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The bad law of "disparate impact"

ROGER CLEGG

THE "disparate impact" theory of discrimination is curious, ubiquitous, and mischievous. The theory holds that when an action has a disproportionate *effect* on some group (racial, ethnic, gender, whatever), it can be challenged as illegal discrimination—even if there was no discriminatory *intent*. This is quite different from a "disparate treatment" lawsuit, where the plaintiff must prove that the defendant treated him worse because of a particular characteristic.

The perniciousness of disparate impact was recently on display in two high-profile cases. The Office for Civil Rights (OCR) in the U.S. Department of Education, headed by civil-rights activist Norma Cantu, relied on the approach in its "draft guidelines" circulated to various college officials (and others). The guidelines put colleges on notice that relying on standardized tests, like the SAT and ACT, on which some classes of persons do worse than others, can place them in legal jeopardy under OCR's interpretation of the civil-rights laws.

In another example, federal judge Ronald L. Buckwalter ruled earlier this year that the National Collegiate Athletic Association's "Proposition 16" had an illegal disparate effect on African Americans. Proposition 16, along with its predecessor Proposition 48, was designed to ensure that students accepted into college athletic programs had some likelihood of eventually graduating. By requiring that any student have achieved some minimal combination of high-school grades and standardized test scores, the NCAA hoped to raise student-athlete graduation rates and end horror stories of collegiate exploitation of young athletes.

Cantu does not assert that the SAT and ACT judge students of different races according to different standards, and Buckwalter did not rule that Proposition 16 by its terms treated blacks differently from whites. Nor did Cantu suggest that those designing standardized tests are deliberately discriminating against certain races or ethnicities, and Buckwalter did not find that the NCAA intended to discriminate against blacks. Nonetheless, because blacks and, to a lesser extent, Hispanics perform below whites and Asians on the ACT and SAT, colleges that rely too heavily on these tests can be accused of civil-rights violations. And because a disproportionate number of black students were disqualified from athletic participation by Proposition 16, Judge Buckwalter ruled that it was illegal discrimination. But if some selection criterion has neither discriminatory terms nor discriminatory intent, then in what sense is it discrimination because of race?

Recent explosion

The disparate-impact idea is not found in the original Civil Rights Act of 1964; indeed, it is clear from the act's text and history that this approach was not what Congress had in mind. But it was adopted by the courts at the behest of federal bureaucrats and the civil-rights establishment. The Supreme Court itself ratified the approach in 1971, in an employment case challenging a high-school diploma requirement and the use of off-the-shelf aptitude tests by a North Carolina utility. Twenty years later, Congress belatedly codified the approach for employment law.

Ironically, the popularity of disparate-impact lawsuits in the

employment area, where the concept began, has actually declined since 1991, when highly lucrative compensatory and punitive damages were made available if intentional discrimination was shown. But outside the workplace, disparate-impact claims are exploding (and their popularity may soon return in the employment area if a decision last summer by the U.S. Court of Appeals for the Third Circuit, making it extremely easy to win disparate-impact lawsuits, is followed).

This new growth first became apparent in housing-discrimination lawsuits. During the Reagan and Bush administrations, the Justice Department had opposed expansion of disparate-impact doctrine to the housing area. The Clinton administration, however, has aggressively pursued these claims, as political scientist Robert Detlefsen has documented. An internal memorandum dated December 17, 1993, written by HUD Assistant Secretary Roberta Achtenberg, and addressed to "all regional directors" of the agency's Office of Fair Housing and Equal Opportunity, instructed that Fair Housing Act cases should now be analyzed using disparate impact. It further stated that if a housing practice had a disproportionate effect, it could be justified only "by a business necessity which is sufficiently compelling to overcome the discriminatory effect," and that such defenses were to be viewed skeptically. Thus, for example, a landlord who decided that he would not rent to drug addicts could be sued if it turned out that, in his community, this had a disparate impact on racial minorities. He would be liable unless he could prove to HUD's or a federal judge's satisfaction that this practice was a "necessity."

The administration has extended the disparate-impact theory not only to the actual providers of housing but also to housing lenders and insurers. Banks and insurance companies that turn down a "disproportionate" number of some racial or ethnic group are being sued. In the wake of one such lawsuit by the administration, Nationwide Insurance Company, one of the largest property and casualty insurers, agreed it would no longer make underwriting decisions on the basis of such objective factors as the age or market value of a home. The administration claimed that these policies had an illegally discriminatory effect on minorities. Allstate and State Farm have also caved in to this pressure.

But it is Title VI of the 1964 Civil Rights Act that has really caught the creative fancy of the civil-rights bar in the last few years. Title VI prohibits racial or ethnic discrimination in any program or activity that receives federal financial assistance. The Supreme Court has held that the statute itself prohibits only intentional discrimination, but unfortunately, the federal bureaucracy's regulations frequently ban actions with a disparate impact as well.

Here, too, the Clinton administration has been eager to push the disparate-impact approach. On July 14, 1994, Attorney General Janet Reno sent a memorandum to all "heads of departments and agencies that provide federal financial assistance," instructing them to "ensure that the disparate impact provisions in your regulations are fully utilized." Where federally funded programs have disproportionate effects, "those policies and practices must be eliminated unless they are shown to be necessary to the program's operation and there is no less discriminatory alternative."

OCR's draft guidelines and Judge Buckwalter's decision are only two of the more recent examples of disparate-impact actions brought under Title VI. Last year, another federal judge struck down Alabama's refusal to administer driver's license tests in a language other than English as illegal discrimination on the basis of national origin. The Clinton administration is supporting the challenge on appeal, which was argued in Atlanta last March.

Earlier in the year, the ACLU and other civil-rights groups challenged Berkeley's alleged overreliance on SAT scores and AP courses on the grounds that such criteria illegally discriminate against blacks, Hispanics, and Filipinos. The Clinton administration had already said it will investigate a similar complaint leveled by civil-rights groups concerned that California's decision to end preferences will have, obviously, a disparate effect on certain minorities. The argument that ending a system of deliberate discrimination—as California did by passing Proposition 209—might somehow violate the civil-rights laws because of its disparate impact on certain groups is breathtaking, but it spotlights where the logic of the disparate-impact approach leads.

In another matter involving the application of disparate-

impact law to education, the NCAA recently decided not to recommend that college basketball players be made ineligible for competition during all or part of their freshman season. The stated goal had been to give freshmen a chance to adjust both academically and socially to college, but the proposal was rejected, at least in part, by a fear that such an action would prompt another disparate-impact lawsuit, since college basketball players are disproportionately black. "We're not going to do anything stupid legally," said one member of the NCAA committee that had been studying the issue.

Even pollution has been challenged as illegally discriminatory. Environmental groups recently challenged a market-oriented pollution-control initiative allowing oil companies to forego cleaning up emissions from certain facilities in exchange for buying older, high-polluting vehicles and taking them off the highways. The initiative was said to have the effect of subjecting certain minority neighborhoods to disproportionately high levels of pollution.

The Clinton administration also has weighed in on behalf of "environmental justice." Bill Lann Lee, the acting head of the Justice Department's civil-rights division, is among the environmental justice pioneers. When he headed the NAACP Legal Defense and Education Fund's Los Angeles office, for instance, he challenged the extension of the Long Beach Freeway by 4.5 miles on the grounds that it would have a discriminatory environmental effect on Latino neighborhoods.

But the predictable effect of environmental justice has been to block economic development in minority areas. Worse, as Brookings Institution senior fellow Christopher H. Foreman, Jr. has argued, it has distracted minority communities from the real health threats they face, like substance abuse and poor diets. One can acknowledge that poor communities often face environmental problems without believing that racial discrimination is the cause or civil-rights litigation the answer.

The case of voting

In 1980, a plurality of the Supreme Court held that the Voting Rights Act of 1965 prohibited only intentional discrimination. But civil-rights advocates succeeded in persuad-

ing Congress to amend the act in 1982, so that voting practices with discriminatory "results" were also barred.

The principal—and hoped for—outcome was preserving the ability of these advocates to demand that districts be drawn in such a way as to ensure a proportionate number of black and Hispanic officeholders for various jurisdictions. The Justice Department's civil-rights division has long insisted on this sort of racial gerrymandering, and the problem has gotten worse as redistricting computer-software has become more sophisticated. "These are Jim Crow districts," Abigail Thernstrom has written, "designed as 'homelands' for black voters."

The degree to which Congress intended this result is open to question, and the Supreme Court has since 1993 put limits on racial gerrymandering. Nonetheless, it cannot be doubted that the "results" language in the Voting Rights Act has, like the disparate-impact approach elsewhere, driven race-consciousness—particularly in reapportionment.

The creation of "safe seats" for minority representatives is, in turn, likely to discourage interracial coalition building, reduce electoral competition and political participation, and encourage identity politics and bloc voting. The disparate-impact approach under the Voting Rights Act has also been used to challenge anticorruption measures, and, most recently, to encourage even state and local judges to view themselves as beholden to particular racial constituencies.

Why it survives and thrives

In *Reaching Beyond Race*, Paul M. Sniderman and Edward G. Carmines conducted a polling experiment to assess support for affirmative action where its justification is responding to disparate impact. They found that this justification "has no persuasive power among whites ... [who] were no more likely, if the justification for affirmative action was described in terms of [correcting] disparate impact, to support it than they were when presented with no justification whatever." Thus "almost 80 percent opposed racial quotas despite the disparate impact of a company's hiring policies." On what ground then is the disparate-impact approach justified, and why has it not only survived but thrived?

The short answer is that anyone who attacks disparate-

impact lawsuits is sure to be accused of wanting to "turn back the clock" on civil rights. When the Supreme Court tried to clarify—certainly not end—disparate-impact law in 1989, NAACP leader Benjamin Hooks likened the justices to Klansmen. But demagogy aside, what are the underlying arguments to be made for these lawsuits?

Those defending the disparate-impact approach make several closely related arguments. First, they argue that because racism is so prevalent, and because, at the same time, it is so skillfully hidden, plaintiffs should not be required to produce a smoking gun of discriminatory intent. Next, they argue that no unintended social costs are incurred when selection devices with disparate impacts must be defended or are eliminated. Finally, they hold that because integration is a vital goal, any device—no matter how innocent and innocently contrived—that stands in the way should be scrapped.

Part of the answer to the first argument is empirical: "Institutional racism" is in fact rare, and where racism does exist, it is usually not particularly well hidden. Of course, it is hard to persuade people who disagree on this point. But one should also keep in mind that no smoking gun is necessary to prove discriminatory intent. The Supreme Court has made clear that, as with any other offense, mere circumstantial evidence of discrimination is sufficient to win a case.

Nor is it true that there's no cost in requiring defendants to get rid of selection devices with disparate impacts that they cannot justify in court. In the first place, the defendant is not just told to get rid of the offending device: He must also pay his lawyers, the other side's lawyers, and the plaintiffs' back wages, besides hiring or promoting someone he thinks will not be the most productive person for the job. Worse, there are the inevitable economic costs when bureaucrats, judges, and plaintiffs' lawyers determine—through litigation or the threat of litigation—the selection devices that ought to be used. Finally, it is simply not the case that only bad selection devices will be shied away from. Being confident in the device does not necessarily mean that you are willing to "bet the company" in an uncertain lawsuit that will be decided by a judge or jury who knows much less about a business than you do.

It is the third argument that one suspects is really behind

the adamant defense of the disparate-impact approach. Perhaps there will be economic costs when perfectly good selection devices are eliminated, but, say the advocates of disparate impact, the social benefits justify them. There is in this the usual leftist impatience with anyone's fear of losing money, even though lost money means lost jobs. But let's concentrate instead on the noneconomic costs. Advocates are no longer making an argument against discrimination but an argument in its favor. They do not maintain that the disparate-impact approach will end deliberate discrimination against some groups; rather, they acknowledge that it will increase discrimination against others. Let there be no mistake: The institutionalization of discrimination is a serious social cost. Integration achieved at the price of white resentment, minority stigmatization, and the legalization of racialist thinking is not worth it.

The intent of disparate impact

Disparate-impact theory has always been without merit. A civil-rights suit ought to focus on whether people of different races are treated differently *because* of their race. That is the common-sense meaning of "discrimination," and that is what the 1964 act clearly said and meant. The question of intent, rather than incidental effect, ought to be at the heart of every lawsuit.

Defendants in disparate-impact suits do have the opportunity to rebut the plaintiffs' case by proving that their challenged policies are justified by some "necessity." But it is risky to go to court, trying to prove to a judge or jury—who will know nothing about one's enterprise—that the challenged practice is a "necessity." The technical "validation" frequently insisted on by civil-rights plaintiffs, enforcement bureaucrats, and federal judges is often impossible to demonstrate. And, conversely, it is almost always possible that a plaintiff in some group can come up with somewhat different criteria that will diminish the impact on that group while still serving the defendant's end, even if not as well.

And so—surprise—many defendants will simply ensure that the disparate impact does not occur in the first place, taking steps to guarantee that the numbers come out right. Indeed,

once the Supreme Court recognized the disparate-impact cause of action, the federal government and the private sector argued that it must also allow reverse discrimination so that employers could comply with the law, and the Court so ruled in 1979. William Coleman, a principal author of the disparate-impact legislation that President Bush vetoed, and later, in more palatable form, signed, was candid in a White House meeting about what he wanted: "What I need is a generation of proportional hiring, and then we can relax these provisions."

Thus potential defendants and bureaucrats have adopted surreptitious quotas, dual standards, and preferential treatment. Or society can simply lower its standards across the board, which is the immediate result of the NCAA ruling and seems to be the object of OCR's intimidating "draft guidelines." Either approach is just fine with the civil-rights lobby. By pushing companies and others to substitute quota-driven decisions for merit-based, colorblind ones, disparate-impact lawsuits have two bad results: less efficient and productive policies and the institutionalization of race-consciousness. And that is not just the effect of disparate impact. That is its intent.

In many cases, the use of the disparate-impact approach will result in a federal agency dictating the selection device. OCR's guidelines, for instance, point a litigation revolver at a college's head. Any college will want to choose students in a way that will not be challenged by the deep-pocketed grantors and litigators from the federal government. Only they can determine what selection device will meet their approval, and they will be quite happy to share their advice.

But what is really rotten at the core of disparate-impact theory is this: Under the guise of combating the oxymoronic problem of "unintended discrimination," the theory requires deliberate discrimination. It requires selection devices that incorporate racial, ethnic, and gender goals or quotas. Such a practice would be condemned as discriminatory under any other circumstances. If a bigoted Los Angeles employer determined that he had been hiring "too many" Asians and Jews by giving a particular test, and therefore deliberately discarded the test for one that he knows will result in fewer of them being

hired, all would agree that this violates the law. And yet, it is precisely this kind of calculation that disparate-impact theory applauds.

The unintended effect of disparate impact

The use of quotas and the lowering of standards are unlikely to offend the civil-rights establishment. But there are other consequences of the disparate-impact approach that might give its supporters some pause.

If it is true, for instance, that Hispanics fail in disproportionate numbers to finish high school, then it makes more sense to address this problem directly than to sweep it under the rug by requiring employers to hire underqualified and unprepared Hispanic workers. Theoretically, of course, it might be possible to solve the underlying problem while prohibiting practices with a disparate impact, but, as a practical matter, the latter goal will undermine the former.

A number of educational reforms in California were precipitated when, but only when, the ballot initiative there prohibited the state's use of preferences based on race, ethnicity, and sex. Similarly, C. Boyden Gray, who led the Bush administration's opposition to those seeking to expand the disparate-impact approach, has argued that its position was motivated principally by a desire to ensure that educational performance and accountability improved. If the private sector cannot demand high-school diplomas and good grades, they are less likely to be earned.

It does minority schoolchildren no service to challenge their schools' use of standardized tests—tests that improve instruction and accountability. Even more questionable is a disparate-impact lawsuit in Alabama, which since 1985 has blocked the state from testing prospective teachers. Or consider a much different problem: The fact that crack cocaine penalties disproportionately affect blacks is cited as proof of discrimination. But easing these sentences will not improve the quality of life in many predominately African-American communities.

The winners and losers in a disparate-impact lawsuit are not always predictable. In the hiring of policemen and firefighters, for example, there will frequently be both a physical-fitness and a paper-and-pencil test, and it is also frequently

the case that the former will have a disparate impact on women. If a lawsuit successfully challenges a physical-fitness test, then the paper-and-pencil test is likely to be weighed more heavily. Unfortunately, however, this is likely to have a disparate impact on Hispanics and blacks. Of course, had they sued first, they might have succeeded in forcing the employer to place more emphasis on the physical-fitness test—to the disadvantage of women. The point is that just about any selection device is likely to have a disparate impact on some group, whether because of race, sex, ethnicity, religion, age, or disability—any of which could be asserted as the basis of a federal lawsuit. And that lawsuit is unlikely to be in the interests of every historically aggrieved group.

The disparate-impact approach also encourages the already widespread tendency, on the Right and Left, to view every social problem through a racial lens. If a disproportion exists, then it must be caused by race, says the Right, or racism, says the Left. But racism is not the problem, on the one hand, nor is there "something in the blood" that predisposes some groups toward antisocial behavior or underachievement. True, there are cultural causes of social pathologies, but race does not equal culture any more than it equals criminality. Most blacks are law-abiding, for instance, and the life styles of many whites reflect a nationwide cultural and moral decline.

The mindset that sees the world in minority-versus-white terms is bad for race relations generally, of course, but the biggest losers are minorities. When standards must be lowered and quotas imposed because of "them," resentment and stereotypes flourish, and progress toward genuine racial equality comes to a halt.

Getting it right

It is likely that, without legislative intervention, disparate-impact theory will continue to flourish in the bureaucracies and the courts. The good news is that, with respect to everything except employment and voting, the politically difficult task of amending or repealing a civil-rights statute is unnecessary. The current statutes do not require a disparate-impact approach for education, housing, or environmental protections; accordingly, the federal bureaucracy should not either. But

since it does, Congress should step in: It should establish that, unless a federal antidiscrimination law expressly provides for a disparate-impact cause of action, then the law proscribes only disparate treatment, not disparate results.

For employment, existing statutes do codify disparate-impact causes of action. In a perfect world, Congress would rewrite these statutes to exclude disparate-impact claims. At a minimum, it should add a defense for employers whose neutral selection criteria are challenged: If the employer can prove that the criteria were not motivated by a desire to discriminate, then he should win.

This is not as good as ending disparate-impact employment claims completely, but it does give employers the chance to deal with them as disparate-treatment claims. And even the politically timid might be willing to support a statute that says: an employer cannot be held liable for discrimination against someone because of, say, race, if he proves that he did not treat that person differently because of race. For voting, too, the statute must be narrowed to prohibit actual discrimination only. It must be rewritten so that no one can use it to encourage racial politics and racial gerrymandering.

Most of the worst abuses of civil-rights laws can be traced to the disparate-impact doctrine. Removing that doctrine from the law will help return the civil-rights statutes to their original purpose of barring, rather than encouraging, race-based thinking and policies.