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The Effects Test: New Directions

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Title VII of the Civil Rights Act of 1964\(^1\) prohibits employment practices which discriminate on the basis of race, color, religion, sex, or national origin.\(^2\) In *Griggs v. Duke Power Co.*,\(^3\) the United States Supreme Court held that a facially neutral employment practice having a disparate impact on a protected class may violate Title VII even though the employer did not actually intend to discriminate. This technique of measuring employment discrimination by disparate impact rather than improper intention is commonly known as the effects test.\(^4\)

Recent judicial developments have given rise to doubt as to the continued viability of the effects test.\(^5\) Such doubt is premature. Although the Supreme Court has curtailed its potential use as a constitutional standard in the employment discrimination field, its basic Title VII coverage and content remain unchanged. Simultaneously, judicial and legislative authorities are initiating use of the effects test to combat discrimination in such areas as credit and housing, signalling, perhaps, that the test can be expected to grow and develop.

Anticipating further development, this article focuses on the effects test as first articulated in *Griggs* and subsequently applied in Title VII class actions. Using employment discrimination as a prototype, it then explores the projected scope of effects test applications in new fields.

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EMPLOYMENT DISCRIMINATION: THE EFFECTS TEST UNDER TITLE VII

The Context: Class Actions

Title VII provides that it shall be an unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment.\(^6\) While discrimination is not defined in Title VII, the effects test or disparate impact theory is one way of establishing its existence.\(^7\) When using the effects test, the plaintiff seeks to show that an employment practice which is neutral in appearance actually has a discriminatory impact upon a protected class. The plaintiff representing the protected class need not prove that a discriminatory purpose motivated the practice.\(^8\) A showing of discriminatory effect, standing alone, establishes a prima facie case of unlawful discrimination, shifting to the employer the burden of justifying the challenged employment practice on a nondiscriminatory basis.\(^9\)

The disparate impact theory appears in class actions alleging employment discrimination. It is not suited to private, individual actions based on a personalized grievance.\(^10\) This type

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6. See notes 1 & 2 and accompanying text supra.


Some courts demonstrate confusion about whether the effects test is a rule establishing the order of proof, a rule establishing the burden of persuasion, a rule of construction for Title VII, or a means of constitutional interpretation.

Were the effects test to prescribe a rigid, shifting order of proof, see, e.g., James v. Stockham Valves & Fittings Co., 394 F. Supp. 434 (D. Ala. 1975), Title VII suits would essentially be operating under different rules of procedure than all other civil actions. See Fed. R. Civ. P. 1.


Finally, courts have used the effects test as a means of constitutional interpretation. E.g., Davis v. Washington, 512 F.2d 956 (D.C. Cir. 1975), rev'd, 426 U.S. 229 (1976). It is now settled that the test is not a rule of constitutional law. See notes 46-62 and accompanying text infra.


9. See id. at 1886 & n.45; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

of action is more typically brought under the disparate treatment theory of discrimination. Under this theory the issue is whether or not a particular employment decision was motivated by a discriminatory purpose. In an individual action, as contrasted with a class suit, proof of an illicit purpose behind an employment practice is critical to recovery.

In order to understand how the effects test applies to discrimination in areas of the law other than employment, it is necessary to initially focus on its elements as used to interpret Title VII.

The Analysis: A Three Step Process

Despite numerous Title VII cases using and interpreting the effects test, no opinion has comprehensively stated the disparate impact theory. Courts agree that an employer’s good or bad faith is irrelevant to show that a challenged practice does or does not unlawfully discriminate against a protected class. All courts focus on discriminatory results. However, opinions do not closely examine the separate elements comprising the theory.

Review of the sequence of Supreme Court cases following Griggs shows that the effects test consists of a three step process which may be stated as follows:

(both the disparate treatment and the disparate impact theories may be applied to a particular set of facts simultaneously).


12. International Bhd. of Teamsters v. United States, 97 S. Ct. 1843, 1854 n.15 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). However, illicit purpose may be proven by circumstantial as well as by direct evidence. If an individual employment decision adversely affecting an individual plaintiff conforms to a pattern or practice having a disparate impact upon a protected class, the showing of disparate impact permits an inference that the particular employment decision at issue was motivated by a discriminatory purpose. 97 S.Ct. at 1854 n.15; Blumrosen, supra note 11, at 69. Thus, in a disparate treatment case, disparate impact is relevant only in an evidentiary sense. It does not have the effect of shifting the burden of persuasion to the employer to show that the decision was not discriminatory.


14. Chronologically, the Supreme Court opinions refining Griggs are: McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Albermarle Paper Co. v. Moody, 422 U.S.
1) The plaintiff-class bears the initial burden of establishing a prima facie case. To do so, it must show that an employment practice has a discriminatory effect on a protected class.

2) The employer may rebut the prima facie case by showing that the employment practice has a manifest relationship to the job in question.

3) It remains open to the plaintiff-class to show that there is an alternative employment practice available which would have a less discriminatory effect on the protected class and which serves the employer's legitimate needs at least as well as the disputed practice.

When the criteria of a step is fulfilled, the burden of proof shifts to the other party. Each of these steps warrants separate discussion.

The prima facie case. The effects test was first formulated in Griggs v. Duke Power Co. In that opinion the Supreme Court stated that an aggrieved plaintiff-class must initially show that an employment practice used by a defendant-employer has the effect of discriminating against a protected class. No showing of discriminatory intent by the employer in adopting the practice is necessary. The Court focused solely


20. 401 U.S. 424 (1971). Griggs presented the Court with an employment policy requiring candidates for transfer to skilled job lines to either have a high school education or pass a standardized intelligence test. Id. at 427-28. The plaintiff made no showing of discriminatory purpose on the part of the employer in adopting these requirements. However, the employer had practiced overt discrimination in the period prior to the enactment of Title VII and the educational requirement, which had the effect of perpetuating the prior discrimination by impeding transfers of minority employees to better paying job lines, had been instituted on the very day Title VII became effective. The Court therefore found that the employer's policy unlawfully discriminated under Title VII. Id. at 431.

21. The Court asserted in Griggs: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the consequences of employment practices, not
on the disparate impact of the challenged practice, observing that Congress directed the thrust of Title VII to the consequences of employment practices and not simply to the motivation.\textsuperscript{22}

Discrimination takes many forms, and both the Supreme Court and lower courts recognize that evidence of disproportionate impact cannot be the same in every case.\textsuperscript{23} Thus, all manner of fact patterns have been accepted as probative on the issue of discriminatory effect.\textsuperscript{24}

When proceeding under the disparate impact theory, however, the plaintiff-class must direct its charges of discrimination to specific employment practices. Mere allegations of disproportionate employment results are insufficient.\textsuperscript{25} Title VII expressly refers to unlawful employment practices rather than to consequences alone.\textsuperscript{26} The prima facie case under the effects test requires an employment pattern or practice. This means a series of similar actions and not simply an isolated employment decision. A single incident is probably not actionable under the effects test.\textsuperscript{27}

A curious corollary to the requirement of an employment pattern or practice is that any given member of the class need only demonstrate an indirect nexus between himself and the
challenged practice in order to have standing to sue. The individual need only show that he is a member of the protected class, and that an unlawful employment decision affected him adversely. However, this employment decision need not be of the same type as the practices directly challenged in the law suit. This approach may derive from the view that employment discrimination is often subtle and difficult to prove.

Employer’s rebuttal. Once the plaintiff-class has established its prima facie case, the burden of persuasion shifts to the defendant-employer, who must then justify the disparate impact by showing a manifest relationship between the questioned employment practice and the employer’s legitimate job-related interests.

Manifest relationship is a term of art in employment discrimination shrouded with vagueness. The problem of precisely defining the term has yet to be addressed by the courts. Generally, it requires that an employment practice be a business necessity, or be job related. Title VII cases have classified

28. Flast v. Cohen, 392 U.S. 83 (1968); Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); Hairston v. McLean Trucking Co., 520 F.2d 226 (4th Cir. 1975); cf. Harrison v. Otto G. Heinzeroth Mortgage Co., 414 F. Supp. 66 (N.D. Ohio 1976) (a complainant need only demonstrate that he was denied housing opportunities on the basis of racial considerations, whether or not he was a direct object of discrimination).


30. The Court in Griggs determined that “Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.” 401 U.S. at 432.

31. Possible characteristics of manifest relationship to employment which are mentioned in Griggs include “genuine business need,” “job capability,” and “successful job performance.” Id. at 431.

32. To establish manifest relationship, the employer must demonstrate a legitimate business reason for having the challenged practice. “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.” Id. at 431 (emphasis added).

This business necessity doctrine, first enunciated in Griggs, has been subsequently interpreted to mean that employers must go as far as possible to remedy discriminatory effects. Green v. Missouri Pac. R.R., 523 F.2d 1290, 1297 (8th Cir. 1975); Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 56 (5th Cir. 1974), rev’d on other grounds, 97 S.Ct. 1891 (1977); Wallace v. Debron Corp., 494 F.2d 674, 677 (8th Cir. 1974); United States v. N.L. Indus., Inc., 479 F.2d 354, 364 (8th Cir. 1973); United States v. St. Louis-San Francisco Ry., 464 F.2d 301, 308 (8th Cir. 1972), cert. denied, 409 U.S. 1116 (1973); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed under Rule 60, 404 U.S. 1006 (1971). Employers must use practices which have the least possible discriminatory effect. The business purpose justifying a policy having a disproportionate effect must be “sufficiently compelling to override any racial impact.” Id. Mere business convenience has not been found compelling. Watkins v. Scott Paper
certain employment practices as job related and others as not job related, but have not offered consistent reasons for their classifications.

Though job relatedness must be judged in the context of the circumstances of a particular case, intelligence tests and departmental seniority systems have not often been held to be manifestly related,\textsuperscript{33} while dismissals of disruptive workers have been upheld as job related.\textsuperscript{34} Additional authority on what showings constitute a manifest relationship may be drawn from the Equal Employment Opportunity Commission (EEOC) guidelines, which suggest that it can be established by demonstrating a significant correlation between the employment practice and "important elements of work behavior which comprise or are relevant to the job."\textsuperscript{35}

\textit{Less discriminatory alternatives.} If the employer rebuts the prima facie case, the plaintiff-class may still prove effects test discrimination by proffering an alternative employment practice which is less discriminatory and which serves the employer's legitimate business needs at least as well as the present employment practice.\textsuperscript{36} Although this has been clearly articu-
lated as a separate third step in the effects test, no appellate case has yet reached this stage of analysis on its facts. Accordingly, it is unclear just how much less discriminatory a suggested alternative employment practice must be in order to result in a finding of unlawful discrimination.\(^37\)

At least two possible approaches, each incorporating concepts from earlier steps of disparate impact analysis, are available for adoption.

One approach derives from the prima facie case's attention to the role of statistics in establishing disparate impact. Under this standard, the plaintiff-class must propose an alternative employment practice which both serves the legitimate needs of the employer and has a significantly less discriminatory impact upon the protected class, meaning that the proposed alternative must confer a substantial reduction in discrimination when compared to the existing practice. A marginal improvement in discrimination reduction is insufficient.\(^38\)


\(^38\) Statistical data might well be relied on to demonstrate that an alternative practice would be significantly less discriminatory. To conduct a basic statistical analysis of disparate impact, the variables which result from the challenged practice—for example, the percentage of applicants hired who belong to protected classes and the hiring rate for applicants who are not members of protected classes—are selected and compared. If they differ, there is a possibility of effects test discrimination.

The courts, however, have properly refused to find discrimination merely because corresponding variables have differed. A finding of discrimination requires that the disparities be “statistically significant,” a mathematical term of art. Albemarle Paper Co. v. Moody, 422 U.S. 405, 430 (1975); accord, United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir. 1976); Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976); Dorsano, Statistical Evidence in Employment Discrimination Litigation: Selection of the Available Population, Problems, and Proposals, 29 Sw. L.J. 859 (1975); Note, Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal, 89 HARV. L. REV. 387 (1975); Note, Evidence: Statistical Proof in Employment Discrimination Cases, 28 OKLA. L. REV. 885 (1975). Suppose that 20% of all applicants are minorities and that only 15% of the persons hired are from minority groups. Is this difference important and systematic or is it random? Suppose the ratios are 25% and
Use of this standard may be justified by the limited foresight an employer enjoys when instituting an employment policy. Without benefit of hindsight, the employer confronted with several alternative policies having nearly identical projected discriminatory effects frequently cannot determine which policy will have the least discriminatory impact. After implementing one policy, it may turn out that one of the alternatives would have had a slightly less disproportionate effect. The employer had no way of knowing this without actually implementing one of the alternative policies. Indeed, the difference in effect may fall within the anticipated interval of statistical error projected at the time the practice was initiated. An employer's Title VII liability should not depend upon such fortuities.

A second, more exacting standard for measuring alternative practice descends from the Supreme Court comments about manifest relationship and business necessity. This theory requires employers to choose the practices having the least possible discriminatory effect. Under this standard, Title VII liability is established if the proposed alternative practice serves the legitimate needs of the employer and is in the slightest degree less discriminatory. This means that the alternative practice does not have to result in a significant reduction in discriminatory impact, but merely a marginal improvement, in order to generate liability. This standard is a natural extension of the demanding attitude taken by the courts when evaluating an employer's justification for policies which are shown

10%, respectively? 50% and 0%? Statistical significance determines precisely where the line is drawn for a given level of reliability. See H. Brunk, Mathematical Statistics 250-58 (1965); H. Blalock, Social Statistics 122-28 (1960). Courts have almost always adopted a 95% level of reliability or statistical significance when determining disproportionate effect. Albemarle Paper Co. v. Moody, 422 U.S. 430 (1975). That is, the relationship between the variables could have occurred by chance only five times or less in a hundred trials. Id.

39. Suppose policy A is estimated to be 36% ± 3% unequal and policy B is estimated to be 37% ± 3% unequal. Upon implementing policy A, a rate of 36.8% disproportionate impact is found to exist, but that policy B would discriminate only at 36.5%. Policy B is less discriminatory than policy A, but given the projected error, this difference cannot be detected without actually using one of the policies. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 450 (1975) (Burger, C.J., dissenting in part).


42. Watkins v. Scott Paper Co., 530 F.2d 1159, 1171 (5th Cir. 1976); Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972).
to be prima facie discriminatory. In view of Title VII's aim of eradicating all barriers to employment based upon racial or other discrimination, it may follow that a slightly less discriminatory alternative fulfilling the same business purpose as an existing policy should suffice to establish liability.

Furthermore, such a standard would place considerable pressure upon employers to assiduously analyze their employment policies for discriminatory impact prior to the advent of litigation. All possible substitute practices would have to be determined and their relative effects measured. Slight differences in discriminatory effect would have to be taken into account when selecting among them for actual use. The employer's greater access to information about employment policies and their varying impact upon job applicants may justify this increased burden upon its selection among alternatives. The public policy of prohibiting all employment discrimination in any form further supports the use of this more stringent standard.

These two suggested standards are not necessarily mutually contradictory or mutually exclusive. It may be that the employer has a duty to utilize employment practices which have the least possible disproportionate effect, while complainants must show a violation of this duty by demonstrating the existence of an alternative practice which has a significantly less disproportionate effect.

THE DEMISE OF THE EFFECTS TEST AS A CONSTITUTIONAL STANDARD

Although use of the effects test is well established law under Title VII, its use as a rule of constitutional law remained

43. See note 32 supra.
45. Senter v. General Motors Corp., 532 F.2d 511, 527 (6th Cir. 1976).
unsettled for several years. Some constitutional cases, including cases relating to employment discrimination, rely upon disproportionate impact to uphold findings of racial discrimination. The United States Supreme Court resolved the issue in 1976 by proscribing the nonevidentiary use of disparate impact in constitutional analysis. In so doing, the Court drew a sharp distinction between the constitutional and statutory standards for measuring discrimination.

In *Washington v. Davis*, unsuccessful minority applicants for employment as police officers in the District of Columbia challenged the validity of a personnel test used in hiring. The applicants did not rely on Title VII, but simply argued that the practice of using the personnel test violated their constitutional right to equal protection of the laws. Although the Court found the test had an adverse impact upon minority applicants, it held that the effects test was inapplicable: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and decline to do so today."

In departing from the analysis of Title VII, the Court emphasized the additional element of the plaintiff's case necessary to show a constitutional violation—proof that the disparate impact was caused by the invidious intent of the employer. Thus, disparate impact standing alone does not generate a constitutional violation. It merely furnishes evidence from which a court may infer discriminatory intent. In *Davis*, no discriminatory intent was shown, and the facially neutral employment practice survived, notwithstanding its adverse impact on minorities.

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49. Public employees were not at that time covered by Title VII. See 426 U.S. at 236 n.6.

50. Since the case involved a federal employer, the plaintiff's constitutional claim was brought under the due process clause of the fifth amendment. This clause has been interpreted to contain an equal protection component. Bolling v. Sharpe, 347 U.S. 497 (1954).

51. 426 U.S. at 238.

52. Id. at 239. The Court said: "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact that the law bears more heavily on one race than another." Id.

53. Id. at 242. Instead, the Court ruled that a facially neutral test need only be
In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court again drew the *Davis* distinction. Here, minority plaintiffs charged that the defendant village's refusal to rezone to permit construction of low and moderate income housing constituted racial discrimination prohibited by the fourteenth amendment and the Fair Housing Act of 1968. The plaintiffs contended that the denial of the rezoning had a disproportionate impact on black people, regardless of the village's underlying motive.

The Court again found that evidence of disproportionate impact was relevant to the issue of discriminatory intent, but noted that it did not by itself indicate a constitutional violation. Since the plaintiffs failed to sustain their burden of showing a discriminatory purpose, the Court dismissed the constitutional claim.

The distinction between constitutional and statutory standards, only recently underscored by the Court in the area of discrimination, has been clouded somewhat by language found "rationally related" to a proper governmental purpose. The rational basis standard has long been used in equal protection litigation. See, e.g., Reed v. Reed, 404 U.S. 71 (1971). In contrast, a legislative classification expressly based upon grounds which are not neutral on their face is subject to "strict scrutiny." See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality) (sex based classification); *McLaughlin v. Florida, 379 U.S. 84 (1964)* (racial classification). Under the rational basis standard, the *Davis* Court held that the plaintiff had failed to make a prima facie case of discrimination. No intent to discriminate was asserted, the test was neutral on its face, and its use was deemed "positively" related to performance in the police training course.

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55. 42 U.S.C. §§ 3601-3631 (1970). The suburb was inhabited entirely by whites, while any public housing project would have been heavily integrated.
56. The Court said:

The impact of the official action . . . may provide an important starting point [in ascertaining discriminatory purpose]. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of State action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in [Gomillion v. Lightfoot, 364 U.S. 339 (1960)] or [Yick Wo v. Hopkins, 118 U.S. 356 (1886)] impact alone is not determinative and the Court must look to other evidence.
429 U.S. at 266 (footnotes omitted).

57. Significantly, the Court remanded the claim under the Fair Housing Act for a determination of whether this statutory theory also requires proof of intent. *Id.* at 506. On remand, the Seventh Circuit held that a Fair Housing violation can be established by effect without a showing of discriminatory intent, but that racially disparate impact alone does not establish a per se violation. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283* (7th Cir. 1977). For the possible extension of the effects test to fair housing cases, see notes 95-145 and accompanying text infra.
The holdings in *Davis* and *Arlington Heights* will impede efforts to remedy harm suffered by minority groups because of the discriminatory barriers found in all segments of society. These cases limit the availability of legal redress for any non-statutory cause of action, forcing minorities to find a statutory basis for relief when relying solely on disparate impact to prove discrimination. In the absence of statutory causes of action, injured classes of plaintiffs must prove invidious intent, a showing which is frequently described as very difficult.

Against the restrictive constitutional backdrop, however, the statutory schemes requiring the use of the effects test are...
increasing. This trend is due partly to express congressional intent and partly to judicial interpretation.\textsuperscript{61} Thus, despite the setbacks suffered by civil rights advocates in the constitutional arena, it seems clear that the effects test can be used as a standard for proving discrimination in employment, lending, housing, and possibly other areas.\textsuperscript{62}

\textbf{Statutory Expansion}

The apparent demise of the effects test in the constitutional arena has obscured the fact that it continues to play a key role under Title VII. More importantly, its use is expanding to other areas of discrimination. In particular, additional development has begun under the Equal Credit Opportunity Act\textsuperscript{63} and under the Fair Housing Act.\textsuperscript{64}

\textit{Credit Discrimination}

The Equal Credit Opportunity Act (ECOA), which became effective in October of 1975,\textsuperscript{65} prohibited creditors from discriminating against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.\textsuperscript{66} Due to its limited antidiscrimination scope, this statute was initially viewed more as a consumer credit law than as a civil rights act.\textsuperscript{67}

In 1976, Congress substantially expanded the ECOA's scope to also prohibit discrimination on the basis of race, color, religion, national origin, age, receipt of public assistance, and the good faith exercise of Consumer Credit Protection Act

\begin{footnotesize}
\begin{enumerate}
\item Lower federal courts have generally interpreted antidiscrimination legislation in a liberal manner. \textit{See} Blumrosen, \textit{supra} note 11, at 63.
\item \textit{See id.}, where the author asserts: "It is more important, today, that we be more concerned about the broad and practical implementation of [civil] rights than about their constitutional foundation."
\item 42 U.S.C. §§ 3601-3631 (1970) [hereinafter cited as Title VIII].
\item The ECOA was enacted in response to the difficulties which single women encountered in obtaining credit, the practice of considering only the husband's characteristics when married persons applied for credit, and the problems of widowed and divorced women in reestablishing credit. \textit{National Comm'n on Consumer Finance, Consumer Credit in the United States} 1, 152 (1972), \textit{reprinted in} CCH Installment Credit Guide No. 215 (1973).
\end{enumerate}
\end{footnotesize}
rights. The 1976 amendments were a natural extension of the coverage of the existing Act. They also made the ECOA more like existing civil rights laws. Consequently, the text of the ECOA has at least a generic resemblance to the text of other equal opportunity statutes.

When elevating the ECOA to the status of a full coverage civil rights law, Congress expressed almost as an aside, its intent that the effects test apply to credit discrimination. The Senate report accompanying the amendments, in discussing the general prohibition of credit discrimination contained in section 701(a) of the ECOA, states: "In determining the existence of discrimination . . . courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions." The report expressly states that the judicial construction of other antidiscrimination legislation is "intended to serve as guides in the application of this Act." The House report accompanying the amendments also endorses the use of the effects test in the credit field. The Federal Reserve Board, which is authorized to promulgate regulations to carry out the purposes of the ECOA, has also sanctioned the use of the test.

The legislative history of the ECOA does not make clear whether the effects test as applied to credit discrimination is

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74. Id.


essentially the same as the effects test applied to employment discrimination. It is not even certain, for example, that the credit test employs a three step process with each step operating to shift the burden of persuasion. The employment test may serve merely as a guide in the development of a new and independent credit effects test.\textsuperscript{78}

Notwithstanding these uncertainties, study of the nature of credit discrimination and of the Title VII effects test permits the formulation of a preliminary statement of the credit effects test. In view of the absence of case law,\textsuperscript{79} the discussion is necessarily speculative. Nevertheless, one can understand how the credit effects test will operate by analogizing to the elements of the effects test in the employment field. In considering this formulation, the reader must recall the factual differences between the normal operational procedures in the fields of employment and credit extension, as well as in the types of discrimination found in each field.

The prima facie case. Generally speaking, the discussion of the plaintiff-class' prima facie case under the employment effects test\textsuperscript{78} should apply to its counterpart in credit. Thus, a credit practice which is neutral on its face may be discriminatory if shown to have a disparate impact upon a protected class. In addition, although the suit is triggered by a single act, the test will relate to a series of incidents constituting a discriminatory credit practice. Finally, a party claiming redress under the credit effects test must show only injury and membership in the aggrieved class. Proof of a causal relationship between the discriminatory credit practice and the individual's damages can be attenuated and indirect.

The principle difference between the respective prima facie cases involves the classes protected by each statute. The protected classes described in the ECOA are much broader...
than those covered by Title VII. Among the categories protected by the ECOA and not protected by Title VII are marital status,\textsuperscript{81} age, receipt of public assistance, and good faith exercise of Consumer Credit Protection Act rights.\textsuperscript{82}

By analogy to its employment ancestor, the credit effects test appears to require a showing of disparate impact. If adverse action, a term of art, occurs at higher rates for a protected class or there is disproportionate lending at statistically significant rates, this should suffice to establish a prima facie case of discrimination under the credit effects test.\textsuperscript{83} The House report impliedly supports this conclusion by stating that population statistics evidencing a disparate lending practice may be used to establish a prima facie effects test case.\textsuperscript{84}

The relative access of the litigants to pertinent credit information supports this conclusion.\textsuperscript{85} The complainant in a credit denial case is usually in a position to estimate whether a protected class is being refused credit more often than others, but cannot determine whether this action relates to creditworthiness. Creditworthiness depends upon proprietual information in the possession of the creditor.\textsuperscript{86} Accordingly, it may be appropriate to deem a showing of disproportionate credit denials as a prima facie effects test case, and then leave it to the


\textsuperscript{83} “Adverse action” is a term which has been defined to encompass all manner of credit refusals, changes, revocations, and denials in which a credit decision is made. 15 U.S.C. § 1691(d)(6) (Supp. VI 1976); 12 C.F.R. § 202.2(c) (1977); 42 Fed. Reg. 1242 (1977).

\textsuperscript{84} The House report, in referring to an ECOA provision (subsequently dropped from the enacted version) which held that a showing of disproportionate lending did not constitute a per se violation of the ECOA, said that this provision was not intended to limit judicial use of population statistics in accordance with the effects test. H. Rep. No. 210, 94th Cong., 1st Sess. 5 (1975).

\textsuperscript{85} Accord, Swint v. Pullman-Standard, 539 F.2d 77 (5th Cir. 1976); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976); Chicano Police Officers Ass'n v. Stover, 526 F.2d 431 (10th Cir. 1975).

\textsuperscript{86} Determining creditworthiness is, however, a much less subjective decision than estimating employment qualifications. In addition, the validity of the creditor's practices can be checked by statistical analysis of default rates. This exercise usually cannot be undertaken in employment situations because of the smaller number of decisions involved and the uncertainty about what constitutes good job performance. Accordingly, the credit effects test may properly involve a simpler prima facie showing than its employment counterpart.
creditor to rebut by showing that the statistical disparity is actually related to creditworthiness. 87

Finally, under the credit effects test, evidence of disproportinate extension of credit should not be regarded as a per se violation of the ECOA. 88 It is the policy of the ECOA to consider each applicant on the basis of his or her own creditworthiness, and not upon assumptions about characteristics of demographic classes of which the applicant is a member. 89 If evidence of disproportinate extension were a per se violation, then creditors might feel compelled to make unsound loans to uncreditworthy applicants in order to avoid a statistical disparity. This was not the congressional intent. 90 The ECOA merely obligates creditors to ignore prohibited bases when evaluating creditworthiness and granting credit.

**Creditor's rebuttal.** The creditor may rebut the prima facie case by demonstrating that it is the creditor's customary procedure to use the challenged credit practice for all extenstions of credit of the amount and type applied for, and that the credit practice has a manifest relationship to creditworthiness or other legitimate business purpose. 91 This rebuttal should be nearly identical to its employment counterpart. “Manifest relationship” is again a term charged with uncertain meaning. Usually, the creditor will seek to show that the challenged credit practice is necessary to determine creditworthiness. Where the creditor invariably uses the credit practice in question, its relationship to creditworthiness can be determined by

87. The characteristics of applicants will vary greatly from creditor to creditor. Main, A New Way to Score with Lenders, MONEY, Feb. 1977, at 73, 74; Letter from Richard A. Kerr, Operating Vice President, Federated Stores, to Neil Butler, Section Chief, Equal Credit Opportunity Section, Board of Governors of the Federal Reserve System (Dec. 9, 1976). Intuitively the credit customers of Tiffany's are different from those of K Mart. Accordingly, disproportionate lending should be measured against the population consisting of the creditor's applicants rather than the population of the surrounding geographical area. The comparison population used in employment cases is more geographic, because of the more homogeneous nature of potential employment applicants. Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975).

88. Notwithstanding that the House report's statement to this effect referred to a provision which was dropped from the final version of the ECOA. See note 84 supra.


91. See 41 Fed. Reg. 49,135 n.6 (1976), a preliminary draft of Regulation B, interpreting the ECOA.

Note that creditors tend to process all applicants using a uniform procedure. This computer imposed standardization should obviate the need for plaintiffs to use the class action form. The nature of credit analysis is such that a pattern or practice of using the challenged policy can simply be assumed.
use of statistics which associate default rates with certain applicant characteristics and by empirical analysis of defaulted loans.\footnote{92}

\textit{Less discriminatory alternatives.} It remains open to the plaintiff-class to prove that another credit practice will have less undesirable discriminatory effects on the protected class and will serve the creditor's legitimate needs at least as well as the existing credit practice.\footnote{93} This step parallels its employment counterpart in not specifying the degree by which discrimination must be reduced under an alternative practice in order to cause effects test liability. In addition, no guidance is offered as to how much effort the creditor should use to discover the alternative prior to instituting the practice. Finally, it is uncertain whether the plaintiff-class will prevail if the proffered alternative is so expensive or difficult to use or discover that its implementation is rendered impractical.\footnote{94}

\textit{Housing Discrimination}

The use of the effects test in Title VII cases was authorized by decisions of the Supreme Court. Courts using the effects test under the ECOA will draw their authorization from the legislative history surrounding the Act. At present, no penultimate legal authority has authorized the use of the effects test under Title VIII, the Fair Housing Act.\footnote{95} Notwithstanding the absence of superior legal sanction, federal courts have moved to rapidly incorporate the effects test into their Title VIII rulings in connection with at least four potentially discriminatory housing practices: zoning, refusals to deal, placement of public housing, and redlining.

\textit{Zoning practices.} The most controversial area of Title VIII litigation involves unintentional discrimination which results from the zoning practices of local authorities. Some cases use disparate impact as evidence of discriminatory intent on the part of zoning authorities.\footnote{96} Other courts, by way of dicta, have


94. \textit{See generally} notes 36-45 and accompanying text \textit{supra}.


96. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1292 (7th Cir. 1977).}
supported the proposition that the effects test applies in these types of zoning cases, but the issue is far from settled.

The Supreme Court has recently shown an apparent willingness to give this issue serious consideration. In Village of Arlington Heights v. Metropolitan Housing Development Corp., the Court rejected a constitutional claim of discrimination based on the disproportionate impact of a zoning practice. The Court remanded, however, with instructions to consider the question of whether the effects test applied to a similar claim under Title VIII. Upon reconsideration, the appellate court held that a Title VIII case can be established, at least under some circumstances without recourse to proving improper intent. Conversely, proof of disparate impact alone is not a per se violation of Title VIII.

In the wake of Arlington Heights, the Supreme Court also vacated a Sixth Circuit decision, Joseph Skillken & Co. v. City of Toledo, which had held by implication that the effects test cannot be used under Title VIII. In Skillken the trial court found that city authorities were motivated by discriminatory purposes in refusing to rezone certain areas to permit construction of low rent housing projects. It concluded, however, that motivation was immaterial to a finding of discrimination.

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97. The line of zoning cases reported under Title VIII by lower federal courts appears at first blush to fully embrace the effects test. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); United Farm Workers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970) (42 U.S.C. § 1983); Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970) (fourteenth amendment). The opinions contain comforting quotations for the advocate desiring to use disproportionate effect as the main proof of discriminatory zoning under Title VIII. E.g., United States v. City of Black Jack, supra (showing of disparate impact suffices for prima facie case, shifting burden of justification to defendant). All of these decisions, however, actually involve intentional discrimination in zoning. See, e.g., United States v. City of Black Jack, 372 F.Supp. 319, 322-25 (E.D. Mo. 1974). The judicial displeasure with the effects of exclusionary zoning practices has been largely admonitory.

99. See note 56 and text accompanying notes 56-57 supra.
100. 429 U.S. at 271.
104. The court said: "The courts will look beyond the form of a transaction to its substance and proscribe practices which actually or predictively result in racial discrimination irrespective of the defendant's motivation." Id. at 233, quoting Wil-
appeal, the Sixth Circuit reversed, finding that the city officials did not have discriminatory motives when refusing the rezoning request. In the absence of discriminatory intent, the court held that there was no constitutional violation. The court mentioned but did not discuss the Title VIII claims. Apparently, it either concluded that the Title VIII claims were dependent upon the constitutional claim or it used constitutional standards to resolve the statutory issues. The Supreme Court granted certiorari, vacated the judgment, and remanded to the court of appeals “for further consideration in light of [Village of Arlington Heights].”

It is difficult to state the implications of these developments. However, when the language of Arlington Heights is viewed in conjunction with the vacation of Skillken, it can probably be said that the Court is seeking to draw a firm line between constitutional and statutory claims of discrimination. Although it has rejected the use of the effects test as a constitutional standard, it may well adopt it as a statutory standard under Title VIII as well as Title VII. In vacating Skillken, which rejected the test as a statutory standard, the Court demonstrated a possible willingness to adopt the test under Title VIII.

Refusals to sell or rent. Title VIII prohibits “discrimination” in the sale or rental of housing. It does not define discrimination. A minor provision of Title VIII gives the Attorney General power to intervene where a “pattern or practice” of housing discrimination develops. When construing

liams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974).

The court endorsed the concept of the prima facie case under Title VIII and stated that it operates to shift the burden of justification to the defendants. 380 F. Supp. at 234.


106. Id. at 876. The court concluded that the city officials were merely intending to protect property values. Id. at 881.

107. The court spoke in terms of using the rational basis test in lieu of the compelling interest test. Id. at 879. Under this standard, the fact that minority residents were concentrated in certain areas of the city was not deemed proof of official discrimination. The court supported its validation of facially neutral policies having unequal impact with citations to constitutional cases.


110. It does, however, define “discriminatory housing practice” in a general way. Id. § 3602(f).

111. Id. § 3613. It is of interest to observe that Title VII refers generally to “unlawful employment practices,” including discrimination with respect to employ-
this provision, federal courts have held that a discriminatory pattern or practice standing alone is sufficient to trigger federal intervention. The practice need not be shown to be intentional or motivated by discriminatory purposes. Thus, discrimination in Title VIII has been interpreted to bar not only intentional discrimination, but also practices which produce discriminatory results, and good faith will be an inadequate defense when such discriminatory effects are shown.

Subsequent opinions have transferred the definition of discrimination as disparate impact from the federal intervention section to cases brought by individuals under section 804, a general Title VIII provision which prohibits discrimination in the sale or rental of housing.

Thus, in Williams v. Matthews Co., the Eighth Circuit found Title VIII's proscription on practices which resulted in discrimination, irrespective of the defendant's motives, persuasive in an individual action brought partly under 804. Williams, a minority group member, had attempted to purchase one of the defendant-developer's lots in a development confined to white residents only. The developer employed a restrictive sales practice— that of selling only to "approved" builders. The court concluded that this practice "operated to exclude black persons from acquiring building lots in the real

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116. E.g., Banks v. Perk, 341 F. Supp. 1175, 1183 (N.D. Ohio 1972). These opinions are also noteworthy in that it is not necessary to proceed as a class action in order to assert the housing effects test. This may be attributable to its diversified origin in many unrelated opinions. Alternately, the limited impact of certain types of housing discrimination, such as a refusal to deal, may compel use of the individual form of action. Rarely will enough members of a protected class have sought to purchase a particular house so that they can properly claim that joinder is impossible, as required by Fed. R. Civ. P. 23.
119. Id. at 826.
Thus, said the court, this facially neutral practice could not stand if it operated to discriminate on the basis of race.\textsuperscript{121} Since it pre-dated \textit{International Brotherhood of Teamsters v. United States},\textsuperscript{122} \textit{Williams} failed to distinguish the disparate impact theory of discrimination from the disparate treatment theory.\textsuperscript{123} In spite of the sweeping language used by the court, the actual holding appears to have been based upon the unequal treatment to which the plaintiff was subjected.\textsuperscript{124} The court outlined a three step process for analyzing cases of housing discrimination, but interlaced elements of both theories into the various steps.\textsuperscript{125}

Adding to the confusion about refusals to deal are cases such as \textit{Boyd v. Lefrak Organization},\textsuperscript{126} in which the Second Circuit reversed a lower court decision which had incorporated the effects test of the employment discrimination field within the area of housing discrimination.\textsuperscript{127} Boyd, a renter, was required to maintain a minimum weekly net income in order to qualify for tenancy. The district court observed that this requirement had the effect of excluding all welfare recipients, the vast majority of whom were minority group members.\textsuperscript{128}

\begin{footnotes}
\footnotetext[120]{Id. at 823.}
\footnotetext[121]{Id. at 828, citing \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971).}
\footnotetext[122]{97 S. Ct. 1843 (1977).}
\footnotetext[123]{See notes 6-12 and accompanying text supra.}
\footnotetext[124]{The plaintiff's attempt to purchase a lot had been put through a "special handling" process—that is, it was handled separately from offers tendered by whites. 499 F.2d at 827. Although the appellate court formally accepted the district court's finding that this procedure was not motivated by a discriminatory purpose, it is clear from the opinion that the appellate court gave little credence to this finding. The court concluded that the practice carried with it racial overtones. Id. at 828.}
\footnotetext[125]{In addition to this indication of unequal treatment, the court's description of the prima facie case was phrased in terms of unequal treatment. See id. at 826. Further, the court relied upon \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792 (1973), a disparate treatment case, for its discussion of the prima facie case and of the seller's rebuttal. See 499 F.2d at 826-27.}
\footnotetext[126]{See note 124 supra. One other peculiarity may be noted in the court's formulation. The court said that it would disallow any business necessity justification for a restrictive selling practice unless the seller also demonstrated the absence of any alternative practices which were less discriminatory in effect. 499 F.2d at 828. This novel prerequisite to the business necessity defense has not been endorsed in Title VII case law. \textit{But cf. 29 C.F.R. § 1607.3} (1974) (endorsed by EEOC under Title VII).}
\footnotetext[127]{509 F.2d 1110 (2d Cir. 1974) (2-1), cert. denied, 423 U.S. 896 (1975).}
\footnotetext[128]{509 F.2d 1110 (2d Cir. 1974).}
\end{footnotes}
It concluded that this disproportionate impact constituted a violation of Title VIII.\textsuperscript{129}

On appeal, the Second Circuit held the disparate impact theory inapplicable to Title VIII.\textsuperscript{130} It did so based on relatively unsound reasoning\textsuperscript{131} and over a strong dissent.\textsuperscript{132} Although a petition for rehearing en banc was denied, four judges went on record as favoring the application of the effects test to Title VIII actions.\textsuperscript{133}

It is interesting to observe that cases involving intentional refusals to deal are becoming increasingly rare. Either refusals to deal have become more covert, a situation which will compel more frequent resort to the disparate impact theory,\textsuperscript{134} or refusals to deal are actually becoming less common, indicating that Title VIII has been successful in this area.

\textsuperscript{129} Id., citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). In conjunction with its findings of disproportionate impact, the district court found that the minimum weekly income requirement did not accurately measure rent paying ability and thus not justified on grounds of business necessity. Id. at 14,242.

\textsuperscript{130} 509 F.2d at 1114. In reversing, the court of appeals also rejected the district court's equating of race with economic status. The minimum weekly income requirement, it said, affected all poor people and not merely racial minorities or welfare recipients. Moreover, the court found that the percentage of defendant's minority tenants fairly reflected the percentage of minority members in the local population. Id. at 1113.

\textsuperscript{131} Id. at 1114. The court cited Jefferson v. Hackney, 406 U.S. 535, 549 n.19 (1972), a constitutional decision, for the proposition that the effects test did not apply to Title VIII.

In Jefferson, recipients of Aid to Families with Dependent Children (AFDC) challenged the allocation of a fixed pool of funds among four public assistance programs as having an unequal effect upon minority group members in contravention of Title VI, which requires nondiscrimination in federally assisted programs. See 42 U.S.C. §§ 2000d to 2000d-4 (1970). The Court rejected application of Griggs, ruling that the variation in composition of the programs was rationally related to the various purposes of the separate programs. 406 U.S. at 449 n.19.

Jefferson's constitutional basis makes it questionable authority for the statutory issue presented in Boyd. See generally notes 46-57 and accompanying text supra.

\textsuperscript{132} 509 F.2d at 1115 (Mansfield, C.J., dissenting)(urging the adoption of Griggs and suggesting in detail how the disparate impact theory's burden of proof would operate in the area of housing discrimination).

\textsuperscript{133} 517 F.2d 918 (2d Cir. 1975). A majority of the Second Circuit judges available voted for rehearing, but because of judicial vacancies or absences, a majority of judges authorized to sit on the circuit did not. See FED. R. APP. P. 35(a).

Public housing. A few decisions have used the effects test to attack the placement of public housing projects. Generally, these cases charge that "scatter site" housing would be more desirable, and that placing additional public housing in minority neighborhoods has the effect of perpetuating discrimination. These suits have usually been brought on constitutional grounds, rather than under Title VIII.

These constitutional attacks relying on the effects test have not fared well in the courts. Although they antedated the Davis holding, these cases anticipated its distinction between discrimination for constitutional purposes and statutory purposes. Further, the constitutionality of the Court's ability to force the placement of public housing is limited in some cases by its lack of power to shape intermunicipal remedies.

In addition, some public housing location cases have not fared well under a statutory cause of action either. Courts have generally stated that something more than just a discriminatory impact is required to make out a prima facie case under Title VIII.

Redlining. The final area in which Title VIII litigation uses the disparate impact theory is redlining, a practice whereby mortgage lenders specify certain areas in which mortgage loans will not be made, or made only at very unfavorable terms.

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137. Acevedo v. Nassau County, 500 F.2d 1078, 1082 (2d Cir. 1974).


139. Id. at 1068 n.5. Contra, Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977).


More recently, redlining has also encompassed geographic limitations imposed upon distribution of credit cards. Stuart, 'Redlining' Charged in Denial of Credit to Detroit Couple, N.Y. Times, June 16, 1977, at 19, col. 1; 'Redlining with Credit Cards, Wash. Post, July 20, 1977 at A22, col. 1; Letter from Senator Donald W. Riegel, Jr., to the Washington Post (July 31, 1977).
The lender takes this action because it anticipates that the neighborhood will decay, change racially, or otherwise become undesirable. When lenders adopt such a policy, the decline of the neighborhood often becomes a self-fulfilling prophecy.

Recent federal cases have tentatively ruled that such practices violate Title VIII. In *Laufman v. Oakley Building Co.*, for example, the court stopped just short of expressly adopting the effects test for redlining decisions. The court cited with approval a federal regulation for savings and loan associations which prohibits redlining practices because of their discriminatory effects upon protected classes. It also made express reference to *Griggs*. This decision indicates that future use of the effects test to combat redlining is highly probable.

As a result of the contradictory case law under Title VIII, no definitive statement has yet emerged stating the components of the effects test to be utilized under it. This uncertainty stems from the variety of factual patterns of Title VIII cases, which are less susceptible to ready classification than their employment counterparts. Nevertheless, additional development of the effects test under Title VIII appears very probable.

**CONCLUSION**

Although two highly publicized Supreme Court cases have eliminated hopes of using the effects test as a constitutional standard in discrimination cases, the same cases reaffirm its use as a statutory standard. *Davis* sanctions its application in Title VII actions, while *Arlington Heights* can be read to impliedly allow the effects test in Title VIII cases.

As a statutory standard, the effects test continues to expand its scope. It began as a test for scrutinizing employment discrimination under Title VII, and Congress subsequently authorized its use under the Equal Credit Opportunity Act.

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143. *Id.* (discussing 12 C.F.R. § 528.2(d) (1974), as interpreted in a formal opinion of the General Counsel to the Federal Home Loan Bank on March 21, 1974).
144. *Id.* at 495.
Courts are now exploring its possible application to cases of housing discrimination under Title VIII. Indeed, there is no reason to preclude its use to interpret other antidiscrimination statutes.\textsuperscript{146}

In fact, it can be persuasively contended that the effects test is evolving into a generally applicable statutory standard for testing discrimination. All manner of antidiscrimination legislation is susceptible to interpretation based on its formula. This process has already begun. Uses of the effects test in areas other than employment are not simply coming, they are already here.
