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Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges

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INTRODUCTION

President George W. Bush's recent re-nomination of 20 federal judges previously blocked by Senate Democrats, two recent vacancies on the Supreme Court, and the political showdown over filibustering judicial nominees have heightened the Congressional debate over the role ideology should play in evaluating candidates for the federal judiciary. During President Bush's first term, Senate Democrats employed filibusters to block 10 of the President's 52 nominees to the Courts of Appeals.[1] Democrats maintain that these conservative jurists hold views that are outside of the political

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1. Michael A. Fletcher, *Bush Will Renominate 20 Judges; Fights in Senate Likely Over Blocked Choices*, WASH. POST, Dec. 24, 2004, at A1.

mainstream—a charge that Republicans vociferously dispute.[2] During his recent confirmation hearings, Judge John Roberts faced intense questioning about his views on salient social issues.[3] Prominent members of both political parties predict that the next nominee to the United States Supreme Court will face a potentially acrimonious confirmation process that will probe the ideological leanings of the nominee.[4]

Amidst this politically-charged dispute over the ideologies of federal court nominees, I examine the role of judges' ideologies in case outcomes in one area of civil rights law: disparate impact employment discrimination lawsuits by African American plaintiffs under Title VII of the 1964 Civil Rights Act. Title VII disparate impact cases provide a unique window through which to observe the effect of judges' ideologies because the unsettled state of disparate impact law may give judges more individual discretion to decide such cases. The current uncertainty in disparate impact law results primarily from the adoption of the 1991 Civil Rights Act[5]; standards for evaluating disparate impact claims were significantly less ambiguous in the pre-1991 era. Therefore, a study of disparate impact cases decided before and after the 1991 Act makes it possible to test the hypothesis that lawmakers can mitigate the ideologically-driven discretion of federal judges by enacting less ambiguous standards for deciding cases.

Congress enacted the 1991 Civil Rights Act[6] to mitigate the chilling effects of two decades of federal court decisions limiting the availability of Title VII disparate impact suits challenging facially-neutral employment practices.[7] The Act specifically sought to overturn elements of the 1989 Supreme Court decision in *Wards Cove Packing Co., Inc. v. Atonio*, which restricted Title VII plaintiffs' use of statistical evidence and eliminated the burden of persuasion on employers to refute a prima facie case of disparate impact.[8] Numerous commentators have assumed that the Act's vague exceptions and ambiguous language would result in arbitrary decisions and ultimately fail to mute *Wards Cove* restrictions on disparate impact

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2. *Id.*

3. Todd S. Purdum, *With His Goal Clear, the Nominee Provides a Profile in Caution During Questioning*, N.Y. TIMES, Sept. 14, 2004, at A25 (describing intense questioning from Senator Biden on Roberts' civil rights record).

4. Michael A. Fletcher and Charles Babington, *Partisans Gear Up for High Court Fight Ahead; Activists Mobilize Over Bush's Vow to Nominate Conservative*, WASH. POST, March 13, 2005, at A5 (stating that "with Bush expected to follow through on his promise to nominate a staunch conservative to fill any Supreme Court vacancy, groups on both sides of the political spectrum are girding for an all-out battle.").

5. 42 U.S.C. § 2000e-2 (2004).

6. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (2004).

7. *See* Mojica v. Gannett Co., 986 F.2d 1158, 1168 (7th Cir. 1993) (noting that *Wards Cove* was among several cases overruled by the 1991 Civil Rights Act); Allen v. Entergy Corp., 193 F.3d 1010, 1015 (8th Cir. 1999) (stating that the "1991 Civil Rights Act expressly amended Title VII to overrule the Wards Cove analysis").

8. 490 U.S. 642 (1989).

litigation.[9] However, very little comprehensive analysis explores the extent to which the decline of successful disparate impact challenges is attributable to the shifting ideology of the federal judiciary. Because the ambiguity in disparate impact doctrine created by the 1991 Civil Rights Act is likely to facilitate ideologically-driven judicial decisions,[10] the increasingly conservative composition of the federal judiciary may explain a significant part of the decline in successful Title VII challenges to facially-neutral employment practices.[11]

This study employs various statistical techniques to test the efficacy of the 1991 Civil Rights Act in moderating the highly restrictive disparate impact regime imposed by *Wards Cove*, and to evaluate the hypothesis that political ideology should be a more powerful predictor of case outcomes following the 1991 Act. Part I of the paper describes the evolution of disparate impact doctrine from 1971 to the present. Part II analyzes data from randomly selected disparate impact cases brought by African American plaintiffs and finds that the current disparate impact doctrine emanating from the 1991 Civil Rights Act dramatically decreases the likelihood that such plaintiffs will successfully challenge facially-neutral employment practices. Two significant observations may be gleaned from Part II: first, that the ideologies of judges on the appellate panels deciding Title VII cases exert a far more significant impact on case outcomes in the post-1991 period; and, next, that one important explanation for the decline of successful disparate impact claims is that politically conservative judges decide a greater percentage of recent cases. Based on these findings, Part III argues that Congressional action to clarify disparate impact standards is essential to preserve Title VII as a conduit through which African Americans can seek redress for discrimination.

The importance of the study's central finding, that new legal standards and the increasingly conservative federal judiciary dramatically curtail successful disparate impact litigation, cannot be understated. A meaningful disparate impact doctrine is necessary to vitiate the need for plaintiffs to establish discriminatory intent by employers. The Supreme Court emphasized in *Griggs v. Duke Power Co.* that "the [1964 Civil Rights] Act proscribes not only overt discrimination but also practices

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9. *See* Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of Griggs, a Partial Return to* Wards Cove, *or All of the Above?*, 43 CASE W. RES. L. REV. 287, 350 (1993).

10. *See generally* Donald R. Songer, Martha Humphries Ginn, and Tammy A. Sarver, *Do Judges Follow the Law When There is No Fear of Reversal?*, 24 JUST. SYS. J. 137, 137–62 (2003).

11. Numerous commentators have posited that federal judges appointed by Republican presidents are more skeptical of civil rights claims than Democratic appointees. *See, e.g.*, Timothy B. Tomasi & Jess A. Velona, *All the President's Men: A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 776–77 (1987) (observing that Reagan appointees were hostile to the claims of civil rights plaintiffs).

that are fair in form, but discriminatory in operation."[12] Without an effective method for challenging facially-neutral employment practices, successful challenges will be limited to the rare cases of unsophisticated employers who flaunt their inclinations to discriminate. These limited "smoking gun" cases cannot eradicate unconscious discrimination or remedy disparate outcomes emanating from social conditions wrought by the pre-1964 legal subjugation of African Americans.[13] Absent Congressional intervention, Title VII litigation will not be an effective instrument with which "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[14]

I. THE DEVELOPMENT OF VAGUE LEGAL STANDARDS

A brief review of important elements of the Title VII disparate impact doctrine reveals the ambiguities in current legal standards.

A. *Establishment of Title VII Disparate Impact Doctrine*

The Supreme Court established the basic framework for disparate impact adjudication in *Griggs v. Duke Power Co.* The *Griggs* case arose from a challenge by African American employees of a generating plant operated by Duke Power. Duke Power required workers to obtain a high school diploma or pass an intelligence test in order to transfer into certain jobs at the plant.[15] The employees presented evidence that African American workers were less likely to meet the diploma and intelligence test requirements than White employees. Applying the standard outlined below, the *Griggs* court concluded that Duke Power's requirements violated Title VII because they adversely affected African American workers and were not sufficiently related to job performance.[16]

Under *Griggs*, plaintiffs must initially establish a prima facie case of discrimination by presenting statistical evidence showing that a facially-neutral employment practice had an adverse impact on African American employees or job applicants.[17] The *Griggs* decision does not require plaintiffs

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12. 401 U.S. 424, 431 (1971).

13. Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1152 (1991) (asserting that "an intent standard will rarely be satisfied").

14. *Griggs*, 401 U.S. at 429–30.

15. *Id.* at 425–26.

16. *Id.*

17. *See* Furnco Constr. Corp. v. Waters et al., 438 U.S. 567, 583 (1978) (stating that "[a]s set out by the Court in Griggs v. Duke Power Co., to establish a prima facie case on a disparate-impact claim, a plaintiff need not show that the employer had a discriminatory

to pinpoint the exact policy that adversely affected minority applicants; plaintiffs may submit evidence of an adverse impact generally stemming from vague or subjective hiring and promotion policies. Following the *Griggs* approach, the Ninth Circuit Court of Appeals noted that "[s]ubjective job criteria . . . provides a convenient pretext for discriminatory practices."[18]

After identifying an objectionable employment practice, plaintiffs must present statistical evidence establishing a prima facie case of discrimination. The Supreme Court held in *McDonnell Douglas Corp. v. Green* that to establish a prima facie case, plaintiffs must demonstrate that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.[19] To determine the type of statistical evidence necessary to establish a prima facie case of disparate impact, the *Griggs* court held that guidelines issued by the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcement of the Civil Rights Act, should receive great deference.[20] The Uniform Guidelines of Employee Selection Procedures issued by the EEOC codify a "four-fifths rule."[21] The rule states that a selection rate for any race which is less than four-fifths of the rate for the race with the highest rate will generally be regarded as evidence of adverse impact.[22] In addition to the EEOC guidelines, the Supreme Court recognized in *Hazelwood School District v. United States* that a statistical disparity of more than two standard deviations from the mean will also create an inference of discrimination.[23]

Once plaintiffs establish a prima facie case of discrimination, the burden of persuasion shifts to the employer to establish that the challenged practice was a business necessity.[24] The *Griggs* court emphasized that the employer is required to demonstrate that "any given requirement must have a manifest relationship to the employment in question" or have a "demonstrable relationship to successful performance of the jobs for which [the practice is] used."[25] Finally, the Supreme Court ruled in *Albemarle Paper Co. v. Moody* that even if employers met their burden of demonstrating a manifest relationship, plaintiffs could still prevail under the *Griggs* analysis

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intent but need only demonstrate that a particular practice in actuality 'operates to exclude Negroes.' ").

18. Nanty v. Barrows Co., 660 F.2d 1327, 1334 (9th Cir. 1981).
19. 411 U.S. 792, 802 (1973).
20. *Griggs*, 401 U.S. at 433–34.
21. 29 C.F.R. § 1607.4(D) (1979).
22. *Id.*
23. 433 U.S. 299, 311 (1977).
24. *Griggs*, 401 U.S. at 431.
25. *Id.* at 432.

by showing that the employer was using the practice in question as a mere pretext for discrimination.[26]

B. Wards Cove v. Atonio *Places a Higher Burden on Plaintiffs*

The Supreme Court altered the *Griggs* disparate impact framework and expressly limited the availability of the disparate impact doctrine in its 1989 decision *Wards Cove Packing Co., Inc. v. Atonio*.[27] The Court restricted the ability of plaintiffs to establish disparate impact emanating from subjective hiring or promotion practices. Under *Wards Cove*, plaintiffs are "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[28] The *Wards Cove* decision requires plaintiffs to causally link the identified employment practice with a demonstrated adverse impact.[29]

Wards Cove also restricts the type of statistical evidence plaintiffs may tender to demonstrate adverse impact on racial minorities. The *Wards Cove* Court asserted that previous decisions allowing plaintiffs to establish a prima facie case of disparate impact merely by showing a relatively low percentage of minority workers "fundamentally misconceived the role of statistics in employment discrimination cases."[30] The Court restricted the use of statistical evidence to comparisons between the racial composition of the at-issue jobs and the racial composition of the *qualified* population in the relevant labor market.[31]

The *Wards Cove* Court also eased the burden on employers to justify challenged employment practices after the establishment of a prima facie case of disparate impact. The Court held that employers must only carry the "burden of producing evidence of a business justification for their employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff."[32] The Court emphasized that "[t]he dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer .... [There is] no requirement that the challenged practice is 'essential' or 'indispensable' to the employer's business ...."[33]

If employers articulate a legitimate employment goal, *Wards Cove* allows plaintiffs to prevail only if they prove that "other tests or selection

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26. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

27. 490 U.S. 642 (1989).

28. *Wards Cove*, 490 U.S. at 656 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988)).

29. *Id.* at 657.

30. *Id.* at 650 (quoting Hazelwood School Dist. V. United States, 433 U.S. 299, 308 (1977)).

31. *Id.* at 650–51.

32. *Id.* at 659.

33. *Id.*

devices, without a similarly undesirable racial effect, would also serve the employer's legitimate hiring interests."[34] The Court stressed that plaintiffs will not meet this burden unless their proposed alternative procedures are equally effective as the challenged procedure and not significantly more expensive.[35]

C. *1991 Civil Rights Act Reverses Part of the* Wards Cove *Analysis*

In response to the Supreme Court's restrictive interpretation of disparate impact claims, Congress reversed parts of the *Wards Cove* framework by passing the 1991 Civil Rights Act.[36] The ambiguous language and intent of the Act confused the state of disparate impact law and allowed broad judicial discretion. The Act codified the *Wards Cove* requirement that plaintiffs demonstrate a causal link between a specific employment practice and the alleged disparate impact.[37] However, Congress created an exception for criteria that "are not capable of separation for analysis."[38] The meaning and scope of this exception have been subject to significant debate among scholars and judges.[39]

Similarly, the Act's mandate to replace the *Wards Cove* "legitimate business justification" defense with a defense requiring the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"[40] is also subject to conflicting interpretations by courts. The Act's official legislative history declares that interpretation of the terms "business necessity" and "job related" should "have the meaning enunciated by the Supreme Court in *Griggs* and in other Supreme Court decisions prior to *Wards Cove*."[41] Prior Supreme Court decisions enumerate conflicting interpretations of these terms. For example, in *Albemarle Paper Co. v. Moody*, the Court held that employers must validate their challenged employment practices according to the EEOC's "guidelines for employers seeking to determine, through professional validation studies, whether their employment tests are job

34. *Id.* at 660 (quoting Albemarle Paper Co. v. Moody, 442 U.S. 405, 425 (1975)).

35. *Id.* at 661.

36. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (2004).

37. *Id.*

38. *See id.* at § 2000e-2(k)(B)(i) (2004).

39. *See, e.g.*, Paul N. Cox, *On a Blindered Impact Model: A Response*, 46 DEPAUL L. REV. 265, 267–68 (1997) (discussing Professors Ramona Paetzold and Steven Wilborn's proposed "stratification" and "concurrence" lenses that may be used when courts must aggregate or disaggregate certain criteria for purposes of disparate impact analysis).

40. Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 455 (1995) (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. V 1993)).

41. 137 CONG. REC. S15233, 15233–34 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth).

related."[42] Conversely, the Court ignored the validation guidelines in *Washington v. Davis* and held that employment practices must only have a reasonable relationship to the job.[43] The ambiguity created by the Act's instruction for courts to make decisions based on conflicting precedents and vague exceptions encourages broad judicial discretion based on the ideologies of individual judges deciding Title VII disparate impact cases.

II. METHODS AND RESULTS

To test the effect of the *Wards Cove* decision and the 1991 Civil Rights Act on disparate impact litigation and the influence of judges' political ideologies, I created a database of disparate impact cases decided by the U.S. Circuit Courts of Appeals. The unit of analysis in this study is the decision by a Circuit Court of Appeals panel to approve or invalidate an employment practice challenged by an African American plaintiff under the Title VII disparate impact doctrine. Appeals court decisions that did not either enter a final judgment on the challenged employment practice or remand to the district court with instructions to enter a judgment were not included in the study.[44] Similarly, the study does not address class certification actions or litigation over the legitimacy of bona fide seniority systems.[45]

Data for this study were collected and analyzed from six circuits of the United States Courts of Appeals: the Second, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits. These circuit courts were chosen based on two criteria: geographic diversity[46] and the presence of enough disparate impact cases brought by African American plaintiffs within the circuit to permit meaningful analysis. While this geographic diversity allows comparisons across regions, the selected circuits were not chosen at random and the study does not purport to make any claims about the treatment of cases in circuits excluded from the analysis. A total of 97 cases from these six circuits were selected for this analysis.

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42. *Albemarle*, 422 U.S. at 430–31.

43. 426 U.S. 229, 250 (1976).

44. As a result, several issues tangentially related to disparate impact doctrine were not included in the data set. For example, decisions solely concerned with the appropriate standard of appellate review or the type of statistical evidence to be used in a disparate impact challenge were excluded.

45. *See* Pullman-Standard v. Swint et al., 456 U.S. 273, 277 (1982) (holding that bona fide seniority systems cannot be attacked on disparate impact grounds unless the company adopted them specifically because of their discriminatory impact. This paper is not concerned with cases assessing the intent of employers.).

46. The selected circuits are headquartered in New York City, Richmond, New Orleans, Cincinnati, Chicago, San Francisco and Atlanta, respectively, and represent every major region of the country.

A. *Data Sources*

Information for research on these court decisions was collected using the online legal database Lexis Nexis. Various searches were used to compile a list of all disparate impact cases brought by African American plaintiffs for two time periods: January 1, 1977 through December 31, 1988 (cases following the *Griggs* and *Hazelwood* decisions, but before *Wards Cove*) and January 1, 1992 through December 31, 2000 (cases following the 1991 Civil Rights Act and the *Wards Cove* decision). The data set does not represent a random sample of all disparate impact cases within these circuits for the time period of the study. To ensure that there were a sufficient number of cases from each circuit for cross-circuit analysis, the database includes all disparate impact cases brought by African Americans in the three circuits with the lowest number of such cases: the Second, Seventh and Eleventh Circuits. These three circuits are overrepresented in the database.

For the Ninth, Fifth and Sixth Circuits, which contained a larger number of disparate impact decisions, systematic samples of cases were selected for coding based on the guidelines enumerated by Earl Babbie.[47] In each of these three circuits, an interval was chosen by dividing the number of total cases in the circuit by the number of desired cases (25). A random number within the total range of cases was generated and used as the starting point for selecting cases.[48] Subsequent cases were selected by adding the interval to the previous case. For example, if a circuit had 50 cases and the generated random number was 30, the first selected case would be case 30, then case 32, then case 34, etc. In practice, systematic sampling is virtually identical to random sampling.[49]

Information coded for each case includes the disposition of the case, the race and gender of the plaintiff, the type of defendant, the type of challenged employment practice, whether the plaintiff submitted evidence satisfying either the four-fifths rule or two standard deviations criteria, whether the plaintiff alleged past discrimination by the employer, and the political affiliations of the judges on the panel who decided the case. Using the Database on the Attributes of United States Appeals Court Judges compiled by Dr. Gerard Grisky and Dr. Gary Zuk,[50] information on the political affiliation of the panel judges was added to the database. The political affiliation of the panel judges allowed the analysis to test the

47. *See generally* EARL BABBIE, THE PRACTICE OF SOCIAL SCIENCE RESEARCH (Eve Howard ed., Wadsworth Publishing 10th ed. 2004).

48. *See id.* at 203 (stating "[i]n systematic sampling every kth element in the total list is chosen (systematically) for inclusion in the sample"). A random number program on a TI-83 graphing calculator was used to generate the starting number for this process.

49. *Id.* at 203–04.

50. Gerard Grisky and Gary Zuk, *Database on the Attributes of US Appeals Court Judges*, NSF Grant # SBR93-11999 (2000).

hypothesis that the ambiguity in post-1991 disparate impact law provides for the influence of judges' political ideologies in case outcomes.

B. *Results*

Since 1977, several notable patterns of plaintiffs' success rates in disparate impact cases are apparent. The data reveal that the *Wards Cove* decision dramatically reduced the likelihood that plaintiffs will prevail in disparate impact litigation. The data also demonstrate that case outcomes are increasingly correlated with the political ideologies of Circuit judges, suggesting that the current ambiguous disparate impact legal standards result in greater ideological discretion. As demonstrated by Table 1, plaintiffs successfully challenged employment practices on disparate impact grounds in 20 of the 97 cases, or 20.6%. The data reveal a striking discrepancy, however, between cases brought before the *Wards Cove* decision and cases decided after the decision. Plaintiffs won 32.7% of pre-*Wards Cove* cases but won only 6.7% of cases decided after *Wards Cove* and the 1991 Civil Rights Act. Plaintiffs were five times more likely to prevail under the pre-*Wards Cove* framework.

TABLE 1
PLAINTIFF SUCCESS RATE

	PLAINTIFF WINS	CASES	PERCENTAGE
PRE-WARDS COVE	17	52	32.7%
POST-WARDS COVE	3	45	6.7%
OVERALL	20	97	20.6%

Table 2 reveals the impact of the *Wards Cove* decision on disparate impact cases, both at the initial stage of presenting statistical evidence and after plaintiffs establish a prima facie case of disparate impact. The study suggests that the *Wards Cove* requirement that plaintiffs' statistical evidence must involve comparisons with the *qualified* relevant labor pool[51] imposes a nearly insurmountable burden on plaintiffs. Disparate impact plaintiffs were able to present evidence meeting the EEOC guidelines in only 5 of 45 post-1991 cases (11.1%), compared with 19 of 52 pre-Wards Cove cases (37%). Plaintiffs who fail to meet this evidentiary burden rarely establish a

51. *Wards Cove*, 490 U.S. at 650.

prima facie case of disparate impact.[52] Therefore, the *Wards Cove* qualified labor pool requirement essentially eliminates eight out of nine disparate impact plaintiffs before employers ever have to justify their challenged employment practice.

TABLE 2
PLAINTIFF PRESENTS EVIDENCE SATISFYING EEOC GUIDELINES

.	EVIDENCE SATISFIES 4/5 RULE OR TWO STANDARD DEVIATIONS TEST	CASES	PERCENTAGE
Pre-Wards Cove	19	52	36.2%
Post-Wards Cove	5	45	11.1%
Overall	24	97	24.7%

For cases involving plaintiffs who satisfy the *Wards Cove* evidentiary burden and establish a prima facie case, the Supreme Court held that employers only have a burden of production to present a reasonable justification for business practices[53] instead of a burden of persuasion to show that the challenged practice has a manifest relationship to the employment in question.[54] The study shows that the *Wards Cove* rule significantly improved employers' chances of prevailing after plaintiffs established a prima facie case of disparate impact. Table 3 illustrates that employers were 2.6 times more likely to provide adequate justification for their challenged employment practices under the *Wards Cove* burden of production standard than under the *Griggs* "manifest relationship" standard. This result comports with the intention of the Supreme Court's decision in *Wards Cove* to ease the burden on employers in disparate impact litigation.

52. Plaintiffs who did not meet the EEOC evidentiary guidelines established a prima facie case in only 9 of 72 cases.

53. *Wards Cove*, 490 U.S. at 659.

54. *Griggs*, 401 U.S. at 432.

TABLE 3
RATES OF ESTABLISHING BUSINESS NECESSITY
FOLLOWING A PRIMA FACIE CASE

	PLAINTIFF ESTABLISHED PRIMA FACIE CASE	EMPLOYER EST. BUSINESS NECESSITY	PERCENTAGE OF PRIMA FACIE CASES SUCCESSFULLY REBUTTED
Pre-Wards Cove	24	7	29.2%
Post-Wards Cove	8	6	75%
Overall	32	13	40.6%

The chilling effect of *Wards Cove* on Title VII disparate impact litigation is apparent across the different circuits included in the study. Table 4 reveals substantial variations in the application of the *Griggs* standard between the six different Circuit Courts selected for this study. The success rates of plaintiffs in the pre-*Wards Cove* period varied from 0% in the Ninth Circuit to 86% in the Eleventh Circuit. These disparities were largely eliminated by the Supreme Court's decision in *Wards Cove*, however. From 1992–2000, plaintiffs rarely prevailed in any circuit.

TABLE 4
PLAINTIFF SUCCESS RATES BY CIRCUIT

	PRE-WARDS COVE	POST-WARDS COVE	OVERALL
2nd Circuit	4/5 = 80%	0/4 = 0%	4/9 = 44%
5th Circuit/11th Circuit	11/24 = 45.8%	0/6 = 0%	11/30 = 36.7%
6th Circuit	1/9 = 11.1%	2/16 = 12.5%	3/25 = 12%
7th Circuit	1/5 = 20%	1/5 = 20%	2/10 = 20%
9th Circuit	0/9 = 0%	0/14 = 0%	0/23 = 0%

In addition to demonstrating the profound chilling effect of *Wards Cove*, the study shows the increasing influence of the political ideologies of the judges deciding Title VII cases. The data supports the intuition that judges appointed by Democratic presidents may be more sympathetic to claims of race discrimination than judges appointed by Republican presidents. The results are displayed in Table 5. Overall, Circuit panels consisting of a majority of Democratic judges were more than twice as likely to rule in favor of plaintiffs as cases decided by majority Republican

panels. Furthermore, the impact of political ideology is only apparent in the post-1991 period.

Since the 1991 Civil Rights Act, 20% of plaintiffs prevailed in cases heard before majority Democratic panels. By contrast, plaintiffs did not win any of the post-Act cases argued before majority Republican panels. The finding of the increased impact of judges' political ideologies following *Wards Cove* and the 1991 Civil Rights Act supports the hypothesis that the current status of the legal standards governing Title VII litigation is unclear. Significant scholarly research demonstrates that as the governing legal rules become more ambiguous, the effect of a judge's political ideology on case outcomes increases.[55] The data suggests that judges are using the legal ambiguity surrounding post-1991 disparate impact litigation to reach outcomes consistent with their political ideologies.

TABLE 5
PANEL IDEOLOGY

	PLAINTIFF WINS	CASES	PERCENTAGE
PRE-WARDS COVE			
0 or 1 Democrats on Panel	6	19	31.6%
2 or 3 Democrats on Panel	11	33	33.3%
POST-WARDS COVE			
0 or 1 Democrats on Panel	0	30	0%
2 or 3 Democrats on Panel	3	15	20%
OVERALL			
0 or 1 Democrats on Panel	6	49	12.2%
2 or 3 Democrats on Panel	14	48	29.2%

C. *Logistic Regression Analysis*

The analysis of disparate impact cases reveals the dramatic chilling effect of *Wards Cove* and the increased impact of political ideology of the deciding panel since the 1991 Civil Rights Act. However, these correlations alone are insufficient to suggest causation. It is possible that the effects observed here result from an unequal distribution of the quality of disparate impact cases. For example, post-1991 plaintiffs in cases argued before majority Democratic panels may, on average, have presented better

55. *See* Songer et al., *supra* note 10, at 137–62.

statistical evidence than cases heard by Republican panels. Multiple regression techniques, which measure the impact of certain variables while controlling for all other variables, are necessary to make a more definitive judgment about the relevant effect of different variables on the success of African American plaintiffs in disparate impact litigation.

The disparate impact database facilitates the use of logistic regression techniques to determine the relative influence and statistical significance of numerous variables on the outcomes of Title VII disparate impact litigation. This paper utilizes three different regression equations. To test the effect of the new legal doctrine established by *Wards Cove* and the 1991 Civil Rights Act, the study employed a logistic regression model encompassing all cases in the database. The regression equation utilized nine variables relating to disparate impact cases. These variables included: whether the defendant is a government or private entity, the quality and type of evidence presented, the type of employment practice being challenged, whether the plaintiff also presented evidence of specific past acts of discrimination by the employer, the ideological disposition of the judges on the appellate panel that heard the case, the sex of the plaintiff, and the operative legal standard under which the case was judged. Controlling for these relevant case factors, the equation reveals that post-1991 disparate impact legal doctrine dramatically restricts the ability of plaintiffs to successfully challenge facially-neutral employment practices.

This overall equation included a variable for the political ideology of the panel deciding the case, which reveals the effect of political ideology on all disparate impact decisions over the entire period of the study. To test whether this influence is more pronounced following the 1991 Civil Rights Act, I compared two additional regression models. The two models each contained the same case variables as the overall model. One equation consisted entirely of cases prior to *Wards Cove*, and the second model included only post-1991 cases. A comparison of these models suggests that political ideologies of judges profoundly affect post-1991 disparate impact decisions. The methodology and results of these equations are presented below.

All three equations are based on the same scientific methods. Since the dependent variable (whether or not plaintiffs successfully challenged an employment practice) is dichotomous, and ordinary least squares is inappropriate, I used logistic regression, a maximum likelihood technique.[56] This method produces parameter estimates for the model's independent variables in terms of each variable's contribution to the probability that the dependent variable falls into one of the designated categories (finding for the plaintiff or the employer). For each independent variable, a maximum likelihood estimate (MLE) is calculated, along

56. *See generally* JOHN H. ALDRICH & FORREST D. NELSON, LINEAR PROBABILITY, LOGIT AND PROBIT MODELS, (Sage Publications 1984).

with its standard error.[57] The MLE's represent the change in the logistic function that occurs from a one-unit change in each independent variable. I also present the odds ratios for each variable.[58] The numerical values of the odds ratios can be used comparatively, as a way to describe the strength of their effects on the dependent variable.[59] Each variable's impact will be assessed using these odds ratios. The analysis was performed in SPSS.

The results of the overall logit analysis, which encompasses all cases in the database, are presented in Table 6. Generally, results that are significant at or beyond .05 or .10 are considered to be statistically significant.[60] A significance level of .10 indicates that there is less than 10 percent probability that the observed results are attributable to chance. Results that do not meet this significance level may be suggestive of the variable's influence, although there is a greater likelihood that the results occurred randomly.

TABLE 6
LOGISTIC REGRESSION MODEL: ALL CASES 1977–2000

VARIABLE	COEFFICIENT	STANDARD ERROR	SIGNIFICANCE LEVEL	ODDS RATIO
4/5 Rule or Two Std Deviations	4.36	.96	.00	78.69
Evid. of Past Discrimination	.59	1.08	.29	1.80
Test	.51	.96	.29	1.67
Non-Test Criteria	1.33	1.37	.16	3.79
Black Female Plaintiff	.56	1.04	.29	1.75
Government Defendant	-.26	.92	.78	.77
Pre-Wards Cove	.76	1.01	.22	2.13
Democrat Panel	.67	.86	.21	1.96

Not surprisingly, the variable with the greatest predictive effect on the outcome of disparate impact cases is whether plaintiffs presented evidence satisfying the EEOC's four-fifths disparate impact guidelines or the

57. *See id.*

58. An odds ratio is a ratio of the odds at two different values of the independent variable. Thus, the odds ratio equals the antilogarithm (e to the power) of the MLE coefficient.

59. LAWRENCE C. HAMILTON, REGRESSION WITH GRAPHICS: A SECOND COURSE IN APPLIED STATISTICS, (Brooks/Cole Publishing Co. 1992).

60. *Id.*

Supreme Court's *Hazelwood* "two standard deviation" test. Controlling for all other variables in the model, courts are 78 times more likely to invalidate an employment practice when plaintiffs presented evidence satisfying these tests than when they did not present such evidence. This result is significant beyond the .001 level, indicating there is less than a one in 1,000 chance that the observed result occurred randomly. This finding highlights the profound importance of statistics in Title VII litigation; plaintiffs are virtually assured of defeat if they do not present evidence satisfying the EEOC guidelines.[61] This result also suggests the powerfully deleterious impact of the new *Wards Cove* evidentiary standard on Title VII plaintiffs. Under *Wards Cove*, plaintiffs must identify the qualified relevant labor pool with which to draw statistical comparisons. One would expect that identifying, compiling and analyzing data on the segment of the population that courts will deem "qualified" for a certain job may be a daunting challenge for many plaintiffs.

Also, unsurprisingly, the data shows that plaintiffs had more success challenging specific employment practices than alleging that vague or subjective practices created an impermissible disparate impact. Plaintiffs challenging non-test criteria, such as a high school graduation requirement, were 3.8 times more likely to prevail than other plaintiffs ($p < .16$).[62] This finding is not surprising given the skepticism expressed by the Supreme Court towards the necessity of having a specific degree to perform many kinds of work.[63]

Finally, the results of the logit analysis reveal the effect of the *Wards Cove* decision on disparate impact suits. Controlling for all other variables, courts were 2.13 times more likely to invalidate employment practices before the *Wards Cove* decision. There is good reason to suspect that the demonstrated effect of *Wards Cove* in the model significantly underestimates its impact. By requiring plaintiffs to identify a qualified relevant labor pool with which to draw statistical comparisons, *Wards Cove* is expected to drastically restrict the ability of plaintiffs to present evidence satisfying the EEOC's "four-fifths" disparate impact guideline. However, this effect is not attributed to the *Wards Cove* decision in the regression model because the model controls separately for whether plaintiffs presented acceptable statistical evidence. The odds multiplier of 2.13 calculated by the regression analysis only represents the significance of the new doctrine in the final stage of disparate impact litigation.

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61. Plaintiffs who did not present evidence satisfying either the four-fifths or two standard deviations criteria lost 70 of 72 cases (97.2%).

62. Although this finding is significant beyond a .05 level, it is highly suggestive of the variable's effect.

63. *See Griggs*, 401 U.S. at 436 (holding that employer "must measure the person for the job and not the person in the abstract") and at 431 (observing that employees who did not meet the high school diploma requirement had satisfactory performance records).

After a plaintiff establishes a prima facie case, the court's inquiry focuses on whether the employer can justify the challenged policy, and whether plaintiffs can demonstrate that this justification is pre-textual. At this stage of litigation, *Wards Cove* eases the burden on employers and heightens the burden on litigants. The calculated odds multiplier only illustrates the impact *Wards Cove* exerts at this final stage of disparate impact litigation. The 1991 Civil Rights Act was intended to reverse this aspect of the *Wards Cove* decision. The demonstrated impact of the *Wards Cove* variable suggests that the Act did not accomplish its aim. Some federal judges continue to apply the restrictive doctrine announced in *Wards Cove* instead of the more permissive standard prescribed by the Civil Rights Act.

To test the extent to which the failure of the 1991 Civil Rights Act to reverse the *Wards Cove* decision is attributable to the increasingly conservative federal judiciary, I compared two additional regression models. The models contain identical variables to the overall regression model, but are separated by time period. The first model contains all cases in the dataset decided before *Wards Cove*, and the second model contains all cases decided subsequent to the 1991 Civil Rights Act. The results of these two logit equations are presented in Tables 7 and 8.

TABLE 7
LOGISTIC REGRESSION: 1977–1988 CASES (PRE-*WARDS COVE*)

VARIABLE	COEFFICIENT	STANDARD ERROR	SIGNIFICANCE LEVEL	ODDS RATIO
4/5 Rule or 2 Std Deviations	3.71	1.06	.00	40.75
Evid. of Past Discrimination	.47	1.60	.35	1.60
Test	.29	.99	.38	1.34
Non-Test Criteria	1.62	1.51	.14	5.03
Plaintiff B/Female	.93	1.08	.19	2.54
Govt Defendant	-.19	1.01	.85	.83
Democrat Panel	-.12	.93	.45	.89

TABLE 8
LOGISTIC REGRESSION: 1992–2000 CASES
(POST-1991 CIVIL RIGHTS ACT)

VARIABLE	COEFFICIENT	STANDARD ERROR	SIGNIFICANCE LEVEL	ODDS RATIO
4/5 Rule or 2 Std Deviations	4.61	1.07	.00	100.83
Evid. of Past Discrimination	.54	2.57	.42	1.72
Test	1.25	3.10	.34	3.50
Non-Test Criteria	.22	4.06	.48	1.25
Plaintiff B/Female	-.04	2.36	.49	.96
Govt Defendant	.28	2.09	.89	1.33
Democrat Panel	1.34	2.30	.28	3.81

A comparison of the two regression equations illustrates that the political ideologies of judges deciding disparate impact cases have a much greater impact following adoption of the 1991 Civil Rights Act. Controlling for all other variables in the model, the party affiliation of the majority of judges on the appellate panel had no discernable impact on case outcomes from 1977–1988. However, in the post-1991 period, plaintiffs were nearly 4 times more likely to prevail in cases decided by majority Democratic panels. In the post-1991 period, the political ideology of the appellate panel was the variable with the second-greatest predictive force in determining the outcome of disparate impact cases. Although this variable is not statistically significant due to the small sample of appellate disparate impact decisions since 1991, the data suggest that judges' ideologies powerfully impact post-1991 case outcomes. By contrast, the data reveal absolutely zero impact of judges ideologies in the pre-*Wards Cove* time period.

The influence of ideology in the post-Act period is likely attributable to the vague language of the Civil Rights Act[64] and its direction for judges to decide cases in accordance with past precedents. Because of the conflicting nature of these precedents, judges are likely to rely on cases that reach outcomes consistent with their personal preferences. Scholars have previously posited that the Act's vague language may facilitate inconsistent application of the doctrine because judges pick and choose among past decisions.[65] The results of this analysis bolster this hypothesis and con-

64. *See* Browne, *supra* note 9, at 350 (stating that "the Act 'codified' case law that was far from harmonious.").

65. *Id.*

firm that judges' political affiliations significantly affect the success of disparate impact challenges.

Furthermore, judicial decision-making does not appear arbitrary—it is systematically linked to partisan affiliation. Controlling for myriad factors relating to the objective strength of plaintiffs' cases, Democratic judges were far more likely to decide disparate impact cases in favor of plaintiffs than Republican judges following *Wards Cove*.[66] These results suggest that the decreasing success of African American disparate impact plaintiffs may be significantly attributable to the increasingly conservative federal judiciary. The overall success rate for African American plaintiffs in disparate impact cases fell precipitously from 33% in pre-*Wards Cove* litigation to less than 7% in post-1991 cases. However, the success rate of plaintiffs with the good fortune to argue their cases in front of majority-Democratic panels only fell from 33% to 20%. The overall drop in plaintiff success exists in part because majority-Republican panels decided a far higher percentage of cases in the post-1991 period (67%) than in the pre-*Wards Cove* period (37%).[67] The study shows that a major cause of the diminished success in African American disparate impact challenges is not only the new legal standards per se, but the ambiguity that allows an increasingly conservative federal judiciary to restrict disparate impact doctrine.

This finding portends an ominous future for Title VII disparate impact litigation. The increasingly conservative federal judiciary should be expected to further restrict the application of disparate impact doctrine. Due to the conservative appellate appointments by President George W. Bush, the federal judiciary is presumably more conservative today than in 2000, the last year included in this study. One would expect an even higher percentage of future cases to be decided by conservative panels disposed to rule against disparate impact plaintiffs.

III. ARGUMENT FOR UNAMBIGUOUS DISPARATE IMPACT STANDARDS

The results of this study demonstrate that African Americans challenging employment practices under Title VII have little chance of success. Black plaintiffs were successful in only 6% of disparate impact cases decided by the Courts of Appeals in the post-1991 period. The current unavailability of disparate impact doctrine is disturbing for three principal reasons.

First, without a meaningful opportunity to show disparate impact, plaintiffs facing discrimination must establish an employer's discriminatory intent. A showing of discriminatory intent is onerous and will result in

66. *See* Table 8: since the passage of the 1991 Civil Rights Act, Democratic judges found in favor of plaintiffs 3.81 times as often as Republican judges.

67. *See* Table 5.

redress for plaintiffs in only an extremely limited number of "smoking gun" cases. Second, the demise of disparate impact doctrine eviscerates any remedy against practices that disadvantage African Americans based on social inequalities, or against employers who unconsciously discriminate. Finally, this study reveals that the post-1991 disparate impact doctrine is sufficiently ambiguous to allow judges' political ideologies to imbue their decisions. Given the increasingly conservative federal judiciary, the availability of disparate impact challenges to facially-neutral employment practices may be restricted even further. Congress should clarify disparate impact standards to ensure that Title VII remains a viable tool for eliminating intentional and unconscious discrimination.

A. *Proving Discriminatory Intent is Not a Viable Alternative to Disparate Impact*

Numerous commentators assert that an intent requirement would severely limit the reach of Title VII.[68] Mandating a finding of discriminatory intent restricts successful challenges of employment practices to rare cases of unsophisticated employers who flaunt their inclinations to discriminate. The *Griggs* court recognized that disparate impact doctrine is essential to providing a meaningful avenue for challenging discriminatory employment practices. The Court emphasized that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups ... Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[69]

The Supreme Court's 1976 decision in *Washington v. Davis* illustrates the chilling effect the intent requirement has on disparate impact litigation. The *Davis* court held that disparate impact plaintiffs challenging employment practices under the Equal Protection Clause of the 14th Amendment do not provoke strict scrutiny of the challenged employment practice without showing an employer's intent to discriminate.[70] The plaintiffs, a class of African American applicants to the Washington, DC police department, challenged the department's use of a written test in making employment decisions.[71] African Americans failed the test at a rate 4 times higher than Whites.[72] Despite this adverse impact on Black applicants, the Court refused to invoke strict scrutiny due to the test's facially-

68. *See* Turner, *supra* note 40, at 384. *See also* Eisenberg & Johnson, *supra* note 13, at 1152.

69. *Griggs*, 401 U.S. at 432.

70. *Davis*, 426 U.S. 229 (1976).

71. *Id.*

72. *Id.* at 237.

neutral character.[73] The Court emphatically stated that disparate impact "is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[74] In the 28 years since the *Washington v. Davis* decision, no plaintiff has ever satisfied the Court's intent requirement in a constitutional disparate impact action.

The restrictive Title VII disparate impact doctrine applied by courts since the *Wards Cove* decision and the 1991 Civil Rights Act precludes almost all challenges to facially-neutral employment practices.[75] Absent Congressional intervention, plaintiffs will be forced to rely on proving the discriminatory intent of employers. Past cases and scholarly analysis suggest that proving discriminatory intent is not a viable alternative for African Americans facing employment discrimination.[76]

B. *Disparate Impact Doctrine is Necessary to Mitigate Social Inequality*

Even if plaintiffs could prove discriminatory intent in cases of intentional discrimination, a robust disparate impact doctrine is necessary to address the adverse impact engendered by unconscious racial bias and the effects of the historical subjugation of African Americans. Eradication of barriers to employment opportunities and the integration of African Americans into the workforce were central tenants of the 1964 Civil Rights Act.[77] Senator Hubert Humphrey, one of the chief sponsors of the Act, asserted during floor debate on the bill that "[t]he crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them."[78]

African Americans continue to face barriers to the employment opportunities described by Senator Humphrey. Tremendous inequality persists in educational opportunities and professional attainment. The most recent study by the Civil Rights Project at Harvard University found that 70% of minority children attend American schools with majority-minority populations.[79] More than one-third of these children attend schools that are comprised of at least 90% African American students.[80] African American students continue to score significantly lower than White students on standardized tests used in college and graduate

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73. *Id.* at 247–48.

74. *Id.* at 242.

75. *See* Table 5 (only three out of forty-five African American disparate impact plaintiffs have prevailed since 1991 (7%); over 93% have lost).

76. *See, e.g.*, Browne, *supra* note 9.

77. 110 CONG. REC. 6548 (1964)

78. 110 CONG. REC. 6548 (1964) (remarks of Senator Humphrey).

79. Peter Applebome, *What Did We Just Learn*, N.Y. TIMES, Dec. 22, 2002, § 4, at 3.

80. *Id.*

school admissions.[81] Furthermore, these trends have been increasing in the past decade: the gap in SAT scores between White and Black students rose from 187 points in 1993 to 206 points by 2003.[82] School segregation is also on the rise.[83]

Given these disparities, it is not surprising that Black Americans have not attained professional parity with Whites. According to the 2000 census, the median income for African American households was $15,000 less than the median income for White households.[84] The Family of Four Project at the Heritage Foundation calculated that the average White family of four has a net worth of over $140,000 while the net worth of an average four-person African American family is only $22,230.[85] Poor socioeconomic status, in conjunction with statistics presented above illustrating educational disparity for African Americans, suggest that Black applicants remain susceptible to being adversely impacted by facially-neutral barriers to employment opportunity. Intelligence and aptitude tests, as well as requirements of certain educational degrees or prior job experience, are likely to disproportionately exclude Black applicants. Such exclusion erodes Title VII's purpose of opening employment opportunities to African Americans. Congress should charge employers with providing sufficient justifications for policies that perpetuate this exclusion. Alabama Law professor and civil rights scholar Ronald Turner notes that Title VII, "as currently interpreted and enforced, is no match for the societal, economic, and political conditions, both past and present, which have limited the educational, economic, and employment opportunities and advancements of large segments of African American communities."[86]

C. *The Vague Language of the 1991 Civil Rights Act Results in Ideologically-Driven Judicial Decisions*

Without Congressional action to clarify the current state of disparate impact doctrine, the ability of plaintiffs to challenge facially-neutral employment practices is likely to deteriorate further. Research on appeals court decision-making indicates that the political ideology of judges has a greater effect on court decisions when the governing legal rules are am-

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81. Richard Rothstein, *SAT Scores Aren't Up. Not Bad, Not Bad at All*, N.Y. TIMES, Aug. 29, 2001, at B8.

82. Michael Berube, *Testing Handicaps*, N.Y. TIMES, Sept. 21, 2003, § 6 (Magazine), at 18.

83. *Id.*

84. Katharine Q. Seelye, *Poverty Rates Fell in 2000, But Income Was Stagnant*, N.Y. TIMES, Sept. 26, 2001, at A12.

85. *See* The Heritage Foundation Research, *The Family of Four Project, available at* http://www.heritage.org/Research/Features/Familyof4/chapter3/chapter3.htm (last visited September 21, 2005).

86. *See* Turner, *supra* note 40, at 386.

biguous.[87] As discussed in Section II of this paper, the 1991 Civil Rights Act created ambiguity in disparate impact doctrine by including vague exceptions and directing judges to consider conflicting precedent. Given this ambiguity, one would expect the political ideology of judges to drive disparate impact decisions to a greater extent following the 1991 Act than before the Act.

Consistent with this theory, the results of this study indicate that the political ideologies of judges affect disparate impact case outcomes to a greater extent in the post-1991 period in which courts must interpret the vague guidelines contained in the 1991 Civil Rights Act. Plaintiffs did not win a single post-Act disparate impact case decided by a panel composed of a majority of Republican-appointed judges. By contrast, plaintiffs successfully challenged facially neutral employment practices in 20% of post-Act cases decided by Democratic panels. The gross disparity in post-Act outcomes based on the political affiliation of the panel judges contrasts sharply with the negligible differences between Republican and Democratic panel decisions prior to *Wards Cove*.

The clear implication of the increased importance of judges' ideologies is that the future success of plaintiffs is likely to be curtailed by the increasingly conservative federal judiciary. An important reason for the observed decline in successful disparate impact challenges is the simple fact that a higher percentage of cases are being decided by conservative judges, who are ideologically predisposed to favor employers in employment law disputes. In the six circuits examined in this study, panels with a majority of Democratic appointees decided 63% of cases between 1977 and 1988. By contrast, majority-Democratic panels decided only 33% of the cases from 1992–2000.[88] One scholar asserts that "[a] majority of federal judges, led by the Reagan-Bush-appointed majority on the Supreme Court, have come to believe that Title VII cannot be a significant agent in removing the vestiges of our long history of racial discrimination."[89] Although this study only includes data through the end of 2000, one would expect this trend to have intensified with the numerous conservative appellate appointments by President George W. Bush.[90] The current vagueness in Title VII disparate impact doctrine, combined with the conservative nature

87. *See* Songer et al., *supra* note 10, at 137–62.

88. *See* Table 5 (percentage of cases decided by majority-Democratic panels derived by taking number of cases decided by majority-Democratic panels and dividing it by total number of cases from that specific time period.).

89. Jerome M. Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 967 (1993).

90. President Bush appointed 225 federal judges in his first term, 198 of whom were confirmed by the Senate. *See* Senate Democratic Policy Committee, *Bush Judicial Nominees Confirmed at a Rate Better Than or Equal to Recent Presidents*, Jul. 22, 2004, *available at* http://democrats.senate.gov/dpc/dpc-doc.cfm?doc_name=fs-108-2-197 (last visited October 25, 2005).

of judges deciding most disparate impact cases, creates an environment increasingly hostile to disparate impact litigation. Congress must clarify the 1991 Civil Rights Act to reverse the current trend of conservative judges eviscerating the disparate impact doctrine.

D. *Policy Prescriptions*

The aggregate effect of the difficulty of proving discriminatory intent, the lingering social inequality based on race, and the growing influence of conservative federal judges is that African American job applicants have virtually no redress against facially-neutral policies that adversely affect them. According to Table 1, fewer than 7% of Title VII disparate impact plaintiffs since 1992 prevailed in court, and the possibility of proving discriminatory intent is probably even more remote. Absent Congressional intervention to clarify disparate impact law, this bleak picture is likely to be even further eroded by the increasingly conservative federal judiciary. Given the persistent disparities in educational and professional attainment between White and Black Americans, Congress should not remain idle while the goals of Title VII are extinguished.

Three changes to the 1991 Civil Rights Act would dramatically increase Title VII's efficacy for combating discrimination. First, Congress should reverse the *Wards Cove* requirement that plaintiffs must identify a *qualified* labor force with which to draw statistical comparisons. This requirement is a powerful cause of the erosion of disparate impact doctrine. Table 2 shows that plaintiffs were 3.3 times more likely to present sufficient statistical evidence prior to the "qualified" restriction, and plaintiffs presenting such evidence were nearly 80 times more likely to prevail as plaintiffs who did not meet this evidentiary burden. The Fourth Circuit's decision in *Carter v. Ball*[91] illustrates the obstacles faced by plaintiffs attempting to meet the "qualified labor pool" requirement. The African American plaintiff in *Carter* demonstrated that none of the defendant company's 30 managerial level positions were filled by African American employees.[92] Nonetheless, the Fourth Circuit refused to consider the plaintiff's evidence because she could not prove the number of African Americans in the local population who were qualified to hold managerial positions.[93] The court refused the plaintiff's request to infer that, at a minimum, more than 0% of the local Black population must have been "qualified."[94]

Second, Congress should explicitly charge the employer with the burden of refuting a plaintiff's prima facie case by establishing that the

91. 33 F.3d 450 (4th Cir. 1994).
92. *Id.* at 457.
93. *Id.*
94. *Id.*

challenged practice is a business necessity. If the employment practice at issue is truly a business necessity, history suggests that employers should be able to demonstrate this necessity to the courts. Requiring employers to demonstrate business necessity will not preclude employers from using legitimately important criteria to make hiring decisions. Before the *Wards Cove* decision lessened the burden on employers to justify their disparity-inducing practices, employers still prevailed in 68% of all cases, including 30% of cases in which plaintiffs established a prima facie case of a practice's disparate impact. However, employment practices that adversely impact African Americans and are not business necessities must be eliminated to achieve Title VII's goal of opening employment opportunities.

Third, Congress should clearly enumerate these policies rather than subjecting them to interpretation of confused precedents or vague exceptions by the judiciary. Such clarity is essential to avoid ideologically-driven judicial erosion of the Congressional action. This study indicates that contemporary judges continue to impose the restrictive *Wards Cove* framework, contrary to the 1991 Civil Rights Act, in post-Act disparate impact cases. For example, numerous post-1991 decisions hold that an employer's burden following a prima facie case is only to articulate some "legitimate business justification" for the challenged practice, despite the Act's attempt to nullify this portion of the *Wards Cove* framework.[95] Unambiguous legal standards are essential to reduce ideological discretion.

CONCLUSION

Justice Blackmun's dissent from the landmark *Wards Cove* decision reflects the widely held perception that the decision would dramatically restrict the ability of plaintiffs to challenge facially-neutral employment practices under Title VII: "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[96] Congress responded to *Wards Cove* by passing the 1991 Civil Rights Act which was designed to mitigate the chilling effect of *Wards Cove* on disparate impact litigation. This paper employed logistic regression techniques to test the efficacy of the 1991 Act in moderating the deleterious effect of *Wards Cove* on disparate impact challenges, and to test the hypothesis that the vague language of the 1991 Act allows broad discretion for judges based on their political ideologies.

The central finding of the analysis is clear: the current disparate impact doctrine engendered by *Wards Cove* and the 1991 Civil Rights Act dramatically reduces the ability of African American plaintiffs to successfully

95. *See, e.g.*, Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993); Rosser v. Pipe Fitters Local 392, No. 92-3016, 1993 US App. LEXIS 31484 (6th Cir. 1993).

96. *Wards Cove*, 490 U.S. at 662 (Blackmun, J., dissenting).

challenge facially neutral employment practices in federal court. The erosion of disparate impact doctrine is significantly attributable to conservative judges exploiting the ambiguous legal standards to decide cases in accordance with their ideological proclivities. That the ideologies of federal judges affect the outcome of disparate impact litigation is especially salient in the heated political climate engulfing judicial nominations. Although it is certainly possible that judges' ideologies impact decisions in numerous cases involving major political issues, more research is necessary to explore the impact of ideology in other areas. This analysis does not purport to make any generalizations beyond the context of disparate impact litigation. In the disparate impact arena, however, the analysis demonstrates that the ideologies of conservative judges increasingly contribute to the unavailability of challenges to employment practices that disproportionately exclude African Americans.

The data presented support these conclusions. Since the 1991 Civil Rights Act ushered in vague disparate impact standards, plaintiffs prevailed in 20% of disparate impact cases decided by majority-Democratic panels, but did not prevail in any case decided by majority-Republican panels. The logistic regression model, controlling for myriad factors relating to plaintiff success, calculates that plaintiffs were 3.8 times more likely to prevail in cases decided by Democratic panels during this period.

The lack of a meaningful disparate impact doctrine through which African Americans can challenge facially-neutral employment practices has several disturbing implications. Plaintiffs are virtually precluded from challenging employment practices that are "fair in form, but discriminatory in operation"[97] due to the extreme difficulty of proving that the practices were enacted with discriminatory intent. Only rare "smoking gun" cases are actionable without the availability of disparate impact litigation. Even if plaintiffs could divine the intent of employers, a robust disparate impact doctrine is necessary to eradicate disparate outcomes resulting from unconscious discrimination or social inequality wrought by the historical subjugation of African Americans in the United States. Due to the ambiguity in current disparate impact law and the increasingly conservative federal judiciary, one should expect even further erosion of plaintiffs' abilities to challenge facially-neutral employment practices in the future.

Courts have stripped Title VII of its power to open employment opportunities to African Americans at a time of increasing inequality in education and employment. Recent data reveals that school enrollment is becoming more segregated, and the gap between Whites and Blacks in educational test scores and household income is increasing. Today, White households in America make an average of $15,000 per year more than

97. *See Griggs*, 401 U.S. at 431.

African American households.[98] The data suggest that African Americans remain vulnerable to facially-neutral requirements which foreclose certain employment opportunities to underprivileged groups. Now is not the time for Congress to abandon Title VII's goal of opening employment opportunities for African Americans. Without new Congressional action that unambiguously reverses crucial elements of the *Wards Cove* decision, Title VII will not be an effective vehicle for removing barriers to economic opportunity and professional achievement for African Americans.

98. *See* Seelye, *supra* note 84.