

The Bottom Line Concept Under Title VII: *Connecticut v. Teal*¹ —

The United States Supreme Court has interpreted Title VII of the Civil Rights Act of 1964² to prohibit the use of certain employment tests. These are tests having a discriminatory, or "disparate impact" on members of groups protected under the statute, while bearing no manifest relationship to the employment in question.³ To establish a prima facie case of employment discrimination under this "disparate impact" theory, a plaintiff must show the administration of a facially neutral employment practice, such as a written aptitude test, resulted in a significant adverse impact upon a protected class.⁴ If such a prima facie case is established, the employer may refute the plaintiff's case by demonstrating that the challenged employment practice is in fact job related.⁵

Since the development of the disparate impact method of Title VII analysis, disputes have arisen surrounding the stage in the employment selection process at which disparate impact upon a statutorily protected group should be measured. A majority of federal courts addressing the issue has required that plaintiffs seeking to make out a prima facie case demonstrate the alleged disparate impact of a selection procedure is found in the final pool of candidates for hire or promotion.⁶ This approach of focusing on the overall results of a selection procedure is known as the "bottom line" analysis.⁷ Other

¹ 102 S. Ct. 2525 (1982). 457 U.S. 440.

² Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(1964).

³ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

⁴ *Id.* See also *infra* text accompanying notes 42-58.

⁵ See, e.g., *Griggs*, 401 U.S. at 432.

⁶ See, e.g., *Costa v. Markey*, 677 F.2d 158 (1st Cir. 1982), *rev'd on rehearing*, 694 F.2d 876, *rev'd en banc* 706 F.2d 1 (1st Cir. 1982); *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188 (3d Cir. 1980); *EEOC v. Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979); *Friend v. Leidinger*, 588 F.2d 61 (4th Cir. 1978); *Rule v. Ironworkers Local 396*, 568 F.2d 558 (8th Cir. 1977), *vacated*, *Hameed v. Ironworkers Local 396*, 637 F.2d 506 (8th Cir. 1980); *Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975) *cert. denied*, *Smith v. Troyan*, 426 U.S. 934 (1976); *Ramirez v. City of Omaha*, 538 F. Supp. 7 (D. Neb. 1981) *aff'd*, 678 F.2d 751 (8th Cir. 1981); *Cormier v. PPG Indus. Inc.*, 519 F. Supp. 211 (W.D. La. 1981); *Williams v. City & Cty. of San Francisco*, 483 F. Supp. 335 (N.D. Cal. 1979) *rev'd without op.*, *Williams v. San Francisco*, 685 F.2d 450 (9th Cir. 1982); *Stewart v. Hannon*, 469 F. Supp. 1142 (N.D. Ill. 1979) *aff'd*, 675 F.2d 846 (7th Cir. 1981); *Lee v. City of Richmond*, 456 F. Supp. 756 (E.D. Va. 1978); *Brown v. New Haven Civil Serv. Bd.*, 474 F. Supp. 1256 (D. Conn. 1979); *Jackson v. Nassau County Civil Serv. Comm'n*, 424 F. Supp. 1162 (E.D.N.Y. 1976).

⁷ See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW*, 1191 (1976 & Supp. 1979) [hereinafter cited as B. SCHLEI & P. GROSSMAN].

In "bottom line" cases, courts are confronted with an individual claiming to have suffered unintentional discrimination caused by the disproportionate impact of a facially neutral employment standard. Such discrimination is alleged to have occurred even though the plaintiff's protected group as a whole has suffered no adverse effects from the overall selection procedure. *Id.* at 143. Faced with this situation, deciding whether to adopt the bottom line approach depends upon how the purpose of Title VII as well as the goals of equal employment opportunity law. *Id.* at 1193. Proponents of the bottom line concept claim its adoption reflects the proper intent of Congress to increase the employment opportunities for certain groups in the economy. See Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C. CENT. L. J. 1, 6 (1980) [hereinafter cited as Blumrosen]. Critics of the bottom line theory argue that evidence showing a protected group as a whole has not been subject to employment discrimination does

courts have sustained Title VII challenges to discriminatory components of an employer's selection procedure even though the final pool of candidates reflects a nondiscriminatory racial balance.⁸ These courts focus on the disparate impact of the particular test and have found a violation of Title VII at the testing stage, rather than in the final pool of applicants.⁹

In *Connecticut v. Teal*,¹⁰ the United States Supreme Court resolved this split among the circuits. The Court ruled that an individual may establish a prima facie case under Title VII by producing evidence that one component of a selection procedure — a component which operated to bar that individual from further consideration for promotion — had a discriminatory disparate impact on the individual's protected group.¹¹ The Court allowed the establishment of a prima facie case despite the fact that the overall results of the selection process, or bottom line, reflected an "appropriate racial balance."¹² By rejecting the "bottom line" approach, the Court correctly applied Title VII, arriving at

not offset the injury suffered by a specific individual under Title VII who has been denied an employment opportunity because of a discriminatory employment criterion. See Brief of Respondent at 13, *Connecticut v. Teal*, 102 S. Ct. 2525 (1982), reprinted in BNA's LAW REPRINTS, 15 Labor Law Series, No. 20 (1981/82) [hereinafter cited as BNA's LAW REPRINTS]. See also Lopatka, *A 1977 Primer on Federal Regulation of Employment Discrimination*, 1977 U. ILL. L. F. 69, 80 (1977) [hereinafter cited as Lopatka]; Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L. J. 121, 156-57 (1980) [hereinafter cited as Booth & Mackay]; Blumrosen, *The Bottom Line in Equal Employment Guidelines: Administering a Polycentric Problem*, 33 AD. L. REV. 232, 333-35 (1981) [hereinafter cited as Blumrosen, *The Bottom Line*]. Prior to the Supreme Court's decision in *Teal*, a fundamental difference of opinion existed over whether Title VII mandates the elimination of every instance of unfair treatment of protected individuals, or the more general goal of reallocating jobs in society among certain protected groups. B. SCHLEI & P. GROSSMAN, *supra*, at 1193.

In *Connecticut v. Teal*, cert. granted, 454 U.S. 813 (1981), the Supreme Court undertook to determine whether Title VII prohibits discrimination in component parts of a selection process, even when the overall results of the process are not discriminatory. The issue framed for the Supreme Court on Petition for Certiorari in *Teal* was:

"In a Title VII action in which the final outcome of the employee selection process does not result in an adverse impact against plaintiff's minority group, can the plaintiffs make a prima facie showing of employment discrimination by merely establishing: (1) that they failed to succeed on one component of the selection process and thereby became ineligible to proceed further in the selection process and (2) that the results of such component had a disparate impact on plaintiff's minority group?" 50 U.S.L.W. 3054 (1981).

⁸ For instance, a test may serve to preclude a large number of applicants from a protected class, but nonetheless a large enough number of remaining applicants are hired to defeat any allegation of disparate impact in the final result. See, e.g., *Teal v. State of Connecticut*, 645 F.2d 133 (2nd Cir. 1981), *aff'd*, 102 S. Ct. 2525 (1982); *Davis v. Washington*, 512 F.2d 956 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 229 (1976); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *EEOC v. Trailways, Inc.*, 530 F. Supp. 54 (D. Colo. 1981); *League of United Latin American Citizens v. Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976).

⁹ *Id.*

¹⁰ 102 S. Ct. 2525 (1982).

¹¹ *Id.* at 2529.

¹² *Id.*

a result consistent with the congressional purpose to protect rights of all individuals to equal employment opportunities.¹³

The plaintiffs in *Connecticut v. Teal* were four black employees of the Department of Income Maintenance for the State of Connecticut.¹⁴ Each had been promoted provisionally to the position of welfare eligibility supervisor.¹⁵ To obtain permanent status as supervisors, the plaintiffs were required to participate in a promotion selection process. The first step in the process was a written aptitude test.¹⁶ It was necessary for an applicant to obtain the requisite passing score on the written test to advance in the selection procedure.¹⁷ Those applicants passing the test were entitled to a personal interview and a review of their past employment record. After completion of these steps, the applicants were placed on an eligibility list from which the employer selected its supervisors.¹⁸

The written test was administered to 329 candidates of whom 259 were white and 48 were black.¹⁹ 54.17% of the black applicants achieved a passing score on the test, while 79.54% of the white aspirants passed the exam.²⁰ The passing rate for blacks was therefore 68% of the passing rate for white candidates.²¹ Plaintiffs were among those black applicants failing the test. Because the candidates failing the test were deprived of the opportunity to be further considered for promotion, plaintiffs challenged the written exam under Title VII.²² Plaintiffs attacked the test through the disparate impact theory since the test results showed blacks passed at a significantly lower rate than whites.²³

After the plaintiffs initiated their action, the supervisor selection process continued. The results of the entire process showed that 22.9% of the original 48 black applicants were eventually promoted to supervisor, while 13.5% of the original white applicants received promotions.²⁴ The bottom line,

¹³ See *infra* notes 369-71 and accompanying text.

¹⁴ 102 S. Ct. 2525, 2529 (1982).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² The Court scrutinized the plaintiffs' cause of action in *Teal* under § 703(a)(2) of Title VII. *Id.* at 2530. That section provides in pertinent part:

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

Title VII of the Civil Rights Act of 1964, 78 Stat. 253 as amended, 42 U.S.C. § 2000e-2(a)(2).

²³ *Teal*, 102 S. Ct. 2525, 2529.

²⁴ *Id.* at 2530. 46 persons were promoted to permanent supervisory positions, 11 of whom were black and 35 of whom were white. *Id.*

therefore, was that blacks fared better as a class in the overall selection process than did whites. The employer accordingly argued in response to the plaintiffs' Title VII challenge that since blacks were promoted at a higher rate than whites, blacks suffered no disparate or adverse impact from the selection process.²⁵

The Supreme Court held that the plaintiffs established a prima facie case of employment discrimination based upon the discriminatory impact of the test component, despite the presence of the nondiscriminatory bottom line.²⁶ The Court viewed the test component as a discriminatory "barrier" to individual employment opportunities which could not be offset by the favorable treatment of blacks as a group.²⁷

This casenote will examine the development, adoption, and rejection of the bottom line concept in employment discrimination law. First, the disparate treatment and especially the disparate impact methods of analysis under Title VII will be considered.²⁸ This discussion will provide a theoretical framework for understanding the operation of the bottom line concept. In Section II, the casenote will consider the bottom line concept itself,²⁹ including a discussion of the theory's development. Specifically, the adoption of the bottom line concept by four key federal agencies in federal guidelines governing employee selection procedures will be observed, as well as the acceptance and rejection of the bottom line theory in some federal courts. Then, Section III discusses the decision of the United States Supreme Court in *Connecticut v. Teal*.³⁰ This section examines the majority opinion, focusing on the rationale given by the Court for its decision. It concludes with a discussion of the *Teal* dissent and an analysis of the two positions. In Section IV, the effect of the *Teal* decision on procedures for the selection of employees is examined.³¹ It is submitted that the Supreme Court decided this case correctly. Unfortunately, however, the Court's silence on the scope of its decisions could result in the skillful circumvention of the *Teal* opinion by employers.

I. STANDARDS OF REVIEW UNDER TITLE VII

A plaintiff may establish an employer's liability for employment discrimination by satisfying the disparate treatment and disparate impact standards of Title VII review.³² Both theories, therefore, need to be appreciated before discussing the bottom line theory. This section first will discuss these methods

²⁵ *Id.*

²⁶ *Id.* at 2536.

²⁷ *Id.* at 2533.

²⁸ See *infra* notes 33-108 and accompanying text.

²⁹ See *infra* notes 109-219 and accompanying text.

³⁰ See *infra* notes 220-388 and accompanying text.

³¹ See *infra* notes 389-444 and accompanying text.

³² See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1. In addition to these two theories, Title VII actions may be brought under two other recognized approaches. *Id.* One theory alleges the defendant employer has engaged in a pattern or practice of policies which perpetuate in the

of Title VII analysis, and then focus specifically on the methods of proof used to implement the disparate impact theory.

A. Disparate Treatment

The disparate treatment method of Title VII analysis addresses a literal form of discrimination, namely, treating people differently in the employment context because of their race or other distinguishing characteristic.³³ Disparate treatment is thus a method by which an individual may claim he was the victim of intentional employment discrimination if he was rejected for a position despite his qualifications for the job.³⁴ The crucial factual burden borne by a plaintiff in such actions is proving the employer's discriminatory intent.³⁵ In *McDonnell Douglas Co. v. Green*,³⁶ the Supreme Court articulated an order of proof for cases where an individual alleges that an employer has engaged in intentional disparate treatment.³⁷ According to the Court, establishing a prima facie case under the disparate treatment theory requires a plaintiff to satisfy four elements.³⁸ If a plaintiff successfully fulfills the requirements for a prima facie case by a preponderance of the evidence, the burden then shifts to the defendant employer to articulate a legitimate nondiscriminatory reason for the plaintiff's rejection.³⁹ Even if an employer articulates such a reason, however,

present the past effects of discrimination. See, e.g., *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). The other approach under Title VII claims the employer failed to make reasonable accommodation to an employee's religious observance or practices. See, e.g., *Trans World Airlines, Inc. v. Hardinson*, 432 U.S. 63 (1977). See also B. SCHLEI & P. GROSSMAN, *supra* note 7, at 185. The discussion in this casenote will be confined to the two predominant theories of disparate treatment and disparate impact.

³³ See generally B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1153-54. See also Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 3 (1979) [hereinafter cited as Friedman].

³⁴ See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1153-54.

³⁵ *Id.* at 15-16, 1153-54.

³⁶ 411 U.S. 792 (1973).

³⁷ *Id.* at 802.

³⁸ *Id.* at 794. When an individual alleges intentional discrimination under Title VII, the 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
- iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualification.

³⁹ *Id.* at 802. In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Supreme Court elaborated on the extent of the employer's burden. While the plaintiff must establish his prima facie case of discrimination by a preponderance of the evidence, the Court emphasized in *Burdine* that the defendant's burden to rebut is only one of production. *Id.* at 255. The defendant need only present "a legitimate reason" for his actions. *Id.* See also *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 24-25 (1978) (per curiam) ("we think that there is a significant distinction between merely articulating some nondiscriminatory reason and proving absence of discriminatory motive . . . the former will suffice to meet the employee's prima facie case of discrimination.").

a plaintiff is afforded an opportunity to rebut the employer's defense by showing that the reason stated by the employer for rejecting the plaintiff was in fact a pretext to mask a discriminatory motive.⁴⁰ When a plaintiff prevails under the *McDonnell Douglas* test, an employer is found liable under Title VII.⁴¹

B. Disparate Impact

Unlike the disparate treatment theory, which addresses intentional employment discrimination, the disparate impact method of Title VII analysis is used by plaintiffs who assert that a facially neutral employment practice, such as a written test, results in a disproportionately poor success rate for members of a statutorily protected group as compared with that of the majority group.⁴² As an individual member of the protected group, a plaintiff may challenge the legality of the particular employment practice under Title VII once the adverse or disparate effect upon the plaintiff's group is established.⁴³ Under the disparate impact theory, therefore, an employer may not use an objective employee selection criterion that results in an adverse impact on a statutorily protected group unless the employer can prove the criterion is job related.⁴⁴

Disparate impact focuses on the consequences of employment practices, not the motivation of the employer. The Supreme Court made this clear when it broadened the scope of Title VII by developing the disparate impact theory in *Griggs v. Duke Power Co.*⁴⁵ The *Griggs* Court ruled Title VII not only prohibited intentional employment discrimination, but also employment practices that are fair in form, but discriminatory in operation.⁴⁶

The plaintiffs in *Griggs*, a group of black employees of the Duke Power Company, challenged under Title VII a policy for transfers within the company.⁴⁷ The policy required employees wishing to be assigned to departments

⁴⁰ 411 U.S. 792, 804.

⁴¹ See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 16.

⁴² See Booth & Mackay, *supra* note 7, at 141.

⁴³ See Blumrosen, *Strangers in Paradise: Griggs v. Duke Power and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 89-90 (1972) [hereinafter cited Blumrosen, *Strangers in Paradise*].

⁴⁴ See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 132.

⁴⁵ 401 U.S. 424 (1971). In the opinion of two commentators, *Griggs v. Duke Power Co.* is the "most important court decision in employment discrimination law." B. SCHLEI & P. GROSSMAN, *supra* note 7, at 5.

⁴⁶ 401 U.S. 424, 431. *Griggs* involved a high school diploma and written aptitude test requirement. In addition to test and diploma requirements, other examples of employment practices that are "fair in form" and objectively applied appear in: *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (minimum height and weight requirements for applicants); *Green v. Missouri & Pac. R.R.*, 549 F.2d 1158 (8th Cir. 1977); *Gregory v. Litton Sys.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972) (refusing to employ applicants with arrest or conviction records); *Johnson v. Pike Corp. of America*, 332 F. Supp. 490 (C.D. Cal. 1971) (refusing to hire because of a record of wage garnishment). See generally, B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1 n.3, Friedman, *supra* note 33, at 11 n.58; Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 571 (1977).

⁴⁷ 401 U.S. 424, 426-27.

other than the unskilled "Labor Department" to possess a high school diploma and pass two written aptitude tests.⁴⁸ Both requirements were satisfied by white employees at a much greater rate than blacks.⁴⁹ One administration of the written tests produced a 58% pass rate for whites and a 6% pass rate for blacks.⁵⁰ The diploma and test requirements, therefore, effectively constituted a barrier preventing disproportionate numbers of black employees from advancing within the company.⁵¹

The Supreme Court ruled that the adverse impact of the test and diploma requirements upon black employees rendered the policy discriminatory under Title VII.⁵² Specifically, the Court held that objective practices, procedures, and tests neutral on their face, but also neutral in terms of their intent may not act as barriers to employment opportunities if their effect is discriminatory.⁵³ To establish a prima facie case of discrimination under disparate impact theory, therefore, a plaintiff need only present evidence that a facially neutral employment practice, such as a written test, had a significant adverse impact on the plaintiff's statutorily protected group.⁵⁴ If this prima facie burden is satisfied, an employer may rebut the plaintiff's case by demonstrating the challenged employment practice had a manifest relationship to the employment in question.⁵⁵ For example, in an employment testing case the burden of showing a manifest relationship, or job relatedness, is accomplished through test validation.⁵⁶ In addition, however, if an employer produces evidence show-

⁴⁸ *Id.* at 427-28.

⁴⁹ *Id.* at 430. The Supreme Court noted that census figures for the State of North Carolina showed 34% of the white males in the state had completed high school, while only 12% of the black males in the state had finished high school. *Id.* at n.6.

⁵⁰ *Id.*

⁵¹ *Id.* at 431. Because the two employment requirements worked to disproportionately freeze black employees in the unskilled Labor Department at the company, the plaintiffs brought their Title VII actions under § 703(a)(2). *Id.* at 426 n.1. For the text of this statutory provision, see *supra* note 22.

⁵² 401 U.S. 424, 431.

⁵³ *Id.* at 430-31. Under the disparate impact theory articulated in *Griggs*, and especially in cases involving employment testing where discriminatory intent is either absent or difficult to discern, a plaintiff need not demonstrate discriminatory intent on the part of the employer in order to prevail. *Id.* at 432. "But Congress directed the thrust of the Act to the consequences of employment practices not simply the motivation." *Id.* (emphasis the Court's).

⁵⁴ *Id.* at 431-32. See also B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1159-60; Wilson, *A Second Look at Griggs v. Duke Power Co.: Ruminations on Job Testing, Discrimination, and the Role of Federal Courts*, 58 VA. L. REV. 844, 847 (1972); Friedman, *supra* note 33, at 12.

⁵⁵ *Griggs*, 401 U.S. at 432.

⁵⁶ In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 426-36 (1975), the Supreme Court elaborated on the extent of the employer's burden of test validation. The Court encouraged the use of the EEOC Guidelines that were based upon standards of test validation developed by the American Psychological Association. *Id.* at 430-31. At present, § 5 of the Uniform Guidelines on Employee Selection Procedures incorporates these same standards and governs test validation. 29 C.F.R. § 1607.5 (1982). The purpose of validation is to prove through scientific analysis that the test in question is actually an indicator of how well an applicant will perform in a particular position. See generally, Booth & Mackay, *supra* note 7, at 159-89; B. SCHLEI & P. GROSSMAN *supra* note 7 at 66-126; Rowe & Rowe, *Employment Testing and Title VII of the Civil Rights Act of*

ing a test or other selection criterion is job related, the Supreme Court ruled in *Albemarle Paper Co. v. Moody*,⁵⁷ that a plaintiff may still prevail by demonstrating that other tests or selection devices without a similarly undesirable racial impact would serve the employer's legitimate business interests.⁵⁸

C. Disparate Treatment and Disparate Impact Compared

Disparate treatment and disparate impact are two distinct methods of Title VII analysis. The presence of a few crucial factors in an employment discrimination claim may be used to determine which is the appropriate method to apply. Basically, the applicability of either theory will depend on whether a statutorily protected group, or single individual is alleged to have suffered discrimination, whether intentional discrimination is asserted, and whether statistical evidence is used as the predominant grounds for the Title VII claim.

First, the plaintiff in a disparate treatment action alleges that he was a victim of discrimination intentionally directed at him by an employer.⁵⁹ In contrast, a plaintiff bringing a disparate impact action must premise his claim on the fact that the protected group to which he belongs suffered discrimination from a particular employment practice. It is only as a result of the adverse impact suffered by the group, that the individual member of the group derives his right to relief under Title VII.⁶⁰ Second, the most salient difference between disparate treatment and disparate impact is the factor of discriminatory intent. In a disparate treatment action, a plaintiff's satisfaction of the four components of a prima facie case set forth in *McDonnell Douglas*⁶¹ is tantamount to an allegation that intentional discrimination has been practiced by the employer against the plaintiff.⁶² In contrast, disparate impact focuses on "procedures and

1964: *After Albemarle Paper Co. v. Moody*, 38 ALA. LAW. 357 (1977); Barrett, *Is the Test Content-Valid: Or Who Killed Cock Robin?*, 6 EMP. REL. L. J. 584 (1981); Barrett, *Is the Test Content-Valid: Or Does It Really Measure a Construct?*, 6 EMP. REL. L. J. 459 (1981).

⁵⁷ 422 U.S. 405 (1975).

⁵⁸ *Id.* at 425. This third stage in the disparate impact order of proof is analogous to the plaintiff's opportunity to show under the disparate treatment theory that the employer's stated reason for rejecting him is a pretext for discrimination. See *supra* text accompanying note 40. At this stage in the disparate impact order of proof, the plaintiff must not only show that a suitable alternative procedure, with a less severe impact is available, but also that the employer was aware of its existence. Therefore, the plaintiff must show that the selection procedure used by the employer was a pretext for intentional discrimination. See generally, *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979). See also Note, *Rebutting the Griggs Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 U. ILL. L. REV. 181 (1981); Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C. L. REV. 419, 422 (1982); Friedman, *supra* note 33, at 14.

⁵⁹ See Friedman, *supra* note 33, at 13-14. See also *supra* note 35 and accompanying text.

⁶⁰ B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1192. See also *supra* note 54 and accompanying text.

⁶¹ See *supra* note 38.

⁶² See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). See also *Furnish, supra*

mechanisms" which operate as "built in headwinds for minority groups."⁶³ Proof of discriminatory intent is not required when a plaintiff challenges a facially neutral employment practice which results in an adverse impact upon a protected group.⁶⁴ Employment practices such as written tests, however neutral they may be on their face, are unlawful under Title VII if they operate to exclude a disproportionately large number of individuals belonging to a protected group and who are capable of performing effectively in the desired positions.⁶⁵

Finally, the propriety of using statistical evidence in setting out a prima facie case differs under the disparate treatment and disparate impact methods of analysis. In a disparate impact action, a dispute over whether a challenged employment practice did in fact have an adverse impact upon the plaintiff's protected group will center on statistical analysis.⁶⁶ A comparison of statistical evidence derived from the rates at which protected group members and majority group members satisfy a particular employment requirement is a sufficient basis for the establishment of a prima facie case under disparate impact.⁶⁷ Furthermore, a defendant employer may produce his own statistics to refute the existence of a disparate impact and, accordingly, the prima facie case.⁶⁸

In contrast, statistical evidence is not dispositive in a disparate treatment action. A successful action under disparate treatment depends on the plaintiff's satisfaction of the elements set forth in *McDonnell Douglas*.⁶⁹ If the plaintiff establishes a prima facie case, the defendant bears the burden of articulating a legitimate non-discriminatory reason for the plaintiffs' rejection.⁷⁰ This burden, however, may not be entirely satisfied by the production of statistical evidence which shows the plaintiff's group, or other protected groups are well represented in the employer's workforce.⁷¹ The critical factor in disparate

note 58, at 422.

⁶³ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). See also *supra* text accompanying note 53.

⁶⁴ See *supra* note 53 and accompanying text. See also Note, *Rebutting the Griggs Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, *supra* note 58, at 187-88.

⁶⁵ See *supra* note 46 and accompanying text.

⁶⁶ See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1161-63. See also Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 794-95 (1978).

⁶⁷ Booth & Mackay, *supra* note 7, at 142. See also discussion *infra* note 87 and accompanying text.

⁶⁸ See *infra* notes 92-102 and accompanying text.

⁶⁹ See Shoben, *supra* note 66, at 794 n.8. See also *supra* note 38 and accompanying text.

⁷⁰ See *supra* note 39 and accompanying text.

⁷¹ In *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978), the plaintiffs established a prima facie case of discrimination under the disparate treatment theory. *Id.* at 575. The employer offered statistical evidence that his workforce reflected a non-discriminatory racial balance. *Id.* at 579. The Supreme Court ruled that these statistics were not totally irrelevant when the issue of whether the employer has acted with a discriminatory motive is to be determined. "We cannot say that such proof would have absolutely no probative value in determining whether the otherwise unexplained rejection of minority applicants was discriminatorily motivated." *Id.* at 580.

treatment analysis is the employer's intent. While statistical data may be useful,⁷² it is not enough by itself to sufficiently rebut a prima facie case under the disparate treatment theory.⁷³

D. Proving Disparate Impact

Unlike disparate treatment cases⁷⁴ where statistical evidence does not provide the dispositive basis for a Title VII claim,⁷⁵ in disparate impact actions, statistics may be employed in a variety of ways to both prove and disprove the discriminatory effect of an employer's objective selection criterion.⁷⁶ Employment tests are one example of an objective selection criterion used by employers. After *Griggs v. Duke Power Co.*⁷⁷ and *Albemarle Paper Co. v. Moody*⁷⁸, it is clear that tests may not be used by employers without a business justification, if they result in an adverse impact on a statutorily protected group.⁷⁹ In a disparate impact action under Title VII, the plaintiff bears the burden of establishing a prima facie case by proving the test in question had a substantial disparate impact on a protected class.⁸⁰ At this stage, the defendant employer is also afforded an opportunity to produce evidence showing no disparate impact has occurred, thereby rebutting the plaintiff's prima facie case.⁸¹ Disparate impact litigation consequently is focused on the prima facie stage of the order of proof⁸² where courts must decide whether the plaintiffs' protected group has suffered an adverse impact, or whether the employer has sufficiently rebutted the plain-

The Court cautioned, however, that these statistics are not enough to rebut a prima facie case alone because "a racially balanced workforce cannot immunize an employer from liability for specific acts of discrimination." *Id.* at 579.

⁷² The Supreme Court has ruled that evidence of a racially balanced workforce for example, may be considered when the employer's motivation is to be determined. *See supra* note 71.

⁷³ *Id.*

⁷⁴ *See supra* notes 33-41 and accompanying text.

⁷⁵ *See supra* notes 69-73 and accompanying text.

⁷⁶ *See supra* notes 66-68 and accompanying text.

⁷⁷ 401 U.S. 424 (1971) discussed *supra* notes 45-56 and accompanying text.

⁷⁸ 422 U.S. 405 (1975) discussed *supra* notes 57-58 and accompanying text.

⁷⁹ *See supra* text accompanying notes 49-58. If a test has a disproportionate impact on a protected group and is proven to be job related, nothing prevents the employer from selecting employees according to the results of the test. This employer right is explicitly guaranteed in Title VII. Section 703(h) of Title VII provides in pertinent part:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

78 Stat. 257, as amended 42 U.S.C. § 2000e-2(h).

⁸⁰ *See* B. SCHLEI & P. GROSSMAN, *supra* note 7, at 73. *See also* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

⁸¹ *See* B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1160.

⁸² *Id.* at 1161. In *Connecticut v. Teal*, 102 S. Ct. 2525 (1982), discussed *infra* notes 258-353 and accompanying text, the issue before the Court was whether the plaintiff may establish a prima facie case. *See also supra* note 7.

tiff's claim of disparate impact.⁸³ The evidence proffered by both parties at this stage in the disparate impact order of proof often consists of statistical evidence.

Courts have recognized three forms of statistical evidence introduced by plaintiffs as sufficient methods of proving a significant disparate impact has occurred.⁸⁴ The first method of proof analyzes the effect of the challenged employment requirement in the context of the general population. This approach compares the percentage of minorities or women in the general population excluded by an employment requirement with the percentage of whites or males similarly excluded.⁸⁵ If a requirement excludes a disproportionate number of protected group members, a prima facie case of discrimination may be established.⁸⁶ A second statistical method is to compare the pass-fail rates of the actual applicants for hire or promotion under the challenged employment requirement. In cases involving employment testing, a comparison is made of the percentage of the protected group members failing a particular test, with the number of whites or males failing the same test.⁸⁷ If, for example, whites pass a test at a significantly higher rate than blacks, this may be sufficient for the establishment of a prima facie case of discrimination.⁸⁸ The third method of statistical proof involves a plaintiff presenting a comparison of the racial, or sexual composition of the employer's workforce with the racial or sexual composition of the local geographical area from which the employer hires person-

⁸³ See M. MINER & J. MINER, *EMPLOYEE SELECTION WITHIN THE LAW*, 22-23 (1979) [hereinafter cited as M. MINER & J. MINER]. See also Blumrosen, *Strangers in Paradise*, *supra* note 43, at 91.

⁸⁴ See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1162; Lopatka, *supra* note 7, at 76; see also Smith and Abram, *Quantitative Analysis and Proof of Employment Discrimination*, 1981 U. ILL. L. REV. 33, 46 n.54 (1981).

⁸⁵ Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 6 (1977) [hereinafter cited as Shoben, *Probing*]. The Supreme Court applied this type of analysis in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971), by comparing the census figures for white males and black males in the State of North Carolina possessing high school diplomas. *Id.* See *supra* note 49 and accompanying text.

⁸⁶ See Shoben, *Probing*, *supra* note 85 at 6.

⁸⁷ B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1162 n.66. See also Booth & Mackay, *supra* note 7, at 143-46; Shoben, *Probing*, *supra* note 85, at 7; Shoben, *supra* note 66, at 796. The question of how substantial the disparity is in the pass-fail rate for majority groups when compared to statutorily protected groups has been subject to mixed opinion. See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1184-88.

In *Chance v. Board of Examiners*, 458 F.2d 1167, 1171-73 (2d Cir. 1972), the passing rate for the majority group compared to the protected group which equaled the ratio of 1.5: 1.0 was held to constitute substantial disparate impact. The Uniform Guidelines on Employee Selection Procedures, discussed *infra* notes 119-34 and accompanying text, recommend a 4/5 rule of thumb for determining disparate impact. The 4/5 rule could also be expressed as the ratio 1.25: 1.0 or 80%. According to this rule, if the selection rate for a protected group is less than 80% the selection rate for the majority group under the challenged employment procedure, the Guidelines suggest disparate impact has occurred. 29 C.F.R. § 1607.4D. See Booth & Mackay, *supra* note 7, at 151-55 for a discussion of the Uniform Guidelines.

⁸⁸ See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1162-63.

nel.⁸⁹ The plaintiff may create an inference of discrimination by showing that there is a significant disparity between these two percentages.⁹⁰

A defendant employer has an opportunity to produce statistical proof of his own to rebut plaintiff's assertion of a prima facie case.⁹¹ One form of such statistical proof is applicant flow data.⁹² Applicant flow data reflects a comparison of the minority or sexual composition of the applicant group with the sexual or racial composition of the group of applicants the employer eventually decides to hire or promote.⁹³ The Supreme Court addressed the role of applicant flow statistics in *Dothard v. Rawlinson*.⁹⁴ In that case, a female plaintiff challenged the State of Alabama's policy of requiring its correctional officers to meet minimum height and weight requirements set by statute.⁹⁵ The plaintiff failed to satisfy the minimum requirement and was denied a position as a correctional officer. The plaintiff produced evidence showing the combination height and weight requirements excluded 41% of the female population, but less than 1% of the males.⁹⁶ The Supreme Court rejected an argument by the defendant state employer that the plaintiff was required to produce applicant flow data to establish a prima facie case.⁹⁷ The Court, however, did not totally

⁸⁹ Shoben, *Probing*, *supra* note 85 at 9. See also B. SCHLEI & P. GROSSMAN *supra* note 7 at 1170-81.

In *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977), the Supreme Court narrowed the local population comparison when the job in question demands certain qualifications. In that case, the position was a schoolteacher. Because schoolteachers require special training and licensing, the Court recommended a "qualified labor market" be used in a comparison to determine whether disparate impact had occurred. *Id.* at 308 n.13. The qualified labor market consists of all those persons in the local community who are actually qualified to perform the job in question. *Id.* See Shoben, *Probing*, *supra* note 85, at 9-19.

In cases where the position in question does not necessarily require specialized training or qualifications, courts have used the Standard Metropolitan Statistical Area (SMSA), a geographical area defined by the Office of Management and Budget for the purpose of local population statistical comparisons. See generally, Gwartney, Asher, Haworth and Howarth, *Statistics, the Law and Title VII: An Economist's View*, 54 NOTRE DAME LAW. 633 (1979); Braun, *Statistics and the Law: Hypothesis Testing and Its Application to Title VII Cases*, 32 HASTINGS L. J. 59, 64 (1980).

⁹⁰ See Booth & Mackay, *supra* note 7, at 148. See also Shoben, *Probing*, *supra* note 85, at 8. In both *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307 (1977), and *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977) the Supreme Court held that there must be a "gross disparity" shown to exist between the composition of the employer's workforce and the population composition of the surrounding community area from which the employer hires in order for a prima facie case of discrimination to be based on this comparison alone. In *Hazelwood*, the Court also stated that applicant flow statistics offered by the employer could rebut a prima facie case based on a workforce-local community population disparity. 433 U.S. at 308 n.13.

⁹¹ Shoben, *Probing*, *supra* note 85, at 19.

⁹² *Id.* at 21. See also B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1165-67.

⁹³ Shoben, *Probing*, *supra* note 85, at 22.

⁹⁴ 433 U.S. 321 (1977).

⁹⁵ *Id.* at 324. The statute set minimum physical qualifications for all law enforcement officers, including correctional officers. The law required all applicants to meet a 120 lb. minimum weight requirement and a 5 foot-2 inch minimum height standard. *Id.* at 323-24 n.2.

⁹⁶ *Id.* at 329-30.

⁹⁷ *Id.* at 330. The applicant flow statistics requested by the employer would show a

dismiss the relevance of applicant flow data. The Court stated an employer was free to offer such statistical evidence of his own, if he discerns fallacies or deficiencies in the data offered by the plaintiff.⁹⁸

Applicant flow statistics can be a very reliable tool for a defendant employer.⁹⁹ By using applicant flow statistics, an employer could demonstrate that his selection requirements do not result in a disparate impact if the percentage of minorities or women job applicants accepted for position was higher than the percentage of whites or men ultimately hired.¹⁰⁰ Consequently, even if there were a substantial disparity between the composition of these protected groups in the employer's work force, and their representation in the general population, the employer could demonstrate no disparate impact has occurred with applicant flow statistics.¹⁰¹ Applicant flow data has been adopted by various courts as an accurate indicator of the presence or absence of disparate impact.¹⁰²

comparison of those women who applied for corrections jobs with the number of women actually hired. The Supreme Court rejected the employer's demand, reasoning that the numbers would be skewed due to "applicant self selection." *Id.* Self-selection refers to the fact that the actual pool of applicants for jobs would not accurately reflect the maximum potential applicants because those women who were aware of the minimum height and weight requirements would not bother to apply for a job since they knew they would be eliminated by the physical standards. *Id.* See Shoben, *Probing*, *supra* note 85, at 22. Self selection illustrates the primary means by which a plaintiff may refute the applicant flow statistics proffered by defendant employer. The plaintiff should argue that discrimination tainted the formation of the applicant pool either through self selection or another discriminatory requirement. See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1167. See also Shoben, *Probing*, *supra* note 85, at 22-23.

⁹⁸ *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977). In *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977), the Supreme Court instructed the district court, on remand, to consider the applicant flow data offered by the employer in rebuttal of the plaintiff's *prima facie* case as "very relevant."

⁹⁹ See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1166-67.

¹⁰⁰ See Shoben, *In Defense of Disparate Impact Analysis Under Title VII: In Reply to Dr. Cohn*, 55 IND. L. J. 515, 530-32 (1980) [hereinafter cited as Shoben, *In Defense*]. See also *supra* notes 91-98 and accompanying text.

¹⁰¹ See, e.g., *Ochoa v. Monsanto Co.*, 473 F.2d 318, 319-20 (5th Cir. 1973). The plaintiff challenged the company's hiring policies under Title VII as discriminatory towards Mexican-Americans. Mexican-Americans comprised about 10% of the surrounding community population. Out of 684 applicants for employment during the year in question, 11 were Mexican-Americans, 20 were black, and 653 were Anglo (white). *Id.* at 320. The employer hired 56 persons during that year and only one was a Mexican-American. Despite the apparent disparity, the court recognized applicant flow statistics offered by the employer which showed 9.09% of all Mexican-American applicants were hired, while only 8.17% of all other groups were hired. Because of the favorable applicant flow data, the court ruled no discrimination had occurred. *Id.*

¹⁰² See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1165 n.84. See also B. SCHLEI & P. GROSSMAN, *supra* note 7, (Supp. 1979) 320 n.66.

In *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977) in which the Supreme Court allowed the use of applicant flow statistics, the Court approvingly cited *Hester v. Southern Ry. Co.*, 497 F.2d 1374, 1379-81 (5th Cir. 1974). In that case, the appeals court stated "The most direct route to proof of racial discrimination in hiring, is proof of a disparity between the percentage of blacks among those applying for a particular position, and the percentage of blacks among those hired for a particular position." *Id.* at 1379. See generally, Hay, *The Use of Statistics to Disprove Employment Discrimination*, 29 LAB. L. J. 430 (1978).

In summary, there are two basic theories of Title VII analysis. The disparate treatment theory is employed by individual plaintiffs who have suffered intentional discrimination directed personally at them.¹⁰³ Disparate impact is used by plaintiffs to challenge a facially neutral employment practice which has an adverse effect on a statutorily protected group.¹⁰⁴ As a member of that group, the plaintiff is entitled to challenge the legality of the employment practice under Title VII. In cases involving employment testing, courts have employed disparate impact analysis.¹⁰⁵ In all disparate impact cases, including testing cases, statistical evidence plays a critical role.¹⁰⁶ Various methods of statistical analysis are used by plaintiffs to establish a *prima facie* case under disparate impact.¹⁰⁷ Applicant flow data is an example of statistical evidence which may be introduced by a defendant employer to rebut the plaintiff's *prima facie* case.¹⁰⁸ Using this discussion of standards of review under Title VII and the methods of proof as a theoretical background, the next section of this casenote will examine the emergence of the "bottom line" concept in employment discrimination cases.

II. THE BOTTOM LINE CONCEPT

The popularity of applicant flow statistics in disparate impact cases provided a foundation on which to build the bottom line concept.¹⁰⁹ Courts decided that when determining whether a protected group has suffered a disproportionate impact from a selection process, the most reliable indicator was a comparison between the percentage of the plaintiff's class among the applicants for the job, and the percentage of plaintiff's class among persons actually hired or promoted.¹¹⁰ The acceptance of applicant flow data shifted a court's focus from inquiring whether members of a protected group are suffering discriminatory impact from a selection requirement, to whether a sufficient number of protected group members were among those ultimately selected.¹¹¹ Applicant flow data thus tended to supplant general population statistics, pass-fail comparisons, and local community or relevant labor market and workforce comparisons as the method of determining whether a substantial disparate impact had occurred.¹¹²

¹⁰³ See *supra* notes 35-43 and accompanying text.

¹⁰⁴ See *supra* notes 44-58 and accompanying text.

¹⁰⁵ See *supra* notes 59-65 and accompanying text.

¹⁰⁶ See *supra* notes 66-73 and accompanying text.

¹⁰⁷ See *supra* notes 80-90 and accompanying text.

¹⁰⁸ See *supra* notes 91-102 and accompanying text.

¹⁰⁹ In *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979), the Supreme Court further encouraged the use of applicant flow statistics when it refused to allow the plaintiff to establish a *prima facie* case on the basis of population statistics. In a footnote, the Court implied applicant statistics would be more significant proof of discrimination. *Id.* at 587 n.29. See Freidman, *supra* note 33, at 48-52. See also B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1191, and (Supp. 1979) *supra* note 7, at 320-21.

¹¹⁰ See *supra* note 102 and accompanying text.

¹¹¹ See *supra* notes 91-101 and accompanying text.

¹¹² See *supra* note 102.

Under the bottom line concept of disproportionate impact, a violation of Title VII is deemed not to occur when the overall results of an employer's hiring or promotion scheme are not discriminatory, even if individual component requirements of that scheme had a disparate impact on a protected group.¹¹³ Thus the court's focus in a bottom line case is on the percentage of women or minorities actually hired, rather than on a single criterion in the overall process.¹¹⁴ Without clear guidance from the Supreme Court on the heightened role for applicant flow statistics embodied in the use of the bottom line theory,¹¹⁵ lower courts either applied their own reasoning, or looked to the federal enforcement agencies for direction on the propriety of the bottom line approach to disparate impact.¹¹⁶ Until the Supreme Court rejected the bottom line concept in 1982, in *Connecticut v. Teal*,¹¹⁷ it had been heralded as the most important concept in employment discrimination law since the disparate impact theory was developed in *Griggs v. Duke Power Co.*¹¹⁸

A. The Federal Guidelines

After the Supreme Court's landmark pronouncement on disparate impact in *Griggs*,¹¹⁹ Congress instructed the five government agencies responsible for monitoring employment discrimination to draft guidelines to help coordinate the implementation of Title VII.¹²⁰ The agencies were unable, however, to reach unanimous agreement over such critical issues as a definition of what constitutes disparate impact, and the validity of the bottom line theory.¹²¹ The

¹¹³ See generally Blumrosen, *supra* note 7, at 4-6.

¹¹⁴ B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1191. See also Lopatka, *supra* note 7, at 79-80.

¹¹⁵ The Supreme Court had recognized the utility of bottom line applicant flow statistics in *Dothard*, discussed *supra* notes 94-97 and accompanying text, *Hazelwood*, discussed *supra* note 98, and *Beazer*, discussed *supra* note 109. There had been no case before the Court, however, involving a component of a selection process with an adverse impact and a non discriminatory bottom line. In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), for example, the height and weight standards had a disproportionate impact on female applicants and women were also not proportionately represented at the bottom line. For a discussion of *Dothard*, see *supra* notes 94-98 and accompanying text.

¹¹⁶ For a discussion of the bottom line concept in the Uniform Guidelines, see *infra* notes 119-34 and accompanying text.

¹¹⁷ 102 S. Ct. 2525 (1982).

¹¹⁸ See, e.g., Blumrosen, *supra* note 7, at 5, 20.

¹¹⁹ For a discussion of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), see *supra* notes 47-58 and accompanying text.

¹²⁰ The Agencies involved were the Equal Employment Opportunity Commission, Civil Service Commission, Civil Rights Commission, Department of Labor and Department of Justice. They comprised the "Equal Employment Opportunity Coordinating Council," which was created to promote efficiency and to "eliminate conflict, competition, duplication, and inconsistency among the federal enforcement agencies." Shoben, *Probing*, *supra* note 85, at 29 n.129. Prior to the creation of the four member council, the EEOC had issued its own guidelines on employee selection and employment testing in 1966 and 1970. See Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 CATH. U. L. REV. 605, 612-19 (1979) [hereinafter cited as Catholic Univ. Note].

¹²¹ Blumrosen, *The Bottom Line*, *supra* note 7, at 329-30.

EEOC refused to join in the publishing of the Federal Executive Agency Guidelines in 1976.¹²² These guidelines included a definition of substantial disparate impact known as the "4/5 rule of thumb."¹²³ According to the rule, adverse impact does not occur in any selection process which chooses minority or women candidates at 80% or more the rate that whites or men are selected.¹²⁴ The 1976 guidelines also incorporated the bottom line theory by stating that validation of individual components in a selection process which had a disparate impact on protected groups would not be required, if the overall results of the process reveal no adverse impact.¹²⁵ The EEOC instead recommended in its own guidelines, that non-discriminatory results of an entire selection procedure do not preclude an application of the disparate impact method of Title VII analysis to each discriminatory component in the selection process.¹²⁶

The need for uniformity among all the federal agencies led in 1978 to the adoption of the "Uniform Guidelines on Employee Selection Procedure."¹²⁷ The EEOC and other agencies reached a compromise which resulted in the inclusion of the bottom line concept in the new guidelines. The compromise achieved was to have the guidelines state no government agency would initiate proceedings under Title VII against an employer with a non-discriminatory bottom line.¹²⁸ On the one hand, this wording assured the EEOC that the right of an individual to challenge a discriminatory component of a selection process, even if a non-discriminatory bottom line existed, was preserved.¹²⁹ On the other hand, an employer maintaining a non-discriminatory bottom line could

¹²² *Id.* at 330. "Federal Executive Agency Guidelines on Employee Selection Procedures" 41 Fed. Reg. 51734 (1976).

¹²³ Catholic Univ. Note, *supra* note 120, at 628-29. For a discussion of the 4/5 rule, see *supra* note 87.

¹²⁴ See A. SMITH, *EMPLOYMENT DISCRIMINATION LAW*, 925 (1978).

¹²⁵ *Id.* See also Blumrosen, *The Bottom Line*, *supra* note 7, at 330.

¹²⁶ Blumrosen, *The Bottom Line*, *supra* note 7, at 3301. See also Shoben, *Probing*, *supra* note 85, at 28-29.

¹²⁷ 29 C.F.R. § 1607 (1978). The stated purpose of the guidelines was to "... Assist ... employers to comply with federal law prohibiting employment practices that discriminate, and provide a framework for determining the proper use of tests and other selection procedures." 29 C.F.R. § 1607.1b.

¹²⁸ Blumrosen, *The Bottom Line*, *supra* note 7, at 335-36. The provision states in pertinent part:

"If ... the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact ... If ... the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in the usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection."

29 C.F.R. § 1607, 4C (1978).

¹²⁹ Blumrosen, *The Bottom Line*, *supra* note 7, at 336-37 n.40.

expect no government initiated Title VII challenge to individual components of his selection process.¹³⁰ Thus the Uniform Guidelines speak only of the propriety of government enforcement actions in bottom line cases. Since the Guidelines are not law, they did not affect the ability of the EEOC to pursue an individual's charges of employment discrimination.¹³¹

Unlike the preceding Federal Agency Guidelines, the Uniform Guidelines do not represent a total acceptance of the bottom line theory.¹³² Under the Federal Agency Guidelines, no disparate impact challenge would be allowed, and no validation expected of individual selection criterion when a favorable bottom line existed.¹³³ The 1978 Uniform Guidelines, however, without force of law, recommend the bottom line theory as a matter of governmental discretion rather than a binding legal interpretation of Title VII.¹³⁴ Hence, federal courts were free to entertain individual claims attacking selection criterion in bottom line cases after the promulgation of the Uniform Guidelines.

B. *The Adoption of the Bottom Line by Federal Courts*

The compromise eventually reached by the federal agencies on the role of the bottom line concept in the Uniform Guidelines did not constitute an unqualified endorsement of the theory. Nevertheless, the inclusion of the bottom line concept in the federal guidelines could be perceived by some federal courts as an authoritative opinion on an issue not easily addressed by existing case law. A pronouncement on the bottom line issue in an EEOC guideline carried great persuasive weight since the Supreme Court stated in *Griggs* that the guidelines should be accorded "great deference" in determining congressional intent under Title VII.¹³⁵ Thus, some lower courts were likely to embrace the bottom line provision in the Uniform Guidelines as more controlling than the agencies themselves had originally anticipated.¹³⁶

¹³⁰ *Id.* See also Shoben, *Probing*, *supra* note 85, at 31; Catholic Univ. Note, *supra* note 120, at 628.

¹³¹ Blumrosen, *The Bottom Line*, *supra* note 13, at 337 n.40. See also "Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures," Question and Answer No. 26, 44 Fed. Reg. 12000 (1979), reprinted in M. MINER & J. MINER, *supra* note 83, at 464, 473.

¹³² See *supra* notes 121-22 and accompanying text.

¹³³ *Id.* Compare 29 C.F.R. §§ 1607.2-1607.3 (1975) (EEOC Guidelines) with 41 C.F.R. § 60-3.4(b) (1976) (Federal Agency Guidelines), cited in Lopatka, *supra* note 7, at 80 n.51.

¹³⁴ Blumrosen, *The Bottom Line*, *supra* note 7, at 335 n.32. See also Catholic Univ. Note, *supra* note 156, at 628 n.166.

¹³⁵ *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court reiterated that "the EEOC guidelines are not administrative regulations promulgated pursuant to formal procedures established by Congress. But as this Court has heretofore noted, they do constitute the administrative interpretation of the Act by the enforcing agency and consequently they are entitled to 'great deference.'" *Id.* at 431. For a discussion of *Albemarle*, see *supra* notes 57-58 and accompanying text. See also Espinoza v. Farah Mfg., 414 U.S. 86, 94 (1973).

¹³⁶ See, e.g., Note, *Rebutting the Griggs Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, *supra* note 58, at 189 n.51. "The Uniform Guidelines' recent

The inclusion of the bottom line concept in the Uniform Guidelines served to augment the technique employed by some federal courts to analyze the end result of a selection process through applicant flow statistics.¹³⁷ The popularity of applicant flow statistics, when coupled with what could be viewed as an endorsement of the bottom line approach in the Uniform Guidelines, created a judicial atmosphere ripe for the adoption of the bottom line theory. Without any clear indication from the Supreme Court, lower federal courts focused on the actual hiring rates for applicants from statutorily protected groups in disparate impact actions and rejected Title VII challenges to isolated selection requirements when the applicant flow statistics reflected no adverse impact.¹³⁸

The bottom line approach to a disparate impact case was adopted in *Brown v. New Haven Civil Service Board*.¹³⁹ The *Brown* court's rationale included reliance on applicant flow statistics and the bottom line provision in the Uniform Guidelines. In *Brown*, three black applicants challenged a written examination that constituted one phase of a multi-stage hiring process for the New Haven Police Department under Title VII.¹⁴⁰ Applicants were required to obtain a combined passing score on both a written test and a physical agility

approval of the bottom line concept will likely have a profound effect on the effective use of applicant flow statistics . . ." *Id.*; Shoben, *Probing*, *supra* note 85, at 31-32; Catholic Univ. Note, *supra* note 120, at 628-29. "The Uniform Guidelines' adoption of the bottom line concept and the four-fifths rule could increase a plaintiff's burden of establishing a prima facie case of discrimination . . . To present a prima facie case under the bottom line concept, plaintiffs now usually must show that the employer's total selection process, rather than a single test adversely affects minorities. Only then will an employer be forced to put forth proof of job relatedness." *Id.*

¹³⁷ Applicant flow data had focused the courts' attention on the ultimate rate of selection for members of a protected group from the original applicant pool. *See, e.g.*, *Friend v. Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978) ("various subtests may not be analyzed in isolation as this can lead to inconsistencies. The best comparison is between the number of blacks and whites who initially sought promotion to Fire Lieutenant, and the numbers who were actually promoted."); *Jackson v. Curators of Univ. of Missouri*, 456 F. Supp. 879, 881 (E.D. Mo. (1978)) ("The court concludes that Plaintiff Jackson has not established a prima facie case. Although the two year college education requirement certainly has a disparate impact on the general population, defendant has had no problem recruiting qualified blacks."); *Donnell v. G.M. Corp.*, 430 F. Supp. 668, 672 (E.D. Mo. 1977) ("It would be illogical to conclude that plaintiff has established a prima facie case . . ."). *See also supra* notes 92-102 and accompanying text.

¹³⁸ *See, e.g.*, *Cormier v. P.P.G. Indus.*, 519 F. Supp. 211, 278 (W.D. La. 1981) ("In examining selection procedures which allegedly have a disparate impact, the court must first determine whether the selection procedure in its entirety has resulted in a meaningful or substantial exclusion of blacks from the job opportunity in question. If there is no disparate impact in the overall process, then there is no prima facie case of disparate impact discrimination.") *Ramirez v. City of Omaha*, 538 F. Supp. 7, 12 (D. Neb. 1981) ("But in considering the parties' statistical proof it is important to note the firefighter selection process must first be viewed as a whole to determine the presence of disparate impact . . ."). *Lee v. City of Richmond*, 456 F. Supp. 756, 771 (E.D. Va. 1978) ("The crucial fact in determining disparate impact is the rate at which blacks are ultimately chosen for the position rather than their test scores made in the process of selection."); *Jackson v. Nassau County Civil Serv. Comm'n*, 424 F. Supp. 1162, 1168 n.11 (E.D.N.Y. 1976) ("...if the final result of the examination procedure does not evidence a discriminatory impact, cultural or racial bias in individual test items is irrelevant.").

¹³⁹ 474 F. Supp. 1256 (D. Conn. 1979).

¹⁴⁰ *Id.* at 1258.

test to continue to be eligible for further consideration in the process.¹⁴¹ The plaintiffs were among those black applicants who failed the written exam and were therefore barred from continuing in the selection process.¹⁴² Statistical evidence revealed 61.9% of the white applicants passed the test, while 30.3% of the black applicants received passing scores.¹⁴³ Despite the clear disparate impact the examination had on black applicants, applicant flow statistics showed the number of blacks hired as a percentage of the original black applicants was roughly the same as the percentage for whites.¹⁴⁴

The court held that ultimate results of the entire hiring procedure showed no prima facie case of disparate impact could be established.¹⁴⁵ At the outset, the district court employed the "4/5 rule of thumb" set forth in the Uniform Guidelines as a definition of adverse impact.¹⁴⁶ The *Brown* court recognized that this rule was not binding on courts, but nevertheless determined the Uniform Guidelines were an "administrative interpretation of Title VII entitled to considerable deference."¹⁴⁷ Most importantly, however, the court chose to apply the 4/5 rule to the results of the selection process as a whole, rather than to the results of the test component.¹⁴⁸

Judge Newman's decision in *Brown* to concentrate the court's analysis on the results of the overall selection process was based on more than applicant flow statistics. He also buttressed his decision to confine the court's analysis to the overall results with a judicial economy argument.¹⁴⁹ He felt examining individual components of a multi-stage selection process would launch the court on a course which has "no boundaries and no clear end."¹⁵⁰ Judge Newman

¹⁴¹ *Id.* If the applicant accumulated a combined passing score on the exam and agility test, he or she was eligible for an interview. The interview was scored separately and selections were made according to the rating received in the interview. An applicant failing to achieve a passing score on the exam and agility test was disqualified from further consideration. *Id.*

¹⁴² *Id.* This type of selection process differs from a cumulative selection procedure, discussed *infra* notes 204-19 and accompanying text, in which all applicants are exposed to every component of the selection procedure and receive an aggregate rating from the total process.

¹⁴³ *Brown*, 474 F. Supp. at 1260. Out of 99 blacks who took the written exam, 30 passed; out of 194 whites who took the exam, 120 passed. *Id.*

¹⁴⁴ *Id.* The most favorable construction of the results of the selection process showed that of those applicants taking the exam, 8.0% of the blacks were hired and 9.5% of the original white applicants were hired. *Id.* The defendant also produced statistical evidence which showed the number of blacks hired (14), represented 28% of the newly hired officers. The black composition of the City of New Haven was 26%. *Id.* at 1261.

¹⁴⁵ *Id.* at 1263.

¹⁴⁶ *Id.* at 1260. While the applicant flow data proffered by the employer satisfied the 80% rule for determining adverse impact included in the Uniform Guidelines, (a black hiring rate 84% that of the white rate), the passing rate for blacks on the exam did not satisfy the 80% rule. (30.3% of the black applicants passed the test while 61.9% of the whites passed. Thus the black rate was less than 50% of the white rate.) *Id.*

¹⁴⁷ *Id.* at 1260.

¹⁴⁸ *Id.* at 1260-61.

¹⁴⁹ *Id.* at 1262.

¹⁵⁰ *Id.* See also *Smith v. Troyan*, 520 F.2d 492, 497-98 (6th Cir. 1975), discussed *infra* notes 168-74 and accompanying text. See also *Shoben, Probing, supra* note 85, at 26-27.

contended that even courts that decided to penetrate the application process to examine a single pass-fail hurdle would have to draw the line at some point to avoid scrutiny of every question found on every test in a hiring procedure.¹⁵¹ He concluded, therefore, the prospect of a court examining sub-tests, sub-sub-tests and even individual questions within the test was a legitimate argument in favor of examining only the end result of an entire hiring process.¹⁵²

The *Brown* court also viewed the bottom line concept as an incentive for employers to engage in voluntary affirmative action.¹⁵³ The *Brown* court concluded Title VII would be "needlessly construed" if used to invalidate a process which resulted in a non-discriminatory racial proportionality.¹⁵⁴ As a final justification for denying a prima facie case based on the applicant flow statistics from the entire selection process, the *Brown* court referred to the inclusion of the bottom line concept in the Uniform Guidelines.¹⁵⁵ The court noted that the guidelines specifically pertain to the decision of government agencies and prosecutors whether to allocate scarce federal resources in the pursuit of a bottom line case.¹⁵⁶ Nevertheless, the court inferred that the incorporation of the bottom line concept indicated a "threshold of administrative concern."¹⁵⁷ In the absence of any evidence of discriminatory intent, the court felt judicial concern should be set at the same level.¹⁵⁸ In other words, federal courts likewise should adopt the bottom line approach.

Brown serves as an example of the conflicting outcomes that occur when cases involve a discriminatory component with both a discernible disproportionate impact on a protected group, and non-discriminatory bottom line hiring statistics. In *Brown*, the test component functioned as a pass-fail barrier which the court termed a "hurdle."¹⁵⁹ Those individual applicants failing the test were disqualified and eliminated from the pool of potential policemen. Despite the fact that the test had a disparate impact by itself on a protected group, and functioned as a barrier, the court was not willing to afford these individuals the protection of Title VII. As long as an adequate number of black applicants cleared the hurdle and were ultimately hired, the court placed no

¹⁵¹ *Brown*, 474 F. Supp. at 1262.

¹⁵² *Id.*

¹⁵³ *Id.* at 1263. For a contrary view of the voluntary affirmative action prompted by the bottom line concept, see Shoben, *Probing*, *supra* note 85, at 31-33. See also EEOC v. Greyhound Lines Inc., 635 F.2d 188, 196-97 (3d Cir. 1980) (Slovitier, C.J., dissenting) ("This rule would establish by judicial fiat an invidious quota defense.").

¹⁵⁴ *Brown*, 474 F. Supp. at 1263.

¹⁵⁵ *Id.* at 1263 n.10.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1262. Such a requirement could also be termed a "knock out" component because it eliminates applicants from further consideration. See Brief of the National League of Cities and the National Public Employer Labor Relations Assoc. as Amicus Curiae in Support of Petitioners at 26. *Connecticut v. Teal*, 102 S. Ct. 2525, (1982), reprinted in BNA'S LAW REPRINTS, *supra* note 7, at 288.

burden on the employer to show the written test was in fact related to job performance.¹⁶⁰

In summary, the reasoning employed by the *Brown* court included four factors that generally facilitated the adoption of the bottom line approach to disparate impact cases. First, courts recognized applicant flow data as the most salient indication of whether a protected group had suffered from adverse impact in a selection process.¹⁶¹ Second, despite the fact that the Uniform Guidelines provision on the bottom line tacitly preserved the right of individuals to challenge discriminatory components in cases with non-discriminatory bottom lines, the guidelines provision could be interpreted by courts as the official imprimatur of the EEOC and other enforcement agencies endorsing the bottom line approach to disparate impact.¹⁶² Third, the argument for judicial economy could be employed to dissuade courts from choosing to penetrate individual components of a selection process.¹⁶³ Fourth, the bottom line theory could be seen as an incentive for employers to engage in voluntary affirmative action.¹⁶⁴

Brown is an example of a court allowing favorable bottom line statistics to absolve an employer from liability where a selection criterion with a disparate impact eliminates members of a protected group from consideration for hiring. In that case, the written test acted as an absolute barrier to further consideration for selection. A different situation is presented by a selection procedure where no one component functions as a pass-fail hurdle, but rather the results of several criteria are combined to achieve a single applicant rating. The bottom line theory is also applicable to this type of "cumulative selection procedure."

In a cumulative selection procedure, a passing score on an employment test is not a prerequisite for progression to other stages of the selection process such as physical agility tests, medical exams, or personal interviews.¹⁶⁵ Rather, in such a selection procedure an applicant's score on a written test would be considered in the aggregate with the results of other components of the entire selection procedure.¹⁶⁶ In this way exposure to other components may serve to offset a lower score, or a rating received by a candidate in a specific component of the entire selection process.¹⁶⁷

¹⁶⁰ *Brown*, 474 F. Supp. at 1263.

¹⁶¹ See *supra* notes 109-15 and accompanying text.

¹⁶² See *supra* notes 119-35 and accompanying text. See also *Teal v. Connecticut*, No. B-79-128 (D. Conn. 1980), discussed *infra* note 233 and accompanying text.

¹⁶³ See also Brief for Petitioner at 26; *Connecticut v. Teal*, 102 S. Ct. 2525 (1982) reprinted in BNA's LAW REPRINTS, *supra* note 7, at 206; Amicus Brief in Support of Petitioners by the Equal Employment Advisory Council and International Personnel Management Assn. *Id.* at 6.

¹⁶⁴ See *supra* notes 153-54 and accompanying text. See also discussion *infra* note 425.

¹⁶⁵ See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1192. See also *Teal v. Connecticut*, 645 F.2d 133, 137 (2d Cir. 1981).

¹⁶⁶ See Shoben, *Probing*, *supra* note 85, at 3-4, 25-27.

¹⁶⁷ See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1192.

*Smith v. Troyan*¹⁶⁸ provides an example of a case involving such a cumulative selection procedure. In *Smith*, the Sixth Circuit Court of Appeals employed the bottom line approach to reject a plaintiff's assertion that a prima facie violation of Title VII occurred from the use of a written test that had an adverse effect on blacks. *Smith* differs from *Brown* in that no one component of the selection process functioned as a pass-fail barrier which had to be surpassed by a candidate.

The plaintiff in *Smith* was a black applicant for a position on the police department of the City of East Cleveland, Ohio.¹⁶⁹ Applicants were required to proceed through a selection process that consisted of a written test, an athletic test, a medical examination, and an oral interview.¹⁷⁰ These requirements were combined to achieve an aggregate rating which was adjusted upwards if an applicant was a veteran.¹⁷¹ The plaintiffs challenged the written test component claiming the test resulted in a disparate impact upon blacks.¹⁷² The Sixth Circuit held no prima facie case of disparate impact could be established based on favorable applicant flow statistics produced by the employer.¹⁷³ In addition, since the written exam was a subtest of a cumulative procedure, the court determined that a disproportionately poor black performance on the written component was not conclusive¹⁷⁴ since the applicants were exposed to all the other components of the selection procedure.

In 1975, the Second Circuit Court of Appeals¹⁷⁵ similarly advocated the bottom line approach and refused to fragment a cumulative selection procedure to investigate its sub-components in *Kirkland v. New York State Department of Correctional Service*.¹⁷⁶ The court approved of the district court's decision not to penetrate a multi-part examination and analyze its component parts. The court saw little relevance in an investigation of individual test components

¹⁶⁸ 520 F.2d 492 (6th Cir. 1975), cert. denied *Smith v. Troyan*, 426 U.S. 934 (1976).

¹⁶⁹ 520 F.2d at 493 n.1.

¹⁷⁰ *Smith v. City of East Cleveland*, 363 F. Supp. 1131, 1134 (N.D. Ohio 1978).

¹⁷¹ *Id.*

¹⁷² The plaintiff "failed" the written test portion of the cumulative selection procedure by receiving a score so low on the written exam, that it could not be offset by one or all of the other components. *Id.* at 1135. The plaintiff produced the results for three years of testing that showed that whites passed the written test component significantly more often than blacks. In the latest administration, 71% of the white applicants passed, while only 22% of the black applicants passed. *Id.*

¹⁷³ *Smith*, 520 F.2d at 497. The applicant flow statistics for the three years of hiring that were under Title VII challenge by the plaintiff, showed blacks comprised 33% of the applicants and 29% of the police hired from the selection process. *Id.*

¹⁷⁴ The district court had reasoned that blacks were adversely affected by the test requirement, but they were disproportionately advantaged by the veterans preference adjustment. 363 F. Supp. at 1146. (75% of the black applicants were veterans while only 36% of the white candidates were veterans. *Id.*) Therefore, the circuit court drawing upon this reasoning, concluded that the process should be viewed in its entirety. 520 F.2d at 497-98. See Shoben, *Probing*, *supra* note 85, at 25-27.

¹⁷⁵ The same court of appeals that would later decide *Teal v. State of Connecticut*, 645 F.2d 133 (2d Cir. 1981), discussed *infra* notes 234-57 and accompanying text.

since a passing score and promotion was based on the cumulative results of five subtests, and the issue was really whether the examination as a whole had a disparate impact.¹⁷⁷ The district court in *Kirkland* had vigorously insisted on an analysis of the examination procedure in its entirety; not after it was fragmented into its component parts.¹⁷⁸ The district court reasoned any other approach to the problem would "conflict with the dictates of common sense."¹⁷⁹

The propriety of a bottom line approach to disparate impact claims involving individual components of cumulative selection procedures also has been adopted by other courts.¹⁸⁰ The application of the bottom line approach to cases involving cumulative selection procedures, however, is distinguishable from a case involving pass-fail hurdles.¹⁸¹ The major difference between the two types of procedures is that in a cumulative procedure, if a member of a protected group suffers discrimination from the disparate impact of one component, he or she has the opportunity, at least in theory, to offset that discrimination with a superior performance on another component. Alternatively, the applicant could benefit from a component which favors his protected group.¹⁸² In a selection procedure where a component criterion acts as a pass-fail barrier or "knock-out" component, the candidate suffering discrimination is afforded no similar opportunity since he is eliminated from any further consideration.¹⁸³

Courts such as *Smith* and *Kirkland* which adopted the bottom line theory in cases challenging the validity of an isolated component of a cumulative selection procedure are a distinct category of courts accepting the bottom line theory that based their reasoning on the applicant's ability to offset a poor score in one selection criterion by excelling in another component of the selection procedure. The other category of courts embracing the bottom line theory, typified by *Brown*, allowed an employer to use bottom line statistics to justify a discriminatory component, even though that component operates as a pass-fail barrier eliminating applicants from any further consideration.¹⁸⁴ These courts

¹⁷⁶ 520 F.2d 420 (2d Cir. 1975).

¹⁷⁷ *Id.* at 425.

¹⁷⁸ 374 F. Supp. 1361, 1370 (S.D.N.Y. 1974). The district court quoted from *Vulcan Soc. of the New York Fire Dept., Inc. v. Civil Service Commission*, 360 F. Supp. 1265, 1272 (S.D.N.Y. 1973), *aff'd*, 490 F.2d 387 (2d Cir. 1973), in which the court stated "[M]oreover, the examination may not be truncated; whether or not it has an adverse impact upon minority groups should be considered in terms of the total examination procedure."

¹⁷⁹ *Kirkland*, 373 F. Supp. at 1370.

¹⁸⁰ *See, e.g.*, *Rule v. Ironworkers Local 396*, 568 F.2d 558, 565 n.10 (8th Cir. 1977); *Wilmore v. City of Wilmington*, 533 F. Supp. 844, 857 n.33 (D. Del. 1982) *rev'd Wilmore v. Wilmington*, 699 F.2d 667 (3d Cir. 1983).

¹⁸¹ For a discussion of selection procedures with pass-fail hurdles, *see supra*, notes 139-67 and accompanying text.

¹⁸² *See supra* notes 165-79 and accompanying text. *See, e.g.*, Shoben, *Probing*, *supra* note 85, at 31-32.

¹⁸³ *See supra* notes 139-64 and accompanying text. *See, e.g.*, Shoben, *Probing*, *supra* note 85, at 30.

¹⁸⁴ *See supra* notes 139-64 and accompanying text.

based their analysis on applicant flow statistics.¹⁸⁵ They also inferred an official endorsement of the bottom line concept by key federal government agencies when the theory was included in the Uniform Guidelines.¹⁸⁶ Although courts of both categories formed a majority favoring the bottom line approach, a few federal courts ruled a favorable bottom line should not prevent a plaintiff from establishing a prima facie case under Title VII by demonstrating the disparate impact of one requirement in the hiring process.

C. Federal Courts Rejecting the Bottom Line

The acceptance of the bottom line concept in the lower federal courts was not unanimous. At the same time the bottom line theory was receiving increased acceptance by some courts, other federal courts explicitly rejected the approach. These courts considered the bottom line results of a hiring process irrelevant to the issue of whether a plaintiff may seek the protection of Title VII when one component of the selection process has a disparate impact on the plaintiff's protected group. Rather, an entire selection process was deemed impermissibly discriminatory if one component of the process had an adverse impact on a statutorily protected group.¹⁸⁷

An early rejection of the bottom line concept occurred in *Johnson v. Goodyear Tire and Rubber Co.*¹⁸⁸ *Goodyear* involved a set of facts very similar to *Griggs*.¹⁸⁹ Goodyear required all employees wishing to transfer to skilled positions within the company to pass a written aptitude test.¹⁹⁰ Black employees challenged the test requirement under Title VII, alleging the results of the test showed an adverse impact was suffered by blacks.¹⁹¹ The district court found that Goodyear's test requirement had not resulted in a disparate impact on blacks since 132 blacks failed the test, while 126 whites likewise failed.¹⁹² The appeals court reversed the holding of the district court finding the statistics

¹⁸⁵ See discussion of applicant flow statistics *supra* notes 92-102, 109-14, and accompanying text.

¹⁸⁶ See *supra* notes 119-34, 155-58 and accompanying text.

¹⁸⁷ See, e.g., *Davis v. Washington*, 512 F.2d 956, 960-61 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 229 (1977); *League of United Latin American Citizens v. Santa Ana*, 410 F. Supp. 873, 894-95 (C.D. Cal. 1976). See also *Rothschild & Werden, Title VII and the Use of Employment Tests: An Illustration of the Limits of Judicial Process*, 11 J. LEGAL STUDIES 261, 277 (1982); *Booth & Mackay, supra* note 7, at 156-57.

¹⁸⁸ 491 F.2d 1364 (5th Cir. 1974).

¹⁸⁹ For a discussion of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), see *supra* notes 45-56 and accompanying text.

¹⁹⁰ *Johnson*, 491 F.2d at 1368. In 1957, Goodyear, like Duke Power Co., required all new hires to possess a high school diploma and pass a written aptitude test. The policy also covered those Goodyear employees who wished to transfer within the company to other departments. Over the years, the diploma and testing requirements were eventually discontinued, but a disincentive for blacks who wished to transfer out of the unskilled labor department remained. Any employee transferring departments would lose all accumulated seniority. *Id.* at 1368-69.

¹⁹¹ *Id.* at 1368, 1372.

¹⁹² *Id.* at 1372. The district court measured the disparity between the black and white failure rate as "a difference of less than 6%." *Id.*

relied on by the lower court "erroneous."¹⁹³ As the Fifth Circuit indicated, when read in context, the figures cited by the district court represented a failure rate of 49% for black candidates compared to 15% for white candidates.¹⁹⁴

Despite the existence of this disparate pass-fail rate, Goodyear attempted to invoke the bottom line concept to refute the evidence of disparate impact. The company showed that it had transferred, and hired black employees from the surrounding Houston, Texas area in proportion to the black composition of the local population.¹⁹⁵ The appeals court rejected this argument holding that evidence did not disprove the "essential finding that the tests had a detrimental impact on black applicants."¹⁹⁶ The court ruled the evidence merely disclosed that Goodyear had attempted, by other practices, to remove the taint of the test's consequences.¹⁹⁷ In conclusion, the court stated that the bottom line evidence could not dispel the substantial invidious effect that the written tests had on black employees and potential employees.¹⁹⁸ That effect, according to the court, was to confine blacks to Goodyear's unskilled labor department, thereby depriving them of equal employment opportunity.¹⁹⁹

In *EEOC v. Trailways Inc.*,²⁰⁰ a Colorado federal court similarly refused to allow the use of bottom line statistics to refute the disproportionate impact caused by a neutral employment requirement on blacks. *Trailways*, unlike most bottom line cases, did not involve employment testing. The plaintiff, a black Trailways employee, challenged the employer's policy of prohibiting the wearing of beards by employees in public contact positions.²⁰¹ The adverse impact in this case was attributable to a disease, peculiar to roughly 25% of black males, which caused shaving to be painful.²⁰² The plaintiff was among those blacks who suffered from this ailment and therefore challenged the no beard policy under the disparate impact method of Title VII analysis.²⁰³

Trailways used bottom line data to argue that the policy had no adverse effect on blacks since its workforce contained a black representation proportional to the black population in the surrounding area.²⁰⁴ The *Trailways* court

¹⁹³ *Id.*

¹⁹⁴ *Id.* 274 blacks had taken the written test and 132, or 49%, had failed. 848 whites took the test and 126, or 15%, failed. *Id.* at 1372 n.21.

¹⁹⁵ *Id.* at 1372.

¹⁹⁶ *Id.* at 1373.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ 530 F. Supp. 54 (D. Colo. 1981).

²⁰¹ *Id.* at 56. The plaintiff had lost his job as a Trailways driver because of the policy. *Id.*

²⁰² *Id.* Plaintiff suffered from pseudofolliculitis barbae (PFB). *Id.* This skin disease, overwhelmingly peculiar to blacks makes shaving a painful, and possibly injurious experience. *Id.* The only effective treatment for this condition is abstinence from shaving. *Id.* It is estimated that approximately 25% of all black males suffer from PFB. *Id.* Because it was medically necessary for the plaintiff to allow his beard to grow, the plaintiff claimed the no beard policy had an adverse impact on blacks. *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 55-56.

was also confronted with persuasive precedent in *EEOC v. Greyhound Lines*.²⁰⁵ *Greyhound* involved the same facts as *Trailways*. In *Greyhound*, however, the Third Circuit denied the establishment of a prima facie case because of the employer's bottom line evidence that there was a higher percentage of black employees in public contact jobs than in the labor force and general population of that area.²⁰⁶

The *Trailways* court refused to follow the Third Circuit's *Greyhound* decision. Rather, the court viewed the bottom line statistics produced by the employer in *Trailways* showing a black representation in the workforce proportional to the local black population as a step towards a blatant quota system.²⁰⁷ The *Trailways* court also found the pass-fail rate for blacks excluded by the no beard policy as more demonstrative of discrimination than the employer's proffered applicant flow data.²⁰⁸ Since 25% of the potential black male applicants for jobs were eliminated by the policy, the court concluded the no beard policy had a significant adverse impact on blacks. Therefore, the court allowed the plaintiff to establish a prima facie case.²⁰⁹

D. Summary of the Bottom Line in Federal Courts

The bottom line approach to disparate impact analysis was adopted by federal courts dealing with two types of employee selection procedures. In one type, a written test or similar requirement acts as a single pass-fail hurdle which must be overcome by an applicant seeking employment or promotion.²¹⁰

²⁰⁵ 635 F.2d 188 (3rd Cir. 1980).

²⁰⁶ *Id.* at 191. In *Greyhound*, the court relied on a bottom line population comparison that showed black males held more than 20% of the jobs at the Philadelphia terminal covered by the policy, but blacks only comprised 15% of the male population in the labor force of the Philadelphia SMSA. *Id.*

²⁰⁷ *Trailways*, 530 F. Supp. at 58. As an example of the quota system, the *Trailways* court stated the employer's argument carried to its logical conclusion would allow an employer to legally hire no blacks, as long as he maintained one more black employee in his workforce than the number which represents the proportional representation of the black population in the area. *Id.* at 57-58.

²⁰⁸ *Id.* at 59.

²⁰⁹ *Id.* In so ruling, the *Trailways* court declined to follow the Third Circuit's *Greyhound* decision. *Id.* at 57. The approach of the *Trailways* court more closely resembled the position of the dissent in *Greyhound*.

In that dissent, Circuit Judge Sloviter chastized the *Greyhound* majority for adopting the bottom line approach. He termed the bottom line concept a "tautological new rule." *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 196 (3d Cir. 1980) (Sloviter, C.J., dissenting). The dissent considered the majority's acceptance of the bottom line comparisons offered by the employer as a justification for an admittedly discriminatory policy. The dissent viewed the bottom line concept as a "deceptively subtle" transformation of the disparate impact method of proving discrimination which could have a devastatingly deleterious effect on the enforcement of Title VII. *Id.* The dissent objected to the bottom line concept's justification of unfairness to the individual on the basis of fairness to the minority group. *Id.* at 198. In the dissent's view, in light of the history of Title VII as interpreted by the Supreme Court, the basic policy of Title VII required that the court's focus be on fairness to individuals, rather than fairness to groups. *Id.* at 198.

²¹⁰ See *supra* notes 139-64 and accompanying text.

When an individual member of a protected group challenged the adverse impact of this exclusionary hurdle, courts adopting the bottom line approach would not allow the establishment of a prima facie case on the basis of disparate pass-fail statistics alone.²¹¹ Rather, they looked to the end results of a selection process to determine, through applicant flow statistics, whether members of the plaintiff's group were actually selected for hire or promotion in disproportionately high numbers.²¹² If the applicant flow statistics revealed no disparity, no violation of Title VII was deemed to have occurred.²¹³

The other type of employee selection procedure found susceptible to bottom line analysis was the cumulative selection procedure. In the cumulative procedure, the results of several components are factored together to arrive at one aggregate rating for a candidate for hire or promotion,²¹⁴ thereby exposing applicants to all components of the procedure. Courts applying the bottom line to this situation also based their decision on favorable applicant flow statistics.²¹⁵ The courts reasoned that the possibility of an applicant receiving offsetting scores on the various parts of the process warranted viewing the entire process in determining whether a selection procedure was impermissibly discriminatory.²¹⁶

The minority of federal courts which rejected the bottom line approach found applicant flow statistics not to be the most dispositive indicator of disparate impact. Focusing instead on the exclusionary effects of a particular employment requirement,²¹⁷ these courts allowed protected individuals to establish a prima facie case through statistical analysis of actual pass-fail rates, even if the employer's applicant flow statistics revealed a favorable treatment of the individual's group as a whole.²¹⁸

²¹¹ See *supra* notes 145-48 and accompanying text.

²¹² *Id.*

²¹³ *Id.* See also, *EEOC v. Navajo Refining*, 593 F.2d 988, 991-92 (10th Cir. 1979). A high school diploma and written aptitude test requirement were challenged for their adverse impact on Spanish Surnamed Americans (SSA's). *Id.* at 990. The court ruled:

the percentage of SSA's hired during the period at issue exceeded significantly the percentage of SSA's in the available workforce Thus the company is free to use its tests and high school education requirements if the result is not discrimination in fact. When 30% of the applicants for jobs are SSA's, from a workforce in the community of 23.2% SSA's, and 38% of the persons hired by Navajo are SSA's, the requirement of proof of discrimination is not met.

Id. at 992.

²¹⁴ See *supra* notes 165-67 and accompanying text.

²¹⁵ See *supra* notes 167-79 and accompanying text.

²¹⁶ See *supra* note 182 and accompanying text.

²¹⁷ See *supra* notes 227-53 and accompanying text.

²¹⁸ *Id.* See also *League of United Latin American Citizens v. Santa Ana*, 410 F. Supp. 873, 894-95 (C.D. Cal. 1976). This case involved a challenge to a test component of a selection procedure which had an adverse impact on Mexican-Americans and acted as a barrier. *Id.* at 891-94. The court rejected the defendant's applicant flow data that showed the plaintiff's group of Mexican-Americans, as a class, were adequately represented at the bottom line. *Id.* at 894. The court distinguished *Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975), discussed *supra* notes 168-74 and accompanying text, because that case involved a challenge to a subtest of a cumula-

All of these factors involved in the adoption and rejection of the bottom line concept in the federal courts, including the role of the theory in cumulative selection procedures, are present in *Connecticut v. Teal*.²¹⁹ In *Teal*, the Supreme Court had the opportunity to consider each of the factors which had contributed to the inconsistent treatment of the bottom line concept in the lower courts.

III. CONNECTICUT V. TEAL

In *Connecticut v. Teal*, the United States Supreme Court affirmed the decision of the Second Circuit Court of Appeals to reject the bottom line approach to disparate impact Title VII analysis. In *Teal*, the plaintiffs challenged the employer's use of a written test in a promotion process.²²⁰ The test, which was a mandatory prerequisite for further consideration for promotion, was passed by 79.53% of the white candidates and 54.17% of the black candidates.²²¹ On the basis of the disproportionate pass-fail rate for blacks, the plaintiffs sought to establish a prima facie case under the disparate impact theory. The defendant state employer, however, produced applicant flow data that showed 22.1% of the black applicants were eventually selected for promotion, while only 13.5% of the white candidates were promoted.²²² The decision of the Supreme Court to allow establishment of a Title VII prima facie case on the basis of the disparate pass-fail rate for the tests, despite the favorable applicant flow data at the bottom line, runs counter to the view of a majority of federal courts favoring the bottom line approach.²²³

This casenote will examine the disposition of *Connecticut v. Teal*. First, the treatment of the *Teal* case at the District Court and Circuit Court of Appeals will be discussed.²²⁴ Second, the majority position of the Supreme Court in *Teal* will be presented.²²⁵ Third, the position of the four dissenting Justices of the Court, in *Teal* will be discussed.²²⁶ Finally, this casenote will undertake an analysis of both the majority and dissenting opinions in *Teal*.²²⁷

A. Connecticut v. Teal in the Federal Courts

The plaintiffs in *Connecticut v. Teal* initiated their action in the United States District Court for the District of Connecticut.²²⁸ The plaintiffs claimed

tive selection procedure. 410 F. Supp. at 894. The court held "the Civil Rights Acts protect individuals from discriminatory treatment. The Acts simply do not permit employers to exclude individuals from employment by use of discriminatory devices. Victims of discrimination are no less victims when an employer can point to favorable acceptance rates." *Id.* at 895.

²¹⁹ 102 S. Ct. 2525 (1982), discussed *infra* notes 220-388 and accompanying text.

²²⁰ See *supra* notes 14-23 and accompanying text.

²²¹ *Teal v. Connecticut*, 645 F.2d 133, 135-36 (2d Cir. 1981). 26 of the 48 blacks taking the test passed, while 206 of the 259 whites taking the test passed. *Id.* at 136.

²²² *Id.* See also discussion *supra* notes 187-213 and accompanying text.

²²³ See *supra* note 6 and discussion *supra* notes 135-86 and accompanying text.

²²⁴ See *infra* notes 228-57 and accompanying text.

²²⁵ See *infra* notes 258-316 and accompanying text.

²²⁶ See *infra* notes 317-53 and accompanying text.

²²⁷ See *infra* notes 354-88 and accompanying text.

²²⁸ *Teal v. State of Connecticut*, No. B-79-128, Slip Op. (D. Conn. 1980), reprinted in

the defendant state employer had violated Title VII by administering and acting upon the results of a written test which had a disproportionately adverse impact on black applicants for promotion.²²⁹ The district court ruled the plaintiffs may not establish a prima facie case under the disparate impact theory.²³⁰ The court held the defendant employer's bottom line applicant flow statistics showed blacks had suffered no disparate impact from the promotion process as a whole.²³¹ The district court's decision to allow the employer to refute the plaintiffs' assertion of disparate impact with the bottom line theory was based on two factors: applicant flow data²³² and the persuasive influence of the bottom line provision of the Uniform Guidelines.²³³

The *Teal* plaintiffs appealed the district court's decision to the United States Court of Appeals for the Second Circuit.²³⁴ The plaintiffs argued that the district court erred in using the results of the entire selection process, rather than the results of the written test to determine whether black applicants for promotion had suffered disparate impact.²³⁵ The appeals court agreed with the plaintiffs²³⁶ and ruled the results of the written test alone were enough to establish a prima facie case under the disparate impact theory.²³⁷

The court emphasized the fact that the test at issue in *Teal* acted as a barrier preventing a disproportionately large number of blacks from proceeding to the next step of the selection process.²³⁸ Title VII, according to the court, was

Petition for Writ of Certiorari at 17a, *Connecticut v. Teal*, 102 S. Ct. 2525 (1982), reprinted in BNA'S LAW REPRINTS, *supra* note 7 at 35.

²²⁹ *Id.* at 19a. The plaintiffs originally characterized their Title VII claim as one of disparate treatment under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *Id.* at 22a. For a discussion of *McDonnell Douglas* and the disparate treatment theory see *supra*, notes 33-41 and accompanying text. The district court, however, chose to evaluate the plaintiff's case under the disparate impact theory since it involved a facially neutral selection device. *Id.* at 22a.

²³⁰ *Id.* at 24a.

²³¹ *Id.*

²³² *Id.* at 22a-23a. For a discussion of applicant flow data, see *supra*, notes 92-102 and accompanying text.

²³³ The district court explained, the *Brown* court, see discussion *supra* notes 104-22 and accompanying text, adopted the "bottom line approach sanctioned by the EEOC Guidelines" as did the majority of the courts considering the issue. *Teal v. State of Connecticut*, No. B-79-129, Slip Op., reprinted in Petition for Writ of Certiorari at 17a, 22a-23a. Accordingly, on the basis of the higher promotion rate for blacks compared to whites, the district court ruled the plaintiffs had not established a prima facie case of disparate impact. *Id.* at 24a.

²³⁴ 645 F.2d 133 (2d Cir. 1981). For a discussion of the opinion of the Second Circuit, see 1980-1981 *Annual Survey of Labor Law, Discriminatory Impact of an Employee Selection Process: Teal v. Connecticut*, B.C. L. REV. 82, 275 (1981).

²³⁵ 645 F.2d at 137.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 138. To reach this conclusion, it was necessary for the *Teal* court to distinguish *Kirkland v. N.Y. State Dept. of Correctional Serv.*, 520 F.2d 420 (2nd Cir. 1975), discussed *supra* notes 174-80, which it had decided several years prior to *Teal*. In *Kirkland*, the Second Circuit had agreed with a district court ruling that it would conflict with the dictates of common sense to apply disparate impact to the separate components of a test scored on the basis of the cumulative results of all the components. *Id.* at 425. The *Teal* court left the *Kirkland* ruling intact by distinguishing between the use of the bottom line concept in cumulative selection procedures,

intended by Congress to protect individuals and not "faceless groups."²³⁹ The Court thus concluded that allowing the overall selection process result to validate what may be the denial of equal employment opportunities to protected individuals, is "an expedient that transgresses the purpose of Title VII."²⁴⁰

In reaching its final decision, the appeals court rejected two arguments presented by the *Teal* defendants which had been drawn from prior Second Circuit decisions.²⁴¹ First, the court rejected an argument favoring the bottom line approach under principles of judicial economy.²⁴² It was maintained that courts should not examine each component of a selection process because once this inquiry has begun, the court might be prompted to investigate further subtests of that component and possibly individual test questions.²⁴³ The *Teal* court agreed that a detailed investigation of component parts would be inappropriate when a component requirement of a cumulative selection process is challenged.²⁴⁴ In a cumulative process, the court reasoned, all applicants are exposed to several components which would enable them to offset a poor performance in a single part.²⁴⁵ When a selection process contained a discriminatory pass-fail barrier, however, the court saw "little justification for judicial restraint."²⁴⁶ The plaintiffs in cases involving pass-fail barriers are prevented from participating in subsequent selection practices.²⁴⁷ Therefore, because these plaintiffs are totally denied employment opportunity, and since the barrier to that opportunity is readily identifiable, the *Teal* court concluded courts were under an obligation to entertain these individual claims of discrimination.²⁴⁸ In so deciding, the Second Circuit narrowed the scope of its holding in *Teal* to cases involving a selection component that has a disparate impact and constitutes a pass-fail barrier.²⁴⁹

and in cases such as *Teal* where a discriminatory component of a selection procedure can act as a barrier. 645 F.2d at 137. The *Teal* court explained that a cumulative process allows candidates to benefit from other components in the process which may theoretically offset a candidate's poor performance in a discriminatory component. *Id.* A component that functions as a pass-fail barrier, on the other hand, is the type of obvious denial of employment opportunity the *Teal* court concluded is not permitted under Title VII. *Id.* at 138. The court distinguished *Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975), on the same basis. 645 F.2d at 138.

²³⁹ *Id.* at 138. For the text of the statute, see *supra* note 22.

²⁴⁰ *Teal*, 645 F.2d at 140.

²⁴¹ *Id.* at 138-39. The two arguments were drawn from *Brown v. New Haven Civil Serv. Bd.*, 474 F. Supp. 1256 (D. Conn. 1979), discussed *supra* notes 139-64 and accompanying text, and *Kirkland v. New York State Dept. of Correctional Serv.*, 520 F.2d 420 (2d Cir. 1975), discussed *supra* note 238. The *Teal* defendants relied heavily on *Brown* which, due to its factual similarity to *Teal*, was implicitly overruled by the Second Circuit's *Teal* opinion. 645 F.2d at 139.

²⁴² See *supra* notes 149-52 and accompanying text.

²⁴³ *Teal*, 645 F.2d at 138.

²⁴⁴ *Id.* at 139.

²⁴⁵ *Id.* For a discussion of cumulative selection procedures see *supra*, notes 164-83 and accompanying text.

²⁴⁶ 645 F.2d at 139.

²⁴⁷ See *supra* notes 182-83 and accompanying text.

²⁴⁸ 645 F.2d at 139.

²⁴⁹ *Id.* at 135.

The second argument offered in favor of the bottom line approach claimed employers were encouraged to adopt voluntary affirmative action programs under the bottom line concept.²⁵⁰ The *Teal* court also rejected this argument as a reason for adopting the bottom line approach. While conceding that voluntary affirmative action programs, while not required under Title VII,²⁵¹ contribute towards achieving a racial balance in the workforce,²⁵² the court reasoned that such affirmative action had never been held to relieve an employer of Title VII liability to persons injured by the employer's previous discriminatory conduct.²⁵³ Therefore the court deemed the employer's deliberate effort to promote proportionately more blacks at the end of the selection process in *Teal* of little comfort to individuals not permitted to advance beyond a discriminatory pass-fail barrier.²⁵⁴

The decision of the Second Circuit in *Teal* to reject the bottom line approach was largely based on the individual focus of Title VII.²⁵⁵ The court referred to the language of the statute itself, which speaks of depriving "any individual of employment opportunities,"²⁵⁶ in concluding the favorable treatment of blacks as a whole could not immunize an employer from Title VII liability for a discriminatory test.²⁵⁷

B. Connecticut v. Teal in the Supreme Court

In a five to four decision, the Supreme Court affirmed the ruling of the Second Circuit by holding that a favorable bottom line does not preclude an individual from establishing a prima facie case of discrimination based on the disparate impact of a single component of the selection process.²⁵⁸ The Court further held that a non-discriminatory bottom line does not provide an employer with a defense to such a prima facie case of disparate impact.²⁵⁹ At the outset of its opinion, the Court confronted whether the application of an examination

²⁵⁰ *Id.* at 139. The *Teal* court quoted the affirmative action argument verbatim from *Brown*. *Id.* at 138-39. The affirmative action argument surfaced again in the Supreme Court's decision in *Teal*, 102 S. Ct. 2525, 2540 (1982) (Powell, J., dissenting). See *infra* note 424.

²⁵¹ *Id.* at 139. Section 702(j) states in pertinent part: "Nothing contained in this title shall be interpreted to require any employer . . . subject to this title to grant preferential treatment to any individual, or to any group because of race . . ."

²⁵² 645 F.2d at 139.

²⁵³ *Id.* The court cited *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978) as holding "a racially balanced workforce cannot immunize an employer from liability for specific acts of discrimination." 645 F.2d at 139. The *Teal* court then stated, "[I]n the case at bar, an employee selection device produced a readily discernable disparate impact upon the black candidates. The affirmative action effort then taken by the defendants at the end of the process was of 'little comfort' to the candidates who were not permitted to proceed beyond the allegedly discriminatory barrier." *Id.* at 139-40.

²⁵⁴ *Id.* at 139.

²⁵⁵ *Id.* at 140.

²⁵⁶ *Id.* at 134 n.1, 138.

²⁵⁷ *Id.* at 139.

²⁵⁸ 102 S. Ct. 2525, 2529 (1982).

²⁵⁹ *Id.*

that both bars a disproportionate number of black employees from consideration for promotion and has not been shown to be job related presents a claim cognizable under Title VII.²⁶⁰ The Court next addressed the problem of at which stage in the selection process it is proper to apply disparate impact analysis.²⁶¹ The Court also considered an argument, submitted by the United States as amicus curiae in support of the employer, that the favorable bottom line results demonstrated the written test was not "used to discriminate" against blacks within the meaning of Title VII and thus the use of the test was protected under the statute.²⁶² Finally, the majority considered whether the presence of favorable bottom line evidence should impose an increased burden on a plaintiff seeking to establish a prima facie case, or whether such evidence may serve as an affirmative defense for an employer confronted with a prima facie case.²⁶³

To determine whether the challenge to the written examination in *Teal* presented a claim cognizable under Title VII, the Court first reviewed the language of the statute.²⁶⁴ The Court centered its analysis on Section 703(a)(2).²⁶⁵ Section 703(a)(2) of Title VII renders unlawful any attempt by an employer to limit, segregate, or classify his employees in any way which deprives any individual of employment opportunities.²⁶⁶ The primary purpose of Congress in enacting Title VII, the majority emphasized, was to achieve equality of employment opportunities and remove barriers to that equality.²⁶⁷ The Court then reviewed its landmark decision in *Griggs v. Duke Power Co.*, which interpreted Section 703(a)(2) as prohibiting employment practices that deny equal employment opportunity through their adverse impact on statutorily protected groups.²⁶⁸ By declaring unlawful an examination that clearly had a disparate impact on blacks, and barred promotion, the *Teal* majority stressed

²⁶⁰ *Id.* at 2530.

²⁶¹ *Id.* at 2532-33.

²⁶² *Id.* at 2533.

²⁶³ *Id.* at 2534.

²⁶⁴ *Id.* at 2530.

²⁶⁵ (a) It shall be an unlawful employment practice for an employer:

(2) to limit, segregate, or classify his employees or applicants for employment 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)(2).

²⁶⁶ *Id.*

²⁶⁷ *Teal*, 102 S. Ct. at 2531.

²⁶⁸ *Id.* at 2530. Reviewing the purpose behind the disparate impact theory developed in *Griggs*, the Court quoted language from *McDonnell Douglas Co. v. Green*, 411 U.S. 792 (1973). In that case, the Court stated "*Griggs* was rightly concerned that the childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *Id.* at 806. 102 S. Ct. at 2531.

the outcome in *Griggs* was consistent with the congressional intent behind Title VII.²⁶⁹

The Court then applied the *Griggs* disparate impact standard of Title VII review to the facts of *Teal*. The Court concluded the plaintiffs had presented a claim cognizable under Title VII when they challenged the employer's use of the written test.²⁷⁰ The test, the majority reasoned, which had a discriminatory impact on black employees, and effectively barred promotion, clearly fell within the literal language of Section 703(a)(2) as interpreted by *Griggs*.²⁷¹ Specifically, the Court viewed the challenged test in *Teal* as precisely the type of non-job related barrier which could deny a member of a protected group employment opportunity in violation of Title VII.²⁷²

The Court then turned its attention to the central question of whether disparate impact is most appropriately measured at the point where the challenged test was administered, or at the end of the overall selection process, that is, the bottom line.²⁷³ The Court emphasized that when considering claims under Section 703(a)(2), it had consistently focused in past cases on the particular employment and promotion requirements that created a discriminatory bar to employment opportunities.²⁷⁴ The Court stated it had never read Section 703(a)(2) as requiring the focus to be placed on the overall number of minority or female applicants actually hired or promoted.²⁷⁵ Accordingly, the majority rebuked the district court's bottom line approach to disparate impact in *Teal* by reiterating the purpose of Title VII.²⁷⁶ The majority stated that to suggest disparate impact should only be measured at the bottom line ignores the fact that Title VII guarantees protected individuals an opportunity to compete equally with white workers on the basis of job related criteria.²⁷⁷ The Court again cited Title VII's goal to achieve equality of opportunity by

²⁶⁹ *Id.* at 2532. The Court discussed the legislative history of the 1972 extension of Title VII by Congress to cover state and municipal employees. The majority concluded that the Congress felt the public sector employees needed the protection of Title VII to ensure equality of opportunity and the elimination of barriers to professional development. *Id.* The Court especially noted the Congressional concern over the widespread use by state and local governments of invalid selection techniques that had a discriminatory impact. *Id.*

²⁷⁰ *Id.* at 2533.

²⁷¹ *Id.* at 2532-33.

²⁷² *Id.* at 2532.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* The Court cited: *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (minimum height and weight requirements for prison guards acted as an arbitrary barrier to employment opportunity for women); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, (1975) (tests required for promotion and transfer were barriers to blacks); and *New York Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979), wherein the Court stated "[a] prima facie violation of the Act may be established by statistical evidence showing the employment practice has the effect of denying the members of one race equal access to employment opportunities." (emphasis the Court's).

²⁷⁶ 102 S. Ct. at 2533. For a discussion of the disposition of *Teal* in the district court see *supra* notes 228-33 and accompanying text.

²⁷⁷ *Id.*

eliminating arbitrary, unnecessary, and artificial barriers that have a discriminatory impact on individuals.²⁷⁸ The majority concluded, therefore, that the *Teal* plaintiffs had established a prima facie case of disparate impact at the written test stage of the promotion process.²⁷⁹ The Court accordingly shifted the burden to the defendant employer to show the written test was actually related to job performance.²⁸⁰

The Court also considered an argument submitted by the United States as amicus curiae for the employer.²⁸¹ Although the government recognized a Title VII issue was presented in *Teal*, it nevertheless sought to allow the employer to invoke the testing defense explicitly provided in the statute.²⁸² Section 703(h) allows an employer to give a test and act upon its results provided the test is not designed, intended, or used to discriminate.²⁸³ The United States argued the non-discriminatory applicant flow data for blacks ultimately selected at the bottom line proved the test was not being used to discriminate within the meaning of Title VII.²⁸⁴ The Court rejected the government's argument. The majority saw the government's theory as an attempt to offer a "special haven" for discriminatory tests within the statute.²⁸⁵ The Court ruled the Title VII provision cited by the government only refers to the use of tests that are proven to be job related but result in a disparate racial impact.²⁸⁶ Employment tests are considered job related only after the completion of a validation study detailed in the Uniform Guidelines.²⁸⁷ Since the test in *Teal* had not yet been found job related, the majority concluded it was "used to discriminate" within the meaning of Section 703(h) if it was used to limit equal employment opportunities.²⁸⁸

In the final section of its opinion, the *Teal* majority considered an argument presented by the employer and some amici that the bottom line concept should have some role in the disparate impact order of proof. The employer submitted that where an employer had compensated for a discriminatory pass-fail barrier by hiring or promoting blacks at a higher rate than whites at the bottom line, a plaintiff attempting to establish a prima facie case should satisfy an additional burden.²⁸⁹ Specifically, the employer argued the showing of disparate results suffered by the plaintiff's group on the test was not enough.²⁹⁰

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* See also Brief for the United States as Amicus Curiae at 9, *Connecticut v. Teal*, 102 S. Ct. 2525 (1982), reprinted in BNA'S LAW REPRINTS, *supra* note 7 at 307. The EEOC refused to join the Government's brief. *Id.* at 1.

²⁸² 102 S. Ct. at 2533.

²⁸³ See *supra* note 79 for text of the statute.

²⁸⁴ 102 S. Ct. at 2533. See also Brief for the United States *supra* note 281 at 9, *Connecticut v. Teal*, 102 S. Ct. 2525 (1982), reprinted in BNA'S LAW REPRINTS, *supra* note 7 at 307.

²⁸⁵ 102 S. Ct. at 2533.

²⁸⁶ *Id.*

²⁸⁷ See discussion *supra* note 56 and accompanying text.

²⁸⁸ *Id.* at 2534.

²⁸⁹ *Id.*

²⁹⁰ Brief for Petitioner at 21, *Connecticut v. Teal*, 102 S. Ct. 2525 (1982), reprinted in

The employer asked that the plaintiff be compelled to prove that the entire selection procedure had an adverse effect on the plaintiff's protected group.²⁹¹ Alternatively, the employer sought to allow favorable bottom line evidence to be used as an affirmative defense by a defendant employer.²⁹² As an affirmative defense, bottom line evidence could successfully rebut a prima facie case in the same way a showing of job-relatedness would dispose of a Title VII action. The Court rejected both these arguments.²⁹³

The Court characterized these suggestions by the employer as "nothing more than a request that we redefine the protections guaranteed by Title VII."²⁹⁴ The guarantee, according to the majority, is the prohibition of practices that would deprive any individual of employment opportunities.²⁹⁵ Protection of the individual employee, not the minority group as a whole, the Court again stated, is the principle focus of the statute.²⁹⁶ The Court rejected the employer's argument for the use of bottom line evidence as an employer's defense on three grounds. First, the Court explained that the Uniform Guidelines provision incorporating the bottom line concept provided no such defense for an employer.²⁹⁷ Second, the Court distinguished between the employer defenses used in disparate impact and disparate treatment actions.²⁹⁸ Third, the Court ruled that allowing a bottom line defense would contravene the intent of Congress.²⁹⁹

In a lengthy footnote, the *Teal* majority reviewed the inclusion of the bottom line concept in the Uniform Guidelines.³⁰⁰ The Court stated the guidelines were not a binding endorsement of the bottom line theory and were of no defensive use to the employer.³⁰¹ Furthermore, according to the Court, the guidelines had no effect on the ability of an individual to challenge a particular discriminatory component of a selection process which otherwise results in a nondiscriminatory bottom line.³⁰²

In further addressing the defendant employer's attempt to secure the bottom line concept as a defense, the Court reviewed the role of an employer defense in a disparate impact case.³⁰³ The majority explained favorable bottom

BNA'S LAW REPRINTS, *supra* note 7 at 105.

²⁹¹ *Id.*

²⁹² 102 S. Ct. at 2534.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ For a discussion of the bottom line concept in the Uniform Guidelines, see *supra* notes 119-34 and accompanying text.

²⁹⁸ For a discussion of the orders of proof under disparate treatment and disparate impact see *supra* notes 33-58 and accompanying text.

²⁹⁹ See *infra* notes 307-09 and accompanying text and note 369.

³⁰⁰ 102 S. Ct. at 2534 n.12.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 2535.

line evidence is relevant in a disparate treatment action where the determination of the employer's discriminatory intent is the dispositive issue.³⁰⁴ The Court stated that in a disparate treatment case, good faith efforts by the employer to achieve a non-discriminatory work force could help rebut an inference of intentional discrimination.³⁰⁵ In a disparate impact action, however, intent is not an issue. Therefore, the *Teal* majority saw the use of bottom line evidence in an employer's defense to a disparate impact claim as an attempt to justify discrimination against a statutorily protected individual on the basis of favorable treatment of that individual's racial group as a whole.³⁰⁶

Additionally, in the Court's view, to allow a bottom line defense would above all contradict the intent of Congress.³⁰⁷ According to the *Teal* majority, Congress never intended to give an employer a license to discriminate on the basis of race or sex merely because he favorably treats other members of the employee's group.³⁰⁸ The Court again underscored the obligation imposed by Title VII. That obligation, in the majority's view, is to provide equal opportunity for each applicant, regardless of race and without regard to whether members of the applicant's race are already proportionately represented in the workforce.³⁰⁹

In finding for the individual plaintiffs and rejecting the bottom line concept, the Supreme Court resolved several issues. The Court reaffirmed the scope of the disparate impact theory, first set forth in *Griggs*, as prohibiting the use of selection devices which result in an adverse impact on groups protected under Title VII.³¹⁰ The Court also ruled that disparate impact analysis must be applied to the particular component in a selection process which functions to bar individual applicants from employment opportunities, rather than applied to the end results of the entire selection process.³¹¹ The *Teal* majority clarified the applicability of section 703(h) of Title VII to testing cases by ruling that the provision only allows the use of employment tests which are found to be job related.³¹² The *Teal* opinion also rejects any possible use of the bottom line concept as either a means of increasing a plaintiff's burden in establishing a prima facie case, or providing an employer with an affirmative defense to a prima facie case of discrimination under Title VII.³¹³ In the process of its reasoning,

³⁰⁴ *Id.* See also *supra* note 71-72 and accompanying text.

³⁰⁵ 102 S. Ct. at 2535. The Court cited language from its decision in *Furnco Constr. Corp. v. Waters*, 431 U.S. 324, 340 n.20 (1977) wherein the Court stated: "Proof that a workforce is racially balanced, or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent, when that issue has yet to be decided." 102 S. Ct. at 2535.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ See *supra* notes 264-69 and accompanying text.

³¹¹ See *supra* notes 270-80 and accompanying text.

³¹² See *supra* notes 281-88 and accompanying text.

³¹³ See *supra* notes 289-309 and accompanying text.

the Court dismissed the persuasive value of the bottom line provision in the Uniform Guidelines,³¹⁴ clarified the role of the statistical defense in disparate treatment as opposed to disparate impact actions,³¹⁵ and continuously emphasized the paramount concern of the Congress when enacting Title VII was the protection of the individual.³¹⁶

C. *The Dissenting Opinion in Teal*

Despite its internal consistency, the majority opinion met with some disagreement. Justice Powell authored a dissenting opinion in *Connecticut v. Teal* that was joined by three other Justices.³¹⁷ The dissenters focused on several issues to support their view that the *Teal* majority had decided the case incorrectly. First, the dissent stated the majority had improperly blurred the distinction between the disparate impact and disparate treatment methods of Title VII analysis.³¹⁸ Second, the dissenters advocated the application of disparate impact analysis only to the overall results of a selection procedure as the proper use of the disparate impact theory.³¹⁹ Third, the dissenters believed the overwhelming weight of legal authority favored the use of the bottom line concept.³²⁰ Finally, the dissent focused on what it considered several unfortunate consequences of the majority opinion in *Teal*.³²¹

The dissent maintained that the majority blurred the critical distinction between the disparate impact and disparate treatment theories.³²² The distinction that Powell and the dissenters see between the two theories is that disparate treatment focuses on the way in which an individual has been treated by an employer, while disparate impact is only concerned with the condition of the group protected under Title VII.³²³ Consequently, in what the dissent termed a "key distinction," disparate impact cannot be used to vindicate the rights of an individual when that individual's protected group as a whole has

³¹⁴ See *supra* notes 300-02 and accompanying text.

³¹⁵ See *supra* notes 303-06 and accompanying text.

³¹⁶ See *supra* notes 307-09 and accompanying text.

³¹⁷ Justice Powell was joined by Chief Justice Burger, and Justices Rehnquist, and O'Connor. 102 S. Ct. 2525, 2536 (Powell, J., dissenting).

³¹⁸ *Id.*

³¹⁹ *Id.* at 2537 (Powell, J., dissenting).

³²⁰ *Id.* at 2538-39 (Powell, J., dissenting).

³²¹ *Id.* at 2539-40 (Powell, J., dissenting).

³²² *Id.* at 2536 (Powell, J., dissenting). For a discussion of the disparate treatment and disparate impact theories of Title VII analysis see *supra* notes 32-73 and accompanying text.

³²³ 102 S. Ct. at 2536 (Powell, J., dissenting). In support of his view of distinct theories for groups and individuals under Title VII, Justice Powell presented a different interpretation of *Griggs v. Duke Power Co.*, than that employed by the majority. The dissent begins its review of the language of § 703(a)(2) just as the majority had done. The dissent acknowledged the language of the statute "suggests discrimination only occurs on an individual basis." *Id.* at 2536. In the dissent's view, however, *Griggs* expanded the scope of the statute by its holding that discriminatory intent by the employer against an individual need not be shown when employment practices of mechanisms operate as "built in headwinds for minority groups." *Id.* Thus in the dissent's view, *Griggs* stands for the proposition that the adverse impact of an employer's practices on a protected group can also violate § 703(a)(2). *Id.* (emphasis added).

not been subjected to discrimination from the total selection process.³²⁴ In the dissenters' view, the majority reached a conclusion which is inconsistent with the very nature of disparate impact claims by allowing the individual plaintiffs in *Teal* to establish a prima facie case of disparate impact when the results of the employer's entire selection process showed no discriminatory impact had been suffered by their group as a whole.³²⁵

Justice Powell attempted to explain the divergent results of the majority and dissent's use of disparate impact analysis. Justice Powell contended that the majority confused the individualistic aim of Title VII with the legal theories through which a plaintiff may bring an action under the statute.³²⁶ The dissent agreed with the majority that the primary aim of Title VII is to protect individuals.³²⁷ Nonetheless, Title VII jurisprudence, in the dissent's view, provides two distinct methods of establishing a violation of the statute.³²⁸ In a disparate treatment action, an individual plaintiff may allege that intentional discrimination was personally directed towards him without reference to his protected group.³²⁹ In a disparate impact action, on the other hand, an individual may establish a prima facie case premised upon the adverse impact of an employment practice suffered by his group as a whole.³³⁰ If the group has suffered discrimination, the plaintiff may, according to the dissent, draw a fair inference that he, as a member of the group, has also suffered the adverse effect of a discriminatory selection procedure.³³¹ In the dissent's opinion, the majority therefore improperly allowed the establishment of a prima facie case by the *Teal* plaintiffs when the total selection process had no adverse effect upon the plaintiffs' group. The dissent would hold no violation of Title VII under the disparate impact theory existed in *Teal* in the absence of an adverse impact upon the protected group.³³²

The dissent in *Teal* advocated the adoption of the bottom line approach itself by contending that disparate impact analysis should only be applied to the ultimate hiring or promotion results at the end of the total selection process.³³³ The dissent noted that the applicant flow statistics in *Teal* revealed 22.9% of the blacks entering the promotion process were selected for advancement, while only 13.5% of the original white candidates were ultimately promoted.³³⁴ Based on these group figures, the dissent concluded that any attempt to say the

³²⁴ *Id.* at 2536-37.

³²⁵ *Id.* at 2536 (Powell, J., dissenting).

³²⁶ *Id.* at 2537 (Powell, J., dissenting). See also, *supra* notes 258-309 and accompanying text.

³²⁷ 102 S. Ct. at 2537 (Powell, J., dissenting).

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 2538 (Powell, J., dissenting).

³³⁴ *Id.* at 2537 (Powell, J., dissenting).

selection process had an unfavorable disparate impact on blacks was to "ignore reality."³³⁵

The dissent also argued that the weight of legal authority supported the adoption of the bottom line theory.³³⁶ The dissent noted the adoption of the bottom line concept by the E.E.O.C. and other federal enforcement agencies in their Uniform Guidelines.³³⁷ In addition, the dissent observed that the majority concentrated on cases of "questionable relevance" as support for its opinion,³³⁸ including some previous Supreme Court opinions cited by the majority.³³⁹

Finally, the last section of the dissent centers on the likely consequences of the Court's holding in *Teal*.³⁴⁰ First, the dissenters felt the Court's holding will force employers either to eliminate tests, or rely on expensive alternative job related testing measures.³⁴¹ The dissent speculates, however, that even this type of selection criteria might also be subjected to a Title VII challenge.³⁴² Secondly, the dissent felt the *Teal* decision will lead to simple quota hiring by state and local governments, because these employers are unable to incur the prohibitive cost of test validation studies and litigation due to fiscal constraints.³⁴³ Furthermore, the dissent in *Teal* envisions the increased use of cumulative selection procedures.³⁴⁴ In the dissent's view, the actual hiring decisions from a cumulative process would not be subject to disparate impact analysis as defined in the majority opinion.³⁴⁵ Rather, an employer could argue

³³⁵ *Id.*

³³⁶ *Id.* at 2537-38 (Powell, J., dissenting).

³³⁷ *Id.* at 2537 n.4 (Powell, J., dissenting). The dissent cites the Uniform Guidelines in support of its statement "There can be no violation of Title VII on the basis of disparate impact, in the absence of disparate impact on a group." *Id.* For a discussion of the Uniform Guidelines' adoption of the bottom line concept, see *supra*, notes 119-34 and accompanying text.

³³⁸ *Id.* at 2538 n.5 (Powell, J., dissenting). To support this position, the dissent cites the fact that most lower courts confronting this issue have concluded that there can be no finding of discrimination in the absence of an adverse impact at the bottom line. *Id.* See also, *supra* note 6.

³³⁹ 102 S. Ct. at 2538 (Powell, J., dissenting). For example, the majority cited language from *Dothard v. Rawlinson*, 433 U.S. 321 (1977) to support its decision to reject the bottom line concept. 102 S. Ct. at 2538 (Powell, J., dissenting). In *Dothard*, the Court had struck down the facially neutral height and weight requirements for prison guards in Alabama, because the standards had an adverse impact on women. 433 U.S. at 324, 331. The *Teal* majority cited *Dothard* to illustrate that in that case, despite a disproportionate bottom line representation of women, the Court focused its analysis on the exclusionary effect of the employment requirement rather than the disproportionate bottom line. 102 S. Ct. at 2532-33. Conversely, Justice Powell and the dissenters feel *Dothard* represented a case where the adverse impact of the challenged standards was proven by the discriminatory bottom line. *Id.* at 2538 (Powell, J., dissenting).

³⁴⁰ *Id.* at 2539 (Powell, J., dissenting). This casenote will also offer a separate treatment of the likely consequences of *Teal*, *infra* notes 389-444 and accompanying text.

³⁴¹ 102 S. Ct. at 2539 (Powell, J., dissenting).

³⁴² *Id.* See, e.g., *Fire Fighters Inst. v. St. Louis*, 616 F.2d 350 (8th Cir. 1980) discussed in Note, *Promotion Tests and Statistical Evidence of Disparate Impact: The Eighth Circuit's Position*, 14 CREIGHTON L. REV. 1145 (1981).

³⁴³ 102 S. Ct. at 2539-40 (Powell, J., dissenting).

³⁴⁴ *Id.* at 2540 n.8 (Powell, J., dissenting).

³⁴⁵ *Id.*

that the bottom line concept was still viable in the cumulative context since no one portion of a cumulative selection procedure would act as a "barrier" to employment opportunity.³⁴⁶ Consequently, in the dissent's view, an employer maintaining a cumulative selection process would only have to select a number of statutorily protected individuals proportionate to their representation in the community to escape liability.³⁴⁷ Finally, the dissent predicts the *Teal* holding may actually result in fewer members of statutorily protected groups being selected for employment.³⁴⁸ Without an incentive for employers to make affirmative action adjustments at the bottom line, the dissent expressed fear that fewer protected individuals will surpass a validated examination.³⁴⁹ The dissent suggested that as long as a written test is shown to be job related, an employer will be under no obligation to adjust the test results to favor members of groups protected under Title VII.³⁵⁰

In summary, the *Teal* dissent was premised on the dissenters' belief that the majority had blurred the distinction between disparate impact and disparate treatment by incorrectly allowing an individual to establish a prima facie case under disparate impact when the individual's group suffered no adverse effects from the entire process.³⁵¹ Moreover, the dissent contended that the majority had improperly applied disparate impact analysis to an intermediate stage of the selection process. The dissent argued that existing authority favored the application of disparate impact only to the overall results of the selection process, that is, only to the bottom line.³⁵² As a result, the dissenters envisioned several unfortunate consequences of the Court's holding in *Teal*.³⁵³

Connecticut v. Teal will have widespread implications for both employers and protected individuals as a seminal Supreme Court decision interpreting Title VII. The fundamental decision over the validity of the bottom line approach to disparate impact which divided the lower federal courts also caused a division among the Justices of the Supreme Court. For these reasons it is crucial to understand fully the respective positions of the majority and dissenting Justices of the Court regarding the "bottom line."

D. Analysis of Connecticut v. Teal

A fundamental disagreement exists between the majority and dissent in *Teal* over the appropriate method of furthering the purpose of Title VII. The majority opinion, however, was correct in choosing to reject the bottom line

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 2540 (Powell, J., dissenting).

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ See *supra* notes 322-32 and accompanying text.

³⁵² See *supra* notes 333-47 and accompanying text.

³⁵³ See *supra* notes 348-50 and accompanying text.

concept. The majority correctly perceived the proper purpose of Title VII and applied the statute in a manner consistent with that purpose. The purpose of Title VII, as articulated by the majority, is the protection of individuals from the discriminatory denial of equal employment opportunity. The dissent's adoption of the bottom line approach would deny relief to protected individuals who had suffered a clear deprivation of equal employment opportunity from the use of a discriminatory selection device. Thus, the dissent's support of the bottom line concept fails to appreciate the individual focus of the congressional intent embodied in Title VII.

The majority and dissent in *Teal* primarily differ over the proper use of the disparate impact method of Title VII analysis. The dissent's approach in *Teal* would result in a narrow application of disparate impact, limiting the establishment of a prima facie case under the theory to those instances when the overall results of an employment selection procedure show a protected group has suffered from an adverse impact.³⁵⁴ Under the majority view, the submission of bottom line evidence demonstrating the overall procedure, including a written test had no adverse impact is irrelevant because Title VII guarantees the individuals the right to compete equally for employment opportunities.³⁵⁵ The dissent agreed with the majority that individuals are the target of Title VII, but the dissent adamantly maintained the statute has two distinct methods of analysis.³⁵⁶ Only when a protected group as a whole has suffered an adverse impact from the entire selection process, would the dissent allow a member of that group to invoke disparate impact analysis.³⁵⁷ Otherwise, in the dissent's view, without a disparate impact on the group when applicants are selected for hire or promotion, an individual is limited to the use of the disparate treatment theory under Title VII.³⁵⁸

In contrast, the majority holds the individual focus of Title VII demands that a plaintiff be allowed to establish a prima facie case based on the disparate results of a single test or selection device alone.³⁵⁹ In support of its position that an individual may establish a prima facie case of disparate impact even if his group is favorably treated at the bottom line, the majority cited the plain language of Title VII itself as the strongest evidence that the statute is intended to ensure equal employment opportunities for individuals. The language of Section 703(a)(2) in particular explicitly forbids depriving "any individual of employment opportunities."³⁶⁰ As the majority properly indicates, *Griggs v. Duke Power Co.* expanded the reach of Title VII by proscribing not only intentional discrimination, but also employment practices that are fair in form, but

³⁵⁴ See *supra* notes 317-53 and accompanying text.

³⁵⁵ See *supra* notes 273-80 and accompanying text.

³⁵⁶ *Connecticut v. Teal*, 102 S. Ct. 2525, 2537 (1982), (Powell, J., dissenting).

³⁵⁷ See *supra* notes 327-32 and accompanying text.

³⁵⁸ *Teal*, 102 S. Ct. at 2536 (Powell, J., dissenting).

³⁵⁹ See *supra* notes 277-80 and accompanying text.

³⁶⁰ See *supra* note 268 and accompanying text.

discriminatory in operation.³⁶¹ *Griggs* specifically focused on practices, procedures, or tests that deny equal employment opportunity.³⁶² The majority reviewed the *Griggs* rationale that Congress' primary purpose in Title VII is to achieve equality in employment opportunity and remove the barriers to that equality.³⁶³ The rule of *Griggs*, in conjunction with the language of Section 703(a)(2), operates to prohibit the use of tests or procedures which act to limit or classify applicants in a way which deprives any individual of equal employment opportunities.³⁶⁴ Like the test at issue in *Griggs*, the examination administered by the employer in *Teal* had a clearly adverse effect on protected individuals.³⁶⁵ In this way, the test alone operated as a discriminatory barrier to employment opportunity for those protected individuals who failed, and were thereby eliminated from consideration for a promotion.³⁶⁶ If the bottom line concept were successfully applied in *Teal*, these individuals who suffered from the form of employment discrimination explicitly prohibited by *Griggs*, would be left wronged, but deprived of a cause of action under Title VII.

The *Teal* majority correctly recognized that the individual is to be the focus of the protection offered by Title VII. In addition, the majority effectively refuted the bottom line concept by reasoning that Title VII is not limited to the prevention of discrimination in the actual selection of individuals for jobs or promotions. Title VII clearly applies to the selection of individuals for particular positions, however, in a broader respect, the statute also preserves the right of protected individuals to receive equal employment opportunities.³⁶⁷

³⁶¹ *Id.*

³⁶² See *supra* notes 45-58 and accompanying text.

³⁶³ *Teal*, 102 S. Ct. at 2531. In *Griggs*, the Supreme Court stated:

What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. Congress has now provided that tests for employment or promotion may not provide *equality of opportunity* in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has to resort again to the fable — provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (emphasis added).

³⁶⁴ See *supra* notes 45-73 and accompanying text.

³⁶⁵ *Connecticut v. Teal*, 102 S. Ct. 2525, 2531 (1982).

³⁶⁶ *Id.*

³⁶⁷ 102 S. Ct. at 2531. The majority's concentration on the precise language chosen by Congress for § 703(a)(2) is exacerbated by an interesting footnote to the majority's discussion of the statute covering not only actual jobs or promotion, but also "limitations" and classifications that deprive any individual of employment opportunities. *Id.* The majority contrasts the wording of § 703(a)(2), *supra* note 265, to that of § 703(a)(1). Section 703(a)(1) states in pertinent part:

(a) It shall be an unlawful employment practice for an employer . . .

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

The language of Title VII itself is clear in expressing its prohibition of the deprivation of "employment opportunities" to "individuals."³⁶⁸ In addition, the legislative history of the statute includes repeated references to the purpose of Title VII as being the protection of equal employment opportunities for individuals.³⁶⁹ Senator Dirksen of Illinois articulated the purpose of Title VII succinctly during the floor debates prior to the statute's passage. He stated that the statute "does not deal with the volume of employment, or the number of people assigned to jobs. It deals with equal employment opportunity, nothing more."³⁷⁰ The majority was mindful of this congressional intent and recognized the disparate impact theory developed in *Griggs* as a vehicle through which individual rights are vindicated.³⁷¹

conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin.

The majority speculates that were § 703(a)(1) the only protection offered employees and applicants under Title VII, it might support the employer's argument that disparate impact discrimination should only be measured at the bottom line. 102 S. Ct. at 2531 n.9. Although both statutory provisions refer to the protection of individuals, § 703(a)(1) is worded to cover "hire" and "discharge". Thus under § 703(a)(1), the bottom line theory, which focuses on how many protected group members are actually hired, would be appropriate. In contrast, § 703(a)(2) forbids the classification of employees in a way which would deny "employment opportunities." Employment "opportunities" is a much broader term connoting more than actual receipt of a job. Thus, through this footnote, the majority underscores the significance of the use of the words "employment opportunities" by Congress. Under the broader language of § 703(a)(2), the Court has authority for its decision to reject the bottom line theory, and measure disparate impact at the testing stage of the selection process where employment opportunity may be denied.

³⁶⁸ See *supra* note 265.

³⁶⁹ Senators Joseph Clark and Clifford Case, bipartisan floor managers of Title VII in the Senate, submitted an "Interpretive Memorandum of Title VII" to the Senate during the debates on passage of the title in 1964. 110 CONG. REC. 7212 (1964). In the memo, the Senators stress that the statute protects "any individual". *Id.* When discussing the issue of what to do about an employer maintaining a racial balance in his workforce, the memo states, "[i]t must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the workforce may be a relevant factor in determining whether in a given case, to hire or refuse to hire was based on race, color etc., it is only one question and the question in each case would be *whether the individual was discriminated against.*" *Id.* at 7213 (emphasis added).

In addition, Senator Humphrey, a vigorous proponent of Title VII's passage, stated: "a citizen of the United States is entitled to equal opportunity to succeed." 110 CONG. REC. 13082 (1964) (remarks of Sen. Humphrey). "Whenever people are denied work opportunities because of race, religion, or ethnic origin, it is not only the individual that is injured, but it is the nation." *Id.* at 13084. Senator Humphrey continued, "... the issue here is not how many people are employed, the issue is whether a man shall be denied the opportunity to be employed on the basis of his merit, and whether we shall provide a legal instrument to have justice done in employment." *Id.* See also 110 CONG. REC. 13078 (1964) (remarks of Sen. Cooper) ("As I understand an employer ... could not discriminate, he could not deny a person a job, or dismiss a person, or promote on the grounds of his color, or his religion. . ."), 110 CONG. REC. 8921 (1964) (remarks of Sen. Williams) ("Every man must be judged according to his ability. In that respect all men are to have an equal opportunity to be considered for a particular job.")

³⁷⁰ 110 CONG. REC. 13084 (1964) (remarks of Sen. Dirksen).

³⁷¹ *Connecticut v. Teal*, 102 S. Ct. 2525, 2535 (1982).

Unfortunately, the dissenters have a different outlook concerning disparate impact analysis. The dissent feels *Griggs* and every subsequent disparate impact case has concerned whether the protected group, not the protected individual, has suffered an adverse impact.³⁷² Under the dissent's disparate impact scenario, whether the group has suffered adverse impact may only be determined from the applicant flow data produced at the bottom line.³⁷³ The dissent's construction of *Griggs* and its progeny, however, ignores the fact that those actions were based on Section 703(a)(2) of Title VII.³⁷⁴ That provision of the statute, both on its face, and as construed by the Supreme Court, does not refer to the hiring or selection of protected groups by an employer.³⁷⁵ On the contrary, the statute, as the Court has repeatedly stated, prohibits the use of employment requirements which deprive protected individuals of equal employment opportunities through their disproportionate impact.³⁷⁶

The employment test administered by the employer in *Teal* indisputably had an adverse impact on the plaintiffs' statutorily protected group.³⁷⁷ As an individual member of that group, the plaintiff was prevented by this discriminatory barrier from receiving an equal opportunity for a promotion.³⁷⁸

³⁷² *Id.* at 2536 (Powell, J., dissenting).

³⁷³ *Id.* at 2537. See also, *supra* notes 333-35 and accompanying text.

³⁷⁴ This is the same statutory provision under which the *Griggs* Court ruled the objective of the Congress was to "achieve equality of employment opportunities and remove barriers" such as tests and other discriminatory procedures. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

³⁷⁵ The Supreme Court has clearly spoken on the individual focus of Title VII in *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). In that case, the employer required female employees to make larger contributions to their pension plan than male employees because women as a group live longer than men. *Id.* at 707. When the pension program was challenged under Title VII, the Court was faced with the problem of what to do about the individual women who do not live longer than men. The Court framed the issue, "whether the existence or nonexistence of discrimination is to be determined by a comparison of class characteristics, or individual characteristics." *Id.* at 708. To resolve this issue, the Court examined the language of § 703(a)(1), *supra* note 367, and emphasized the fact the statute refers to "any individual." *Id.* Therefore, the Court concluded, "the statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class." *Id.* The Court further stated, "[e]ven if the statutory language was less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." *Id.* at 709 (emphasis added).

³⁷⁶ See, e.g., *McDonnell Douglas Co. v. Green*, 411 U.S. 792, 802 n.14, 806 (1973); *International Bhd of Teamsters v. United States*, 431 U.S. 324, 348-49 (1975); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 583 (opinion of Marshall, J.) (1978); *Dothard v. Rawlinson*, 433 U.S. 321, 328-29 (1977). See also discussion *supra* notes 42-108 and accompanying text.

³⁷⁷ See *supra* note 221 and accompanying text.

³⁷⁸ In this way, the test had a discriminatory impact similar to that imposed by the testing procedure at issue in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), discussed at *supra* notes 57-58. In that opinion, the Court while discussing the EEOC testing guidelines in effect at that time, stated: "The message of these guidelines is the same of that of the *Griggs* case — that discriminatory tests are impermissible unless shown by professionally acceptable methods to be predictive of, or significantly correlated with important elements of work behavior which are relevant to the job, or jobs for which candidates are being evaluated." *Id.* at 431.

Despite the fact that the plaintiff's protected group as a whole suffered no discrimination from the bottom line promotion decisions, the plaintiff nevertheless was denied employment opportunity within the meaning of Title VII.³⁷⁹

The majority opinion in *Teal* enables individuals who have suffered racial or other types of discrimination, to protect their right to equal employment opportunities by removing the barrier which favors some employees over others.³⁸⁰ This outcome is consistent with Congress' paramount concern with the individual in the enactment of Title VII. The dissent would not recognize a disparate impact claim unless the disparate impact was evident at the bottom line.³⁸¹ This would leave only the disparate treatment theory available for an aggrieved individual. The dissent must be aware, however, that the disparate treatment theory is tailored for intentional discrimination which is specifically targeted at an individual.³⁸² In a case like *Teal*, where a facially neutral employment practice such as a written test is to be challenged, discriminatory intent is extremely difficult, if not impossible, to prove.³⁸³ Consequently, despite the fact that the examination in *Teal* had been established as discriminatory, the dissent's preference for an individual claim to arise under disparate treatment would leave those protected individuals adversely affected by the test wronged without a remedy.³⁸⁴ Accordingly, all "bottom line" cases would present instances of individuals clearly suffering the discriminatory im-

³⁷⁹ Ironically, one of the dissenting Justices in *Teal* advocated the approach taken by the *Teal* majority in a prior Supreme Court decision. In *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1979), Mr. Justice Rehnquist, writing for the Court, stated, "it is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce." *Id.* at 579 (emphasis the Court's). By allowing the individual victims of racial discrimination in *Teal* to successfully invoke the protection of Title VII, the *Teal* majority fully appreciates and implements the purpose of the statute as accurately stated by Justice Rehnquist.

³⁸⁰ *Teal*, 102 S. Ct. at 2532.

³⁸¹ 102 S. Ct. at 2537 (Powell, J., dissenting). *See also, supra*, notes 310-53 and accompanying text.

³⁸² For a discussion of disparate treatment analysis under Title VII, *see supra* notes 33-41, 59-73 and accompanying text.

³⁸³ *Id.*

³⁸⁴ An individual would be left without a remedy because once deprived of the disparate impact theory, it would be necessary for an individual to satisfy the elements of a disparate treatment case set forth in *McDonnell Douglas Co. v. Green*, 411 U.S. 792 (1973), *discussed supra* note 38. The difficulty involved in this approach is illustrated in the Second Circuit's *Teal* opinion. 645 F.2d 133 (1981). The *Teal* plaintiffs originally challenged the discriminatory promotion procedure under both disparate impact and disparate treatment. *Id.* at 136. The Appeals Court agreed with the district court's decision to view the *Teal* case under disparate impact, because of the difficulty surrounding the proof that plaintiff was a qualified candidate. Proof of qualification is a critical stage in the establishment of a *prima facie* case under disparate treatment. *Id.* at 137. If the plaintiff was qualified for the job, and failed the promotion test, the plaintiff would have to prove the written test was not job related in order to maintain its assertion that he is in fact qualified. *Id.* The court concluded the question of whether the test is job related is more appropriately resolved through disparate impact analysis. *Id.*

pact of an employment practice, but deprived of any relief if the employer's final hiring or promotion decision reflects a relatively nondiscriminatory bottom line.³⁸⁵

As some commentators had predicted, the resolution of the bottom line issue would eventually depend on the outcome of the conflict between two views of Title VII.³⁸⁶ One view sees the purpose of Title VII as the protection of each individual from the discriminatory deprivation of employment opportunity.³⁸⁷ The other view considers the obligation imposed by the statute satisfied when a reallocation of jobs occurs in favor of a promoted group.³⁸⁸ In *Connecticut v. Teal*, a majority of the Supreme Court found Congress held the former view when it enacted Title VII. After *Teal*, the right to equal opportunity must be preserved even if an individual's protected group as a whole is adequately represented after an entire selection process has been completed.

IV. THE IMPACT OF *CONNECTICUT V. TEAL*

The consequences of *Connecticut v. Teal* will affect not only the future of the bottom line concept, but also how the purpose of Title VII is viewed. It is crucial for employers to know that after *Teal*, they may be forced to alter the structure of their employee selection procedures. It is just as important for individuals, whether they be applicants for first time employment or for promotion, that *Connecticut v. Teal* allows them to invoke the protection of Title VII in situations where they previously would have had no adequate remedy for discrimination.

This casenote now examines five specific consequences of the *Teal* decision. The first consequence of *Teal* is the expansion of an individual's ability to establish a prima facie case of employment discrimination under Title VII. Second, *Teal* may be viewed as lessening the distinction between the disparate impact and disparate treatment methods of analysis under Title VII. Third, *Teal's* effect upon the bottom line provision of the Uniform Guidelines will be examined. Next, the *Teal* decision, arguably, may lead to the abandonment of employment testing by employers. Finally, the *Teal* rationale may affect the use of cumulative selection procedures. It is suggested that through the use of cumulative selection procedures, it may be possible for employers to continue using the bottom line concept despite the Supreme Court's ruling in *Teal*.

The Supreme Court's decision in *Connecticut v. Teal* expands the ability of an individual to establish a prima facie case and maintain an action of employment discrimination under Title VII. Prior to *Teal*, the majority of federal

³⁸⁵ This result does not seem consistent with the Congressional intent behind Title VII, see *supra*, note 369, and in particular the efforts of the Congress to structure a statute which would "enable an individual to secure his own rights through the courts." 110 CONG. REC. 13082 (1964) (remarks of Sen. Humphrey).

³⁸⁶ B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1193.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

courts abided by the bottom line approach when an individual challenged the discriminatory operation of a component of a selection procedure, but the entire selection procedure yielded non-discriminatory results.³⁸⁹ The effect of the application of the bottom line approach by the courts was to prevent the establishment of a prima facie case by an individual who was eliminated from consideration at an isolated stage of the process.³⁹⁰

After *Teal*, an individual may establish a prima facie case under the statute when a single component of a selection procedure operates as a discriminatory barrier to the individual's employment opportunity.³⁹¹ Thus, the ability of an individual to establish a prima facie case will not be deterred by a favorable representation of the individual's group as a whole at the bottom line. The establishment of this prima facie case compels an employer to demonstrate the written test, or other selection criterion challenged, is job related.³⁹² This burden is now imposed on the employer even if the employer's overall process results in no discriminatory impact.³⁹³ In addition, the *Teal* holding precludes the use of favorable bottom line evidence by the employer as a defense to a Title VII action.³⁹⁴ By allowing the establishment of a prima facie case in the face of nondiscriminatory bottom line results, the *Teal* opinion therefore expands the ability of an individual to bring a Title VII action. Prior to *Teal*, such an action could not be maintained in most federal courts.³⁹⁵

³⁸⁹ See *supra* note 6. See also *supra* notes 135-86 and accompanying text.

³⁹⁰ *Id.*

³⁹¹ See discussion of *Connecticut v. Teal*, *supra* notes 259-316.

³⁹² See *supra* note 56 and accompanying text.

³⁹³ For a discussion of the employer's burden following the establishment of a prima facie case, see *supra*, notes 49-58 and accompanying text.

³⁹⁴ See *supra* notes 289-309 and accompanying text.

³⁹⁵ For a vivid illustration of the use of the bottom line concept before, and after *Teal*, see *Costa v. Markey*, 677 F.2d 158 (1st Cir. 1982) *rev'd on rehearing* 694 F.2d 876, 30 FEP Cas. 593 (1st Cir. 1982) *rev'd en banc* 706 F.2d 1 (1st Cir. 1982). *Costa* involved a selection procedure for police officers in New Bedford, Mass. The plaintiff, a woman, passed a civil service test, physical exam, and was ranked first on the eligibility list for female applicants. A city, in need of police officers, would select a new officer from the eligibility list. When the City of New Bedford required female officers, the City passed over the plaintiff and the second ranked applicant because they did not satisfy the City's 5 foot, 6 inch minimum height requirement. Two women who placed third and fourth on the list, and satisfied the height requirement were chosen in New Bedford.

The plaintiff challenged the minimum height requirement under the disparate impact method of Title VII analysis, 677 F.2d 158, 159. The City defended by pointing to the "bottom line" which indicated women were hired, therefore, no discrimination had occurred. *Id.* at 160. A few months prior to the Supreme Court's decision in *Teal*, the First Circuit ruled the plaintiff had not suffered discrimination since no adverse impact was suffered by women. *Id.* Confronted with the Second Circuit's decisions in *Teal*, the *Costa* court chose to ignore *Teal* and follow the reasoning of *Brown v. New Haven Civil Ser. Bd.*, 474 F. Supp. 1256 (D. Conn. 1979), discussed *supra* notes 139-167 and accompanying text. *Id.* at 161. The *Costa* court stated, "... we do not follow the *Teal* approach. Absent any discriminatory purpose, we see no justification for looking behind a result that does not reveal a hiring that has a disproportionately adverse impact on the relevant labor pool." *Id.* 161-162.

After *Teal*'s rejection of the bottom line approach, the First Circuit granted a petition for rehearing to examine the effect of the Supreme Court's *Teal* decision on their prior disposition of *Costa*. 694 F.2d 876, 30 FEP Cas. 593 (1st Cir. 1982). In their second *Costa* opinion, the appeals

A second consequence of the *Teal* decision centers on whether the Court's opinion lessens the distinction between disparate impact and disparate treatment. The opinion of the Supreme Court in *Connecticut v. Teal* does not result in a lessening of the distinction between the disparate treatment and disparate impact methods of Title VII analysis. *Teal* involved a challenge to a written employment examination.³⁹⁶ Challenges to such facially neutral employment practices historically have been reviewed under the disparate impact theory.³⁹⁷ The *Teal* majority did not depart from this traditional use of disparate impact. At the outset of its opinion, the majority reviewed the decision of the District Court and Second Circuit Court of Appeals to classify *Teal* as a disparate impact case.³⁹⁸ Accordingly, the Court applied the disparate impact standard of review drawn from *Griggs v. Duke Power Co.* to the results of the examination administered by the employer in *Teal*.³⁹⁹ Under this standard, the Court concluded that the plaintiffs had sufficiently established a prima facie case of a violation of Title VII.⁴⁰⁰

Justice Powell in his dissent however, expresses the fear that the majority has blurred the distinction between the two theories by allowing the individual plaintiffs to invoke the group oriented theory of disparate impact when, in his opinion, the group as a whole has suffered no discrimination.⁴⁰¹ Under Powell's view of the two theories, individuals wishing to challenge an employment practice as discriminatory under *Teal*-like circumstances are limited to the use of the disparate treatment theory.⁴⁰² Powell and the dissenters believe the disparate impact theory is only available to plaintiffs when an individual's protected group has suffered an adverse impact at the bottom line, despite the

court engaged in a detailed review of the *Teal* case and concluded that the Supreme Court's decision required a reversal of their previous *Costa* opinion. *Id.* The First Circuit stated:

Teal teaches us the proper place to evaluate a Title VII plaintiff's prima facie case of disparate impact discrimination is the point at which the employer's neutral criterion had a discriminatory effect. The Court's focus must be on the first step in the employment process that produces an adverse effect on a group protected on Title VII, not the end result of the employment practice as a whole. When it is shown an employer's rule disproportionately effects members of a class protected by Title VII, eliminating them from competition for an employment opportunity, the plaintiff establishes a prima facie case.

Id. at 30 FEP Cas. 593, 595.

In May, 1983, however, the First Circuit reheard the *Costa* case a third time sitting *en banc*. The court reinstated its original *Costa* holding that no discrimination had occurred because the height policy had not resulted in the exclusion of women, merely the exclusion of the plaintiff. 706 F.2d at 12. As Circuit Judge Bownes stated in his dissent, the Court's holding is irreconcilable with *Teal*. See *Costa*, 706 F.2d 1, 14-15 (Bownes, Circuit Judge, dissenting).

³⁹⁶ See *supra* text accompanying notes 16-23.

³⁹⁷ See *supra* notes 59-73 and accompanying text.

³⁹⁸ *Connecticut v. Teal*, 102 S. Ct. 2525, 2530.

³⁹⁹ *Id.* at 2531.

⁴⁰⁰ *Id.* See also *supra* notes 265-75 and accompanying text.

⁴⁰¹ 102 S. Ct. at 2536 (Powell, J., dissenting).

⁴⁰² *Id.* at 2537 (Powell, J., dissenting).

presence of a discriminatory component in the procedure.⁴⁰³ Under this approach, an individual could not successfully challenge a discriminatory, facially neutral employment practice when a nondiscriminatory bottom line existed.⁴⁰⁴ Thus the individual suffers clear discrimination, but is left without a means of relief under Title VII.⁴⁰⁵ It is precisely this unfair result which is avoided by the *Teal* majority's decision to allow an individual to maintain a disparate impact challenge to a criterion which acts as a barrier to employment opportunity, even in the face of a non-discriminatory bottom line. The majority of the Court merely applied disparate impact in its traditional way to protect the individual from barriers which deprive him of employment opportunities in accordance with the plain language of Title VII. The distinction between disparate impact and disparate treatment actions was not altered by the *Teal* majority.⁴⁰⁶

A third consequence of *Teal* is the effect of the ruling on the Uniform Guidelines. The bottom line provision adopted in the Uniform Guidelines is not invalidated by the Supreme Court's decision in *Teal*.⁴⁰⁷ The *Teal* opinion does not explicitly contradict the wording of the bottom line provision in the guidelines, nor find the paragraph inconsistent with Title VII.⁴⁰⁸ Thus, *Teal* does not represent an outright rejection of the guidelines. The bottom line provision is left intact because the Court only interpreted the Uniform Guidelines as not applicable to the issue contested in *Teal*.⁴⁰⁹ The *Teal* Court reviewed the

⁴⁰³ See *supra* notes 328-35 and accompanying text.

⁴⁰⁴ See *supra* 135-86 and accompanying text.

⁴⁰⁵ See *supra* notes 380-85 and accompanying text.

⁴⁰⁶ The *Teal* majority reaffirmed the distinction between disparate treatment and disparate impact analysis at the close of its opinion. The Court concluded its opinion by stating: . . . irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiff's group can be 'of little comfort to the victims of discrimination. . . . Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex have been hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral, but practically discriminatory. Every individual employee is protected against both discriminatory treatment and against policies that are fair in form but discriminatory in operation. . . [r]equirements and tests that have a discriminatory impact are merely some of the more, but also the more pervasive of the 'practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens'.

102 S. Ct. at 2535, (emphasis the Court's).

⁴⁰⁷ For a discussion of the Uniform Guidelines, see *supra* notes 119-34 and accompanying text.

⁴⁰⁸ *Teal*, 102 S. Ct. at 2534 n.4. See also *supra* notes 300-02 and accompanying text.

⁴⁰⁹ *Id.* In the past, the Supreme Court has concluded that Title VII contradicts a provision of a EEOC guideline provision. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court found that the exclusion of pregnancy related disability from the coverage of the employer's weekly disability benefits plan was not a violation of Title VII. *Id.* at 127. Confronted with an EEOC guideline which explicitly called for the inclusion of pregnancy related disability in such benefit plans, the Court ruled the contrary conclusion reached by the guidelines was not "persuasive" and not a contemporaneous interpretation of Title VII. *Id.* at 142.

guidelines in conjunction with their original purpose as stated by the issuing agencies.⁴¹⁰ When the guidelines were promulgated in 1978, the agencies explained that the bottom line provision did not prohibit an individual from pursuing a Title VII challenge of a discriminatory selection criterion in the presence of non-discriminatory bottom line results.⁴¹¹ The guidelines were intended only to apply to enforcement actions initiated by one of the government agencies.⁴¹² Therefore, the *Teal* opinion merely clarified the propriety of an employer using the guidelines to restrict an individual plaintiff's private challenge of a discriminatory selection criterion in a bottom line situation. After *Teal*, the guidelines may not be viewed as an authoritative expression of statutory interpretation supporting an employer's use of the bottom line defense in a private action. The Uniform Guidelines' status as a restraint on government prosecution of employers who maintain non-discriminatory bottom lines in their hiring and promotion schemes remains unchanged.⁴¹³

A fourth important impact of the Supreme Court's decision in *Connecticut v. Teal* is that the ruling may accelerate the increasing abandonment of employment testing by employers.⁴¹⁴ Prior to *Teal*, in most federal circuits, an employer could administer an unvalidated exam to job applicants and act upon the results as long as the employer achieved a non-discriminatory bottom line.⁴¹⁵ *Teal* allows an individual to establish a prima facie case of disparate impact when a testing procedure has an adverse impact on a protected group, even if that group as a whole is sufficiently represented at the bottom line. The majority was both thorough and consistent in its opinion, however, by holding not only that favorable bottom line evidence does not prevent the establishment of a prima facie case, but also that evidence of a nondiscriminatory bottom line may not be used as an affirmative defense by an employer confronted with a prima facie case.⁴¹⁶ The only recourse, therefore, for an employer to avoid liability is to prove the test in question is job related through "validation."⁴¹⁷

Congress subsequently revived the EEOC pregnancy guideline ignored by the Court in *Gilbert* by enacting the "Pregnancy Disability Amendment to Title VII of the Civil Rights Act of 1964" § 701(k) added by P.L. 95-552, effective October 31, 1978. See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 97.

⁴¹⁰ *Connecticut v. Teal*, 102 S. Ct., 2525, 2534 n.12.

⁴¹¹ See *supra* notes 128-34 and accompanying text.

⁴¹² See *supra* notes 127-34 and accompanying text.

⁴¹³ 29 C.F.R. § 1607.4c, the bottom line provision of the Uniform Guidelines, was republished in its entirety after *Teal* in the regulations revised as of July 1982.

⁴¹⁴ "The Supreme Court decision is expected to have a substantial impact on employer testing practices." H. ANDERSON & M. LEVIN-EPSTEIN PRIMER OF EQUAL EMPLOYMENT OPPORTUNITY, 78 (2d Edition 1982).

⁴¹⁵ See *supra* notes 135-86 and accompanying text.

⁴¹⁶ See *supra* notes 289-304 and accompanying text.

⁴¹⁷ The Supreme Court's decision in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), recommended deference to the EEOC guidelines when validation of an employment test is required after the plaintiff's establishment of a prima facie case. *Id.* at 431. The Uniform Guidelines promulgated by the EEOC and other federal enforcement agencies include § 5, 29 C.F.R. § 1607.5, which governs validation of employment tests. Basically, the validation process

The validation of employment testing is governed by Section 1607.5 of the Uniform Guidelines.⁴¹⁸ That provision contains elaborate standards which must be satisfied for an employer to defend successfully a test as job related.⁴¹⁹ Statistics indicate that prior to *Teal*, many employers decided to abandon employment testing rather than attempt to satisfy the rigorous validation standards imposed by the guidelines.⁴²⁰ The elimination of the bottom line defense in *Teal* forces employers who previously could escape the pains of validation now to validate exams which have a disparate impact on a statutorily protected group.⁴²¹ In the aftermath of *Teal*, employers may wish to reconsider the benefits of using employment tests when weighed against the potential costs.⁴²² Those employers willing to invest the time and money necessary to

determines whether an employment test is actually related to the jobs for which it is used. See B. SCHLEI & P. GROSSMAN *supra* note 7, at 66. The validation procedure involves the application of standards developed by the American Psychological Association which seek to prove job relatedness through either criterion related validity, content validity, or construct validity. See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 66-68; for a thorough treatment of the issue of selection procedure validation see M. MINER & J. MINER, *supra* note 83, Chapters 6-20. See also, *supra* note 56.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ A 1976 BNA survey of 200 companies across the country focused on the use of paper and pencil tests in the aftermath of *Griggs* and EEOC activity regarding employment testing. The results of the survey revealed only 42% of the employers administered pre-employment tests, compared to 90% of the companies participating in a similar survey in 1963. M. MINER & J. MINER, *supra* note 83, at 56.

⁴²¹ The alternatives to validation are either discontinuing the use of tests, or a finding of liability under Title VII and the imposition of the various remedies provided for by the statute. The most costly aspect of a finding of liability under Title VII is the possibility that an employer will have to pay a substantial amount of money in back pay. In *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975), the Supreme Court reasoned that the "make whole" purpose of Title VII requires a presumption of an order for back pay upon a finding of liability under Title VII. *Id.* The Court stated, "...given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy, and making persons whole for the injuries suffered through past discrimination." *Id.*

In addition to back pay, § 706(g) of Title VII authorizes a federal court to exercise its equitable powers to frame a remedy including an injunction, order of reinstatement, or hiring of employees, or other affirmative remedy. Furthermore, § 706(k) enables the prevailing party in a Title VII action to recover reasonable attorney's fees. See B. SCHLEI & P. GROSSMAN, *supra* note 7, at 1277-1313 (a comprehensive discussion of remedies under Title VII).

Alternatively, the cost of validation may be a sufficient disincentive for an employer to engage in employment testing. See, e.g., B. SCHLEI & P. GROSSMAN, *supra* note 7, at 103 n.60 ("One of these studies involved a sample of 200 bus drivers and cost approximately \$400,000"). See also, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring.) ("I fear that a too rigid application of the EEOC Guidelines will leave the employer little choice save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This of course is far from the intent of Title VII.').

⁴²² See, e.g., Hunter and Schmidt, *Ability Tests: Economic Benefits Versus the Issue of Fairness*, 21 INDUSTRIAL REL. 293 (1982) (Benefits of employment testing such as increased productivity and monetary savings far outweigh the detriments in employment testing).

validate an employment test,⁴²³ however, are not precluded from using the test after *Teal*, once it is proven to be job related.⁴²⁴

The fifth and most interesting consequence of the *Teal* opinion, is the prospect that the Court's holding could be avoided, thus preserving the bottom line

⁴²³ The use of employment tests is specifically recognized by Title VII in § 703(h), see *supra*, note 79. The preservation of an employer's right to use an employment test was the subject of much concern in the Senate debates on the passage of Title VII. See, e.g., 110 CONG. REC. 13504 (1964), (remarks of Sen. Humphrey) "Such tests are considered to be legal, there has never been a denial of that. The only point is that the test that is used for purposes of discrimination would be declared illegal."; 110 CONG. REC. 7213 (1964) (Interpretive Memorandum on Title VII by Senators Clark and Case) "There is no requirement in Title VII that employers abandon bona fide qualification tests."

⁴²⁴ In his dissent, Justice Powell also claims that employers may adopt quota hiring in place of employment testing after *Teal*. 102 S. Ct. 2525, 2540 (Powell, J., dissenting.) Ironically, Justice Powell characterizes quota hiring as "an arbitrary method of employment. . . itself unfair to individual applicants whether or not they are members of minority groups." *Id.* Justice Powell's concern for the individual in quota hiring seems difficult to reconcile with his tolerance of individual unfairness under the bottom line theory, which in itself is a quota based concept. See, e.g., Shoben *Probing*, *supra* note 85, at 31 (the bottom line concept is a "surreptitious quota system"). One of the architects of the bottom line concept, Alfred Blumrosen, apparently considers the bottom line approach quota based. At a workshop of the American Psychological Association, he criticized the Supreme Court's *Teal* decision by claiming the ruling will have the effect of "knocking out affirmative action" and removing employer incentives because "the numbers game" is no longer applicable. HERRICK & SMITH, EMPLOYMENT LAW NEWSLETTER, Vol. 4, No. 5, p. 1 (October 1982).

In addition, in terms of Title VII liability, it could be more advisable for an employer to rely on the results of validated selection techniques rather than random or quota hiring. See *M. MINER & J. MINER*, *supra* note 83, at 16-17.

Whether there is adverse impact or not, an employer should determine whether any selection procedure is job related; otherwise, there is little if any justification for using the procedure. Random selection, frequently advocated by civil rights activists, may very well be as effective unvalidated selection procedure. However, both these approaches involve costs in terms of unnecessary turn-over, low employee productivity, and other detrimental effects that can be avoided by the use of validated selection techniques.

Id. at 74.

Justice Powell also expresses concern in the *Teal* dissent that the use of validated tests instead of voluntary affirmative action adjustments by the employer will actually result in fewer protected individuals being employed. *Teal* 102 S. Ct. at 2540 (Powell J., dissenting.) Justice Powell's reasoning is not unassailable. As two commentators have stated, "minority representation in overall employment on a level equal to that in the labor market, or even in the applicant pool, is no assurance that minority employment might not even be higher in the absence of the 'discriminatory' test." Booth and Mackay, *supra* note 7, at 156-57. In addition, preferential treatment is not required by Title VII under § 703(j). See also 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey) "Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion." Employers are permitted, however, to engage in private affirmative action under *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

Above all, the prospect of greater minority representation under a discriminatory test coupled with affirmative action than would be achieved through a validated test alone, cannot offset the injury suffered by protected individuals. The Supreme Court has clearly stated in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), "The company's later changes in its hiring and promotion policies could be of little comfort to the victims of earlier, post Act discrimination, and could not erase its previous illegal conduct, or its obligation to afford relief to those who suffered because of it." *Id.* at 341-42.

approach. It is possible that employers may avoid the reach of the *Teal* opinion by instituting cumulative selection procedures.⁴²⁵ In a cumulative selection procedure, no one component of the selection process must be overcome to remain eligible for consideration by the employer.⁴²⁶ The theory behind the cumulative system is that an individual will offset a poor performance on an arguably discriminatory component of the process with a superior performance on one of the other requirements.⁴²⁷ Because the *Teal* opinion focuses on components that operate as barriers to employment opportunity, an employer maintaining a cumulative selection procedure could argue an applicant is not exposed to any "barriers" in such a system since all applicants experience all stages of the selection process.⁴²⁸ Despite the fact that a component of a cumulative selection procedure could be shown to act as much like a barrier to employment opportunity as the pass-fail test hurdle in *Teal*, an argument distinguishing *Teal* might be successful. Thus, the failure of the *Teal* Court to define the scope of its opinion could encourage the implementation of cumulative selection procedures, resulting in the skillful circumvention of *Connecticut v. Teal*.

If necessary, however, the *Teal* holding could be applied to prevent the denial of equal employment opportunities that might occur in a cumulative selection procedure. In a final footnote to his dissent, Justice Powell raises this possibility of employers choosing to "integrate test results into one overall hiring decision based on that factor and other factors."⁴²⁹ The possibility that the *Teal* holding may be avoided through the use of cumulative selection procedures, however, rests on more than a footnote in a dissent.

In *Teal*, the Supreme Court affirmed in full the decision of the Second Circuit Court of Appeal's *Teal* opinion.⁴³⁰ In that case, the appeals court stated, "We hold that where a plaintiff establishes that a component of a selection process produced disparate results and constituted a pass-fail barrier beyond which the complaining candidates were not permitted to proceed, a prima facie case of disparate impact is established notwithstanding that the entire selection procedure did not yield disparate results."⁴³¹ The emphasis attached by the Second Circuit to its bifurcated holding is evident in the *Teal* opinion. The appeals court dealt at length with the distinction between situations where a test operates as a pass-fail barrier to employment opportunity for an individual, and instances when a test is one of several factors aggregated to achieve a cumulative rating on an applicant.⁴³²

⁴²⁵ For a discussion of cumulative selection procedures, see *supra* notes 165-83 and accompanying text.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ See *supra* note 238.

⁴²⁹ *Connecticut v. Teal* 102 S. Ct. 2525, 2540 n.8 (1982) (Powell, J., dissenting.).

⁴³⁰ *Teal v. State of Connecticut*, 645 F.2d 133 (2d Cir. 1981).

⁴³¹ *Id.* at 135 (emphasis in original).

⁴³² *Id.* at 137-38.

Accordingly, the Second Circuit's *Teal* opinion endorsed the relevance of bottom line results when a component of a cumulative procedure is under attack.⁴³³ The appeals court advocated the same policy in *Kirkland v. New York State Department of Correctional Services*.⁴³⁴ In that case, the court refused a request to examine the sub-tests of a cumulatively scored examination.⁴³⁵ In its *Teal* opinion, the court stated that "viewing the overall results of a selection process is ordinarily a prudent course to pursue."⁴³⁶ When a selection procedure contains a single component which acts as a pass-fail barrier, however, the court discarded the general rule and analyzed the component for disparate impact. The Second Circuit explicitly approved of the bottom line approach, however, when a component of a cumulative selection procedure is being challenged, and the overall results reveal no significant disparate impact.⁴³⁷

The Supreme Court's silence regarding the role of the bottom line concept in cumulative selection procedures in *Teal* could be interpreted by employers as a tacit endorsement of the Second Circuit's acceptance of the bottom line theory in the context of cumulative selection procedures.⁴³⁸ Moreover, the *Teal* majority's emphasis on the operation of the test in *Teal* as a "barrier" could be distinguished.⁴³⁹ In a case where an individual challenges the disparate impact of a single component of a cumulative selection procedure, the defendant employer plausibly could argue that the component by itself did not function as a barrier to opportunity within the meaning of the *Teal* opinion. The employer could demonstrate that the individual was not denied equal employment opportunity since he was exposed to every component which combined to produce a single rating for selection.⁴⁴⁰

In response to an employer's defense claiming a cumulative selection procedure is outside the scope of the *Teal* ruling, it is foreseeable that a plaintiff challenging the operation of such a procedure could nonetheless employ the concept of "a barrier to employment opportunity" set forth in *Teal*. The distinction between a test functioning as a barrier when it is a mandatory pass-fail hurdle and not acting as a barrier when used in a cumulative process is not a clear one. In addition, the Supreme Court's emphasis on the protection of each individual in *Teal* could be employed by a plaintiff challenging a compo-

⁴³³ *Id.* See also, *supra* note 328.

⁴³⁴ 520 F.2d 420 (2nd Cir. 1975). See also, *supra* notes 175-79 and accompanying text.

⁴³⁵ *Id.*

⁴³⁶ *Teal*, 645 F.2d at 138.

⁴³⁷ *Id.*

⁴³⁸ The issue of the bottom line in cumulative selection procedures was briefed for the Supreme Court in *Teal*. See Brief for Respondents at 21; Brief Amici Curiae of the Equal Employment Advisory Council and International Personnel Management Association in support of the Petitioners at 16-21; Brief Amici Curiae of the National League of Cities and National Public Employer Labor Relations Assoc. in Support of Petitioners at 20-29; Brief for the United States as Amicus Curiae at 14, reprinted in BNA'S LAW REPRINTS, *supra* note 7.

⁴³⁹ See, e.g., *Teal*, 645 F.2d at 137-38.

⁴⁴⁰ *Id.* See also, *League of United Latin American Citizens v. Santa Ana*, 410 F. Supp. 873, 894-95 (C.D. Cal. 1976).

nent of a cumulative selection procedure. A plaintiff could argue that despite the structure of a cumulative selection process, an individual component of the process acted as a discriminatory barrier to employment opportunity. If a plaintiff could prove the component did in fact have the effect of a barrier, then his argument would be justified under the *Teal* rationale.

A testing component of a cumulative selection procedure logically could be shown to act as an exclusionary barrier to employment opportunity. In *Brown v. New Haven Civil Service Board*,⁴⁴¹ Judge Newman stated that a protected individual could score so low on a culturally biased test, that it would be numerically impossible for that individual to compensate for his poor performance by achieving a superior rating on other components of a multipart selection process.⁴⁴² In this type of situation, the test would effectively operate as the type of barrier to opportunity outlined in *Teal*. Another possible scenario is the prospect of a single discriminatory question on a written test which has an adverse effect on members of a group protected under Title VII. If an individual member of this group fails to accumulate the requisite aggregate rating at the end of the total multi-part process by one point, the effect of the test would be a barrier to employment opportunity.⁴⁴³

If necessary, therefore, the prohibitive language of *Teal* could be applied in these situations involving cumulative selection procedures. It could be argued that the paramount concern expressed by the Supreme Court in *Teal* is the protection of each individual under Title VII. The concern expressed by the Court for the plight of the individual could be cited as a justification for the penetration of even a cumulative selection procedure to examine the disparate impact of a single component. Thus, although the language of *Teal* appears to be limited to situations where a single component is used as a preliminary pass-fail barrier in a selection procedure, courts should apply the *Teal* rationale to cases involving cumulative, or multi-part selection procedures as well.⁴⁴⁴ Until such time as the scope of *Teal* is defined through future litigation, however, it

⁴⁴¹ 474 F. Supp. 1256 (D. Conn. 1979), discussed *supra* notes 139-64 and accompanying text.

⁴⁴² *Brown*, 474 F. Supp. at 1262.

⁴⁴³ *Id.*

⁴⁴⁴ Courts could apply a broad interpretation to the Supreme Court's holding in *Teal* which states, "we hold that the bottom line does not preclude respondent-employee from establishing a prima facie case, nor does it provide petitioner-employer with a defense to such a case," *Connecticut v. Teal*, 102 S. Ct. 2525, 2529, as a general prohibition on the use of the bottom line concept. Such a general interpretation was adopted by a member of the First Circuit Court of Appeals in *Costa v. Markey*, 706 F.2d 1, 30 FEP Cas. 593 (1982) discussed *supra* note 395. When confronted with an attempt to distinguish *Teal* in that case because *Costa* involved a sex-specific hiring procedure, Circuit Judge Campbell refused to dilute the scope of the Supreme Court's holding in *Teal*. *Id.* at 8 (Campbell, Circuit Judge, concurring). In a separate opinion concurring with the First Circuit's decision to follow *Teal* in *Costa*, he stated, "When the Supreme Court decides a case, I think we must ascribe a certain generality to its opinion: the present issue seems to be subsumed in principle, if not in every respect, by the language and holding in *Teal*. Accordingly, I think we must affirm the district Court." *Id.*

would be rational for an employer to implement a cumulative selection procedure in an attempt to preserve the viability of the bottom line concept.

CONCLUSION

The Supreme Court's decision in *Connecticut v. Teal* clarified several critical issues in employment discrimination law. Above all else, the decision reflects the Supreme Court's view of the purpose of Title VII. That purpose is the preservation of equal employment opportunities for each individual covered by the statute. In the process of reinforcing this primary purpose of Title VII, *Teal* rejects the bottom line concept by finding the disparate impact theory is not confined in its application only to the end results of a selection process. The Court refused to accept bottom line evidence in the form of applicant flow statistics as a justification for the obvious discrimination against some protected individuals at an intermediate stage of the selection process. *Teal* will no doubt cause the alteration of selection procedures in which employment examinations may act as barriers to the employment opportunities of individuals. Whether the *Teal* opinion is definitive enough to apply to cumulative selection procedures remains to be discovered through litigation. *Teal* may have answered some questions regarding the purpose of Title VII, the nature of disparate impact analysis, and the use of employment tests. But it is also possible that the Court's opinion left just enough ambiguity to allow its holding to be avoided through a rejuvenated bottom line defense.

MICHAEL K. FEE