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Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy

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REINVIGORATING TITLE VI: DEFENDING HEALTH CARE DISCRIMINATION—IT SHOULDN'T BE SO EASY

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INTRODUCTION

> . . . Mrs. Carolyn Payne, a 21-year-old black resident of Holly Springs, Mississippi, delivered her own baby in the front seat of a truck after the emergency room of the Marshall County Hospital had refused admission.[1]
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> . . . Ysidro Aguinagas, an 11-month-old Hispanic baby, died . . . after being denied admission to a public hospital in Dimmitt, Texas, despite the fact that the hospital was . . . publicly financed. The baby would not be admitted without a $450 deposit.[2]
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> . . . an Hispanic man, conscious and speaking Spanish, arrived at an emergency room at 7 p.m. for treatment of stab wounds suffered in an attack. No doctor arrived until 8:30. Upon arrival, the doctor inquired about insurance for the patient and whether the patient was in the country legally. The wife, also Spanish speaking and monolingual, could not satisfactorily answer these questions. By 10 p.m. that evening, three hours after his arrival, the patient died. He had been inadequately treated. He was a U.S. citizen.[3]

ALMOST daily, newspapers and television news reports carry stories like these about people who are turned away from the medical care they need. The problem is usually identified as money—fifteen percent of this nation's population, almost thirty-seven million people, have no form of health insurance[4] and little or no money to pay for care.[5] Yet

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1. Institute of Medicine, Health Care in a Context of Civil Rights 22 (1981) [hereinafter *Health Care in Context*] (quoting Letter from Sylvia Drew Ivie, Ben Thomas Cole and Beth Lief to Harry P. Cain, Bureau of Health Planning and Resource Development, Department of Health Education and Welfare ("HEW") to David Tatel, Director, Office for Civil Rights, HEW (November 7, 1977)).

2. *Id.* (quoting Sylvia Drew Ivie, Ending Discrimination in Health Care: A Dream Deferred, Presentation Before the U.S. Civil Rights Commission (April 15, 1980)).

3. *Id.*

4. As one study found:

> Virtually all elderly Americans have financial access to acute health care through Medicare. Of the 210.6 million nonelderly in the United States, how-

money is not the underlying issue in our three horror stories; these patients were able to pay for care, if given some time. On the other hand, each of the patients was a person of color, and each was denied medical care: here lies the underlying problem. Race discrimination is an almost silent yet pervasive problem in American health care.

Prior to the passage of the 1964 Civil Rights Act,[6] health care facilities openly discriminated against Blacks.[7] Most hospitals excluded Black patients and Black physicians altogether. The hospitals that did admit Blacks segregated them in separate wards with Black physicians and support staff.[8] Federal money supported this segregation through awards of federal Hill Burton Act hospital construction money to segregated hospitals.[9]

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ever, nearly two-thirds receive health insurance through employer-sponsored plans, either as workers or dependents, and about one-sixth have health insurance through a mix of Medicaid, Medicare, CHAMPUS (the health program for military employees, retirees, and their dependents), individually purchased private policies, and other health insurance sources. However, this patchwork arrangement leaves about one-sixth of the nonelderly, or 37 million people, with no health insurance at all.

Shipp, *Health Insurance and the Uninsured*, 9 Cong. Res. Serv. Rev. 9, 25 (1988).

5. Although the United States has the most technologically advanced health care system in the world, it is the only industrialized nation, other than South Africa, that does not provide universal access to health care.

6. 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000a-6, 2000b-2000b-3, 2000c-2000c-9, 2000d-2000d-4, 2000e-2000e-17, 2000f, 2000g-2000g-3, 2000h-2000h-6 (1982).

7. The author believes that Black denotes a specific cultural group rather than merely a skin color and therefore will capitalize the word throughout this Article. *See, e.g.*, Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1332 n.2 (1988) ("I shall use an uppercase 'B' to reflect my view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun."); *see also* MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 Signs: J. Women in Culture & Soc'y 515, 516 (1982) (noting that "Black" should not be regarded "as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions").

8. *See* H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. I, at 25-26, pt. II, at 24, *reprinted in* 1964 U.S. Code Cong. & Admin. News 2391, 2511.

9. Segregated facilities were eligible to receive federal funding as long as they certified that there was a "separate but equal" facility available to treat Blacks. In 1963, the Fourth Circuit struck down this "separate but equal" funding policy as a violation of equal protection. *See* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959, 969 (4th Cir. 1963) (en banc), *cert. denied*, 376 U.S. 938 (1964). In *Simkins* a group of Black doctors, dentists and patients filed suit against two North Carolina hospitals. *See id.* at 962-63. Both hospitals had received sizable federal construction grants even though they maintained a policy of excluding Black patients and doctors. *See id.* HEW, the grantor agency, granted the construction monies because the hospitals had guaranteed that there were "separate hospitals for separate population groups." *Id.* at 965. The court held that the refusal to grant staff privileges to Black doctors and to admit Black patients discriminated against them in violation of the equal protection clause of the fourteenth amendment, finding that the hospitals' receipt of federal construction money constituted state action. *See id.* at 967-68. Moreover, the court stated that federal agencies could not authorize grantees to take unconstitutional action but were constrained to ensure that grantees operated constitutionally. *See id.* at 968.

Congress passed Title VI of the 1964 Civil Rights Act,[10] in part, to ensure that federal money could no longer be used to support segregated health care facilities.[11] Title VI prohibits programs and activities that receive federal financial assistance from discriminating on the basis of race.[12] While enactment of Title VI ended the most blatant forms of health care discrimination,[13] subtle barriers still prevent minorities from gaining full access to federally funded hospitals and other health care facilities.[14]

Health care discrimination no longer takes the form of WHITE ONLY signs, but seemingly race neutral policies operate disproportionately against minorities, setting up barriers that exclude them from health care. Many hospitals admit only patients who have a treating physician with admitting privileges at that hospital.[15] Others require substantial deposits before a patient will be treated in the emergency room or admitted for inpatient care.[16] Increasingly, hospitals refuse to deliver babies for mothers who have not received a certain amount of prenatal care.[17] Both hospitals and nursing homes use a variety of policies to exclude Medicaid patients.[18] Still other hospital business policies

10. Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. §§ 2000d-2000d-4 (1982)).

11. *See* §§ 110 Cong. Rec. 1658 (1964).

12. *See* 42 U.S.C. §§ 2000d-2000d-4 (1982); *infra* text accompanying notes 21-61.

13. *See* Wing, *Title VI and Health Facilities: Forms Without Substance*, 30 Hastings L.J. 137, 157-61, 176 (1978).

14. *See* R. Jaynes & G. Williams, A Common Destiny: Blacks and American Society 428-29 [hereinafter *Common Destiny*]; Davis, Lillie-Blanton, Lyons, Mullan, Powe & Rowland, *Health Care for Black Americans: The Public Sector Role*, 65 Milbank Memorial Fund Q. 213, 219 (1987) (Supp. 1); Miller, *Race in the Health of America*, 65 Milbank Memorial Fund Q. 500, 504-05 (1987) (Supp. 2); Rice & Jones, *Public Policy Compliance/Enforcement and Black American Health: Title VI of the Civil Rights Act of 1964*, in Health Care Issues in Black America 99, 101 (W. Jones & M. Rice eds. 1987); Schlesinger, *Paying the Price: Medical Care, Minorities, and the Newly Competitive Health Care System*, 65 Milbank Memorial Fund Q. 270, 275-77 (1987) (Supp. 1).

15. *See* Dorn, Dowell & Perkins, *Anti-Discrimination Provisions and Health Care Access: New Slants on Old Approaches*, 20 Clearinghouse Rev. 439, 441 (1986). Since most minorities do not have a private physician, this policy excludes most minority patients. *See Common Destiny*, *supra* note 14, at 431; Report of the Secretary's Task Force on Black and Minority Health, U.S. Dep't of Health and Human Services, Executive Summary, Vol. I, at 189 (1985) [hereinafter *Secretary's Task Force*].

16. *See* Dorn, Dowell & Perkins, *supra* note 15, at 441. Thirty-four percent of Blacks, Hispanics and Native Americans have incomes below the poverty line, compared with only eleven percent of whites. *See Secretary's Task Force*, *supra* note 15, at 51. Because minorities are more likely to be poor, they are also more likely to be turned away by hospitals because they cannot pay in advance.

17. *See* Dorn, Dowell & Perkins, *supra* note 15, at 441. While eighty percent of white women receive prenatal care during the first trimester of pregnancy, only sixty percent of Black women receive such care. The percentages for Hispanic and Native American women are even lower. *See Secretary's Task Force*, *supra* note 15, at 188.

18. Some nursing homes limit the number of Medicaid patients they will admit. *See* Dorn, Dowell & Perkins, *supra* note 15, at 451. Many hospitals require that all patients have a treating physician with admitting privileges when the only physicians with admitting privileges take few, if any, Medicaid patients. *See id.* at 441. Because Medicaid patients are disproportionately minorities, these anti-Medicaid policies have the effect of

create bilingual and bicultural barriers, including failure to provide interpreters, failure to provide translations of signs and forms, as well as pre-admission inquiries into a patient's citizenship, national origin, or immigration status.[19] Each of these policies operates to exclude a disproportionately large number of minorities. Each may foreclose access to health care if there are no alternative health care facilities in the area or may relegate minorities to second-class care if the only alternative is inferior.

Hospitals defend these practices by claiming that they are not enacted with the intent to discriminate. Attending physician rules are an easy way to ensure there will be a doctor to treat the patient. Pre-admission deposits guarantee payment for treatment. Requiring prenatal care reduces the chance of delivering a severely impaired baby, thereby lessening the risk of a malpractice suit. Medicaid patients are not as profitable as privately insured patients.

In the language of civil rights laws, these policies are "facially neutral policies that have a disproportionate adverse impact." The policies are "facially neutral" because they may not have been enacted with the subjective intent of discriminating. Their impact is disproportionate because they hit the poor and minorities harder than other groups. Their effect is adverse because in the health care context such exclusionary policies can be deadly.

Title VI litigation has so far proved to be of little assistance in ending health care discrimination caused by these facially neutral policies with a disproportionate impact on minorities. Title VI's implementing regulations proscribe facially neutral policies and practices that, in operation, have the effect of disproportionately excluding minorities, regardless of the defendant's lack of subjective discriminatory intent,[20] but lower courts have allowed hospitals to defend too easily such policies. In the health care arena federally funded defendants have been allowed to defend successfully policies with a disproportionate adverse racial impact by a mere showing that the policies are rationally related to any legitimate, non-discriminatory purpose.

Part I of this Article traces the development of Title VI and the implementing regulations that prohibit facially neutral policies that disproportionately exclude minority patients. Part II discusses the debate about and subsequent adoption of disproportionate adverse impact discrimination theory into Title VI litigation. Because the concept of the defendant's response to a prima facie case of disproportionate adverse impact discrimination has received the most attention and development in the context of Title VII employment discrimination, Part III analyzes the development of and the Supreme Court's increasing deference to em-

blocking minority access. *See* Dallek, *Health Care for America's Poor: Separate and Unequal*, 20 Clearinghouse Rev. 361, 365-371 (1986).

19. *See* Dorn, Dowell & Perkins, *supra* note 15, at 441.

20. *See* 45 C.F.R. § 80.3 (b)(2) (1989).

ployer discretion in Title VII cases. Part IV examines the use of Title VII concepts by courts analyzing Title VI cases outside the health care context. Part V examines the even more deferential standard for the defendant's justification fashioned by circuit courts in Title VI health care litigation, and exposes the lack of a rationale for this more deferential treatment. Part VI explains why Title VI evidentiary burdens should not be tied to Title VII theories.

Part VII concludes that federally funded health care providers should carry a heavy burden to justify a facially neutral policy that excludes a disproportionate number of minority patients. Such defendants should have to prove that the policy significantly furthers an important legitimate program objective that cannot be substantially accomplished through less discriminatory means.

The present status of minority health combined with the Congressional spending power underlying Title VI favor a more stringent burden of justification in Title VI health care cases than that recently articulated by the Supreme Court in Title VII cases. The American health care system as it presently operates is not meeting the needs of America's minority population. A deferential standard of justification allows health care business to continue as usual, but business as usual has not made health care accessible to America's minorities. A burden of justification that focuses on less discriminatory alternatives will encourage the development of new approaches to health care administration that will help bring minority patients into federally funded health care programs.

I. TITLE VI AND ITS IMPLEMENTING REGULATIONS

Title VI was enacted as part of the package that comprised the 1964 Civil Rights Act.[21] Its operative section provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[22]

While Title VII, which prohibits employment discrimination, is authorized by Congress's power under the commerce clause to regulate purely private interstate commerce,[23] Title VI is authorized by Con-

21. Title I, 42 U.S.C. § 1971 (1982) (voting rights); Title II, *id.* § 2000a (public accommodations); Title III, *id.* § 2000b (establishments affecting interstate commerce); Title IV, *id.* §§ 2000c-2000c-9 (public education); Title V, *id.* §§ 1975a-1975d (U.S. Civil Rights Commission); Title VI, *id.* §§ 2000d-2000d-4 (federally funded programs and activities); Title VII, *id.* §§ 2000e-2000e-15 (employment); Title VIII, *id.* § 2000f (Secretary of Commerce to compile registration and voting statistics); Title IX, 28 U.S.C. § 1447 (1982) (procedure after removal of suits from state court to federal court; authorization of Attorney General to intervene in civil rights suits); Title X, 42 U.S.C. §§ 2000g-2000g-3 (1982) (community relations service); Title XI, *id.* §§ 2000h-2000h-6 (miscellaneous provisions).

22. 42 U.S.C. § 2000d (1982).

23. *See* United Steelworkers v. Weber, 443 U.S. 193, 206 n.6 (1979).

gress's power under the spending clause.[24] Title VI rests on the power of Congress to fix the terms on which federal funds are made available.[25] It does not impose obligations; instead, it creates an option—accept federal money and do not discriminate, or discriminate and do not get federal money.[26]

Title VI's non-discrimination requirements reach "recipients" of "federal financial assistance." Federal financial assistance includes federal money awarded through grant, loan or contract, although it does not include federal contracts of insurance or guaranty.[27] A "recipient" is any public or private entity that receives this federal financial assistance.[28] The purpose of Title VI is to ensure that these recipients of federal money do not discriminate in providing services, money or goods to the ultimate beneficiaries of the programs.[29] It does not apply to employment practices except where a primary objective of the federal financial assistance is to provide employment.[30]

Today, almost every hospital and nursing home accepts federal financial assistance in the form of Medicaid and Medicare and therefore is subject to Title VI's non-discrimination requirement.[31] In fiscal year

24. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 599 (1983).

25. *See* 110 Cong. Rec. 6546 (1964) (statement of Senator Humphrey).

26. *See id.* at 1542 (statement of Representative Lindsey).

27. *See* 42 U.S.C. § 2000d-1 (1982); *see also* 42 U.S.C. § 2000d-4 (1982) (nothing in Title VI "shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.").

28. Implementing regulations define recipients as:

> [A]ny State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

45 C.F.R. § 80.13(i) (1989).

29. *See* Federal Civil Rights Enforcement Effort—A Report of the United States Commission on Civil Rights 5-6 (1971) [hereinafter *1971 Civil Rights*]. Recipients do not include the ultimate beneficiaries who receive money and services from the programs and activities that receive federal assistance. Thus, farmers who receive price support payments and poor people who receive welfare and food stamps are not subject to the anti-discrimination provisions of Title VI. *See, e.g.*, The Federal Civil Rights Enforcement Effort—A Report of the United States Commission on Civil Rights 9 (1974) [hereinafter *1974 Civil Rights*]. Neither does Title VI extend to the many programs, such as social security and veterans benefits, in which the federal government directly distributes money to beneficiaries. *See id.*

30. "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3 (1982).

31. More than 6,800 hospitals and 13,700 outpatient and primary care facilities receive federal financial assistance, primarily in the form of Medicaid and Medicare. *See* Rice & Jones, *supra* note 14, at 100.

Both Medicaid and Medicare are "federal financial assistance" for purposes of Title VI.

1987, over seven hundred federal programs administered by twenty-six federal agencies were subject to Title VI. Federal allocations for these programs amounted to over $208 billion.[32] Title VI applies to a wide range of federally funded activities, from hospital and nursing homes that receive Medicaid and Medicare,[33] to public schools,[34] private colleges and universities,[35] state and local governments,[36] and even highway construction projects that receive federal money.[37]

Title VI prohibits discrimination in any "program or activity" that receives federal funds.[38] Title VI defines "program or activity" broadly so that, generally, Title VI prohibits discrimination throughout an entire agency or institution if any part receives federal financial assistance.[39]

Title VI differs from the other titles of the Civil Rights Act because it

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See Frazier v. Board of Trustees of Northwest Miss. Regional Medical Center, 765 F.2d 1278, 1289 (5th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986); United States v. Baylor Univ. Medical Center, 736 F.2d 1039, 1046 (5th Cir. 1984) (collecting cases), *cert. denied*, 469 U.S. 1189 (1985). Title VI regulations list a number of other health grant programs that also provide federal financial assistance including health planning grants, loans and loan guarantees for hospitals and other medical facilities, Maternal and Child Health grants, and Crippled Children Services grants. *See* 45 C.F.R. § 80 app. A (1989).

32. *See* Letter from Stewart B. Oneglia, Chief, Coordination & Review Section, Civil Rights Division, Department of Justice to Sidney Watson (Feb. 3, 1989) (on file at *Fordham Law Review*).

33. *See* 45 C.F.R. § 80 app. A. (1989); Frazier v. Board of Trustees of Northwest Miss. Regional Medical Center, 765 F.2d 1278, 1289 (5th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986); United States v. Baylor Univ. Medical Center, 736 F.2d 1039, 1046 (5th Cir. 1984) (collecting cases), *cert. denied*, 469 U.S. 1189 (1985).

34. *See* 34 C.F.R. Part 100 app. B (1989).

35. *See, e.g.*, Bob Jones Univ. v. Johnson, 396 F. Supp. 597, 602 (D.S.C. 1974) (private university qualifies as "receiving federal financial assistance" under Title VI where student is directly paid veteran's educational benefits), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

36. *See, e.g.*, Latinos Unidos de Chelsea en Accion v. Secretary of Hous. and Urban Dev., 799 F.2d 774, 776 (1st Cir. 1986) (Title VI prohibition on discrimination applied to local housing program).

37. *See* 49 C.F.R. Part. 21 app. C(a)(2) (1989).

38. *See* 42 U.S.C. § 2000d (1982).

39. Lower courts had interpreted the "program or activity" language in Title VI to give the statute a broad, institution-wide application, but in Grove City College v. Bell, 465 U.S. 555 (1984), the Supreme Court interpreted the phrase narrowly and held that Title IX (which is modeled after Title VI) prohibits discrimination only in the particular educational program or activity receiving the federal assistance, not in all the educational programs and activities conducted by the recipient institution. *See id.* at 570-73.

In 1988 Congress overrode a presidential veto and enacted the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (the "Act"). The Act amends Title VI and the other anti-discrimination acts that are modeled on Title VI by adding provisions to define the meaning of the phrase "program or activity." For educational institutions where federal aid is extended anywhere within a college, university, or public system of higher education, the entire institution or system is covered. If federal aid is extended anywhere in an elementary or secondary school system, the entire system is covered. For state and local governments, only the department or agency that receives the aid is covered. Where one entity of a state or local government receives federal aid and distributes it to another department, both entities are covered. For private corporations, if the aid is extended to the corporation as a whole, or if the corporation provides a public service, such as health care, social services, education, or housing, the entire cor-

relies primarily on administrative rather than judicial enforcement.[40] Title VI's proponents saw it primarily as a means to secure administrative enforcement of school desegregation in states where courts had been ineffective in dismantling segregation.[41] Thus, Title VI's authors drafted an administrative compliance mechanism empowering the federal agencies that award federal financial assistance to refuse to grant funds and to terminate funding to any recipient found in violation of the Title VI regulations after an opportunity for an administrative hearing.[42] The federal agency does not need to seek a court order, but the fund recipient may seek judicial review of agency action.[43]

Although a federal funding recipient may not discriminate in any of its activities if any part receives federal financial assistance,[44] the administrative sanction for violation of Title VI is termination of federal funds only to the "particular program, or part thereof, in which such noncompliance has been so found."[45] Federal funds earmarked for a specific purpose are not terminated unless discrimination is found in the use of those funds or the use of those funds is infected by discrimination elsewhere in the operation of the recipient.[46]

Although Title VI provides expressly only for administrative enforcement, the Supreme Court has implied a cause of action for private individuals to sue to enforce both the statute and its implementing regulations.[47] The remedies available to a private plaintiff in a court action do not include termination of federal funding, but a plaintiff who

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poration is covered. If the federal aid is extended to only one geographically separate facility, only that facility is covered. *See* 42 U.S.C. § 2000d4-a (1988).

40. *See* Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 Geo. Wash. L. Rev. 824, 824 (1968).

41. *See* Wing, *supra* note 13, at 152. In 1965 there were 2000 school districts still operating in open defiance of *Brown*. *See* Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After* Brown v. Board of Education, 41 U. Chi. L. Rev. 742, 756 (1974).

42. Section 602 provides for an opportunity for a hearing prior to termination or a final refusal to grant assistance. *See* 42 U.S.C. § 2000d-1 (1982). Section 603 provides for judicial review of such actions. *See* 42 U.S.C. § 2000d-2 (1982).

43. Section 2000d-2 states:

> Any department or agency action taken pursuant to section 2000d-1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5 [5 U.S.C. 701-706] and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

42 U.S.C. § 2000d-2 (1982).

44. *See supra* note 39.

45. 42 U.S.C. § 2000d-1 (1982).

46. Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1079 (5th Cir. 1969).

47. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 593-95 (1983) (White,

proves intentional discrimination can recover both equitable retrospective and prospective relief, including backpay.[48] The Court has not yet addressed whether such a plaintiff can also recover damages.[49] The Court has also left open the question of the relief available to a Title VI plaintiff who proves disproportionate adverse impact discrimination but who does not prove intent to discriminate.[50] While the eleventh amendment prohibits Title VI suits in federal court against a state for compen satory monetary damages,[51] this prohibition does not extend to suits against state officials for prospective injunctive relief.[52]

Title VI does not specifically define "discrimination." Rather, it directs each federal administrative agency that extends federal financial assistance to promulgate and enforce "rules, regulations, or orders of general applicability" effectuating the provisions of Title VI.[53] Soon after passage of Title VI, a task force composed of representatives of the White House, the Commission on Civil Rights, the Justice Department and the Bureau of the Budget was created to develop consistent, enforceable Title VI regulations.[54] The challenge was to write regulations that would not be so general as to be meaningless, but that would take into account the peculiarities of the many programs subject to Title VI and be flexible enough to meet each agency's needs.[55] The task force first developed regulations for the Department of Health, Education and Welfare

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J., joined by Rehnquist, J.); *id.* at 639 (Stevens, J., dissenting, joined by Brennan and Blackmun, J.J.); *id.* at 625 (Marshall, J., dissenting).

48. *See id.* at 602-03 (White, J., joined by Rehnquist, J.); *id.* at 612 (O'Connor, J., concurring in judgment); *id.* at 624-34 (Marshall, J., dissenting); *id.* at 635-39 (Stevens, Brennan and Blackmun, J.J., dissenting); text accompanying notes 96-101; *see also* Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630-31 (1984) (back pay).

49. *See id.* at 630.

50. *See infra* notes 95-104 and accompanying text.

51. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237-38 (1985) (suit against California State Hospital and California Department of Mental Health under Section 504 of the Rehabilitation Act of 1973).

52. *See* Green v. Mansour, 474 U.S. 64 (1985), Edelman v. Jordan, 415 U.S. 651 (1974).

53. Section 2000d-1 reads in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1 (1982).

During debate on the bill, Attorney General Robert Kennedy pointed out that this delegation of authority to define prohibited discrimination was necessary because " 'there are so many different programs' . . . 'to try to write out something specifically in legislation as to what should be done, and what rules and regulations would be issued is virtually impossible.' " Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 Geo. L.J. 1, 30 (1981) (quoting Congressional Record).

54. *See* Comment, *supra* note 40, at 846.

55. *See id.*

("HEW")[56] and then used these regulations as a standard for the other agencies.[57] Ultimately, the task force drafted twenty-two sets of Title VI regulations. Each set was modeled after the initial HEW regulations, and all follow its general pattern with minimal variation.[58] With only relatively minor modification, these regulations continue in force today.[59]

The Title VI regulations all define prohibited "discrimination" in the same general terms prohibiting, among other things: "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."[60] While the administrative agencies charged with enforcing Title VI have been unanimous and consistent in concluding that Title VI should prohibit policies and practices that have a disproportionate adverse impact on minorities, the Supreme Court has been neither unanimous nor consistent.

II. DISPROPORTIONATE ADVERSE IMPACT THEORY AND TITLE VI

For two decades courts have categorized allegations of discrimination according to two analytical frameworks: disparate treatment and disproportionate adverse impact. Disparate treatment discrimination involves claims of intentional discrimination. The plaintiff must prove a discriminatory motive, but the court may infer this motive from circumstantial evidence. Disproportionate adverse impact discrimination is not concerned with the defendant's mental state: motive is irrelevant. Disproportionate adverse impact outlaws practices that are facially race neutral but that fall more harshly on minorities and that cannot be justified. It is an objective theory that requires proof of facts independent of the de-

56. The initial HEW Title VI regulations applied to hospitals, nursing homes and clinics that receive federal funding as well as to a vast array of other programs administered by HEW, including but not limited to primary and secondary education, Aid to Families with Dependent Children ("AFDC"), vocational rehabilitation services, and juvenile delinquency projects. *See* 45 C.F.R. § 80.2 app. A (1989).

57. *See* Comment, *supra* note 40, at 846.

58. *See id.*; *1971 Civil Rights, supra* note 29, at 181; U.S. Comm'n of Civil Rights, Federal Civil Rights Enforcement Effort 554-55 (1970).

59. *See* Wing, *supra* note 13, at 155.

60. 45 C.F.R. § 80.3(b)(1)(vii)(2) (1989); *see also* 7 C.F.R. § 15.3(b)(2) (1989) (Agriculture); 15 C.F.R. § 8.4(b)(2) (1989) (Commerce); 34 C.F.R. § 100.3(b)(2) (1989) (Education); 10 C.F.R. § 1040.13(b)(7)(c) (1989) (Energy); 24 C.F.R. § 1.4(b)(2)(i) (1989) (Housing and Urban Development); 28 C.F.R. § 42.104(b)(2) (1989) (Justice); 29 C.F.R. § 31.3(b)(2) (1989) (Labor); 22 C.F.R. § 141.3(b)(2) (1989) (State); 49 C.F.R. § 21.5(b)(2) (1989) (Transportation); 31 C.F.R. § 51.52(b)(vi) (1989) (Treasury). 43 C.F.R. § 17.3(b)(2) (1988) (Interior); 32 C.F.R. § 300.4(b)(2) (1988) (Defense); Title VI regulations also define discrimination to include: any difference in quality, 45 C.F.R. § 80.3(b)(1)(i) (1989), quantity or the manner in which the benefit is provided; and construction of a facility in a location with the purpose or effect of excluding individuals from the benefits of any program on the grounds of race, color, or national origin. *See* 45 C.F.R. § 80.3(b)(1)-(3) (1989).

lations prohibiting a discriminatory impact were a valid exercise of delegated administrative law-making.[68] Justice White merely concurred in the result without explanation.[69]

Lau's status was unchallenged until 1978, when, in *Regents of the University of California v. Bakke*,[70] five justices concluded that Title VI does not prohibit a recipient of federal funds from taking race into account in an affirmative action program designed to eliminate the vestiges of past discrimination. The special minority admissions program at the Medical School at the University of California, Davis deliberately used racial criteria, eliminating the need for the Court to address the question of whether proof of discriminatory intent is necessary to establish a violation of Title VI. However, in reaching the conclusion that the school's affirmative action program did not violate Title VI, a majority reasoned that Title VI's reach was co-extensive with that of the Equal Protection Clause.[71] Because the Court had previously held that the Equal Protection Clause prohibits only intentional discrimination,[72] *Bakke* cast doubt on the continued validity of *Lau*'s holding that proof of discriminatory impact suffices to establish a violation of Title VI.[73]

The Court next revisited the issue of the reach of Title VI in *Guardians Association v. Civil Service Commission*.[74] Black and Hispanic police officers filed a class action challenging the use of written examinations to make entry level appointments to the New York City Police Department. Minorities as a group scored lower on the tests than did whites. Because appointments were made in the order of test scores, the examination caused minority officers to be hired later than similarly situated whites. When the New York Police Department laid off police officers on a "last-hired, first-fired" basis, the officers with the lowest scores on the challenged examinations were laid off first, causing proportionately more Black and Hispanic officers to be fired.[75]

In response, the plaintiffs brought a class action alleging that the examinations violated Title VI and Title VII because they had a dispropor-

68. *See id.* at 570-71 (Stewart, Burger, and Blackmun, J.J., concurring).

69. *See id.* at 569 (White, J., concurring).

70. 438 U.S. 265 (1978).

71. *See id.* at 287; *id.* at 328 (Brennan, White, Marshall, and Blackmun, J.J., concurring).

72. *See* Washington v. Davis, 426 U.S. 229, 238-48 (1976).

73. *Compare* Cannon v. University of Chicago, 648 F.2d 1104, 1108 (7th Cir. 1981), *cert. denied*, 460 U.S. 1013 (1983) (Title VI requires proof of discriminatory intent) *and* Castaneda v. Pickard, 648 F.2d 989, 1000 (5th Cir. 1981) (same) *and* Lora v. Board of Educ., 623 F.2d 248, 250 (2d Cir. 1980) (same) *with* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1328 (3d Cir. 1981) (en banc) (Title VI prohibits neutral policies with discriminatory impact) *and* Board of Educ. v. Califano, 584 F.2d 576, 589 (2d Cir. 1978) (same), *aff'd on other grounds sub nom.* Board of Educ. v. Harris, 444 U.S. 130 (1979) *and* Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022, 1029 n.6 (9th Cir. 1978) (same).

74. 463 U.S. 582 (1983).

75. *See id.* at 585.

fendant's state of mind. Proof of impermissible motive is immaterial, but the defendant may avoid liability by justifying the need for the facially neutral practice.

These two analytical frameworks serve different purposes and seek to effectuate two different theoretical conceptions of equality. The disparate treatment theory reflects the equal treatment conception of equality: Blacks and whites are entitled to like treatment, and considerations of race should not influence most decisions. In contrast, the disproportionate adverse impact theory reflects an equal opportunity conception of equality. It imposes an affirmative duty on defendants to heed the disproportionate consequences of their policies because structural, historical, or societal barriers have impeded equal achievement. The equal opportunity concept of equality also teaches that arbitrary or thoughtless policies can be just as harmful as intentional discrimination.[61]

Title VII prohibits both intentional discrimination and disproportionate adverse impact discrimination,[62] while the Constitution prohibits only intentional discrimination.[63] The issue of whether Title VI and its implementing regulations proscribe unintentional discrimination with a disproportionate adverse impact has had a tortured history in the Supreme Court.

In 1974, in *Lau v. Nichols*,[64] a unanimous Supreme Court held that the San Francisco school system's facially neutral policy of not providing supplemental English language instruction violated Title VI because it had the effect of excluding non-English speaking Chinese students from the school system's educational programs.[65] Although the Supreme Court has subsequently cited *Lau* as holding that Title VI forbids disproportionate adverse impact discrimination,[66] the opinions are not that sweeping. The five-justice majority opinion relied on the express language of the Title VI regulations prohibiting practices that have the effect of subjecting individuals to discrimination, and assumed that the statutory mandate was consistent with the regulatory language.[67] Three concurring justices concluded that although it was not clear what discriminatory acts were prohibited by Title VI standing alone, the regu-

61. For a further discussion of the conceptions of equality embedded in antidiscrimination laws, see Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1 (1976); *see also* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540, 553-54 (1977) (discussing discrimination involving no motivational element).

62. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 349 (1977).

63. *See* Washington v. Davis, 426 U.S. 229, 238-48 (1976).

64. 414 U.S. 563 (1974).

65. *See id.* at 568.

66. *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 589 (1983); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978); *see also* Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (citing *Lau* to support proposition that Supreme Court will uphold congressional exercise of spending power to induce parties to comply with federal policy).

67. *See Lau*, 414 U.S. at 566-68.

of Title VI. Instead the case generated five opinions which in the words of Justice Powell "further confuse rather than guide."[85] On the question of whether Title VI itself forbids policies that have a disproportionate adverse impact on minorities, counting the votes in *Guardians* without the benefit of a true opinion of the Court has led the justices to rationalize their disparate agglomerations of votes as "holdings."

In *Alexander v. Choate*[86] the Court referred to a majority in *Guardians* as "holding" that Title VI itself, apart from its regulations, reaches only intentional discrimination.[87] Seven justices, in three separate opinions, agreed that Title VI requires proof of intent to discriminate.[88] None of these opinions undertook to examine the history of the statute or the regulations to reach this conclusion; rather, all seven justices felt compelled by the *stare decisis* effect of the *Bakke* holding that Title VI was coextensive with the Constitution.[89]

The *Alexander* court also referred to *Guardians* as "holding" that the Title VI implementing regulations that prohibit facially neutral policies having an unjustified disparate impact are valid.[90] A different five-justice majority concluded that *Bakke* did not overrule *Lau*'s concurring opinion which concluded that even if Title VI does not proscribe unintentional racial discrimination, it permits federal agencies to promulgate valid regulations that do prohibit such discrimination.[91] Justice Stevens, joined by Justices Brennan and Blackmun, concluded that the regulations prohibiting "criteria . . . which . . . have the effect . . ." of discriminating are valid because they are "reasonably related" to Title VI's

affirmed on the ground that there is no private right of action under Title VI. *See id.* at 608-10 (Powell, Burger, J.J., concurring in judgment).

85. *Id.* at 608.

86. 469 U.S. 287 (1985).

87. *See id.* at 293.

88. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 607-08 (1983) (Powell, Burger, Rehnquist, J.J., concurring in judgment); *id.* at 612 (O'Connor, J., concurring in judgment); *id.* at 634 (Stevens, Brennan, Blackmun, J.J., dissenting).

89. Only Justice Marshall in his dissenting opinion undertook an analysis of the legislative history of Title VI. Justice Marshall concluded, based upon the legislative history and consistent administrative interpretation, that Title VI prohibits disparate impact discrimination. *See id.* at 616-24 (Marshall, J., dissenting). Justice White also concluded that Title VI reached disparate impact regulation, but he relied on the concurring opinion in *Lau*. *See id.* at 592.

90. *See* Alexander v. Choate, 469 U.S. 287, 293 (1985). Six circuits have cited *Guardians* as holding that a cause of action premised on Title VI regulations does not require proof of discriminatory intent. *See* Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 317 n.6 (10th Cir. 1987), *cert. denied*, 484 U.S. 849 (1987); Latinos Unidos de Chelsea en Accion v. Secretary of Hous. & Urban Dev., 799 F.2d 774, 785 n.20 (1st Cir. 1986); Larry P. v. Riles, 793 F.2d 969, 981-83 (9th Cir. 1986); Craft v. Board of Trustees of Univ. of Ill., 793 F.2d 140, 142 (7th Cir.), *cert. denied*, 479 U.S. 829 (1986); Castaneda v. Pickard, 781 F.2d 456, 465 n.11 (5th Cir. 1986); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417-18 (11th Cir. 1985).

91. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 591-92 (1983) (White, J.); *id.* at 643 (Stevens, Brennan, Blackmun, J.J., dissenting); *id.* at 623 (Marshall, J., dissenting).

tionate impact on minority applicants.[76] The district court ultimately held that an implied private right of action existed under Title VI[77] and that proof of discriminatory effect was enough to establish a violation of Title VI. The trial court rejected the Police Department's argument that only proof of discriminatory intent could suffice.[78] The district court granted certain relief under Title VII and also granted additional relief under Title VI. The district court found that all forms of traditional equitable relief were available under Title VI and awarded, among other things, constructive seniority, backpay, and back medical and insurance benefits.[79]

The Second Circuit affirmed the Title VII relief but reversed as to Title VI.[80] Two judges held that the trial court erred in its conclusion that Title VI did not require proof of discriminatory intent.[81] The third member of the panel, Judge Meskill, refused to reach the issue of whether Title VI required proof of discriminatory intent, relying instead on the novel conclusion that private plaintiffs cannot obtain compensatory relief for violations of Title VI.[82] Judge Meskill characterized the district court's award of equitable relief—constructive seniority, backpay and other back benefits—as retrospective and compensatory, and reversed the district court on this ground.[83]

Five members of the Court voted to affirm the Second Circuit, although they could not agree on the grounds;[84] consequently, the Supreme Court missed its opportunity in *Guardians* to clarify the reach

76. *See id.* at 585-86.

77. *See* Guardians Ass'n v. Civil Serv. Comm'n, 466 F. Supp. 1273, 1281-85 (S.D.N.Y. 1979), *cert. denied*, 463 U.S. 1228 (1983), *vacated*, 633 F.2d 232 (S.D.N.Y. 1983). The district court initially held that the layoffs constituted employment discrimination in violation of Title VII. That decision was rendered untenable, however, by the Supreme Court's subsequent ruling in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), that a bona fide seniority system that merely perpetuates the effects of pre-title VII discrimination is protected by section 703(h) of the Act. *See id.* at 352-53. The discrimination at issue in *Guardians* took place before Congress extended Title VII to cover municipalities in 1972, and was thus immune from Title VII attack under *Teamsters*. Thus, later stages of *Guardians* proceed under Title VI, which has always been applicable to municipalities. *See Guardians*, 463 U.S. at 587.

78. *See Guardians*, 466 F. Supp. at 1285-87.

79. *See id.* at 1287; *Guardians*, 463 U.S. at 604-05.

80. *See* Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232 (2d Cir. 1980), *cert. denied*, 463 U.S. 1228 (1983).

81. *See id.* at 274-75 (Coffrin, J., concurring).

82. *See id.* at 255-63.

83. *See id.* at 255-56, 263.

84. Justice Powell, joined by Justice Rehnquist as well as the Chief Justice, concluded that Title VI required a showing of intentional discrimination. *See Guardians*, 463 U.S. at 610-11 (Powell, Rehnquist, Burger, J.J., concurring in judgment). Justice O'Connor wrote separately, also concluding that purposeful discrimination is a necessary element of a Title VI claim. *See id.* at 613-15 (O'Connor, J., concurring in judgment). Justice White, joined by Justice Rehnquist concluded that a Title VI plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violation of Title VI, and that such relief did not include an award of constructive seniority. *See id.* at 595-607 (White, Rehnquist, J.J.). Alternatively, Justice Powell joined by Chief Justice Burger

tiffs.[100] Justice O'Connor, while voting to affirm on the ground that proof of intent was required, agreed that both prospective and retrospective equitable relief were available to all Title VI plaintiffs, but reserved judgment on the question of whether there is a private cause of action for damages relief under Title VI.[101]

Since *Guardians*, the Court has not addressed directly the question of whether plaintiffs who prove disproportionate adverse impact discrimination may recover retroactive, equitable relief. However, a unanimous Court has cited *Guardians* saying that "[a] majority of the Court agreed that retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI."[102] The Court has not characterized this majority vote as a "holding," although it has so characterized its majority votes on disproportionate adverse impact theory; thus, the precedential effect of the remedies vote, given the change in Supreme Court personnel since *Guardians*, is unknown. In any event, the remedies question is generally of marginal importance only in Title VI health care cases because such actions typically seek prospective injunctive relief rather than any form of retrospective relief.[103]

In its tortured way *Guardians* resolved that Title VI plaintiffs can prevail upon a showing of disproportionate adverse impact. Yet because the Supreme Court affirmed the Second Circuit's reversal of the trial court's judgment, *Guardians* did not reach the issue of the parties' evidentiary burdens in a Title VI disproportionate adverse impact discrimination suit.[104] These issues are crucial. The nature of the defenses available in a

100. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 624-34 (1983) (Marshall, J., dissenting); *id.* at 635-39 (Stevens, Brennan, Blackmun, J.J., dissenting).

101. *See id.* at 612 (O'Connor, J., concurring).

102. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630 n.9 (1984). *Consolidated Rail* involved a claim brought under Section 504 of the Rehabilitation Act. *See id.* at 626. Section 505(a)(2) of the Rehabilitation Act provides to plaintiffs under Section 504 the remedies set forth in Title VI. *See id.* Citing *Guardians*, the Court held that the plaintiffs, having alleged intentional discrimination, could recover back pay. *See id.* at 631. The court did not explain why back pay constituted equitable relief.

103. *See, e.g.*, Bryan v. Koch, 627 F.2d 612, 614 (2d Cir. 1980) (suit to enjoin closing of one of New York City's seventeen public hospitals); NAACP v. Medical Center, Inc., 657 F.2d 1322, 1324 (3d Cir. 1981) (suit to enjoin implementation of proposed relocation and reorganization plan of private, non-profit hospital); Cook v. Ochsner Foundation Hosp., Civ. No. 79-1969 (E.D. La. Feb. 12, 1979) (suit to enjoin use of hospital admission criteria that had the effect of excluding Black patients).

The issue of the availability of compensatory relief is of critical importance in Title VI cases alleging discrimination in employment. Plaintiffs have traditionally brought these cases under Title VII rather than Title VI. However, the Supreme Court's recent hostility to Title VII disparate impact claims now makes a Title VI claim more attractive.

Prevailing Title VI plaintiffs can recover attorneys' fees under 42 U.S.C. § 1988.

104. Three justices did mention the defendant's burden of justification. Justices White and Rehnquist characterized the defendant's burden as one of proving the affirmative defense of "business necessity." *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). Justice Marshall characterized the defendant's burden as that of proving a "sufficient nondiscriminatory

purpose of ending discrimination in federally funded programs.[92] Justice White, joined by Justice Marshall, reached the same conclusion under a standard that inquired whether the regulations were "clearly inconsistent" with the statute.[93]

Thus, *Guardians* resolved that private Title VI plaintiffs can prevail upon a showing of disproportionate adverse impact without proof of intent to discriminate as long as they are careful to allege a violation of the Title VI regulations. The case left open, though, the question of the relief available to such plaintiffs. Justice White's opinion, which is denominated the opinion of the Court,[94] has confused commentators and courts who have misread it as reflecting the views of a majority of the Court.[95]

Justice White, joined by Justice Rehnquist, argued that only injunctive non-compensatory relief should be available absent a showing of discriminatory intent.[96] Although Justice White's vote was decisive in affirming the Second Circuit,[97] his view that the scope of relief should be limited was rejected by a majority of the Court.[98]

Yet a different *Guardians* majority than those that coalesced around the intent versus impact issues concluded that both prospective and retrospective equitable relief are available to Title VI plaintiffs who prove either intentional or unintentional discrimination.[99] Justices Stevens, Brennan, Blackmun, and Marshall reasoned that both prospective and retrospective legal and equitable relief were available to all Title VI plain-

92. *See id.* at 642-45 (Stevens, Brennan, Blackmun, J.J., dissenting).

93. *See id.* at 592-93 (White, J.); *id.* at 623 (Marshall, J., dissenting).

94. *See id.* at 584.

95. *See* Dorn, Dowell & Perkins, *supra* note 15, at 444; Solomon, *Constraints on Damage Claims Under Title VI of the Civil Rights Act*, 3 L. & Inequality 183, 185 (1985). *See also* Carter v. Orleans Parish Pub. Schools, 725 F.2d 261, 264 (5th Cir. 1984) (Section 504 of the 1973 Rehabilitation Act remedies); Marvin H. v. Austin Indep. School Dist., 714 F.2d 1348, 1356-57 (5th Cir. 1983) (same).

96. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 602-03 (1983) (White, J.,)

97. *See supra* note 84.

98. In *Guardians*, Justice White opined that a majority of the Court agreed with his conclusion that compensatory relief was not available under Title VI absent proof of discriminatory intent. *See Guardians*, 463 U.S. at 607 n.27. However, Justice White appears to have overstated the reasons behind his fellow justices' votes. *See id.* at 612 (O'Connor, J., concurring); *id.* at 624-34 (Marshall, J., dissenting); *id.* at 635-39 (Stevens, Brennan, Blackmun, J.J., dissenting). *See also* Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630 n.9 (1984) (court counting votes in *Guardians*).

99. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 612 (1983) (O'Connor, J., concurring); *id.* at 624-34 (Marshall, J., dissenting); *id.* at 635-39 (Stevens, Brennan, Blackmun, J.J., dissenting); *Consolidated Rail Corp.*, 465 U.S. at 630 n.9 (court counting votes in *Guardians*).

Although a majority of the Court concluded that Title VI plaintiffs who prove disparate impact discrimination may recover retrospective equitable relief, the *Guardians* plaintiffs were denied back pay, back benefits and back seniority. Justice White, who cast the majority vote that the Title VI regulations were valid, also voted with four other justices to affirm the Second Circuit's judgment reversing the trial court's award of relief to plaintiffs. *See supra* note 84.

Title VI disproportionate adverse impact case—which party has the burden of producing evidence, and who bears the risk of non-persuasion—can be determinative of the outcome in any Title VI case.[105] These Title VI questions remain unsettled.

III. THE DEFENDANT'S BURDEN OF JUSTIFICATION UNDER TITLE VII

The parties' evidentiary burdens in disproportionate adverse impact analysis have received the greatest attention and development in the setting of Title VII. The evidentiary standards developed in Title VII cases have been used to analyze disproportionate adverse impact claims brought under other statutes, including Title VI.[106] Because the Title VII evidentiary standards have been the starting point for the courts' analysis of the appropriate standards for Title VI cases, this section will briefly review the Title VII evidentiary burdens, with special attention to the defendant's burden of justification in a case of disparate impact.

Title VII prohibits both intentional discrimination and facially neutral practices that have an unjustified disproportionate adverse impact on protected groups.[107] The courts have developed proof models for each type of Title VII discrimination case. The disparate treatment model addresses intentional discrimination, and the disparate impact model is used for neutral polices with a disproportionate adverse impact. Unfortunately, the Court's recent decision in *Wards Cove Packing Co. v. Atonio*[108] has blurred the distinctions between the two models while lessening the burden on the defendant in a disproportionate adverse impact case.

A. *Title VII Disparate Treatment Model*

Title VII claims of disparate treatment involve both claims of intentional discrimination against individuals and claims of intentional discrimination against an entire class of people.[109] To prove either an individual or a systemic claim, the plaintiff must prove intent to discriminate. Since direct evidence of discriminatory motive is usually unavaila-

justification." *See id.* at 623 n.15 (relying on Judge Kearse's concurring opinion in a Title VI case, Bryan v. Koch, 627 F.2d 612, 621-28 (2d Cir. 1980)).

105. *See* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1207 (1981).

106. *See* Ziegler, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 Minn. L. Rev. 1038, 1039 (1984); Note, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 Fordham L. Rev. 563, 580 (1986).

107. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806-07 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 435-36 (1971).

108. 109 S. Ct. 2115 (1989).

109. Classwide claims are often referred to as systemic disparate treatment or "pattern-or-practice cases." *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 357 (1977).

ble, most cases of intentional discrimination involve the use of circumstantial evidence.[110] This discussion of the disparate treatment model is limited to cases of inferential disparate treatment.[111]

The three-step proof model for inferential disparate treatment claims is designed to focus on circumstantial evidence in an effort to uncover the defendant's true motive. The three stages of proof for this kind of a disparate treatment case are: (1) the plaintiff's prima facie case, (2) the defendant's claim of legitimate business reason, and (3) the plaintiff's proof that the defendant's legitimate business reason is a mere pretext for race or gender discrimination.[112]

First, an individual plaintiff may establish a prima facie case of individual inferential disparate treatment by introducing evidence:

> (i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[113]

In systemic disparate treatment cases, the circumstantial evidence takes the form of statistical evidence showing a gross underrepresentation of protected group members in the employer's workforce as compared to the numbers interested and qualified to hold the positions.[114]

The prima facie case raises an inference of discrimination. The circumstantial evidence in an individual case eliminates the most common reasons for rejecting a job applicant,[115] while the statistical evidence in a mass or systemic case shows that the racial make-up of the employer's work force varies substantially from what would be expected absent discrimination.[116] Both give rise to a rebuttable presumption that the defendant acted because of a discriminatory motive.[117]

In order to rebut the inference of discrimination, the defendant needs only to articulate some legitimate, nondiscriminatory reason for the

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110. *See* Note, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After* Aikens, 88 Colum. L. Rev. 1114, 1116 (1988).

111. The only defense to a case of direct disparate treatment is a bona fide occupational qualification, a burden which is extremely difficult to satisfy. *See* Dothard v. Rawlinson, 433 U.S. 321, 333 (1977).

112. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 336-42 (1977).

113. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (footnote omitted).

114. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-13 (1977); *Teamsters*, 431 U.S. at 335 n.15; *see also* Bazemore v. Friday, 478 U.S. 385 (1986) (suit alleging racial discrimination in employment and provision of services by the North Carolina Agricultural Extension Service).

115. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

116. *See* Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 Harv. L. Rev. 793, 793 (1978).

117. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[127]

Disproportionate adverse impact analysis, like disparate treatment analysis, proceeds in three steps: (1) the plaintiff's prima facie case, (2) the defendant's business justification, and (3) plaintiff's offer of less discriminatory alternatives to cast doubt on that justification.[128]

First, to establish a prima facie case of disproportionate adverse impact, a plaintiff must identify the facially neutral barrier and use statistics to establish a significant adverse effect upon a minority group.[129] While both inferential disparate treatment and disproportionate adverse impact use statistics to establish a prima facie case,[130] in an inferential disparate treatment case the statistics are circumstantial evidence that merely create an inference of illegal intent, while in a disparate impact case the statistics are direct evidence of the ultimate issue: that a facially neutral employment policy or practice has an unequal impact on minorities.

Second, once a plaintiff makes out a prima facie case of disproportionate adverse impact, the focus of the analysis shifts to whether the challenged practice can be justified because it will "serve[ ], in a significant way, the legitimate goals of the employer."[131] This second stage has been the crux of most disproportionate adverse impact cases.

Third, if the defendant carries its burden of showing business justification, the case enters the third stage of the analysis in which the plaintiff must prove that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest."[132] Few Title VII cases reach this third analytical stage, and

127. *Id.* at 431.

128. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2124-27 (1989); International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977). These steps guide the course of the analysis, but do not guide the course of the trial. Plaintiffs may, and generally do, present evidence relevant to stage three of the analysis during their prima facie case.

129. In *Wards Cove*, the Supreme Court stated that to establish a prima facie case the plaintiff must: (1) show a significant disparate impact on a protected class; (2) identify the specific employment practice or selection criteria; and (3) show the causal relationship between the identified practices and the impact. *See Wards Cove*, 109 S. Ct. at 2124-25; *see also* Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 994-95 (1988) (O'Connor, J., plurality opinion).

130. Disproportionate adverse impact cases have not used the same sophisticated statistical techniques required in inferential disparate treatment claims, but Justice White's opinion in *Wards Cove* may signal that the methods of statistical analysis developed in inferential disparate treatment cases will now be applied to adverse disproportionate impact claims as well. *See Wards Cove*, 109 S. Ct. at 2121 n.6.

131. *Id.* at 2125-26.

132. *Id.* at 2126 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)). The Court has said that evidence of less discriminatory alternatives would establish that the "employer was using its tests merely as a 'pretext' for discrimination." *Albemarle*, 422 U.S. at 425. Use of the term "pretext" in the disproportionate adverse impact discrimination context is troublesome because intent to discriminate should be irrelevant. Some scholars have suggested that "pretext" merely signals a "less restrictive alternative"

treatment accorded the plaintiff.[118] In *Texas Department of Community Affairs v. Burdine*,[119] the Supreme Court held that the defendant's burden is merely one of production. The employer need only introduce some evidence of a legitimate reason; he does not need to convince the trier of fact that it was more likely than not the real reason for the employment decision.[120]

The plaintiff's prima facie case of inferential disparate treatment is easily established and does not point reliably to discrimination as the cause or even a cause of the challenged practice; thus, the content of the defendant's response is also fairly low.[121] In *Burdine* the Court ruled that any lawful purpose articulated by the defendant will suffice to rebut the presumption of discrimination arising from plaintiff's prima facie proof. Because the heart of a disparate treatment claim is purposeful discrimination, any purpose other than a purpose to discriminate satisfies the defendant's rebuttal burden.[122]

Third, if the defendant satisfies his burden, the plaintiff has an opportunity to show, by a preponderance of the evidence, that the defendant's articulated legitimate, nondiscriminatory reason is a "mere pretext" for discrimination.[123] In other words, the plaintiff may discredit the defendant's legitimate nondiscriminatory motive or show affirmatively that the true motive was to discriminate. Either showing will suffice to enable the Court to conclude that the employer's stated reason was a smokescreen to mask an unlawful reason.[124]

This final stage is the core of a disparate treatment case, and most cases are won or lost at this stage.[125] The nature of the evidence that the plaintiff offers to prove pretext is determined by the ultimate fact in issue—the defendant's motive. Plaintiff's pretext proof is directed at exposing the defendant's discriminatory state of mind.

B. *Title VII Disproportionate Adverse Impact Model*

While the entire focus of the circumstantial disparate treatment claim is a search for the employer's motive and intent, in a disproportionate adverse impact claim intent and motive are irrelevant. In *Griggs v. Duke Power Co.*,[126] the Court declared that what is required is "the removal of artificial, arbitrary, and unnecessary barriers to employment . . . . The

118. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
119. 450 U.S. 248 (1981).
120. *See id.* at 257-58.
121. *See* Segar v. Smith, 738 F.2d 1249, 1268 (D.C. Cir. 1984), *cert denied*, 471 U.S. 1115 (1985).
122. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981).
123. *See id.* at 256.
124. *See* Patterson v. McClean Credit Union, 109 S. Ct. 2363, 2378 (1989); Aikens v. United States Postal Serv. Bd., 642 F.2d 514, 520 (1980).
125. *See* B. Schlei & P. Grossman, Employment Discrimination Law 14 (2d ed. Cum. Supp. 1988).
126. 401 U.S. 424 (1971).

there are only a few Title VII cases that focus on the issue of less discriminatory alternatives.[133]

Although *Griggs* was decided eighteen years ago, Supreme Court analysis of the defendant's burden of justification in Title VII disproportionate adverse impact cases has still not achieved precision or stability. While early Supreme Court cases narrowly defined the defense and placed a substantial burden on the defendant to prove the defense, the Court's more recent decisions have allowed employers to justify more easily practices that disproportionately exclude minorities.[134] The Court's most recent decision, *Atonio v. Wards Cove Packing Co.*,[135] culminates this trend, while at the same time blurring the distinctions between disproportionate adverse impact and disparate treatment.[136]

First, prior to *Wards Cove* lower courts and commentators were nearly unanimous in concluding that the defendant in a disproportionate adverse impact case bore the risk of non-persuasion on business justification.[137] *Wards Cove*, though, dilutes the magnitude of the defendant's

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analysis meaning that even if there is a business necessity justifying a criteria, the criteria will still be struck down if plaintiff can prove that there is a less discriminatory alternative available to meet the employer's business need. Alternatively, the Court could, in fact, mean "pretext" in its usual meaning. In this sense, a practice with a disparate impact is permissible if there is business justification for its use. But if the practice is selected over alternative methods because it has a disparate impact, pretext is shown. In this sense, the existence of a less restrictive alternative is persuasive, but not conclusive evidence of intent. *See* M. Zimmer, C. Sullivan & R. Richards, Cases and Materials on Employment Discrimination 219 (1988).

133. *See* Lamber, *Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases Under Title VII*, 1985 Wis. L. Rev. 1, 6 n.18. Title VII plaintiffs rarely prevail in the third stage of a disparate impact case by showing the existence of less discriminatory alternatives. *See* Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 Emory L.J. 121, 190 (1980); Rothschild & Werden, *Title VII and the Use of Employment Tests: An Illustration of the Limits of the Judicial Process*, 11 J. Legal Stud. 261, 272-73 (1982).

134. *See* Brodin, *Costs, Profits and Equal Employment Opportunity*, 62 Notre Dame L. Rev. 318, 344-53 (1987); Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. Pitt. L. Rev. 555, 595-96 (1985); Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 Ga. L. Rev. 376, 377 (1981).

135. 109 S. Ct. 2115 (1989).

136. Many of the developments in *Wards Cove* were foreshadowed by Justice O'Connor's plurality opinion in Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2788 (1988).

137. All the circuits, except the Third, held that the defendant bears the burden not only of coming forward with some evidence of business justification, but also the burden of proof on the issue. *See* Washington v. Electrical Joint Apprenticeship & Training Comm., 845 F.2d 710, 715 (7th Cir.), *cert. denied*, 109 S. Ct. 371 (1988); Wislocki-Goin v. Mears, 831 F.2d 1374, 1380 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 113 (1988); Bunch v. Bullard, 795 F.2d 384, 393 (5th Cir. 1986); Lujan v. Franklin County Bd. of Educ., 779 F.2d 51 (6th Cir. 1985); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 572 (4th Cir. 1985); Nash v. Consolidated City of Jacksonville, 763 F.2d 1393, 1397 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249, 1270 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); Robinson v. Polaroid Corp., 732 F.2d 1010, 1016-17 (1st Cir. 1984); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481 (9th Cir 1983); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983); Johnson v. Uncles Ben's Inc., 657 F.2d 750, 752-53

burden of justification from one of persuasion to one of merely producing evidence of business justification.[138] Justice White's majority opinion concedes that earlier Supreme Court decisions seem to place the ultimate burden of proof on this issue on the defendant but instructs us to read now "burden of proof" in those cases as having meant merely the burden of production.[139] This diminution is significant. According to *Wards Cove*, the defendant's burden in a disproportionate adverse impact case now conforms to the defendant's burden in a disparate treatment case.[140] Thus, a disproportionate adverse impact defendant now needs only to introduce some evidence of business justification to satisfy its burden and move the case into the third stage.[141]

Second, *Wards Cove* also changes the nature of the defendant's business justification defense in a disproportionate adverse impact case. In *Griggs*, the Supreme Court used several different phrases to describe the business justification defense: "business necessity," "related to job performance," "demonstrable relationship to successful performance," and "manifest relationship to the employment in question."[142] Because the defendant proffered no evidence on the question, the case failed to provide any precise guidelines as to the exact nature of the defense.

Before *Wards Cove*, most lower courts strictly construed the business justification defense requiring that a disparately impacting policy must "not only foster safety and efficiency, but must be essential to that goal."[143] Under this strict business necessity standard, disparately im-

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(5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982); Coe v. Yellow Freight Sys., Inc., 646 F.2d 444, 448 (10th Cir. 1981); Teal v. Connecticut, 645 F.2d 133, 136 n.5 (2d Cir. 1981), *aff'd*, 457 U.S. 440 (1982); Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232, 235 (2d Cir. 1980), *cert. denied*, 463 U.S. 1228 (1983). *Contra* Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (en banc) ("the burden of persuasion remains at all times with the plaintiff").

The courts and commentators reasoned that since the impact discrimination plaintiff's prima facie statistical case is direct evidence of the ultimate fact in issue, courts should accord it more weight than the prima facie disparate treatment case. Courts therefore placed a heavier burden on the defendant to rebut it, and required the defendant not only to produce evidence of business justification but to carry the burden of persuasion on the issue as well. *See* Caldwell, *supra* note 134, at 600; *Segar*, 738 F.2d at 1270. While lower courts had great difficulty in specifying the exact nature of the proof required to satisfy the defendant's burden, "[a]t a minimum, however, most courts reject[ed] generalized assumptions, unsupported by empirical or comparable evidence, of the challenged practice's effectiveness in serving the defendant's business needs." Caldwell, *supra* note 134, at 593. *See* Holdeman, Watson v. Fort Worth Bank and Trust: *The Changing Face of Disparate Impact*, 66 Den. U.L. Rev. 179, 196 (1989).

138. *See Wards Cove*, 109 S. Ct. at 2126.

139. *See id.*

140. *See id.*

141. *See id.*; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981).

142. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).

143. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 245 (5th Cir. 1974) (quoting United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971)), *cert. denied*, 439 U.S. 1115 (1979); *see* EEOC v. Rath Packing Co., 787 F.2d 318, 328 n.10 (8th Cir.), *cert. denied*, 479 U.S. 910 (1986); Rowe v. Cleveland Pneumatic Co., 690 F.2d

volves an inquiry into "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[149]

It is the Court's choice of the phrases "significantly" and "legitimate employment goals" that creates uncertainty. Justice White did not use the term "manifest relationship," or its oft-used companion phrases "manifestly," "demonstrably" or "substantially" related. Rather, *Wards Cove* says that the challenged practice must "significantly" further the "legitimate employment goals" of the employer.

It may be of no importance that the Court requires a "significant" relationship rather than a "manifest" or "demonstrable" one. Some lower courts have used "significantly" to describe the standard under a "manifest relationship" test.[150] Similarly, the Supreme Court has used the words "significant" and "substantial" interchangeably to describe the disproportionate adverse impact plaintiff's prima facie statistical burden.[151]

Potentially more troubling is the Court's statement that the practice must be related to "legitimate employment goals." Prior to *Wards Cove*, lower courts limited the nature of the business justification defense to policies designed to further the goals of employee job performance or business safety and efficiency.[152] The term "legitimate employment goals" in *Wards Cove* may be an oblique signal that the business justification defense is limited to job performance criteria, or it may be meant to open the door to a broad range of additional considerations.

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149. *Id.* at 2125-26.

150. *See, e.g., Gillespie*, 771 F.2d at 1040 ("significantly related to the applicant's ability to perform the job"); Contreras v. City of Los Angeles, 656 F.2d 1267, 1280 (9th Cir. 1981) ("significantly correlated"); *Craig*, 626 F.2d at 662 ("significantly job-related").

151. *Compare* Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) ("substantially") *with* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) ("significantly") *and* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) ("significantly"); *see also* M. Zimmer, C. Sullivan & R. Richards, *supra* note 132, at 253 (asking whether "significant" is used in the statistical sense, or, as a layperson might, as synonymous with "substantial").

152. One area of initial confusion was whether "business necessity" and "job relatedness" were synonymous or distinct concepts and which term should control the analysis. Job relatedness tests whether an employment practice actually predicts an employee's performance on the job. Business necessity tests whether criteria are necessary to the safe and efficient operation of the business. Some commentators have suggested that job relatedness is a narrower defense because business necessity might justify use of disparately impacting criteria that are unrelated to job performance. *See* M. Zimmer, C. Sullivan & R. Richards, *supra* note 132, at 263. Others have suggested that *Griggs* requires that neutral criteria be both job related and a business necessity. *See* Note, *supra* note 134, at 388-89. *But see Contreras*, 656 F.2d at 1275-80 (criteria should be "significantly correlated" with important elements of the job).

While lower courts and the Supreme Court continue to use the terms "job-relatedness" and "business necessity" interchangeably, in practice, most courts tend to apply the job relatedness standard to scored employment tests, and business necessity analysis to non-testing, broad-based practices such as no beard policies, and height and weight requirements. Because it would be difficult to establish a correlation between an employee's job and these more broadly based policies, courts focus instead on the overall needs of the business and whether the policy promotes the safe and efficient operation of the business. *See* Note, *supra* note 134, at 394-95, 401-03.

pacting criteria could be justified only when forbidding them would seriously damage the business, that is, when they were "necessary" to the operation of the business.[144] Other lower courts rejected this strict approach and required a less exacting correlation of "manifest relationship." This standard requires that the criteria "substantially promote the efficient operation of the business"[145] or be "significantly related to the applicant's ability to perform the job."[146] The manifest relationship standard requires more than a mere "rational basis" for the challenged practice, but less than a perfect positive correlation.[147]

In *Wards Cove*, the Supreme Court specifically rejected the strict business necessity standard.[148] It is unclear, though, whether the Court meant to adopt the less stringent "manifest relationship" standard or tried to articulate a new, even less demanding standard. As formulated in *Wards Cove*, the nature of the defendant's business justification in-

88, 93-94 (6th Cir. 1982); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1016-17 (11th Cir. 1982); Williams v. Colorado Springs School Dist., 641 F.2d 835, 840-42 (10th Cir. 1981); Kinsey v. First Regional Sec., Inc., 557 F.2d 830, 837 (D.C. Cir. 1977); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

These courts apply the standard first set forth by the Fourth Circuit in *Robinson v. Lorillard Corp.*:

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Robinson, 444 F.2d at 798 (footnotes omitted).

Under the *Robinson* formulation of strict business necessity, it is the defendant's burden to prove the absence of acceptable alternative practices. After Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), adopted a three-step approach for disparate impact cases, lower courts split on which party has the burden of proof on less discriminatory alternatives. *See* Belton, *supra* note 105, at 1243-44.

144. In practice, the strict business necessity formulation establishes a balancing test: the greater a policy's disparate impact on minorities, the greater the level of necessity required to justify the practice. Where the disparate racial impact is slight, the employer's burden of justification is correspondingly lower. Generally, cost containment and inconvenience are not sufficiently compelling justifications, but serious economic consequences will overcome a prima facie case of disparate impact. For a discussion of the strict business necessity standard as it has been applied by lower courts, see Brodin, *supra* note 134, at 343; Note, *supra* note 134, at 390.

145. Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262 (6th Cir. 1981).

146. Gillespie v. Wisconsin, 771 F.2d 1035, 1040 (7th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986).

147. *See* Craig v. County, 626 F.2d 659, 662 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); *see also* Note, *supra* note 134, at 392-97 (discussing the manifest relationship standard as applied by lower courts).

148. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989) ("[T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster.").

IV. TITLE VI AND DISPROPORTIONATE ADVERSE IMPACT: THE DEFENDANT'S BURDEN OF JUSTIFICATION OUTSIDE THE HEALTH CARE CONTEXT

Compared with the multitude of reported Title VII cases, Title VI cases are few.[156] Only four circuit court opinions directly address the issue of the Title VI defendant's burden to justify a facially neutral policy that has a disproportionate adverse impact. Two cases involve discrimination in federally funded health care while the other two cases involve claims of discrimination in federally funded public schools.

While courts have tended to look to Title VII in developing evidentiary standards for claims involving disproportionate adverse impact under other civil rights statutes,[157] in the Title VI context the courts have split. All four Title VI cases look to Title VII standards defining the disproportionate adverse impact defendant's burden of justification as "instructive" in determining the Title VI defendant's burden. The health care discrimination cases, though, reject the Title VII standards while the education cases adopt their circuit's Title VII formulation of the defendant's burden of justification as the appropriate standard for Title VI.

The two Title VI cases outside the health care context involve policies that disparately impact on minority children in public school systems. In both cases the courts transplanted Title VII's evidentiary standards for the defendant's justification into the Title VI context. In retrospect, the cases illustrate how *Wards Cove* has sharply altered Title VII analysis by removing any meaningful burden from the defendant.

In *Larry P. v. Riles*,[158] a class of Black school children challenged the use of certain IQ tests by the California public school system to place children in special classes for the educable mentally retarded (E.M.R.) as a violation of Title VI.[159] During the time period when the IQ tests were used, Black children were significantly over-represented in the E.M.R. classes. For example, in one year, Black children accounted for twenty-seven percent of the E.M.R. populations, but comprised only nine percent of the state school population. The E.M.R. classes were "dead-end classes" for children incapable of learning in regular classes. The E.M.R.

156. Title VI health care issues have generally been addressed in the administrative arena. For a discussion critical of the federal agencies' administrative enforcement of Title VI, see Wing, *supra* note 13, at 161-75.

157. Courts have applied Title VII prima facie case analysis, including the defendant's burden of justification, to housing discrimination claims under Title VIII, and age discrimination claims under the Age Discrimination Employment Act of 1967. *See supra* note 56.

158. 793 F.2d 969 (9th Cir. 1984).

159. *See id.* at 972. Plaintiffs also included claims that the use of the IQ tests violated the Emergency School Aid Act of 1972 and 1974, 20 U.S.C. §§ 3191-3207 (repealed 1982); the Education For All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (1982); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982); the equal protection clauses of the United States and California Constitutions; and several sections of the California Education Code. *See Larry P.*, 793 F.2d at 972.

In either case, a showing that an employment practice is significantly related to legitimate employment goals is still a higher showing than that required of a defendant in a disparate treatment case who needs only to show any legitimate non-discriminatory reason for the employment practice.[153] The requirement of any correlation between the facially neutral practice and the employer's legitimate employment goals distinguishes the disparate impact defendant's burden from that of a defendant charged with intentional discrimination and creates at least a slightly more demanding nature for the disproportionate adverse impact defendant's justification.[154]

Finally, the *Wards Cove* Court carved out only a very narrow role for the less discriminatory alternatives analysis in the third stage of disproportionate adverse impact analysis. The Court warned that the proffered alternative must be equally effective, and that factors such as increased cost are relevant in making the determination of equal effectiveness. The Court urged lower courts to "proceed with care" in their consideration of less discriminatory alternatives.[155]

Because the *Wards Cove* majority stated its formulation in the abstract and did not apply it to any facts, the exact nature of the defendant's business justification in a Title VII case remains uncertain. What is certain, though, is that *Wards Cove* has drastically reduced the burden on an employer to defend against a claim that an employment policy disproportionately adversely impacts on a protected group. Employers now have quite an easy burden of justification. *Wards Cove* so blurs the distinctions between adverse disproportionate impact and inferential disparate treatment that the burden placed on a disproportionate adverse impact defendant may now be indistinguishable from that placed on a disparate treatment defendant. If there is any difference in the respective burdens, it is that a disparate treatment defendant may justify a practice by introducing evidence of any legitimate, non-discriminatory reason, while a disproportionate adverse impact defendant has the weightier burden of showing a significant correlation between the challenged practice and a legitimate employment goal.

153. *See, e.g.*, Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. Rev. 419, 421-25 (1982); Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297, 1312 (1987).

154. *But see* Blumoff & Lewis, *The Reagan Court and Title VII: A Common Law Outlook on a Statutory Task* (to be published at 69 N.C.L. Rev. — (Nov. 1990)) (manuscript on file at *Fordham Law Review*). The authors conclude that after *Wards Cove* the nature of the defendant's burden of justification in an adverse disproportionate impact case is indistinguishable from that in an inferential disparate treatment case.

155. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2127 (1989).

classes did not result in skills that would enable the students to return to the regular classroom; they merely focused on the tasks of social adjustment.[160]

Upon finding that the plaintiffs had made out a prima facie showing of disparate impact on Black students, the court of appeals, without discussion, relied on Ninth Circuit Title VII disproportionate adverse impact precedent to define the defendant's burden of justification.[161] The court held that the defendant had the burden of proof to establish that the tests were "manifestly related" to the E.M.R. classes.[162] The Ninth Circuit affirmed the district court's finding that the defendant had failed to persuade that the IQ tests validly and accurately predicted mental retardation among Blacks.[163]

In the second case, *Georgia State Conference of Branches of NAACP v. Georgia*,[164] a class of Black school children alleged that certain Georgia public school systems had violated Title VI through their practice of grouping students in classes on the basis of ability and achievement.[165] The court found that the plaintiffs had made out a prima facie case that achievement grouping had a disproportionate adverse effect on Black children.[166]

The Eleventh Circuit, like the Ninth Circuit, used its prior Title VII cases to establish the evidentiary burdens in a Title VI impact case.[167] The court affirmed the district court's finding that the defendants had carried their burden of proof to show that the tests used to assign students to achievement groups validly tested the students in the subject grouped, closely related subjects or in a broad variety of subjects.[168] It found that the achievement grouping was manifestly related to educational needs because it improved class manageability and permitted more resources to be directed to slower students.[169] Although there was conflicting evidence, the court affirmed the district court's ruling that the plaintiffs had failed to carry their burden of proof that intraclass grouping was an equally sound educational alternative to achievement grouping.[170]

After *Wards Cove*, though, to the extent that courts follow Title VII

160. *See Larry P.*, 793 F.2d at 973.
161. *See id.* at 982.
162. *See id.* at 982 & nn.9 & 10.
163. *See id.* at 983.
164. 775 F.2d 1403 (11th Cir. 1985).
165. *See id.* at 1408. The plaintiffs also alleged that these practices violated the thirteenth and fourteenth amendments to the U.S. Constitution, the Equal Educational Opportunities Act, 20 U.S.C. § 1701 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). *See Georgia State Conference*, 775 F.2d at 1408.
166. *See Georgia State Conference*, 775 F.2d at 1417.
167. *See id.*
168. *See id.* at 1420.
169. *See id.* at 1419.
170. *See id.* at 1421. Plaintiffs argued that random assignment accompanied by intraclass grouping was a less discriminatory alternative. *See id.* at 1421-22.

precedent in Title VI cases, the defendant's burden of justification is now much lighter than that articulated in *Larry P.* and *NAACP*. The defendant no longer bears the risk of non-persuasion on its justification, but merely needs to introduce some evidence that its practice is significantly related to some educational need. Although the *Larry P.* plaintiffs prevailed under pre-*Wards Cove* Title VII standards, the outcome would most likely be different after *Wards Cove* because the burden of proof now lies with the plaintiff and the lower courts have been warned to be wary when considering less discriminatory alternatives.

V. THE TITLE VI HEALTH CARE CASES

The Title VI health care cases involve situations that are significantly different from the facts normally analyzed under Title VII. *Bryan v. Koch*[171] concerns a decision to close a public hospital, while *NAACP v. Medical Center, Inc.*[172] involves a decision to relocate a non-profit hospital. Rather than applying Title VII standards, *Bryan* holds and *Medical Center* implies that in the Title VI health care context a policy with a disparate impact can be justified by showing merely that the policy is rationally related to a legitimate need.[173] This test is even less rigorous than the *Wards Cove* Title VII standard requiring that a disparately impacting policy significantly further a legitimate employment goal.

Bryan v. Koch arose when the City of New York decided to close Sydenham Hospital, one of the city's seventeen public hospitals.[174] Minority patients filed a Title VI action alleging that the closing of Sydenham had a disparate impact on Blacks and Hispanics.[175] While

171. 627 F.2d 612 (2d Cir. 1980).

172. 657 F.2d 1322 (3d Cir. 1981).

173. In neither case did the plaintiffs argue that the court should apply Title VII standards in the context of discrimination in federally funded health care. The plaintiffs proposed an alternative standard that would require the defendant to prove that a disparately impacting criteria was necessary to achieve legitimate objectives, and that these objectives could not be achieved through less discriminatory means.

Bryan and *Medical Center* were decided after *Bakke* but before *Guardians*, and in both cases the initial issue was whether Title VI proscribed disparate impact discrimination. *Medical Center* held that Title VI proscribes unintentional disparate impact discrimination. *See Medical Center*, 657 F.2d at 1328. *Bryan* expressed no view on the issue, but concluded that even if Title VI proscribed disparate impact discrimination, plaintiffs had failed to establish their claim. *See Bryan*, 627 F.2d at 616.

174. *See Bryan*, 627 F.2d at 614. A Health Policy Task Force appointed by Mayor Koch recommended that the City could save $30 million by, among other moves, reducing excess beds in its municipal hospital system. *See id.* Among other recommendations, the Task Force suggested that Sydenham Hospital be closed. *See id.*

175. Sydenham was located in central Harlem, and its patients were 98 percent Black and Hispanic while the minority proportion of patients served by the entire City municipal hospital system was only 66 percent. Even though there were six hospitals within 30 minutes of Sydenham, there was some question as to whether the nearby hospitals would be able and willing to admit all of Sydenham's indigent and Medicaid patients. In addition, there were a small number of emergency room patients who would be at risk if they had to travel even slightly farther than Sydenham to reach an emergency room. *See id.* at 617.

some of the panel thought the issue a close one, the court unanimously held that the plaintiffs had established a prima facie case of disparate impact.[176]

In evaluating the defendant's proffered justification, the Second Circuit eschewed use of Title VII analysis, noting that analogies to other civil rights statutes were limited. The court inquired instead whether the decision to close Sydenham was rationally related to a legitimate objective.[177]

New York City's proffered justification for closing Sydenham was that the closure would reduce total hospital expenditures and would increase efficiency within the municipal hospital system.[178] The court assumed, without analysis, that the city's goal of saving money and increasing efficiency was "obviously" a legitimate objective. The court then asked two questions: whether the criteria used to decide which hospital to close were reasonably related to reducing expenditures and increasing efficiency and whether the decision to close Sydenham was justified according to these criteria. Not surprisingly, since the plaintiffs had never contested that Sydenham was the appropriate hospital to close if one public hospital was to be closed, the court found that the city's decision to close Sydenham withstood this rational relationship scrutiny.[179]

Further, the court refused to consider plaintiff's proffered less discriminatory alternatives. Plaintiffs argued that the city could save just as much money and increase hospital efficiency with less impact on minorities by regionalizing hospital services, merging hospitals or increasing Sydenham's services to make it more profitable to operate rather than closing Sydenham or any public hospital. The court feared that an alternatives inquiry that went beyond the question of which hospital to close would impinge upon elected officials' discretion to run their city government.[180]

The second Title VI health care decision to address the defendant's burden of justification arose in the context of a hospital site controversy. *NAACP v. Medical Center, Inc.*[181] involved a proposed hospital reorganization and relocation from the predominately Black inner city of Wilmington, Delaware, to a predominately white suburb.[182] Plaintiffs

176. *See id.* at 616.

177. *See id.* at 618-20. The plaintiffs argued that the court should evaluate the city's justification under a standard requiring the city to show that the closing of Sydenham was " 'necessary to achieve legitimate objectives . . . and that these objectives cannot be achieved by other measures having a less disproportionate adverse effect.' " *Id.* at 618 (quoting Letter from the Undersecretary of HEW to Mayor Edward Koch (Mar. 5, 1980)).

178. *See id.* at 617.

179. *See id.* at 616-18. The court did not address the issue of which party bears the burden of proof on the issue of the defendant's justification.

180. *See id.* at 619.

181. 657 F.2d 1322 (3d Cir. 1981).

182. *See id.* at 1324. The Medical Center proposed to close two of three inner city hospitals reducing inner-city hospital beds from 1,104 to 250. The remaining inner-city

alleged that the relocation plan violated Title VI because the Medical Center's remaining urban facility would become a "ghetto hospital" serving primarily minorities, the poor, elderly, and handicapped, while the proposed suburban hospital would treat only the more affluent white population.[183] The plaintiffs also alleged that the relocation of certain acute care services exclusively to the new suburban hospital would make them virtually inaccessible to many handicapped and minority residents.[184]

The Third Circuit, sitting en banc, assumed that the plaintiffs had established a prima facie case of disparate impact[185] but affirmed the district court's finding that the defendant had met its burden of justification. The court treated its analysis of Title VII as dispositive, holding that the Title VI plaintiff bears the risk of non-persuasion on the defendant's justification in a Title VI case.[186]

In contrast, the court did not treat Title VII as conclusive or even instructive in determining the nature of the defendant's justification.[187] A majority affirmed the district court's determination that the defendant had met its burden of justification. The district court had required that the relocation serve a legitimate bona fide interest and that there be no less discriminatory alternative.[188] In affirming, a plurality characterized

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hospital would be renovated, and the Medical Center would open a new 780 bed hospital in a suburb 9.35 miles from downtown Wilmington. The plan called for removing most special pediatric, obstetric, tertiary care, and sophisticated services from downtown Wilmington, but retained inner-city emergency room services. *See id.* at 1325.

183. *See id.* at 1324.

184. *See id.* at 1326. Plaintiffs' claims relating to discrimination against the handicapped were litigated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982 & Supp. V 1987). Section 504 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Medical Center, 657 F.2d at 1331 n.9 (quoting 29 U.S.C. § 794 (Supp. II 1978)).

Plaintiffs' claims of age discrimination were brought pursuant to the Age Discrimination Act of 1975, 42 U.S.C. § 6102 (1982). Section 303 provides:

> Pursuant to regulations described under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

Medical Center, 657 F.2d at 1331 n.9 (quoting 42 U.S.C. § 6102 (1976)).

185. *See* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1332 (3d Cir. 1981). Like *Bryan*, *Medical Center* was decided before the Supreme Court's decision in *Guardians*, and part of the opinion is devoted to a discussion of the court's reasons for concluding that Title VI prohibits disparate impact discrimination. *See id.* at 1328-31.

186. *See id.* at 1336. The Third Circuit engaged in a detailed analysis of Title VII cases and became the only circuit, prior to *Wards Cove*, to place the risk of non-persuasion on the issue of the defendant's justification on the Title VII defendant. *See id.* at 1334-38.

187. *See id.* at 1336-37.

188. The district court's standard required the defendant to show that the plan would " 'in theory and practice' serve 'a legitimate bona fide interest of [the Medical Center]

the district court's standard as more stringent than a rational relationship test and "more than adequately served Title VI aims,"[189] while suggesting that the appropriate standard for judging a Title VI defendant's justification was a rational relationship test required by the Constitution.[190]

The rational relationship test articulated in *Bryan* and *Medical Center* is so undemanding that a decision to use the standard is tantamount to holding that the challenged policy is valid.[191] Rational relationship scrutiny merely inquires whether there is any relationship between the challenged practice and any legitimate goal.[192] It strikes down only classifications that are arbitrary because they fail to advance any legitimate goal.[193]

Rational relationship is even less demanding than the watered down

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. . . , and [the Medical Center] must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.' " NAACP v. Wilmington Medical Center, Inc., 491 F. Supp. 290, 315-16 (D. Del. 1980) (quoting Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978)), *aff'd* 657 F.2d 1322 (3d Cir. 1981). The district court declined to try to fashion a justification standard for all Title VI cases. For this case the district court rejected the use of Title VII's "business necessity" standard and instead used the Title VIII standard articulated by the Third Circuit for housing discrimination cases involving public defendants: there must be a legitimate bona fide interest and lack of less discriminatory alternatives. The district court found that because the *Medical Center* case involved a challenge to the site location of a hospital, it was more similar to a housing location decision under Title VIII than to employment decisions covered by Title VII. *See id.* at 315.

189. NAACP v. Medical Center, Inc., 657 F.2d 1322, 1337 (3d Cir. 1981) (footnote omitted). Two judges would have adopted the district court's standard. *See id.* at 1337 n.18.

190. *See id.* at 1336. In suggesting a rational relationship test, the plurality relied on Jefferson v. Hackney, 406 U.S. 535 (1972). *Jefferson* was primarily a constitutional challenge to a facially neutral statute that had a disproportionate adverse impact on minorities. *See id.* at 537-38. Texas' welfare statute paid AFDC families, who were predominately Black and Mexican-American, a reduced percentage of their need while paying disabled and retired welfare recipients, who were primarily white, 100 percent of their need standard. *See id.* at 545. A bare majority of the Court held the facially neutral Texas statute was not unconstitutional because it was rationally related to the purposes of the separate welfare programs. *See id.* at 548. After deciding the constitutional issue, the majority, without analysis or discussion, implied in a footnote that a similar analysis would be appropriate under both Title VI and Title VII. *See id.* at 550 n.19.

The Court's ill-considered footnote in *Jefferson* does not support the use of a rational relationship standard in Title VI cases. *Jefferson* was decided the same term as *Griggs*, and the parameters of the defendant's justification under Title VII had not yet developed. Nor had the Supreme Court articulated the difference between the reach of the Equal Protection Clause and Title VII in *Washington v. Davis*. *See supra* text accompanying notes 61-63.

191. *See, e.g.*, Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (rational relationship test provides "minimal scrutiny in theory and virtually none in fact").

192. *See* Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955).

193. *See* Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. Cal. L. Rev. 689, 698 (1977).

Title VII standard. After *Wards Cove*, Title VII disproportionate adverse impact analysis still requires a "significant" correlation between the challenged practice and a legitimate employment goal.[194] Rational relationship scrutiny does not require any degree of correlation; it asks merely if there is any relationship.[195]

Title VII analysis after *Wards Cove* also requires that the challenged policy further a "legitimate employment goal." This language may open the door to a broader range of legitimate concerns than the ones recognized prior to *Wards Cove* when disparately impacting employment criteria could be justified only if they were related to job skills, job safety or job efficiency.[196] However, *Wards Cove*'s "legitimate employment goal" still appears to be narrower than rational relationship's mere requirement of "any legitimate reason."

In particular, prior to *Wards Cove* courts rejected cost savings as a legitimate consideration for Title VII purposes.[197] Even after *Wards Cove* mere cost containment and inconvenience still arguably do not satisfy the requirement of a "legitimate employment goal." In contrast, the court in *Bryan* accepted an interest in saving money, without discussion or comment, as a legitimate reason that would satisfy its rational relationship test.[198]

Title VII analysis also considers less discriminatory alternatives. While *Wards Cove* reduces the importance of the less discriminatory alternatives analysis in Title VII by requiring that the alternatives be "equally effective," it remains an element of the analysis.[199] On the other hand, under rational relationship scrutiny the existence of less discriminatory alternatives is totally irrelevant.

More fundamentally, any disproportionate adverse impact standard, whether under Title VI, Title VII or any other statute, should require a heavier burden of justification than mere rational relationship. In *Washington v. Davis*, the Supreme Court held that the Constitution does not prohibit policies and practices with a disproportionate adverse racial impact, but requires merely that such policies, like all governmental classifications, be justified as at least bearing a rational relationship to some legitimate governmental goal.[200] The Title VI regulations forbidding

194. *See supra* text accompanying notes 148-151.

195. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 448-53 (1961) (state action to be upheld if any state of facts reasonably conceivable may justify it).

196. *See supra* text accompanying note 153.

197. Cost containment and inconvenience are not sufficiently compelling justifications for Title VII, but serious economic consequences will overcome a prima facie case of disproportionate adverse impact. *See* Brodine, *supra* note 134, at 343; Note, *supra* note 134, at 387-91.

198. *See* Bryan v. Koch, 627 F.2d 612, 618 (2d Cir. 1980).

199. *See supra* text accompanying note 155.

200. The Supreme Court held that the Constitution requires strict scrutiny analysis only when it can be shown that a facially neutral classification has been enacted with the purpose and intent of discriminating against a minority group. While disproportionate adverse impact may be evidence of discriminatory motive, such impact alone is not

facially neutral policies that impact disproportionately on minorities reach beyond this constitutional prohibition to forbid facially neutral policies that can be justified under a rational relationship test. By definition, a prohibition on disproportionate adverse impact discrimination requires a more stringent justification than the mere rational relationship required by the Constitution.

VI. UNHITCHING TITLE VI FROM TITLE VII

The fundamental problem with lower courts' analysis of the evidentiary burdens in Title VI disproportionate adverse impact cases is that they have used Title VII principles as the starting point for their analysis. Title VII does not provide the answers for Title VI. Although Title VI and Title VII are both anti-discrimination statutes and both were enacted as part of the 1964 Civil Rights Act, the similarities end there. Title VI and Title VII serve different purposes and seek to effectuate different goals. There are crucial structural and philosophical differences between the two statutes and the activities they regulate. These differences destroy any attempted analogy between Title VI and Title VII, and argue, instead, for an independent Title VI doctrine defining the defendant's burden of justification in a disproportionate adverse impact case.

As the Supreme Court has said, "Title VII and Title VI . . . cannot be read *in pari materia*."[201] Title VII was enacted pursuant to Congress' power under the commerce clause to regulate purely private decisionmaking.[202] Title VII reaches into private employment relationships, financed with private money, and mandates that employers structure their hiring decisions and business practices to accommodate a societal decision that all people, regardless of race or sex, should have an equal opportunity at employment.

In enacting Title VII, Congress overrode a strong common-law tradition of employment-at-will which allows a private employer to hire and fire whomever he wishes.[203] Even in the midst of forging a majority to pass Title VII, many members of Congress remained reluctant to impose federal regulation on private business. Thus, Title VII incorporates a number of provisions, not found in Title VI, designed to ensure that Title

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enough to trigger strict scrutiny. *See* Washington v. Davis, 426 U.S. 229, 242 (1976). Only those facially neutral classifications that have been enacted with the specific intent to discriminate must be justified under a strict scrutiny standard which requires proof of a substantial relationship between the challenged practice and a compelling state interest, as well as the absence of a less discriminatory alternative. *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1033-36 (1979) (standard of review in modern Supreme Court equal protection jurisprudence).

201. United Steelworkers v. Weber, 443 U.S. 193, 206 n.6 (1979); *see* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1450 n.6 (1987) (quoting *Weber*, 443 U.S. at 206 n.6).

202. *See Weber*, 443 U.S. at 206 n.6; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 367 (1978).

203. Blumoff & Lewis, *supra* note 154.

VII's nondiscrimination mandate does not lead to undue "Federal Government interference with private businesses."[204]

In *Griggs* the Court held that Title VII prohibits facially neutral practices that have a disproportionate adverse impact on protected groups, but the historical hesitancy to interfere with private employment decisions continues to stalk disproportionate adverse impact analysis under Title VII. Some commentators continue to challenge the underlying theory of disproportionate adverse impact as inconsistent with the goals and purposes of Title VII. Other critics of the theory or its application argue that as employment decisions create ongoing relationships, the courts should be cautious in second-guessing employers' judgments. Still others argue that the economics of the marketplace are better able to correct discrimination than the mandates of Title VII and that protected groups are better served if employers are allowed to run their businesses free of interference from Title VII disproportionate impact scrutiny.[205] Although the Court has not responded directly to these arguments, it has heard them. The Court has become increasingly reluctant to second-guess employment decisions that disparately impact upon protected groups. The Court's most recent decision in *Wards Cove* allows disparately impacting practices to withstand Title VII scrutiny as long as the employer can articulate any legitimate employment goal that the practice significantly furthers. Very few, if any, disparately impacting employment criteria will be struck down under the *Wards Cove* standard. In the Title VII context, the employer now has great discretion to use disparately impacting criteria.

The criticisms that have been argued to dilute the defendant's evidentiary burden in Title VII disproportionate adverse impact analysis do not apply to Title VI. While Title VII marked a break with the common-law tradition of government non-involvement in private employment, Title VI arises from the long-standing and often used spending power of Congress to condition the terms of government spending.[206] Title VI involves the exercise of federal power over a matter in which the federal government is already directly involved: programs and activities that receive federal financial assistance.

204. 110 Cong. Rec. 14314 (1964) (remarks of Senator Miller) (quoted in *Weber*, 443 U.S. at 206). For example, Title VII contains statutory exceptions for professionally developed tests, bona fide seniority systems, and bona fide merit systems that do not appear in Title VI. *See* 42 U.S.C. §§ 2000e-2000e-15 (1982); *id.* §§ 2000d-2000d-4.

205. For criticisms of Title VII disparate impact liability, including the defendant's burden of justification, see Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 Am. U. L. Rev. 799, 802-03 (1985); Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. Chi. L. Rev. 911, 912 (1979).

206. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 598-99 (1983); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284-87 (1978) (Title VI enacted to prevent recipients of federal funds from discriminating based on protected class); Lau v. Nichols, 414 U.S. 563, 566-69 (1974) (conditioning funds on schools' contractual agreement to comply with Title VI).

Title VI, unlike Title VII, does not reach out and regulate purely private employment. Title VI is concerned that the "intended beneficiaries" of federal money have equal access to federally funded programs.[207] Title VI recipients, unlike Title VII employers, voluntarily seek federal money. In return for this money they agree to comply with the Title VI statute and regulations prohibiting facially neutral practices with a disproportionate adverse impact. While the Supreme Court has been reluctant to scrutinize strictly private employment relationships under Title VII, it should demand precise compliance with spending power legislation.

The federal government has made a significant financial commitment to health care. Health care spending is one of the largest components of the federal budget, accounting for 127 billion federal dollars and nearly twelve percent of total federal expenditures in 1986.[208] Federal money, primarily Medicaid and Medicare, pays for approximately thirty percent of the total costs of health care in the United States.[209] The federal government's role is greatest in the hospital sector, where federal dollars pay for forty-three percent of the care provided, but federal money also pays for twenty-four percent of doctors' fees and twenty-seven percent of nursing home costs.[210]

Yet minority Americans still are in worse health and receive less health care than white Americans. Although Blacks are generally in worse health than whites,[211] they receive fewer services from doctors and

207. *See* 45 C.F.R. § 80.3(b)(2) (1988). Title VI applies to employment, but only when employment is the "primary purpose of the funding," thus the employee is the "intended beneficiary."

208. *See* Reuter, *Federal Health Policy Overview*, 8 Cong. Res. Serv. Rev. 9:1 (1987).

209. *See id.* at 2. In 1986 Medicare and Medicaid alone accounted for nearly 80 percent of all federal health spending.

210. *See* Koitz, *Federal Role in Health Financing*, 8 Cong. Res. Rev. 9:6 (1987). These figures are for fiscal year 1985.

211. The life expectancy of Black males is almost seven years less than for white males; for Black females it is approximately five years less than for white females. *See* R. W. Johnson, Special Report, The Foundation's Minority Medical Training Programs, Vol. 1, 5 (1987). If Blacks had the same death rates as whites, 59,000 Black deaths a year would not occur. *See* Savage, McGee & Oster, *Reduction of Hypertension-Associated Heart Disease and Stroke Among Black Americans: Past Experience and New Perspectives on Targeting Resources*, 65 Milbank Q. 297, 306 (1987) (Supp. 2).

Blacks have higher death rates resulting from all three of the major killers—heart disease, cancer, and stroke. *See* Andersen, Chen, Aday & Cornelius, *Health Status and Medical Care Utilization*, Health Affairs 136, 149 (1987). Black infant mortality continues to be nearly twice that of whites. *See* R. W. Johnson, *supra*, at 5. This difference is not completely attributable to more young black mothers, but is due in part to inadequate prenatal care and family planning. *See id.*; Miller, *supra* note 14, at 505-06.

Blacks have more undetected disease than whites, and Black children may be in worse health than white children. *See id.* at 506. Older Blacks suffer from more functional limitations than older whites, a situation of "rapid" and "disproportionate" aging. *See* Gibson & Jackson, *The Health, Physical Functioning, and Informal Supports of the Black Elderly*, 65 Milbank Q. 421, 446 (1987) (Supp. 2).

In a survey conducted in 1986, 15.3% of Blacks and 19.4 percent of Hispanics reported their health as fair to poor as compared with only 10.6 percent of whites. *See* Freeman,

hospitals. Blacks have one-third fewer visits to doctors than do whites with comparable health status.[212] There is a thirty-four percent difference between the percentage of Hispanics admitted for hospital inpatient care and the percentage of whites; the gap between Blacks and whites is nine percent.[213] Blacks and Hispanics are less likely than whites to have private physicians,[214] while a disproportionate number of Blacks rely on hospital emergency rooms and outpatient clinics for primary care.[215]

There still exist vestiges of a dual system of hospitals and nursing homes: one system for whites and a separate system for minorities. Although the data is scarce, in areas that have been studied most hospitals and nursing homes are not racially integrated and treat patients predominantly of one racial group. For example, of twenty-four hospitals and twenty nursing homes studied in Atlanta and Birmingham, five facilities served sixty-seven percent of the Black patients, while one hospital and six nursing homes had no Black patients. A single nursing home in Atlanta served seventy-five percent of the Black Medicare patients.[216]

If minorities are ever to gain full access to America's health care system, judges must stringently scrutinize facially neutral policies that exclude a disproportionate number of minority patients. Title VI's im-

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Blendon, Aiken, Sudman, Mullinix & Corey, *Americans Report on Their Access to Health Care*, 6 Health Affairs 6, 12 (1987) [hereinafter *Access to Health Care*]. "[S]tudies have shown that a person's self-assessment of health status is a reasonably sensitive indicator of actual need for medical care, including the presence of chronic conditions and disabilities, the number of specific health problems and symptoms, sensory impairment and immobility, and limitations of normal activities due to illness." *Id.* at 9.

212. *See Access to Health Care*, *supra* note 211, at 12-18. In 1986, whites in fair to poor health averaged 10.1 doctor visits, whereas the average number of visits for Blacks was only 6.8, and 9.8 for Hispanics. *See id.* at 12. In 1986, one quarter of all Blacks with a chronic illness did not see a physician even once in the preceding year. *See id.* at 14. These differences in rate of physician usage cannot be attributed to differences in ability to pay because when middle class whites and Blacks are compared, Blacks still use doctors significantly less than whites. *See* Diehr, Martin, Price, Friedlander, Richardson & Riedel, *Use of Ambulatory Care Services in Three Provider Plans: Interaction Between Patient Characteristics and Plans*, 74 Am. J. Public Health 47, 47, 49 (1984) (race was found to be significantly correlated to use in three health care plans studied; Black use was ten percentage points less in an independent practice association ("IPA"), fourteen in a Health Maintenance Organization ("HMO"), and twenty in a Blue Cross plan.)

213. *See Access to Health Care*, *supra* note 211, at 12-13. These percentages still underestimate the discrepancy between white and minority hospital care because they do not take into account that 15.3 percent of Blacks and 19.4 percent of Hispanics surveyed were in fair to poor health as to compared to only 10.6 percent of whites. *See id.*

214. Minorities are less likely to see private physicians regardless of income level or type of insurance. Minorities are also less likely than whites to see specialists. *See Health Care in Context*, *supra* note 1, at 38-39; *see also Common Destiny*, *supra* note 14, at 431; and *Secretary's Task Force*, *supra* note 15, at 189.

215. *See* Davis, Lillie-Blanton, Lyons, Mullan, Powe & Rowland, *Health Care for Black Americans: The Public Sector Role*, 65 Milbank Q. 213, 214 (1987) (Supp. 1). In 1983, 27 percent of Blacks, but only 13 percent of whites, reported a hospital outpatient department or emergency room as their usual source of care. *See Common Destiny*, *supra* note 14, at 431.

216. *See* Wing, *supra* note 13, at 177-78.

plementing regulations specifically prohibit facially neutral policies that have the effect of discriminating against minorities, and courts should strictly construe the regulations. Federally funded hospitals must bear a heavy burden to justify such policies and to show that there are no less discriminatory alternatives available. Business as usual is not delivering health care to minority Americans.

VII. THE APPROPRIATE STANDARD FOR TITLE VI HOSPITAL CASES

The standards for a Title VI health care defendant should involve a probing judicial review of and little deference to facially neutral policies with a disparate racial impact. The purpose of Title VI is to ensure that the intended beneficiaries of federally funded programs have equal opportunity to enjoy program benefits.[217] Disproportionate exclusion of minorities should not be tolerated under Title VI unless it is unavoidable.

The burden of justification for Title VI hospitals and other health care providers should be to prove that the challenged practice significantly furthers an important, legitimate program objective which cannot be substantially accomplished through less discriminatory means.[218] The proposed Title VI standard requires the defendant to justify the "necessity" for facially neutral criteria by carrying the risk of non-persuasion on two issues: Does the policy significantly further an important, legitimate program objective? Can that objective be accomplished through less discriminatory means?

First, a facially neutral policy challenged under Title VI should further

217. *See* 45 C.F.R. §§ 80.1, 80.3(b)(2) (1989).

218. The Department of Health and Human Services ("HHS") has interpreted its "effect" regulation as incorporating this standard of justification for private litigation under Title VI. In Bryan v. Koch, 627 F.2d 612 (1980), the Department argued that the defendant had to prove that the challenged practice was " 'necessary to achieve legitimate objectives unrelated to race or national origin and that these objectives cannot be achieved by other measures having a less disproportionate adverse effect.' " *Id.* at 618 (quoting Letter from the Undersecretary of HEW to Mayor Edward Koch (Mar. 5, 1980)). In *Medical Center* HEW's position was that the hospital relocation had to be justified by " 'important non-race related goals' . . . 'related to the delivery of quality, accessible, and integrated health care' " and that no alternative arrangements exist that substantially accomplish these goals. *See* Note, *Maintaining Health Care in the Inner City: Title VI and Hospital Relocations*, 55 N.Y.U. L. Rev. 271, 294 (1980) (quoting Letter of Findings Concerning Wilmington Medical Center's Plan Omega, from Dewey Dodd, Director of Office of Civil Rights, Region III, HEW, to James A. Harding, President, Wilmington Medical Center, Inc. at 13 (July 5, 1977)).

While Supreme Court case law is inconsistent, the Court often gives controlling weight to an administrative agency's interpretation of its own ambiguous regulation, stating that the agency's construction will be upheld unless it is "plainly erroneous," "unreasonable," or "inconsistently applied." *See* Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. Pitt. L. Rev. 587, 590-93 (1984). Under this standard, the Court gives much greater deference to the agency's construction of its own regulation than it does to the agency's construction of a statute. *See id.* at 604-05. An agency's interpretation of its own regulation does not need to be persuasive in order to mandate a court's deference, while deference to an agency's interpretation of a statute depends substantially on the persuasiveness of the agency's view. *See id.* at 605.

an important legitimate program objective. Title VII disparate treatment claims can be defended through a showing of *any* legitimate non-discriminatory objective,[219] while post-*Wards Cove* Title VII disproportionate adverse impact cases can be defended by a showing of a "legitimate employment goal."[220] Title VI disproportionate adverse impact claims require not just any legitimate objective but one that is important to the operation of the program. Maintaining a high quality medical program, patient and staff safety, and financial necessity should all qualify as important objectives in the health care context. On the other hand, a mere interest in cutting costs or saving money is not a sufficiently important concern, without some element of financial necessity, to qualify as an important interest. Such cost concerns have been rejected under Title VII analysis,[221] and Title VI scrutiny should be even more demanding.

Second, the challenged policy should "significantly" further its important purpose. A federally funded health care defendant should do more than merely assert that the policy furthers an important purpose; it should introduce some empirical evidence establishing the challenged practice is, in fact, effective in furthering an important program need. The greater the disproportionate adverse impact the more effective the challenged practice needs to be to justify its continued use. For example, if a policy excluded almost all minority patients while only incrementally improving the quality of patient care, the policy would not "significantly" further the important, legitimate objective of non-discriminatory, high-quality care. In effect, the requirement of a "significant" relationship creates a balancing test.

However, the crux of the proposed Title VI standard is the inquiry into less discriminatory alternatives. Rather than inquiring directly into the strength of the relationship between the policy chosen and the goal sought, evidence of less discriminatory alternatives provides a framework for evaluating a health care provider's need for a facially neutral practice that disparately impacts on minorities. The existence of workable alternatives serves as proof that the challenged policy is insufficiently related to the hospital's asserted goal or that the hospital's interests advanced by a particular policy are not important enough to justify use of the policy in light of its disparate racial impact.[222] This Title VI focus on alternatives is designed to avoid the confusion engendered by Title VII terms such as "significant," "substantial," "manifest" and "essential."

The range of available less discriminatory alternatives in Title VI health care cases should be much broader than it is in post-*Wards Cove*

219. *See supra* notes 121-122 and accompanying text.

220. *See supra* text accompanying note 152.

221. *See, e.g.*, Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 945 (1971); Johnson v. Pike Corp. of Am., 332 F. Supp. 490, 495 (C.D. Cal. 1971). For a discussion of lower courts' rejection of a cost defense in Title VII cases and the Supreme Court's increasing willingness to consider costs in Title VII cases, see Brodine, *supra* note 134, at 337-53.

222. *See* Lamber, *supra* note 133, at 16-17.

Title VII cases. *Wards Cove* requires that a proffered alternative be equally effective and warns that costs and other burdens are to be considered in determining equality.[223] Under the proposed Title VI standard, the plaintiff prevails if the less discriminatory alternative substantially accomplishes the health care provider's important legitimate objectives. The costs do not need to be identical. A more costly less discriminatory alternative is acceptable as long as the cost differential is not too substantial.[224] The defendant carries the burden of persuasion to prove that the alternatives are not workable, are not feasible or do not further the employer's important, legitimate business goal.[225] Title VI defendants accept federal money, and in return they accept greater scrutiny of their program practices and organization.

The Title VI health care defendant should bear the risk of non-persuasion on both the important, legitimate business objective and the less discriminatory alternatives. Placing the burden of persuasion on the defendant does not mean that the hospital must disprove every conceivable alternative. The plaintiff has an initial burden to identify reasonable alternatives. The health care provider then must respond and meet the ultimate burden of persuasion by demonstrating that the plaintiff's suggested alternatives do not substantially accomplish the important program objectives.

While the defendant's burden is substantial, it is not impossible. The defendant is the appropriate party to carry the burden of persuasion because it is the health care provider who has specific knowledge of the practices it uses, the rationale supporting their use, and the effects these practices have on patients, doctors and hospital staff.[226] Although the plaintiff may be able to identify some of this information through discovery, it is expensive and inefficient to place the burden of persuasion on the plaintiff when the defendant has access to this information and intimate knowledge of its relevance.

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223. *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126-27 (1989).

224. *See* Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 Yale L.J. 98, 115 (1974) (quoting Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). The author proposes a "not insubstantial" test for Title VII:

> The phrase "not insubstantial" refers to a difference in costs which is not trivial or de minimis. This standard is a relative one and includes consideration of the economic situation of the specific employer. For example, a cost differential may be truly insubstantial for a large business with many employees but not for a smaller employer with fewer workers.

Id. at 115 n.72.

225. *See, e.g.*, Contreras v. City of Los Angeles, 656 F.2d 1267, 1290 n.4 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1987) (Tang, J., dissenting) (Title VII case); Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252, 270 (N.D. Ind. 1977) (Title VII case).

226. *See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1271 (D.C. Cir. 1984) (Title VII case; placing burden of proving business necessity on defendant is traditionally justified because employers have superior access to employment information).

CONCLUSION

In the twenty-five years since passage of the 1964 Civil Rights Act and the enactment of the Medicaid and Medicare programs, Americans' health has improved dramatically. Nevertheless, minorities still do not get the health care services they need nor are they fully integrated into the mainstream of American health care. Longstanding hospital policies, such as private physician rules and pre-admission deposits, still operate to exclude minority patients from federally funded health care.

Courts have mistakenly turned to Title VII principles as the starting point for fashioning evidentiary burdens in Title VI cases involving challenges to facially neutral policies that have the effect of excluding minority patients. Title VII regulates purely private employment decisions, and the Supreme Court has been increasingly reluctant to scrutinize private employers' use of employment practices that impact disproportionately upon protected groups.

Courts should not be reluctant to scrutinize the operation of federally funded programs. Title VI is a spending power statute. It does not regulate but places conditions on the expenditure of federal money. As a condition of receipt of federal Medicaid and Medicare money, hospitals and other health care providers guarantee that they will not use policies and practices that have the effect of excluding minority patients. Courts should hold health care providers to their promise.

In the health care context a Title VI defendant should have to prove that a facially neutral policy that has a disproportionate adverse impact on minorities significantly furthers an important program objective that cannot be achieved through less discriminatory means. This standard focuses on less discriminatory alternatives. The old alternatives have excluded minorities. A search for less discriminatory alternatives will encourage the development of new approaches to health care administration.