Cornell Law Review

Volume 68
Issue 5 *June 1983*

Article 6

Bottom Line Defense in Title VII Actions: Supreme Court Rejection in Connecticut v. Teal and a Modified Approach

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RECENT DEVELOPMENT

THE BOTTOM LINE DEFENSE IN TITLE VII ACTIONS: SUPREME COURT REJECTION IN *CONNECTICUT V. TEAL* AND A MODIFIED APPROACH

Title VII of the Civil Rights Act of 1964[1] prohibits employers from discriminating against job applicants or employees on the basis of race, color, religion, sex, or national origin.[2] The statute proscribes both intentional discrimination and facially neutral selection devices that disproportionately exclude members of minority groups from certain jobs and are unrelated to job performance. Proponents of the "bottom line defense" argue that even where the plaintiff proves that a particular step in the hiring or promotion process disparately affects minorities, title VII is not violated if the employer demonstrates that the result of the entire selection process, the bottom line, is nondiscriminatory.

The Supreme Court recently rejected the bottom line defense in *Connecticut v. Teal*.[3] This Note examines that decision and proposes a modified bottom line defense, an approach that is more consistent with the aims of title VII.

I
BACKGROUND

For the first seven years after Congress enacted the Civil Rights Act of 1964, courts applied title VII only to *intentional* acts of discrimination. In such cases the plaintiff must prove that the employer has barred him from employment or promotion because he is a member of a protected class; proof of the employer's illegal motive is essential to the claim. Courts may infer illegal motive from the employer's "disparate treat-

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1 42 U.S.C. § 2000e (1976 & Supp. V 1981).

2 Section 703(a) provides:

> It shall be an unlawful employment practice for an employer —
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1976).

3 457 U.S. 440 (1982).

ment" of the plaintiff.[4]

In 1971 the Supreme Court, in *Griggs v. Duke Power Co.*,[5] expanded the scope of title VII to include a class of cases in which proof of the employer's discriminatory intent is absent. In *Griggs*, black employees at the defendant's generating plant brought an action challenging the company's policy that required all applicants for "desirable"[6] positions to pass two intelligence tests and possess a high school diploma.[7] These requirements, which did not measure an applicant's ability to perform any particular job, excluded a disproportionate number of blacks from the desirable jobs.[8]

The defendant prevailed in both the district court[9] and court of appeals[10] because the plaintiffs failed to prove intentional discrimination by the employer.[11] The Supreme Court reversed, holding that a title VII plaintiff can establish a prima facie case without showing discriminatory intent if an employer's selection process excludes a disproportionate number of black applicants.[12] The Court concluded that title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[13]

The *Griggs* Court thus established a new type of title VII action, the

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4 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie disparate treatment case, a plaintiff must show:

> (i) that he 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.

Id. at 802.

5 401 U.S. 424 (1971). *See generally* Bernhardt, Griggs v. Duke Power Co.: *The Implications for Private and Public Employers,* 50 TEX. L. REV. 901 (1972); Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Company *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59 (1972).

6 *Griggs,* 401 U.S. at 428. The plant was divided into five departments: (1) labor, (2) coal handling, (3) operations, (4) maintenance, and (5) laboratory and testing. Applicants for positions in all departments except labor had to meet the test and diploma requirements. Incumbent employees could transfer from labor or coal handling to the other three departments by passing the two tests, even if they did not have a high school diploma. *Id.* at 427.

7 These requirements were facially neutral because they did not refer to the applicant's race.

8 401 U.S. at 430 n.6. The Court cited U.S. Burcau of the Census statistics showing that in North Carolina, 34% of white males but only 12% of black males had completed high school. The Court noted that the EEOC in one case had found that 58% of whites but only 6% of blacks passed the two tests given by the company.

9 Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D.N.C. 1968).

10 Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970).

11 *Id.* at 1232. Prior to enactment of the Civil Rights Act of 1964, the company openly discriminated on the basis of race. *Griggs,* 401 U.S. at 424.

12 401 U.S. at 436.

13 *Id.* at 431.

"disparate impact"[14] claim. In *Griggs* and subsequent disparate impact cases,[15] the Court developed a test for assessing such claims. To establish a prima facie case, a plaintiff must demonstrate that an employer's facially neutral selection device excludes a disproportionate number[16] of members of the plaintiff's protected class from employment or promotion.[17] If the plaintiff proves disparate impact, the employer must show that the selection device is "job related."[18] Even if the defendant dem-

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14 Some courts and commentators refer to this as "adverse impact." *See generally* Blumrosen, *supra* note 5.

15 *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). *Dothard* involved the validity under title VII of an Alabama statute requiring that all guards in male prisons meet minimum height and weight standards. The Court determined that the statute had a disparate impact on women because although 99% of all men met the minimum requirements, only 58% of women qualified. The defendant prevailed, however, because the Court held that sex was a "bona fide occupational qualification" due to problems associated with having women in male prisons. The requirements, therefore, were protected under § 703(e) of title VII. *See* 433 U.S. at 332-37.

In *Albemarle,* the employer required that applicants for skilled jobs have a high school diploma and pass two intelligence tests. The Court reaffirmed the *Griggs* disparate impact principle and held that the plaintiff has the initial burden of proving disparate impact. The Court also rejected the employer's position that the requirements were job related. *See* 422 U.S. at 436.

16 The courts have not clearly defined the degree of disparity the plaintiff must prove. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 35 (Supp. 1979) (discussing approaches of various courts); *see also infra* note 35 (discussing "80% rule" of Uniform Guidelines on Employee Selection Procedures).

17 There are at least three ways to establish disparate impact. The plaintiff may demonstrate that:

> (1) the employer's selection device disparately affects *actual* applicants who are members of the plaintiff's protected group. *See, e.g.,* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979);
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> (2) the selection device discriminates against *potential* applicants from the plaintiff's class. This approach is premised on the realization that the employer's selection device may have a disparate impact not only upon actual job applicants, but also upon potential applicants who are aware of, but do not meet, the employer's criteria, and thus do not even apply. *See, e.g.,* Dothard v. Rawlinson, 433 U.S. 321 (1977); *cf.* Griggs v. Duke Power Co., 401 U.S. at 430 n.6 (observing that high school diploma requirement disparately affects blacks because percentage of blacks graduating from high school was much lower than comparable figure for whites);
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> (3) the percentage of his class in the employer's work force is significantly less than its percentage in the area population. *See, e.g.,* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

The defendant also may use these methods to disprove disparate impact claims. *See, e.g., id.* at 308-10; *see also* Shoben, *Differential Pass-Fail Rates in Employment Testing,* 91 HARV. L. REV. 793 (1978). *See generally* 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 74.41 (1982); Note, *Employment Discrimination: Plaintiff's Prima Facie Case and Defendant's Rebuttal in a Disparate Impact Case,* 54 TUL. L. REV. 1187 (1980).

18 401 U.S. at 431. *See id.* at 432 ("[A]ny given [employment] requirement must have a manifest relationship to the employment in question."). In discussing job relatedness, the Court in *Griggs* also stated that "[t]he touchstone is business necessity," *id.* at 431, thus suggesting that an employer can only rely on a selection device having a disparate impact if it is necessary to his business. Subsequent decisions, however, have focused almost exclusively on job relatedness. *See* 3 A. LARSON & L. LARSON, *supra* note 17, at § 72.14.

onstrates job relatedness, the plaintiff can still prevail by showing "that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[19]

Some employers have tried to defeat disparate impact claims with a "bottom line defense." The bottom line defense is applicable when one step in a multistep hiring or promotion process has a disparate impact on a protected class but the overall process is nondiscriminatory. For example, an employer might require applicants for a certain position to be right-handed.[20] Assume this requirement excludes a disproportionate number of blacks because a higher percentage of blacks than whites are left-handed. The employer, however, actually hires enough right-handed blacks to eliminate any disparate impact, thus achieving a nondiscriminatory bottom line despite using a preliminary selection device that had a disparate impact. Employers have argued that selection processes that achieve equitable results—i.e., that attain a nondiscriminatory bottom line—bar disparate impact actions,[21] either by preventing plaintiffs from establishing a prima facie case or by operating as an affirmative defense.

Until 1982, the bottom line concept received judicial and administrative acceptance.[22] Most lower courts that considered the issue held that a nondiscriminatory bottom line is an absolute defense to a disparate impact claim.[23] In addition, the Equal Employment Opportunity Commission (EEOC),[24] the federal agency charged with enforcing titlc

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19 Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

20 This is a facially neutral selection criterion because it does not refer to race. In this example, also assume that the employer cannot rely on the job relatedness defense because being right-handed is unrelated to job performance.

21 Although not a defense, bottom line statistics may nevertheless be relevant in determining discriminatory intent. The court may infer purposeful discrimination from statistically significant disparate treatment of minority groups. Similarly a defendant may attemt to deny the existence of purposeful discrimination by pointing to a nondiscriminatory bottom line. *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); United Bhd. of Teamsters v. United States, 432 U.S. 324 (1977).

22 *See generally* Blumrosen, *The Bottom Line Concept in Equal Opportunity Law,* 12 N.C. CENT. L.J. 1 (1980); Shoben, *Probing the Discriminatory Effects of Selection Procedures with Disparate Impact Analysis Under Title VII,* 56 TEX. L. REV. 1 (1977).

23 *See, e.g.,* EEOC v. Greyhound Lines, 635 F.2d 188 (3d Cir. 1980); EEOC v. Navajo Ref. Co., 593 F.2d 988 (10th Cir. 1979); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Brown v. New Haven Civil Serv. Bd., 474 F. Supp. 1256 (D. Conn. 1979). *But see, e.g.,* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Hester v. Southern Ry., 497 F.2d 1374 (5th Cir. 1974).

24 The Equal Employment Opportunity Commission (EEOC) is an administrative agency established by Congress to enforce title VII. Title VII requires a person allegedly victimized by illegal employment discrimination to first exhaust existing state remedies. If unsatisfied with the result, he may then file a complaint with the EEOC, which investigates the claim to determine if title VII has been violated. If the agency finds probable cause that a violation has occurred, it must attempt to resolve the dispute through conciliation. The

VII, decided not to prosecute employers demonstrating satisfactory bottom line results.[25] In 1982, however, the Supreme Court, addressing the issue for the first time,[26] rejected the bottom line defense in *Connecticut v. Teal.*[27]

II
CONNECTICUT V. TEAL

A. Facts and Lower Court Rulings

In *Connecticut v. Teal,*[28] the plaintiffs, black employees of Connecticut's Department of Income Maintenance, held positions as provisional supervisors. To qualify for permanent positions, the plaintiffs had to participate in a two-stage selection process. The first stage was a written test. Only those candidates who passed the test advanced to the second stage, in which the Department considered the candidate's "past work performance, recommendations of the candidates' supervisors and, to a lesser extent, seniority."[29]

Eighty percent of the white candidates and fifty-four percent of the black candidates passed the written test.[30] The *Teal* plaintiffs failed and therefore were not among the pool of candidates considered at the second stage, from which the state made its promotions. The state ultimately promoted twenty-three percent of the original black candidates and fourteen percent of the original white candidates.[31] The percentage

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EEOC can file suit against the employer only after reconciliation fails. If the EEOC declines to file suit, the aggrieved individual may file a private action. Each stage of this process has strict limitations. *See* 42 U.S.C. § 2000e-5 (1976).

25 The EEOC, the Departments of Labor and Justice, and the Civil Service Commission adpoted the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines), 29 C.F.R. § 1607 (1978), to provide a framework for the appropriate use of selection procedures, including tests. The guidelines state that, as a matter of prosecutorial discretion, the agencies will not take enforcement action against an employer based on the disparate impact of any component of his selection process if the total selection process, the bottom line, does not demonstrate a disparate impact. An employee or applicant may still file an individual suit. *See supra* note 24.

26 Writing in 1980, Alfred Blumrosen, a former consultant to the EEOC, argued that the Supreme Court had already accepted the bottom line approach. Blumrosen, *supra* note 22. Blumrosen cited three cases to support this contention: Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); and United Steelworkers of Am. v. Weber, 443 U.S. 192 (1979). However, the Court's language in the *Teal* decision, *see infra* notes 28-56 and accompanying text, makes clear that it had never accepted the bottom line defense. *See, e.g.,* 457 U.S. at 453.

27 457 U.S. 440 (1982).

28 *Id.*

29 *Id.* at 444.

30 *Id.* at 443 n.4.

31 *Id.* at 444. Connecticut made the promotions long after the plaintiffs had filed suit and only one month before trial. *Id.* at 2529. One commentator suggests that the late date of the promotions and the plaintiffs' having served as temporary supervisors for over two years may have infiuenced the Court. *See Criticism of Teal "Bottom Line" Ruling,* 1 LAB. REL. REP. (BNA) No. 111, at 2 (Sept. 6, 1982).

of black permanent supervisors thus exceeded the percentage of black candidates.

The plaintiffs brought suit in federal district court, alleging that Connecticut's selection process violated title VII as interpreted in *Griggs v. Duke Power Co.*[32]; the written test had a disparate impact on black employees seeking permanent promotion.[33] The defendants argued that because the result of the promotion process—the "bottom line"—was more favorable to blacks than to whites, the test did not have a disparate impact on blacks. The defendants contended that a nondiscriminatory bottom line was a complete defense to the plaintiffs' suit.[34]

The district court agreed with the defendants, holding that although the written test had a disparate impact on blacks,[35] the defendants had not violated title VII because the bottom line was equitable.[36] The United States Court of Appeals for the Second Circuit reversed, holding that because the examination denied a disproportionate number of blacks the chance to continue in the promotion process, a nondiscriminatory bottom line did not insulate the defendants from a title VII claim.[37] The court found that the plaintiffs had established a prima facie case of disparate impact and remanded to the district court to determine whether the written test was job related.[38]

B. Majority Opinion

A divided Supreme Court[39] affirmed the court of appeals. The majority, in an opinion by Justice Brennan, held that the employer's nondiscriminatory bottom line did not preclude the employees from establishing a prima facie case of disparate impact under the Court's interpretation in *Griggs* of section 703(a)(2) of title VII.[40]

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32 401 U.S. 424 (1971). *See supra* notes 5-14 and accompanying text.

33 The 1972 amendments to title VII extended the Act's protection to state and local government employees. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e(b) (1976))

34 457 U.S. at 447 n.7.

35 The district court found, and the defendant acknowledged, that the examination resulted in a disparate impact under the "80% rule" of the Uniform Guidelines on Employee Selection Procedures adopted by the EEOC. *See id.* at 443 n.4. This rule states that a selection rate for a group that "is less than [80%] of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact . . . ." 29 C.F.R. § 1607.4(D) (1982). Here the passing rate for blacks was only 68% of the passing rate for whites. 457 U.S. at 443; *see also supra* note 20.

36 The bottom line showed that a higher percentage of black applicants received a permanent appointment than did white applicants. *See supra* text accompanying note 31.

37 Teal v. Connecticut, 645 F.2d 133, 134-35 (2d Cir. 1981), *aff'd,* 457 U.S. 440 (1982).

38 *Id.* at 140.

39 Justices Brennan, Marshall, White, Blackmun, and Stevens voted to affirm. Chief Justice Burger, and Justices Rehnquist and O'Connor joined Justice Powell's dissenting opinion.

40 *See* 457 U.S. at 451. The Court refused to place an additional burden of proof on plaintiffs seeking to establish a prima facie case of discrimination when the defendant's bot-

In reaching its decision, the majority focused on the language of section 703(a)(2), which speaks "in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*."[41] From this language, the Court concluded that even though the bottom line approach may prevent discrimination in hiring or promotions, it does not prevent discrimination in job opportunities. Justice Brennan stressed that "[t]he suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual [plaintiffs] the *opportunity* to compete equally with white workers on the basis of job related criteria."[42] The majority argued that focusing exclusively on the bottom line ignores the *Griggs* mandate that section 703(a)(2) prohibits "procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups."[43] According to the Court, the bottom line defense is inconsistent with *Griggs* because a test at any stage of an employer's selection process that has a disparate impact on blacks constitutes a "built-in headwind."[44]

The Court cited Congress's 1972 extension of title VII's coverage to include state and municipal employers as support for its position.[45] The legislative history of the 1972 amendments demonstrates that Congress agreed with the *Griggs* decision and intended to apply it to state and municipal employers.[46] The majority concluded that because *Griggs* had focused on "equality of *opportunity* and the elimination of discriminatory *barriers* to professional development,"[47] Congress, in endorsing the decision and applying it to state and local employers, had implicitly rejected the bottom line defense,[48] which emphasizes equality only in *hiring* and *promotion*.[49]

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tom line is nondiscriminatory, and also rejected the bottom line as an affirmative defense. *Id.* at 452-54.

41 *Id.* at 448 (emphasis in original). The Court contrasted § 703(a)(2) with § 703(a)(1), *see supra* note 1, noting that § 703(a)(1), "if it were the only protection given to employees and applicants under Title VII, might support [defendant's] exclusive focus on the overall result." *Id.* at 448 n.9.

42 *Id.* at 451 (emphasis in original).

43 *Id.* at 448-49 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

44 *See id.* at 448.

45 *See supra* note 33.

46 The House and Senate Reports on the 1972 amendments to title VII cited *Griggs* with approval. *See* H.R. REP. NO. 238, 92d Cong., 1st Sess. 21-22, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2156-57 [hereinafter cited as HOUSE REPORT]; S. REP. NO. 415, 92d Cong., 1st Sess. 14-15 (1971) [hereinafter cited as SENATE REPORT]. This support, however, was directed at the disparate impact approach's concern with the effect of selection devices unrelated to job performance on minority groups. *See* HOUSE REPORT, *supra,* at 18-20; SENATE REPORT, *supra,* at 13-14. There is no evidence that Congress interpreted *Griggs* as focusing exclusively on "opportunities," rather than jobs, as did the *Teal* Court. *See infra* note 88.

47 457 U.S. at 449 (emphasis in original).

48 *Id.*

49 *Cf. id.* at 448 & n.9, 449 (*Griggs* Court's interpretation of § 703(a)(2) undermines bot-

The majority also relied on the Court's post-*Griggs* disparate impact decisions, arguing that section 703(a)(2) as interpreted in *Dothard v. Rawlinson*[50] and *Albemarle Paper Co. v. Moody*[51] "focuse[s] on employment and promotion requirements that create . . . discriminatory bar[s] to *opportunities* . . . [rather than] on the overall number of minority or female applicants actually hired or promoted."[52] The Court concluded that this line of cases prohibits an employer from using a nondiscriminatory bottom line as an affirmative defense if any stage of the selection process has a disparate impact.[53]

Finally, the Court concluded that both the language and legislative history of section 703(a)(2), which emphasize the "protection of the individual employee, rather than the protection of the minority group as a whole,"[54] are inconsistent with a defense that permits an employer to discriminate against one minority group member by treating other members of that same group favorably.[55] The Court noted that it had previously rejected this approach in *Furnco Construction Corp. v. Waters.*[56]

C. Dissenting Opinion

Justice Powell, in dissent,[57] countered that the majority reached a result inconsistent with established disparate impact analysis by obscuring the distinction between disparate treatment and disparate impact

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tom line defense by focusing on limitations that deprive individuals of employment opportunities, rather than of jobs and promotions).

50 433 U.S. 321 (1977); *see supra* note 15.

51 422 U.S. 405 (1975); *see supra* note 15.

52 457 U.S. at 450. The majority argued that although the Court in *Dothard* "noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, [the] focus was not on this 'bottom line' . . . . [but rather] on the disparate effect that the minimum height and weight standards had on applicants . . . ." *Id.*

The majority also noted that although in *Albemarle Paper Co.* the Court had remanded the action to allow the defendant to prove that the tests were job related, "[the Court] did not suggest that by promoting a sufficient number of the black employees who passed the examination, the employer could avoid this burden." *Id.*

53 *See id.* at 449-51.

54 *Id.* at 453-54.

55 *See id.* at 455.

56 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination."); *see also supra* note 26 (refuting one commentator's contention that Court had already accepted bottom line defense). The majority also noted similar holdings in City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), and Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), to support the argument that overall fairness to a minority group does not justify discriminatory treatment of individual group members.

The majority, however, failed to point out that these cases all involved disparate treatment claims, whereas *Teal* involved a disparate impact claim. The dissent argued that the majority's use of these eases was improper and confusing. *See infra* notes 62-64, 72-74 and accompanying text.

57 Chief Justice Burger and Justices Rehnquist and O'Connor joined in the dissenting opinion. 457 U.S. at 456 (Powell, J., dissenting).

cases.[58] He argued that disparate impact cases are properly concerned with group, not individual, harm; *Griggs* and its progeny considered not "whether the claimant as an individual had been classified in a manner impermissible under § 703(a)(2), but whether an employer's procedures have had an adverse impact on the protected *group* to which the individual belongs."[59] According to the dissent, disparate impact analysis compels the Court to concentrate exclusively on the effect of the employer's "*total selection process*"[60]—the bottom line. The dissent found no disparate impact in *Teal* because the defendant promoted a greater percentage of black than white candidates.[61]

Justice Powell argued that the majority's focus on individual rights confused the aim of title VII—to protect individual rights—with the legal mechanisms used to achieve that aim, one of which is the disparate impact claim.[62] In a disparate treatment case, the plaintiff attempts to establish intentional, individual discrimination on the basis of title VII's prescribed criteria.[63] In contrast, the plaintiff in a disparate impact case must prove that the employer's selection process excludes a disproportionate number of the plaintiff's protected group, from which a court can infer that plaintiff was a victim of the process's "built-in headwinds."[64] According to the dissent, the latter method of proof *defines* the disparate impact approach; without evidence of group harm resulting from the employer's selection process there can be no disparate impact claims.[65]

The dissent urged that employers be allowed to rely upon a nondiscriminatory bottom line as an affirmative defense to a disparate impact claim. Justice Powell contended that when a plaintiff offers as proof of discrimination a particular set of group statistics, such as the test results in *Teal,* the defendant must have an opportunity to refute that evidence by showing the selection process's overall fairness to the plaintiff's group.[66]

The dissent further contended that the cases cited by the majority in support of its decision, *Dothard v. Rawlinson*[67] and *Albemarle Paper Co. v. Moody,*[68] neither explicitly nor impliedly rejected the bottom line de-

58 *Id.*

59 *Id.* at 457 (emphasis in original).

60 *Id.* at 458 (emphasis in original).

61 *See id.*; *supra* text accompanying note 31-34.

62 457 U.S. at 458.

63 *See id.; supra* note 4.

64 457 U.S. at 459 (quoting *Griggs,* 401 U.S. at 432).

65 *Id.*

66 *See id.* at 460 ("Having pleaded a disparate-impact case, the plaintiff cannot deny the defendant the opportunity to show that there was no disparate impact.").

67 433 U.S. 321 (1977); *see supra* note 15.

68 422 U.S. 405 (1975); *see supra* note 15.

fense.[69] In *Rawlinson,* the defendant could not rely on the bottom line defense because the results of the hiring process reflected actual discrimination against women.[70] In *Moody,* the facts of the case did not present, and the Court did not address, the bottom line defense issue.[71] The disparate treatment cases upon which the Court relied[72] were, according to Justice Powell, fundamentally different from disparate impact cases[73] and, therefore, inapplicable to the bottom line defense issue.[74]

Finally, the dissent raised concerns about the practical consequences of the majority's holding in *Teal.* Justice Powell contended that the decision may force employers to abandon tests entirely[75] or to use job related tests that are expensive and difficult to develop.[76] The dissent argued that employers with limited funds may choose instead to rely on quota hiring, a practice that is both arbitrary and unlikely to produce a competent work force.[77] More importantly, the dissent cautioned that although the bottom line approach ensures proportional minority hiring and promotion, mandating the use of job related tests might result in fewer, rather than more, jobs and promotions for minority group members.[78]

III
ANALYSIS

The Supreme Court confronted the bottom line defense issue for the first time in *Connecticut v. Teal.*[79] In determining the defense's validity, the Court relied on title VII's language and legislative history as well as on earlier Supreme Court decisions interpreting the statute. Neither source, however, provided effective support for the holding in *Teal;* Congress had failed to define precisely the scope of title VII[80] and

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69 *See* 457 U.S. at 461 & n.6.

70 *See supra* note 52.

71 *See* 457 U.S. at 461 n.6; *supra* note 52.

72 *See supra* note 56.

73 *See supra* notes 55-57 and accompanying text.

74 *See* 457 U.S. at 462.

75 *Id.* at 463. Although the Court did not discuss how *Teal* applies to nontest selection devices, there is nothing in the decision to suggest that the holding is limited to tests.

76 *See id.; infra* notes 118-20 and accompanying text.

77 *See* 457 U.S. at 463-64; *infra* notes 110-12 and accompanying text.

78 *See* 457 U.S. at 464. The dissent noted that had the defendant in *Teal* adopted a quota system, it could then have hired blacks only in proportion to their representation in the ranks of provisional supervisors. Because the defendant promoted *more* than a proportional number of blacks, *see supra* note 32 and accompanying text, under a quota system, blacks might have attained fewer permanent supervisory positions than they actually secured under the allegedly discriminatory selection process employed by the defendant. 457 U.S. at 463 n.8.

79 457 U.S. 440 (1982); *see supra* notes 28-78 and accompanying text.

80 A number of commentators have remarked that Congress, in enacting title VII, made a broad policy statement and left the difficult decisions over the statute's precise scope and applicability to the courts. *See, e.g.,* Blumrosen, *supra* note 5, at 60; Cooper & Sobol, *Seniority*

the Court's pre-*Teal* decisions simply did not address the validity of the bottom line defense.[81] Thus, the *Teal* Court relied on narrow phrases and semantic distinctions within the statute[82] and cases of questionable precedential value[83] to support its conclusion that selection devices that have a disparate impact upon a minority group may violate title VII despite a nondiscriminatory bottom line.[84] In reaching its decision in *Teal,* the Court failed to conduct a thorough analysis of the statute's underlying policies and practical effects.[85] Such an examination reveals that title VII is the product of a number of conflicting congressional goals that can best be satisfied by adopting a compromise solution to the bottom line defense issue.

The *Teal* majority stressed title VII's focus on equality of opportunity for minority group members in the hiring and promotion process, relying on the use of the word "opportunity" in section 703(a)(2), and comparing that section to 703(a)(1), which stresses hiring and promotion.[86] The Court concluded that the bottom line defense does not ensure equality of opportunity and thus violates title VII.[87] The legislative history of, and 1972 amendments to, title VII, however, do not suggest that Congress intended to distinguish between subsections 703(a)(1) and (a)(2) based upon a greater emphasis on opportunities for minorities in the former.[88] Both subsections reflect congressional desire to ensure that members of minority groups not only enjoy equal opportunity in the hiring and promotion process, but that they also secure employment and promotions.[89] As the Court recognized in *Griggs,* "Congress di-

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and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598, 1614 (1969); Rotschild & Werden, *Title VII and the Use of Employment Tests: An Illustration of the Limits of the Judicial Process,* 11 J. LEGAL STUD. 261, 268 (1982).

81 *See supra* note 26 and accompanying text.

82 *See supra* note 41 and accompanying text.

83 *See supra* notes 50-53, 69-74 and accompanying text.

84 *See* 457 U.S. at 450-51; *supra* note 40 and accompanying text.

85 *See The Supreme Court, 1981 Term,* 96 HARV. L. REV. 278, 279 (1982). This Comment implies that blacks have a right under title VII to compete for jobs on an equal footing with whites, but does not define equal employment opportunity. *Id.* at 280. Thus, "equal employment opportunity" is similar to the "opportunity" that the Court stressed in *Teal.*

86 *See* 457 U.S. at 448-49; *supra* notes 41-44 and accompanying text.

87 *See* 457 U.S. at 449; *supra* notes 41-44 and accompanying text.

88 There is virtually no legislative history relating to § 703(a)(2). *See generally* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1965). The only recorded remark is a statement by Senator Ervin expressing concern that § 703(a)(2) would outlaw all tests on which whites score higher than blacks. *See* 110 CONG. REC. 5614-16 (1964) (statement by Sen. Ervin). In response, Congress enacted § 703(h), the "Tower Amendment," which allows the use of tests having a disparate impact if they are job related. There is nothing to indicate that Congress rejected the bottom line approach in either 1964 or 1972. *See supra* note 46 and accompanying text (noting congressional agreement with *Griggs* Court's disparate impact theory).

89 *See* 110 CONG. REC. 6548 (1964) ("The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them.")

rected the thrust of [title VII] to the *consequences* of employment practices. . . ."[90]

Although the bottom line defense may be inconsistent with title VII's concern with opportunity for individual minority group members, it does encourage proportional representation at each employment and promotional level. Rejection of the bottom line defense lessens the likelihood of proper proportional results.[91]

In attempting to resolve the bottom line defense issue, the *Teal* Court not only interpreted title VII in a questionable manner, but also misconstrued and misapplied past Supreme Court decisions interpreting the statute. As the dissent argued, the majority's reliance on *Dothard v. Rawlinson*[92] and *Albemarle Paper Co. v. Moody*[93] is misplaced because neither of these decisions addressed the bottom line defense.[94]

The *Teal* majority also relied on past Supreme Court precedent to support its interpretation of title VII as protecting individual, as opposed to group rights. The Court reasoned that the bottom line defense does not protect individual rights because it condones discrimination against individual minority group members at a given stage in the hiring or promotion process if the end results of the process are nondiscriminatory.[95] Prior Supreme Court title VII decisions do not, however, support an interpretation of the statute that focuses exclusively on individual rights. *Griggs v. Duke Power Co.*[96] and subsequent disparate impact cases focused primarily on group harm[97] and provided a group remedy.[98] The *Teal* majority relied on inapplicable disparate treatment cases to buttress its conclusion that title VII protects "*individuals,* not *groups,* and therefore . . . the manner in which an employer has treated other members of a group cannot defeat the claim of an individual who has suffered as a result of even a facially neutral policy."[99] The Court

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(remark by Sen. Humphrey); *id.* at 7220 ("The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass.") (remark by Sen. Clark).

90 401 U.S. at 432 (emphasis in original); *see supra* notes 5-13 and accompanying text.

91 *See infra* note 120.

92 433 U.S. 321 (1977); *see supra* note 15 and accompanying text.

93 422 U.S. 405 (1975); *see supra* note 15 and accompanying text.

94 *See* 457 U.S. at 460-61; *supra* notes 69-70 and accompanying text.

95 *See supra* notes 20-21 and accompanying text.

96 401 U.S. 424 (1971); *see supra* notes 5-13 and accompanying text.

97 *See* Blumrosen, *supra* note 5, at 62; *see also supra* notes 59-60 and accompanying text.

98 If the plaintiff in a disparate impact case prevails, the court enjoins the employer from using the challenged selection device. To secure individual relief the plaintiff must still prove disparate *treatment. See supra* note 4; *see also* Cooper v. Allen, 467 F.2d 836, 840 (5th Cir. 1972) (Because the plaintiff proved discriminatory treatment, he was entitled to back pay and individual injunctive relief unless defendant could show "by clear and convincing evidence that he would not have been hired even absent the discriminatory testing requirement") (footnote omitted).

99 457 U.S. at 467 (Powell, J., dissenting) (emphasis in original).

concluded that its prior rejection in *Furnco Construction Corp. v. Waters*[100] of a bottom line defense in a disparate treatment case supported the same result in *Teal,* a disparate impact case.[101] But as the dissent argued, the Court ignored the distinction between disparate treatment cases, which focus on individual harm, and disparate impact cases, which focus on group harm.[102] The majority fails to explain why it merges these two categories for the first time.[103]

Title VII, then, is concerned both with individual and group rights. The bottom line defense is inconsistent with an exclusive focus on individual rights because individuals such as the *Teal* plaintiffs are discriminated against regardless of the number of minority group members who are ultimately hired or promoted. However, the bottom line defense is consistent with a group rights approach because it encourages proportional representation of minority groups in the employer's work force; this result is less likely to occur under *Teal.*[104]

The bottom line defense issue cannot be resolved by examining the language or legislative history of title VII or by relying on Supreme Court decisions interpreting the statute. Title VII is the product of diverse congressional aims[105] that do not clearly support or oppose the bottom line defense. Because the conflicting policies underlying the statute are inadequate for evaluating the merits of the bottom line defense, the Court should have considered the practical effects of its rejection of the bottom line defense in reaching its decision in *Teal.*

An employer who previously relied on a nondiscriminatory bottom line as protection from disparate impact claims has several options in light of the Supreme Court's rejection of the bottom line defense in *Teal.*[106] The employer can:

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100 438 U.S. 567 (1978).

101 *See supra* notes 55-56 and accompanying text.

102 *See supra* notes 49-60 and accompanying text.

103 One commentator cautioned that exclusive focus on individual harm could subvert disparate impact theory. *See The Supreme Court, 1981 Term, supra* note 85, at 285 ("Relying upon *Teal,* one could argue that, because title VII primarily protects individual rights, an employment policy's disparate impact on a group should not suffice to make out a prima facie title VII case."); *see also supra* notes 58-61 and accompanying text.

104 *See infra* note 120. This distinction is closely linked to the opportunity-job dichotomy discussed above. *See supra* notes 89-92 and accompanying text. A *group* right to actual *jobs* strongly supports the bottom line defense, whereas an *individual* right to employment opportunities is totally inconsistent with the bottom line defense.

105 Congress was not only concerned with employment discrimination against minorities, but also with ensuring that employers would retain the freedom to hire whomever they chose, as long as the hiring process was not discriminatory. "I would emphasize only the point that nothing in title VII . . . tells any employer whom he may hire. What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment." 110 CONG. REC. 13,088 (1964) (remark by Sen. Humphrey).

106 The *Teal* dissent posed these alternatives. *See supra* text accompanying notes 75-77.

(1) adopt a quota selection process;[107]
(2) adopt a totally subjective selection process that does not employ tests or other facially neutral selection devices;
(3) use validated job related tests;[108] or
(4) use a facially neutral selection device as one factor in the overall selection process, but not as a complete obstacle to further consideration of applicants who fail.[109]

The consequences of each alternative are to some extent contrary to the aims of title VII.

The *Teal* decision may encourage the adoption of quota hiring and promotion schemes.[110] Employers who are unwilling or unable to develop job related tests may establish quotas to avoid disparate impact claims.[111] Quota selection, however, is contrary to both congressional intent[112] and title VII's concern with equal employment opportunity because under such a plan minority group members do not compete equally with others but instead compete among themselves for a predetermined number of positions.

Other employers may adopt a selection process that subjectively evaluates each applicant's ability to perform the job. This approach appears to provide equal opportunity to minority group members because all applicants are judged according to the same criteria. Employer bias against minorities, however, may influence hiring or promotion, and without a facially neutral selection device, rejected

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107 The bottom line defense is similar to a "pure" quota system because it ensures that a certain percentage of the members of a protected group will be hired or promoted. In a "pure" quota system, the employer is primarily concerned with hiring a certain percentage of minorities and only secondarily concerned with their qualifications. Under the bottom line approach, on the other hand, the employer first requires the employee to exhibit a relevant qualification by passing a test or succeeding with respect to another selection device. Thus under the bottom line approach, the applicant's qualifications are of primary concern and only qualified applicants, minority and nonminority, are selected. Because the minority members selected have demonstrated the same qualifications as the selected nonminority applicants, the bottom line approach is less likely to stigmatize minority employees than a "pure" quota system.

108 A validated test is one that the employer has examined in terms of its job relatedness. *See infra* note 117.

109 *See* 457 U.S. at 463 n.8 (Powell, J., dissenting).

110 The dissent in *Teal* expressed this concern. *See supra* note 77 and accompanying text.

111 If a selection process revcals no barrier to minority employment or promotion, disparate impact can only be measured at the end of the process. A quota system ensures that each group attains a proportional number of positions. One commentator suggests that quota hiring may be illegal in light of the Supreme Court's decision in University of Cal. v. Bakke, 438 U.S. 265 (1978); *see The Supreme Court, 1981 Term, supra* note 85, at 282 n.29. Under Bakke, however, race can be a factor, as long as it is not the major determinant of selection. Employers now may be able to avoid findings of illegality by simply disguising their quota selection.

112 *See, e.g.,* 110 CONG. REC. 13,080 (1964) (remark by Sen. Clark); *id.* at 9881-82 (remark by Sen. Allott); *id.* at 8921 (remark by Sen. Williams).

applicants cannot make out disparate impact claims.[113] In contrast to the bottom line approach, subjective selection processes do not encourage employers to make affirmative efforts to hire minority group members.[114]

The third alternative for employers is the use of job related tests. Job related tests that have a disparate impact on protected minority groups are nonetheless immune from title VII claims.[115] To determine if a test is job related, courts generally refer to the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines)[116] and require that a validation study be done according to professional standards.[117] It may, however, be difficult for employers to validate tests because the Uniform Guidelines are difficult and expensive to follow.[118] Further-

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113 Applicants may, of course, attempt to prove disparate treatment. *See supra* note 5.

114 An employer using job related tests is immune from disparate impact claims, and thus the percentage of minorities he hires or promotes is legally insignificant. Under the bottom line approach, however, an employer who fails to hire a proportional number of minorities may be subject to disparate impact claims.

115 *See supra* note 18 and accompanying text.

116 *See supra* note 25. According to the *Griggs* Court the EEOC guidelines represent "[t]he administrative interpretation of the Act by the enforcing agency," and are therefore "entitled to great deference." 401 U.S. at 433-34.

117 The Uniform Guidelines recognize three statistical methods of validating the job relatedness of a selection device. The most common technique is "criterion-related validation," which assesses the statistical relationship between the selection device and some significant measure of job performance. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. at § 1607.5(B). There are two forms of criterion related validation. The predictive form, in which the employer gives tests to new employees and compares the results to subsequent job performance, and the concurrent form in which the employer gives tests to present employees and compares the results with the job performance measuring device. *Id.* The second technique is "content-validation," in which the employer compares the skill measured by the selection device with that necessary for the job. *Id.* For example, a typing test for secretarial applicants is content validated. The final technique, rarely used, is "construct-validation," in which an employer identifies a characteristic thought essential to job success, such as verbal acuity for a salesman, and accurately measures that characteristic with the selection device. *Id.*

All three techniques require the employer to carefully describe the predictor and the job and to examine the test for potential bias. The Uniform Guidelines demand a high degree of statistical correlation between the predictor and actual job performance before a test will be considered job related. *See id.* at § 1607.14(B) (criterion-related validation). *Cf.* W. CONNOLLY, A PRACTICAL GUIDE TO EQUAL OPPORTUNITY 86-91 (1975) (suggesting that testing is one means of selecting employees to ensure efficient work force and arguing that testing practices are irrelevant if employer is meeting affirmative action goals). *See generally* 3 A. LARSON & L. LARSON, *supra* note 17, at § 65.00 (describing the three techniques of validation).

118 A recent report by the General Accounting Office concluded that the Uniform Guidelines are (1) inconsistent with professionally accepted methods of demonstrating job relatedness; and (2) so difficult to read and to comply with that employers find it virtually impossible to satisfy the obligations imposed on them. The report called for a revision of the Guidelines. *See* EEOC COMPL. MAN. (CCH) Last Report Letter No. 45 (Sept. 21, 1982). *See generally* 3 A. LARSON & L. LARSON, *supra* note 17, at § 65.00; B. SCHLEI & P. GROSSMAN, *supra* note 16, at 102-03 (main vol. 1976); A. SMITH, C. CRAVER & L. CLARK, EMPLOYMENT DISCRIMINATION LAW 803 (1982).

The complexity of the Uniform Guidelines is one reason the EEOC adopted the bottom

more, some experts believe that virtually no tests conform to the Uniform Guidelines' standards.[119] Finally, it is unclear whether employers' efforts to validate tests, even if successful, will benefit minority group members either in terms of jobs or opportunities.[120]

Despite the Court's rejection of the bottom line defense in *Teal,* employers may continue using discriminatory selection devices by integrating test results into a one-step hiring decision rather than using the test as an absolute barrier to applicants who fail.[121] Plaintiffs will succeed in raising disparate impact claims only if the employer's total selection process is discriminatory because the test's effect on minorities can be measured only at the end of the hiring or promotion process.[122] Employers will, in effect, be able to continue to rely on the bottom line defense thus undermining title VII's protection of individual rights and opportunities. If the minority group as a whole is treated well, individual group members remain at a competitive disadvantage in the selection process because of the use of discriminatory tests.

IV
PROPOSAL

The Supreme Court's rejection of the bottom line defense in *Connecticut v. Teal*[123] not only contravenes several of the policies underlying title VII,[124] but may also allow employers to continue to use discriminatory

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line approach. *See Transcript, EEOC Commissioners' Meeting, Dec. 22, 1977,* 43 DAILY LAB. REP. (BNA) E-1-4 (1978); *see also* B. SCHLEI & P. GROSSMAN, *supra* note 16, at 34 n.25 (Supp. 1979) ("The EEOC appears anxious to encourage employers to focus upon the 'bottom line' selection percentages in an effort to persuade the employer to maintain selection ratios that eliminate the need for embarking upon extensive validation programs to justify the ostensible underrepresentation of minorities or females.").

119 *See, e.g.,* Guardians Ass'n v. Civil Serv., 630 F.2d 79, 89 (2d Cir. 1980) (expert testimony concluding "that there is no test that can be considered completely valid to select candidates for any but the most rudimentary tasks") *cert. denied,* 452 U.S. 940 (1981)).

120 An employer can use a test having a disparate effect on minorities if it is job related. Blacks do not generally do as well on written tests as whites due to test bias and educational disadvantage. *See, e.g.,* L. TYLER, THE PSYCHOLOGY OF HUMAN DIFFERENCES 315 (3d ed. 1965); American Psychological Ass'n, Task Force on Employment Testing of Minority Groups, *Job Testing and the Disadvantaged,* 24 AM. PSYCHOLOGIST 637 (1969); Cooper & Sobol, *supra* note 80, at 1638-41. Therefore, if employers use job related tests to screen applicants, fewer blacks will be hired or promoted than under the bottom line approach, which assures proportional representation in the employer's work force.

The President of the Equal Employment Advisory Council, an employer advocacy group, speculates that "[g]iven the limited funds available to all employers, it is quite possible that funds which might otherwise have gone to training, recruitment, or other efforts to employ additional miniroties [sic] and females, or to upgrade their job related skills, will be shifted to test validation efforts." 111 LAB. REL. REP. (BNA) 3 (Sept. 6, 1982) (comment on practical effect of *Teal*).

121 *See* 457 U.S. at 463 n.8 (Powell, J., dissenting).

122 *See supra* note 111.

123 457 U.S. 440 (1982).

124 *See supra* notes 89-104 and accompanying text.

selection devices.[125] An absolute bottom line defense is also inconsistent with title VII because it fails to protect individual rights and ensure equal opportunity.[126] An intermediate approach reflecting a compromise between complete acceptance or rejection of the bottom line defense can best effectuate title VII's goals in a manner consistent with *Teal.*

This "modified bottom line defense" would apply in situations in which: (1) the plaintiff demonstrates that the employer's selection device results in a disparate impact on a protected group; and (2) the employer shows a nondiscriminatory bottom line. Under the bottom line defense rejected in *Teal,* the employer's selection device would be upheld despite its disparate impact, because of the nondiscriminatory results of the total hiring process. Under *Teal,* the employer's nondiscriminatory bottom line does not immunize him from disparate impact claims unless he demonstrates the job relatedness of the selection device.

Under the modified bottom line defense, if the plaintiff establishes a prima facie showing of disparate impact and the defendant demonstrates a nondiscriminatory bottom line, the court should apply a sliding-scale test to determine if the equality of jobs reflected by that bottom line outweighs the inequality of opportunity resulting from the disparate impact. This test should consider such factors as the severity of the disparate effect on the protected group and the availability of less discriminatory selection devices. Thus, a court should be more hesitant to accept a test that blacks pass half as often as whites than one that blacks pass four-fifths as often as whites. If a test has an extreme disparate impact, even a nondiscriminatory bottom line will not insulate the employer from claims of discrimination. This approach allows the court to consider directly the exact level of inequality of opportunity: the level of the disparate impact.[127]

A court should also consider the availability of less discriminatory selection devices in applying this sliding-scale test. The employer must show that he made a reasonable effort to find a less discriminatory selection device.[128] If an employer uses a test known to disadvantage minority groups and does not actively search for a less discriminatory

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125 *See supra* notes 110-14 and accompanying text.

126 *See supra* notes 89, 93 and accompanying text.

127 A court also should consider whether the employer knew, or should have known, that the test would probably produce a disparate impact on a protected class. If the employer was aware of this, the inequality of the opportunity is less acceptable than if the employer had no knowledge of the test's discriminatory impact. For example, evidence that blacks score worse than whites on generalized intelligence tests, *see supra* note 120, should place employers using such tests under a heavy burden of proving that equality of jobs outweighs this inequality of opportunity.

128 The Uniform Guidelines require employers to use reasonable efforts to find less discriminatory selection devices even if their tests are job related. *See* 29 C.F.R. § 1607.3(B) (1982).

alternative, the modified bottom line defense will not protect him from disparate impact claims. This step imposes on employers an affirmative obligation to pursue equal employment opportunity.

The plaintiff can rebut the defendant's showing by demonstrating the availability of a less discriminatory selection device that adequately serves the employer's need for a qualified work force. Thus, on the facts of *Teal,* the plaintiffs might prevail by arguing that their two years of experience as provisional supervisors[129] gave the employer the opportunity to select the most qualified workers for promotion without relying on the results of a discriminatory test.[130]

Even if the employer demonstrates that the equality of jobs offered by a nondiscriminatory bottom line outweighs the inequality of opportunity resulting from the disparate impact, he must still prove a reasonable connection between the selection device and job performance to prevail under the modified bottom line rule.[131] *Teal* mandates this inquiry into job relatedness.[132] A test, however, may bear a substantial relationship to job performance yet not comply with Uniform Guideline standards.[133] If the employer demonstrates that his selection device results in a bottom line that indicates equality of jobs that significantly outweighs any disparate impact, a court should apply a less stringent standard of job relatedness than if the employer did not have a satisfactory bottom line. In determining job relatedness, a court should inquire whether the test selects applicants who are more qualified than those it rejects. This standard should be implemented by referring to the Uniform Guidelines, without applying them rigidly.

Ultimately, the modified bottom line defense is more consistent with title VII's aims than is the *Teal* decision or the pure bottom line defense. Under this approach, if an employer demonstrates equality of jobs through a nondiscriminatory bottom line, a court will permit a greater, although not unlimited, degree of inequality of opportunity. Because the employer must attempt to implement the least discriminatory yet reasonable selection device, the modified bottom line defense furthers title VII's goals of ensuring employment opportunity and pro-

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129 *See supra* note 31.

130 Connecticut could have used job performance evaluations, or other subjective criteria, based on the quality of the provisional supervisors' work.

131 Commenting on the *Teal* decision, Alfred Blumrosen suggested "a 'rational relationship' standard should be applied in the absence of overall adverse impact." *See Criticism of Teal 'Bottom Line' Ruling,* 111 LAB. REL. REP. (BNA) 1, 2 (1982). The modified bottom line defense proposed in this Note differs from Blumrosen's suggestion in requiring the employer to go beyond the nondiscriminatory bottom line and actually prove that the equality of jobs outweighs the disparate impact's inequality of opportunity.

132 *Teal* holds that an employer must demonstrate the job relatedness of a selection device having disparate impact, notwithstanding a nondiscriminatory bottom line. 102 S. Ct. at 2533.

133 *See supra* note 118.

tecting individual rights to a greater extent than does an absolute bottom line defense.[134] In addition, because an employer relying on this modified defense will have a nondiscriminatory bottom line, title VII's aim of supplying jobs and protecting group rights is more readily achieved than under *Teal.*

The courts or the EEOC can develop this modified bottom line defense and still remain consistent with *Teal.* The Supreme Court remanded *Teal* to allow the lower court to determine if the test in question was job related.[135] Under *Teal* the court could apply a less stringent standard of job relatedness if the defendant meets the elements of the modified bottom line defense.[136] Alternatively, the EEOC could amend the Uniform Guidelines to apply a looser standard of job relatedness in such cases.[137]

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134 If the bottom line defense is valid, an employer has no incentive to adopt nondiscriminatory selection devices; as long as the employer can show a fair bottom line, he is insulated from disparate impact claims.

135 457 U.S. at 456.

136 *Teal* does not discuss the requirements of job relatedness, holding only that the bottom line defense cannot defeat disparate impact claims. One commentator has observed that in the aftermath of *Teal,* courts supportive of the bottom line defense may "be more inclined to find tests to be properly validated and lawful in instances where the employer's 'bottom line' is nondiscriminatory." 111 LAB. REL. REP. (BNA) 1, 3 (1982). The modified bottom line defense is superior to this ad hoe approach because it forces courts to balance the bottom line's equality of jobs and the disparate impact's inequality of opportunity *before* applying a reduced standard of job relatedness.

137 In *Griggs,* the Court held that the EEOC's guidelines are "entitled to great deference." 401 U.S. at 434. Thus, the Court should uphold the modified bottom line defense if the EEOC adopts it.