holding that favorable bottom line statistics will not protect an employer whose employment practices have a discriminatory disparate impact on women or minorities. In *Teal*, the statistical disparity between the percentages of whites and blacks who passed the exam was substantial. Additionally, Connecticut used the exam as an absolute pass-fail barrier, and thus failure to achieve a passing score totally eliminated an applicant from consideration. The *Teal* plaintiffs had successfully performed the responsibilities of their positions for at least two years, yet their test performance barred their further participation in the promotion process. Finally, no white applicants were challenging the affirmative action plan which produced the favorable bottom line figures.

What are *Teal*'s implications for more complex factual situations? If the challenged criterion was some factor other than a written examination that resulted in a disparate impact, would the Court adopt a different analysis? What if the factor causing the disparate impact did not serve to eliminate a candidate entirely, but rather was simply one of many considerations in the decisional process? Is the analysis regarding favorable bottom line statistics the same if only members of minority groups or women are considered for the available positions? And how will the Court's emphasis on the individual affect the lower courts' ability to remedy discrimination? *Teal* and prior Title VII decisions provide varying degrees of guidance for answering these questions.

A. *Employment Criteria Other Than Examinations*

At least three Supreme Court decisions have applied a disparate impact analysis to criteria which did not involve written exams.

47 In addition to this precedent, the Supreme Court held that race-conscious affirmative action plans do not violate Title VII in United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

Dothard v. Rawlinson[48] (height and weight requirements), *New York City Transit Authority v. Beazer*[49] (a ban on methadone users), and *Griggs v. Duke Power Co.*[50] (high school diploma requirement), all involved application of the disparate impact theory to "facially neutral" employment practices. Yet in *Teal*, the Court placed no emphasis whatsoever on the fact that the disparate impact resulted from a written exam, a facially neutral employment criterion.[51]

B. *Employment Barriers Which Are Not Absolute*

Unlike the Second Circuit's treatment of *Teal*, which centered around the pass-fail barrier and thereby enabled the court to distinguish several other bottom line cases,[52] the Supreme Court's majority opinion did not focus on the exam as an absolute barrier. An employer-imposed requirement which results in a disparate impact but does not totally eliminate members of a protected group could arise in any number of fashions. For example, if an employer were to make hiring decisions based on combined scores from a written exam and oral interview, and blacks scored lower than whites on the written exam, *Teal* indicates that the entire hiring procedure could be successfully challenged.[53] The discriminatory factor would function

48 433 U.S. 321 (1977).

49 440 U.S. 568 (1979).

50 401 U.S. 424 (1971).

51 *See* Bartosic & Minda, *Labor Law Myth in the Supreme Court, 1981 Term: A Plea for a Realistic and Coherent Theory*, 30 U.C.L.A. L. REV. 271, 282 (1982).

52 Teal v. Connecticut, 645 F.2d 133, 138-39 (2d Cir.), *cert. granted*, 454 U.S. 831 (1981). Federal court decisions which apparently accepted the bottom line defense include: EEOC v. Greyhound Lines, 635 F.2d 188 (3d Cir. 1980); EEOC v. Navajo Refining Co., 593 F.2d 988 (10th Cir. 1979); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Cormier v. PPG Indus. Inc., 519 F. Supp. 211 (W.D. La. 1981); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256 (D. Conn. 1979); Lee v. City of Richmond, 456 F. Supp. 756 (E.D. Va. 1978); Kirkland v. New York State Dept. of Correctional Serv., 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). *Contra* EEOC v. Trailways, Inc., 530 F. Supp. 54 (D. Colo. 1981); League of United Latin American Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1976).

53 *See* Williams v. City of San Francisco, 31 Fair Empl. Prac. Cas. (BNA) 885, 887 (N.D. Cal. 1983); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1262 (D. Conn. 1979)("The fact that test scores are cumulated in an application process would not itself prevent scrutiny of a component . . . ."); McConnell, *Affirmative Action after Teal—A New Twist or a Turn of the Screw?*, 7 REGULATION 38, 42 (Mar./Apr. 1983). Justice Powell would presumably disagree with this conclusion; dissenting in *Teal*, he noted:

> Another possibility is that employers may integrate consideration of test results into one overall hiring decision based on that 'factor' *and* additional factors. Such a process would not, even under the Court's reasoning, result in a finding of discrimination on the basis of disparate impact unless the actual hiring decisions had a disparate impact on the minority group.

as a "barrier" to an individual's equal employment "opportunity"—the *Teal* Court's paramount concern. Moreover, if blacks as a group tended to score higher on the oral portion of the exam, thus offsetting the lower written exam scores and resulting in a final selection of whites and blacks proportional to their labor force representation, a prima facie case would still be established due to *Teal*'s rejection of the bottom line defense.[54]

Although post-*Teal* courts may begin examining individual examination questions, their responsibilities will not differ radically from the current practice. If a single question does have a discriminatory effect and no other question offsets that effect, the overall hiring figures will manifest the disparity. In order to avoid liability, the employer will have to prove that the question is job-related, certainly a less burdensome task than establishing the job-relatedness of an entire exam. One must also remember that in order to establish that a requirement has a disparate impact, the plaintiff must produce statistically significant evidence of such an effect; the mere fact that one or two members of a protected group incorrectly answer a question will generally not be considered statistically significant.[55]

C. *Procedures Only Applicable to Protected Group Members*

The effect of *Teal* on an employment procedure which only applies to members of minority groups or women was recently considered by the United States Court of Appeals for the First Circuit in *Costa v. Markey*.[56] *Costa* involved a police department requirement that all police officers be at least five feet six inches tall. In need of a female officer to perform special duties related to women prisoners, the city hired a woman from the eligibility list who met the height

457 U.S. at 463 n.8 (Powell, J., dissenting) (emphasis in original). His assertion is puzzling because, as noted, the majority did not emphasize the barrier's pass-fail nature.

54 *See* Wilmore v. City of Wilmington, 31 Fair Empl. Prac. Cas. (BNA) 2, 9 (3d Cir. 1983). One of the prime fears of the courts which accepted the bottom line defense was that "[t]o examine each component of an entire application process . . . launches a court on a course that has no boundaries and no clear end." Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256, 1262 (D. Conn. 1979). Challenges could be made to any subtest of a subtest, and at the extreme this process "would require the elimination of individual questions marked by poorer performance by a racial group." Smith v. Troyan, 520 F.2d 492, 498 (6th Cir. 1975).

55 *See* Wright v. National Archives and Records Serv., 609 F.2d 702, 712 (4th Cir. 1979); Adams v. Reed, 567 F.2d 1283, 1287 (5th Cir. 1978); Morita v. Southern Cal. Permanente Med. Group, 541 F.2d 217, 219-20 (9th Cir. 1976), *cert. denied*, 429 U.S. 1050 (1977).

56 677 F.2d 158 (1st Cir.), *rev'd*, 706 F.2d 1 (1st Cir. 1982), *rev'd*, 706 F.2d 1, 10 (1st Cir.) (en banc), *cert. denied*, 52 U.S.L.W. 3461 (U.S. Dec. 13, 1983) (No. 83-295).

requirement.[57] Plaintiff's name had appeared first on the eligibility list, but she was rejected because she failed to meet the height requirement. Costa sued the city, employing a disparate impact theory of discrimination.[58] She produced evidence that 80 percent of the male population is at least five feet six inches tall, while less than 20 percent of the female population meets that height requirement.[59]

Although the district court found the defendant had violated Title VII,[60] the First Circuit intially reversed.[61] The court of appeals concluded that the situation did "not reveal a hiring that has a disproportionately adverse impact on the relevant minority labor pool"[62] and hence no prima facie case was established. After the Supreme Court's decision in *Teal*, however, the First Circuit granted rehearing of *Costa*. Noting that "*Teal* teaches that the proper place to evaluate the strength of a Title VII plaintiff's prima facie case of disparate impact discrimination is the point at which the employer's neutral criterion has a discriminatory effect,"[63] the First Circuit reversed itself and agreed that a prima facie case had been proved. The court added that the "focus must be on the first step in the employment process that produces an adverse impact on a group protected by Title VII, not the end result of the employment process as a whole."[64] Finally, the fact that the city only hired women was no defense to a prima facie disparate impact case, according to the First Circuit.[65]

Rehearing en banc was then granted in *Costa*, and in a decision dated May 23, 1983, a majority of the First Circuit concluded that *Teal* did not require reversal of its original determination because the "plaintiff ha[d] not made out a prima facie case of disparate im-

57 LeBoeuf v. Ramsey, 503 F. Supp. 747, 752 (D. Mass. 1980). After the litigation began, plaintiff Lynda LeBoeuf changed her name to Lynda Costa.

58 *Id.* at 765.

59 *Id.* at 753. Similar evidence was sufficient in Dothard v. Rawlinson, 433 U.S. 321 (1977), to establish a prima facie case of disparate impact.

60 503 F. Supp. at 756.

61 Costa v. Markey, 677 F.2d 158 (1st Cir. 1982).

62 *Id.* at 161-62.

63 706 F.2d 1, 4 (1st Cir. 1982).

64 *Id.* at 4-5. The court further noted that to establish a prima facie case a plaintiff need not use "statistics from the actual application of a neutral rule." Additionally, in this case national statistics accurately reflected the effect of the rule on the employer's labor pool. *Id.* at 5.

65 The court characterized the city's conduct as seeking to "justify the disparate effect of the rule in general by pointing to the end results of one particular application of the rule. [That] is the 'bottom line' approach which is proscribed by *Teal*." *Id.*

pact."[66] Stating that *Teal* did not apply "in the absence of a discriminatory effect,"[67] the court found that because "the height requirement was applied to women only, it could have had no disparate effect on women."[68]

Teal and *Costa* are clearly distinguishable. In *Teal*, the examination undeniably had a disparate effect on black applicants competing for the supervisory positions. In *Costa*, because the only eligible individuals were women, the height requirement did not have a disparate effect on women in general, but rather a disparate effect on women who were less than five feet six inches tall. In every instance in which the Supreme Court has found a prima facie case of disparate impact discrimination, the group adversely affected was competing with its opposite racial or sexual group for the positions in question.[69] But such was not the case in *Costa*. Additionally, the *Costa* facts are analytically quite similar to *General Electric Co. v. Gilbert*,[70] which involved an employer's exclusion of pregnancy from disability insurance coverage. There the plan, on its face, did not discriminate against women, according to the Court (just as the hiring procedure in *Costa* did not facially discriminate against women), and the Court concluded there was no discriminatory effect because the benefit package was not "in fact worth more to men than to women."[71] Similarly, one cannot argue that the height requirement in *Costa* was more beneficial to men than to women; rather, it was more beneficial to tall women.

66 Costa v. Markey, 706 F.2d 1, 10 (1st Cir. 1983) (en banc).

67 *Id.* at 12.

68 *Id.* The First Circuit distinguished Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1534 (1983), which had concluded that an airline violated Title VII by imposing a weight limitation on flight attendants, all of whom were women. *Id.* The *Gerdom* court specifically relied on disparate treatment analysis, concluding that the requirement was designed to apply only to women and was therefore "facially discriminatory." 692 F.2d at 608.

69 *See* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Malarkey v. Texaco, Inc., 704 F.2d 674 (2d Cir. 1983); Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 612 (9th Cir. 1982)(Farris, J., dissenting), *cert. denied*, 103 S. Ct. 1534 (1983); EEOC v. Greyhound Lines, 635 F.2d 188, 194 (3d Cir. 1980)("When the Supreme Court has found illegal discrimination on the basis of an employer's use of a test or physical requirement to screen applicants, it invariably has compared the impact of the test or qualification on the majority with its impact on the minority alleging discrimination.").

70 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977).

71 *Id.* at 138.

D. *Remedies For Proved Discrimination*

In a number of instances employers found guilty of Title VII violations have been ordered not only to eliminate the discriminatory procedures, but also to hire or promote a specified number or percentage of the group whom the discrimination adversely affected, without regard to whether those specific group members were actually subjected to discrimination.[72] The *Teal* majority emphasized that Title VII is designed to protect the "individual employee,"[73] and the Court reiterated its original statement in *City of Los Angeles Department of Water and Power v. Manhart*,[74] that the " 'statute's focus on the individual is unambiguous.' "[75] However, some have argued that because Title VII is designed to protect individuals only, group-wide relief to non-identifiable victims is inappropriate.[76] Since the *Teal* Court's statements regarding the individualized focus of Title VII arose in the context of the requirements for a prima facie case, however, that language is irrelevant to a discussion of the proper remedy for proved discrimination. Trial courts must have broad discretion in fashioning relief to adequately further the Act's purpose. Title VII "was enacted against a background of hundreds of years of racism and racial violence and represents a congressional determination that continued discrimination in employment is against the public interest."[77] This history of discrimination will continue to haunt us unless active steps are taken to alter it. Finally, broad relief is entirely appropriate in light of *United Steelworkers v. Weber*'s acceptance of affirmative action plans for non-victims.[78]

IV. A New Wrinkle in the Disparate Impact/Disparate Treatment Dichotomy?

The *Teal* Court's substantial reliance on the literal language of section 703(a)(2) marks a significant departure from its previous decisions. In no other Title VII case has the Court gone to such great

72 *See, e.g.*, Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), *vacated and remanded for consideration of mootness sub nom.* Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 103 S. Ct. 2076, *vacated as moot sub nom.* Boston Chapter, NAACP v. Beecher, 716 F.2d 931 (1st Cir. 1983); United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

73 Connecticut v. Teal, 457 U.S. at 453.

74 435 U.S. 702 (1978).

75 457 U.S. at 455 (quoting *Manhart*, 435 U.S. at 708).

76 *See* N.Y. Times, Jan. 12, 1983, at D20; N.Y. Times, June 7, 1983, at A18.

77 Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 319 (1982).

78 See note 33 *supra*.

lengths to base its holding on the specific words of either section 703(a)(1) or section 703(a)(2),[79] the provisions outlawing discrimination. Curiosity and speculation concerning the Court's new approach are fueled by Justice Brennan's footnoted remark that if section 703(a)(1) "were the only protection given to employees and applicants under Title VII, [it] might support [the employer's] exclusive focus on the overall result."[80] Does a majority of the Court perceive a substantive difference between the protections which section 703(a)(1) and section 703(a)(2) afford; and thus may disparate impact cases only be pursued under section 703(a)(2), or was Justice Brennan's opinion merely demonstrating how strongly the disparate impact analysis is supported by the literal language of Title VII? A review of prior Title VII decisions suggests that the Court's members have not agreed on a unified view of the section 703(a)(1) and 703(a)(2) provisions. Moreover, as the *Teal* discussion of section 703(a)(2) is not entirely consistent with this precedent, it may create new analytical difficulties for Title VII cases.

Griggs v. Duke Power Co.,[81] the Court's initial interpretation of Title VII, dealt with the question of whether an employer is prohibited from requiring either a high school diploma or an acceptable test score as a condition of employment when either procedure has a disparate impact on blacks. The Court's opinion began with a footnote reference to section 703(a)(2),[82] and a statement that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute."[83] But the Court then proceeded to discuss the concept of discrimination generally and made no further reference to any statutory language.[84]

The next three Title VII cases, *McDonnell Douglas Corp. v. Green*,[85] *Espinoza v. Farah Manufacturing*,[86] and *McDonald v. Sante Fe Trail Trans-*

79 42 U.S.C. § 2000e-2(a)(1) (1976). Section 703(a)(1) provides:

> It shall be an unlawful employment practice for an employer . . . (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

See note 18 *supra* for the text of § 703(a)(2).

80 457 U.S. 448 n.9.

81 401 U.S. 424 (1971).

82 *Id.* at 426 n.1.

83 *Id.* at 429.

84 Despite the limited reference in *Griggs* to § 703(a)(2), *Teal* characterized *Griggs* as "*[r]elying on* § 703(a)(2)." 457 U.S. at 448 (emphasis added).

85 411 U.S. 792 (1973).

86 414 U.S. 86 (1973).

portation Co.,[87] were analyzed as disparate treatment cases. In all three decisions, the Court merely cited section 703(a)(1) and made no mention of section 703(a)(2).

General Electric Co. v. Gilbert[88] represents the first instance in which any member of the Court indicated that a different analytical approach might be appropriate for sections 703(a)(1) and 703(a)(2). As discussed earlier, the case involved a non-occupational sickness and disability plan which excluded pregnancy-related disabilities. Writing for the majority, Justice Rehnquist advanced the view that sections 703(a)(1) and 703(a)(2) may not be used interchangeably to combat discrimination. The disability policy was apparently reviewed under both the disparate treatment and disparate impact theories. Justice Rehnquist's disparate treatment analysis rejected the notion that the coverage exclusion constituted sex discrimination because he maintained that there was a " 'lack of identity between the excluded disability and gender as such.' "[89] In his view, " 'the program divide[d] potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.' "[90] Justice Rehnquist then seemed to recognize that even if the disability program was characterized as gender-neutral, the plan might still violate Title VII if it had a disparate impact on women.[91] However, the opinion continued: "Even assuming that it is not necessary in this case to prove intent to establish a prima facie violation of section 703(a)(1) . . . the respondents have not made the requisite showing of gender-based effects."[92] Thus, *Gilbert* suggests that discriminatory intent is required to prove a section 703(a)(1) violation and that disparate impact analysis would not be appropriate under that provision. Justice Rehnquist espoused this viewpoint again in his *Dothard v. Rawlinson*[93] dissent.

87 427 U.S. 273 (1976).

88 429 U.S. 125 (1976).

89 429 U.S. at 135 (quoting Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974)).

90 *Id.*

91 Justice Rehnquist stated:

> [I]n the context of a challenge, under the provisions of § 703(a)(2) to a facially neutral employment test, this Court held that a prima facie case of discrimination would be established if, even absent proof of intent, the consequences of the test were "invidiously to discriminate on the basis of racial or other impermissible classification."

Id. at 137 (quoting Griggs v. Duke Power Co., 401 U.S. at 431 (1971)).

92 *Id.* at 137.

93 433 U.S. 321 (1977). This decision was rendered one year after *Gilbert*; it was a disparate impact case. In *Dothard*, Justice Rehnquist stated that "the statistics relied upon in

The majority opinion in *Nashville Gas Co. v. Satty*,[94] also written by Justice Rehnquist, highlighted a potential substantive distinction between sections 703(a)(1) and 703(a)(2), and added an additional wrinkle to the analysis. The employer in *Satty* had a policy of not allowing sick pay to employees on pregnancy leave and denying women employees returning from pregnancy leave their accrued seniority. Attempting to distinguish *General Electric Co. v. Gilbert*,[95] he stated that in *Gilbert*, "there was no showing that General Electric's policy . . . favored men over women. No evidence was produced to suggest that men received more benefits . . . than did women. . . ."[96] The employer in *Satty*, however, did "not merely [refuse] to extend to women a benefit that men cannot and do not receive, but [had] imposed on women a substantial burden that men need not suffer."[97] In *Satty*, Justice Rehnquist reiterated his view that section 703(a)(2) was appropriate for disparate impact claims, and he added the notion that a policy which could be characterized as a deprivation of benefits was not appropriate for a disparate impact analysis.[98]

Few other Supreme Court justices have focused their attention on the scope of either section 703(a)(1) or section 703(a)(2). Those who have commented on the issue have not devoted a great deal of attention to it. In apparent contradiction of the view he espoused in *Teal*, Justice Brennan, joined by Justice Marshall, wrote a dissent in

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this case are sufficient . . . to sustain a finding of a prima facie violation of § 703(a)(2), in that they reveal a significant discrepancy between the numbers of men, as opposed to women, who are automatically disqualified by reason of the height and weight requirements." 433 U.S. at 337-38 (Rehnquist, J., dissenting).

94 434 U.S. 136 (1977).

95 429 U.S. 125 (1976).

96 434 U.S. at 141.

97 *Id.* at 142. "We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other . . . [b]ut that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities. . . ." *Id.*

98 When discussing the exclusion of pregnancy from the sick leave plan in *Satty*, Justice Rehnquist explained:

> We again need not decide whether, when confronted by a facially neutral plan, it is necessary to prove intent to establish a prima facie violation of § 703(a)(1). . . . But it is difficult to perceive how exclusion of pregnancy from a disability insurance plan or sick-leave compensation program "would deprive any individual of employment opportunities" or "otherwise adversely affect his status as an employee" in violation of § 703(a)(2). The direct effect of the exclusion is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment or job status. Plaintiff's attack in *Gilbert* . . . was brought under § 703(a)(1), which would appear to be the proper section of Title VII under which to analyze questions of sick-leave or disability payments.

Id. at 144-45.

Gilbert stating, "this Court . . . and every Court of Appeals now have firmly settled that a prima facie violation of Title VII, whether under section 703(a)(1) or section 703(a)(2), also is established by demonstrating that a facially neutral classification has the *effect* of discriminating against members of a defined class."[99] When Justice Brennan authored the majority opinion in *United Steelworkers of America v. Weber*,[100] he quoted both section 703(a)(1) and section 703(a)(2).[101] Yet only in *Teal* has there been substantial reliance on statutory language as a basis for the Court's decision.

Is the concern about *Teal*'s reliance on the language of section 703(a)(2), and the Court's acknowledgment that exclusive consideration of section 703(a)(1) might have led to a different result, much ado about nothing? At first glance it appears that any problems could be resolved by merely alleging violations of both section 703(a)(1) and section 703(a)(2) in the complaint. Nevertheless, by requiring such inclusive reference to statutory authority the Court is backing itself into an analytical corner from which escape may prove difficult.

If disparate treatment cases are to be analyzed under both sections, but disparate impact cases only under section 703(a)(2), how does one treat a case like *Weber*, in which a white employee was passed over for special training in favor of a less senior black employee? Brian Weber surely was "discriminated against," but was the discrimination "with respect to his compensation, terms, conditions or privileges of employment" under section 703(a)(1), or did it constitute a "limit . . . which would deprive . . . [him] of employment opportunities or otherwise adversely affect his status" under section 703(a)(2)? Similarly, how should cases of sexual harassment be analyzed? The discriminatory conduct might be considered discrimination in terms, conditions or privileges of employment, or possibly as a limitation adversely affecting employee status.[102] The analytical distinction between sections 703(a)(1) and 703(a)(2) will undoubtedly create confusion and undermine the true purpose of Title VII.

The potential for confusion was amply demonstrated in a recent case from the Fifth Circuit, *Carpenter v. Stephen F. Austin State Univer-*

99 429 U.S. at 153-55 (Brennan, J., dissenting)(emphasis added).

100 443 U.S. 193 (1979).

101 443 U.S. at 199 n.2.

102 *See, e.g.*, Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981).

sity.[103] Plaintiffs brought suit against the university alleging race and sex discrimination in violation of Title VII. They claimed that racial and sexual stratification of employees in the lower pay brackets resulted from "institutional employment practices that produce these disparities and adversely affect blacks and women."[104]

The district court concluded that the employer had violated Title VII by "channeling" minorities and women into low-level jobs.[105] This illegal channeling included "educational qualifications for job assignment and promotion that were not proved to be related to job performance; systematic lower compensation of the class by rates set in the Classification Pay Plan; and the University's subjectivity in initially assigning and promoting employees and placing them on the compensation scale."[106]

Reviewing the district court's decision in *Carpenter*, the Fifth Circuit acknowledged that a Title VII class action may be brought under either the disparate treatment or disparate impact theory.[107] The court explained that "[t]he *disparate treatment* model is *based on section 703(a)(1)* of Title VII . . . [and] [t]he *disparate impact* model of Title VII liability is *based on section 703(a)(2)* . . . ."[108] The appellate court agreed that the disparate impact analysis was appropriate for the educational requirements in *Carpenter*. The other practices, however, should have been examined under the disparate treatment model, according to the Fifth Circuit.[109] Yet the court recognized that

> were this a case of first impression . . . we would likewise have concluded that the other channeling practices likewise fell clearly under the disparate impact model, under the literal terms of § 703(a) of Title VII, 42 U.S.C. § 2000e-2(a)(2), since they 'limit, segregate, or classify' employees in a manner that 'would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee' because of race or sex.[110]

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103 31 Fair Empl. Prac. Cas. (BNA) 1758 (5th Cir. 1983).

104 *Id.* at 1763.

105 *Id.* at 1766.

106 *Id.*

107 *Id.* at 1767.

108 *Id.* at 1767 n.7 (emphasis added).

109 *Id.* at 1767-68.

110 *Id.* (emphasis added). The court reached this conclusion by following the 1982 Fifth Circuit decision of Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982), which held that

> a subjective classification practice that depends on the employer's *discretionary* decisions is not included within the category of facially neutral procedures . . . whose

The Fifth Circuit thus remanded the case to the district court for a determination of whether the employer had discriminatory intent to cause the latter two channeling practices, and thus whether violations of Title VII occurred.[111]

The disturbing aspect of *Carpenter* is the court's rigid categorization of disparate treatment cases as only those falling within the literal language of section 703(a)(1), and disparate impact cases as only those which come under the strict terms of section 703(a)(2). The court was absolutely correct in observing that if the employer's workforce was racially and sexually stratified, it constituted a "limit[ation], segregat[ion], or classif[ication]"[112] that would deprive individuals of employment opportunities because of sex or race.[113] Yet the court concluded that section 703(a)(2) could not be used as a basis for a Title VII violation because section 703(a)(2) pertains only to disparate impact cases and the practices in question were not appropriate for disparate impact analysis.[114]

Equally disturbing is the Ninth Circuit's May 1983 decision, *Wambheim v. J.C. Penney Co.*[115] The *Wambheim* plaintiffs challenged Penney's medical insurance policy under which employees who worked at least twenty hours each week were offered medical and dental insurance. Penney paid approximately 75 percent of the program's cost. Various contribution rates were based on whether the employee alone was covered, or whether a spouse and/or dependents were also covered.[116]

In conjunction with the plan, Penney imposed a head-of-household rule which allowed an employee to obtain coverage for a spouse only if the employee earned more than half of the couple's combined income. Seventy percent of Penney's workforce was female, but "most of these women work[ed] in low-paying sales positions."[117] Unremarkably, "only 12.5 percent of the married female employees qualified as heads of households, while 89.34 percent of the married

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discriminatory impact may be isolated and thus . . . shown to have a causal connection to a class-based imbalance in the work force so as to require no further proof of discriminatory motivation or intent.

31 Fair Empl. Prac. Cas. (BNA) at 1768 (emphasis in original).

111 *Id.* at 1768-69.

112 *See* 42 U.S.C. § 2000e-2(a)(2) (1976).

113 31 Fair Empl. Prac. Cas. (BNA) at 1767-68.

114 *Id.*

115 705 F.2d 1492 (9th Cir. 1983).

116 *Id.* at 1493.

117 *Id.*

males qualified."[118]

In an earlier proceeding, the Ninth Circuit determined that the plaintiffs had established a prima facie case of disparate impact discrimination.[119] But in its May opinion, the court characterized *Wambheim* as "an unusual disparate impact case because it alleges a violation of § 703(a)(1) of the Act: discrimination with respect to 'compensation, terms, conditions, or privileges of employment.' "[120] The court then asserted that "[t]he disparate impact theory has been developed in cases alleging violations of § 703(a)(2),"[121] and discussed whether that theory was appropriate in a section 703(a)(1) case. The court concluded that it was.[122]

That conclusion did not turn the court's attention away from the distinction between sections 703(a)(1) and 703(a)(2), however, for the court stated that once the plaintiffs had established a prima facie case of disparate impact the "burden . . . shifted to Penney to justify its policy."[123] The court recited the standard of proof for a section 703(a)(2) case: "business necessity"; "manifest relationship to the employment in question"; or "necessity for the efficient operation of the business,"[124] but chose not to employ any of those standards. Instead, it asserted that because none of those measures is particularly applicable to the section § 703(a)(1) employment benefits case, "Penney must 'demonstrate that legitimate and overriding business considerations provide justification.' "[125] Applying that standard, the court found that Penney had met its burden. Penney explained that the head-of-household rule "is designed to benefit the largest number of employees and those with the greatest need,"[126] and added that "[i]f all spouses are included, the contribution rates will increase."[127]

118 *Id.* at 1494.

119 642 F.2d 362 (9th Cir. 1981).

120 705 F.2d at 1494.

121 *Id.*

122 *Id.* As support for its conclusion, the Ninth Circuit stated: "A recent decision of [the United States Supreme Court] . . . implies that disparate impact analysis may be applied to a § 703(a)(1) claim." *Id.* (citing American Tobacco Co. v. Patterson, 456 U.S. 63 (1982)). *Patterson* involved the issue of whether the operation of a seniority system, which had its origin after Title VII's effective date and which had a disparate impact on blacks, would establish a violation of that Act despite the absence of proof of an intent to discriminate. The Court held it would not. It is difficult to discern the basis for the *Wambheim* court's view of *Patterson*.

123 705 F.2d at 1494 (footnote omitted).

124 *Id.* at 1495 (citing Griggs v. Duke Power Co., 401 U.S. at 431; Connecticut v. Teal, 102 S. Ct. at 2531; and Peters v. Lieuallen, 693 F.2d 966 (9th Cir. 1982)).

125 705 F.2d at 1495 (emphasis added) (quoting Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1303 (9th Cir. 1982)).

126 *Id.*

127 *Id.*

These bare assertions were sufficient to establish the employer's "legitimate and overriding business justifications."[128]

Thus, given the *Teal* Court's endorsement of an analytical distinction between section 703(a)(1) and 703(a)(2) cases, the Ninth Circuit in *Wambheim* seized the opportunity to create a new standard for rebutting a prima facie case of disparate impact discrimination. While it is difficult to discern whether the phrase "legitimate and overriding business considerations" is an easier burden for defendants to meet than "business necessity," the *Wambheim* court's application of the standard was certainly not stringent.

Perhaps an even more important implication of the section 703(a)(1)/703(a)(2) dichotomy involves federal government employees. They are protected against discrimination by section 717 of Title VII, which provides in part: "[a]ll personnel actions . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."[129] Although that language is not very similar to either section 703(a)(1) or 703(a)(2), it is probably closer to section 703(a)(1) because of the reference to "discrimination." If the distinction between the sections prevails, will this analysis prevent federal government employees from basing lawsuits on the disparate impact theory because section 717, like section 703(a)(1), will now be interpreted to require proof of intent to discriminate? Surely such a result would undermine congressional intent. The legislative history surrounding the 1972 amendments to Title VII, which extended the Act to state and federal employees, clearly indicates that pre-1972 decisions, including *Griggs v. Duke Power Co.*,[130] were to become applicable to the newly covered employees.[131] Indeed, the Court itself observed, in *Chandler v. Roudebush*:[132]

> A principal goal of . . . the Equal Employment Opportunity Act of 1972 . . . was to eradicate 'entrenched discrimination in the Federal Service' . . . by strengthening internal safeguards and by according '[a]ggrieved [federal] employees or applicants . . . the full rights available in the courts as are granted to individuals in the private sector under Title VII.'[133]

128 *Id.*

129 42 U.S.C. § 2000e-16(a) (1976).

130 401 U.S. 424 (1971).

131 *See* S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1971); *see also* H.R. REP. NO. 238, 92d Cong., 1st Sess. 8, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137; 118 CONG. REC. 7166, 7564 (1972).

132 425 U.S. 840 (1976).

133 *Id.* at 841 (citation omitted).

There is no basis in logic or legislative history for distinguishing between a section 703(a)(1) and 703(a)(2) disparate impact claim. Congress clearly intended to outlaw discrimination in employment, and in the language of those two sections it provided examples of illegal discrimination. There is no evidence that only section 703(a)(1) was intended to apply to instances of intentional discrimination, while section 703(a)(2) was to apply exclusively to disparate impact cases.[134] Nor is there reasonable support for the idea that a disparate impact analysis might not be appropriate for a situation involving fringe benefits. Justice Stevens, concurring in *Satty*, acutely observed that

> differences between benefits and burdens cannot provide a meaningful test of discrimination since, by hypothesis, the favored class is always benefited and the disfavored class is equally burdened. The grant of seniority is a benefit which is not shared by the burdened class; conversely, the denial of sick pay is a burden which the benefited class need not bear.[135]

The Court seems to be suffering from the same type of constructional weakness in its Title VII jurisprudence as that which plagued it in cases arising under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.[136] Section 8(a)(1) of that Act provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of their protected rights.[137] Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against an employee, with regard to a term or condition of employment, to encourage or discourage union membership.[138] The Supreme Court has struggled for a number of years with those sections, especially

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134 Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 COLUM. L. REV. 1203, 1215 n.38 (1974); Gold, *Equality of Opportunity in Retirement Funds*, 9 LOY. L.A.L. REV. 596, 605-09 & n.61 (1976); *See* Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199, 235 n.151 (1979).

135 Nashville Gas Co. v. Satty, 434 U.S. 136, 154 n.4 (1977) (Stevens, J., concurring). Nor does Justice Stevens perceive a difference between the protections of § 703(a)(1) and § 703(a)(2), for he wrote in *Satty*:

> The Court's second apparent ground of distinction [between §§ (a)(1) and (a)(2)] is equally unsatisfactory. The Court suggests that its analysis of the seniority plan is different because the plan was attacked under § 703(a)(2) of Title VII, not § 703(a)(1). Again, I must confess that I do not understand the relevance of this distinction. It is true that § 703(a)(1) refers to 'discrimination' and § 703(a)(2) does not. But the Court itself recognizes that this is not significant since a violation of § 703(a)(2) occurs when a facially neutral policy has a *'discriminatory effect.'*

Id. (emphasis in original).

136 29 U.S.C. §§ 151-68 (1976).

137 29 U.S.C. § 158(a)(1) (1976).

138 29 U.S.C. § 158(a)(3) (1976).

regarding the questions of what "discriminate" means,[139] and whether it is necessary to prove an intention or motive to interfere with, restrain, coerce or discriminate, in order to establish a violation.[140] Although the Court's 1967 decision in *NLRB v. Great Dane Trailers, Inc.*[141] appeared finally to resolve the latter issue, the problem resurfaced in *NLRB v. Transportation Management Corp.*[142] Prior to *Teal*, Title VII precedent appeared to be developing in a fashion consistent with maximizing the statute's purpose. *Teal* foreshadows the unfortunate likelihood that the Court will repeat its NLRA history, spending precious years myopically adhering to specific statutory language in deciding its employment discrimination cases.

Both section 703(a)(1) and section 703(a)(2) should be construed to prohibit discrimination, whether it occurs in the form of disparate treatment or any practice which has a disparate impact on members of a protected group. To interpret the statutory language in a formalistic fashion disregards the congressional objective underlying Title VII: "to achieve equality of employment opportunities."[143]

V. Conclusion

Pragmatically, *Teal* is a mixed blessing for women and minori-

139 *See generally* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968); Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L. REV. 491 (1967).

140 *See, e.g.*, NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); American Ship Building Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965); Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263 (1965); NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964); NLRB v. Exchange Parts Co., 375 U.S. 405 (1964); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

141 388 U.S. 26 (1967). The Court described two types of § 8(a)(3) violations in *Great Dane*. The first type involves conduct by the employer which is "inherently destructive of employee interests." 388 U.S. at 33. If inherently destructive conduct is established, "the Board need not adduce independent evidence of motivation, . . . the employer has the burden of justifying its actions, and, even if such justifications are adduced, the Board nevertheless may strike the balance in favor of employee rights and against the employer's asserted business purpose." Jackson & Heller, *The Irrelevance of the Wright Line Debate: Returning to the Realism of Erie Resistor in Unfair Labor Practice Cases*, 77 NW. U.L. REV. 737, 768 (1983). The second category of § 8(a)(3) violations involves conduct which has a comparatively slight impact on employee interests. 388 U.S. at 34. "When the impact of the employer's discriminatory conduct is comparatively slight, and the employer has come forward with legitimate and substantial business justification, affirmative evidence must establish anti-union motivation. Absent proof of legitimate business justification . . . a violation is established." Jackson & Heller, *supra*, at 768-69.

142 103 S.Ct. 2469 (1983).

143 Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971). *See also The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 282-83, 285 (1982).

ties. Those employers who are still committed to using tests for employment decisions may now expend their funds on test validation rather than on affirmative action programs.[144] Yet the *Teal* decision does not completely abrogate the bottom line defense in Title VII cases. The Supreme Court acknowledged that the EEOC Guidelines on Employee Selection Procedures handle the bottom line as a tool of administrative discretion, not as a rule of law. The EEOC may therefore choose not to bring a cause of action against an employer whose hiring and promotion procedures reflect no discrimination at the bottom line.[145]

Teal does represent an important step in the evolution of Title VII, however. The employees' ability to contest more barriers to employment opportunities should finally convince employers that their requirements must be absolutely necessary for adequate job performance. By refusing to accept the bottom line defense, the Supreme Court has reiterated its commitment to true equality in employment opportunities. One can only hope that *Teal*'s weaknesses do not overwhelm its basic, laudable contribution to Title VII jurisprudence.

144 Bartosic & Minda, *supra* note 51, at 283-84; Irvin, *Erasing the "Bottom Line": Connecticut v. Teal*, 6 HARV. WOMEN'S L.J. 175, 181 (1983).

145 *See* text accompanying note 24 *supra*. Of course, an individual or individuals may pursue a cause of action just as the *Teal* plaintiffs.