

The Inevitable Constitutional *Adverse Impact* Challenge

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In 1986, I was invited to meet with the then Chairman of EEOC who had read my article entitled, “Uniform Guidelines: Competence or Numbers” published by the Federal Bar Association in 1978.¹ It was based on my previous experience negotiating EEOC’s 1978 *Uniform Guidelines on Employee Selection Procedures* (“*Uniform Guidelines*”).² Chairman Clarence Thomas asked me: “Sharf, you’ve been around... How did we get stuck enforcing a statistical definition of discrimination?” Among other challenging topics, our discussion over the next hour included a range of topics:

The Supreme Court’s 1971 Griggs decision giving EEOC *Guidelines* “great deference:” “The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. [Footnote 9] The administrative interpretation of the Act by the enforcing agency is entitled to great deference” (emphasis added).³

The Ethics Code of the Federal Bar Association offering legal advocates approval for: “...a good faith argument for an extension, modification or reversal of existing law;” and

The civil rights bar’s disdain for objective assessment which rebuts their implicit redistributive assumption that everyone is equally qualified for all jobs and that employment decisions will mirror the demographics of an employer’s labor market.

Chairman Thomas kept returning to the question of how EEOC’s *Uniform Guidelines* came to define a *prima facie* presumption of discrimination based on their statistical definitions of “adverse impact” and the “4/5ths Rule.” Challenged by Chairman Thomas in 1986 and based on my more than thirty articles (33 to be exact) published in *The Industrial Psychologist* (TIP) since 1975, what follows below details the civil rights bar’s successful advocacy redefining individual rights found in the Civil Rights Act of 1964 to their redistributive group rights agenda triggered by “adverse impact” - the mantra of equity advocates. The path is long and tortuous, especially focused on landmark Supreme Court precedents, but following along the journey is instructive in understanding where we are today.

¹ A lawyer's guide to testing practices and procedures. In K. McGovern (Ed.), An Equal Employment Opportunity Practice Guide. Washington, D.C.: Subcommittee on Publications of the Committee on Equal Employment and Collective Bargaining of the Council on Labor Laws and Labor Relations, Federal Bar Association (1977).

²The Guidelines are codified in 29 CFR Part 1607. The Guidelines provide uniform principles for the use of tests and other selection procedures in employment decisions. Their primary purpose is to prevent discrimination based on race, color, religion, sex, or national origin, while guiding employers, labor organizations, employment agencies and licensing boards in lawful hiring and promotion practices. The Guidelines apply to all employment decisions, including hiring, promotion, demotion, retention, licensing, and certification.

³ *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

I begin with Stanford psychologist John Gardner's 1961 Excellence: Can We Be Equal and Excellent Too?⁴ Gardner's book significantly influenced me as a scientist-practitioner negotiating the 1978 *Uniform Guidelines* and, a decade later drafting the *Race-norming Prohibition* in the Civil Rights Act of 1991 as Special Assistant to EEOC's Chairman. Gardner was awarded the Presidential Medal of Freedom, the nation's highest civilian honor, for shaping public policy as Secretary of Health, Education and Welfare, drafting the Civil Rights Act of 1964, founding Common Cause, and heading the Urban Coalition. In 1961, three years before the Civil Rights Act of 1964, Gardner opined:

"Today, as a result of far-reaching and technological developments, we are forced to search for talent and to use it effectively. Among the historic changes that have marked our era, this may in the long run prove to be one of the most profound."

"The development of standardized tests is one of the great success stories in the objective study of human behavior. Anyone who understands the problem of mental measurement must be impressed with technical accomplishment these instruments represent."

"The sorting out of individuals according to ability is very nearly the most delicate and difficult process our society has to face."

"The problem pointed out by both philosophers and economists is that the further one goes in seeking equality of results, the more one must resort to government intervention."

1964 Congress passed the Civil Rights Act of 1964⁵ defining employment discrimination as **Disparate Treatment** – intentionally treating individuals differently based on that person's race, color, religion, sex or national origin. Nowhere in the legislative history is there any discussion of a results-oriented definition of employment discrimination based on comparing groups covered by Title VII:

"It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (emphasis added).

1971 The civil rights bar's successful equal outcomes advocacy, however, convinced the Supreme Court in their unanimous *Griggs* decision to define a results-oriented ('**Disparate Impact**') definition of employment discrimination, no-where found in the language of Title VII or its legislative history:

"The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face,

⁴ John W. Gardner, "Excellence: Can We Be Equal and Excellent Too?" W W. Norton & Co. (1984).

⁵ Pub. L. 88-352, 78 Stat. 241, enacted July 2, 1964) is the landmark civil rights and labor law in the United States that outlaws discrimination based on race, color, religion, sex,^[al] and national origin. It prohibits unequal application of voter registration requirements, racial segregation in schools and public accommodations, and employment discrimination.

and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.”

“The Act requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race, and if, as here, an employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. . . . The Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless they are demonstrably a reasonable measure of job performance.”

The 1971 *Griggs* decision established the legal predicate for pursuing equality of results. The civil rights bar along with the EEOC and the Department of Labor’s Office of Contract Compliance Programs (OFCCP) now had the Supreme Court’s endorsement to pursue enforcement of the concept of “adverse impact,” a statistical definition of employment discrimination comparing the results of employment decisions for race, color, religion, sex and national origin groups covered by Title VII.

1978 The EEOC, OFCCP, DOJ and Civil Service Commission (now OPM) published the *Uniform Guidelines* now incorporating a statistical definition of employment discrimination in terms of “Adverse Impact” and the “4/5ths Rule.” The *Uniform Guidelines* detail an employer’s rebuttal burden to a *prima facie* charge of “adverse impact” by documenting the “job-related” “business necessity” of decision making. Theoretically, these were only guidelines because Congress chose not to give EEOC rule-making authority. But the Supreme Court’s 1971 *Griggs* precedent entitled the enforcement agencies’ guidelines to “great deference.”

1986 Clarence Thomas’ “statistical definition of discrimination” challenge to me in 1986 inspired me to co-edit a volume “Fairness in Testing” with Linda Gottfredson with commentaries from academe, public and private sector employers, the Department of Justice and the civil rights bar.⁶ The Lawyers’ Committee for Civil Rights Under Law opinion was that if validity generalization were embraced, no employer would ever have to conduct another validation study.

1988 Supreme Court Justice O’Connor wrote the majority opinion in *Watson*⁷ - a strategic development in the evolution of Title VII which made it more difficult for plaintiffs to establish a *prima facie* case of “adverse impact” based on statistics alone and clarified the “job-relatedness” burden of demonstrating “business necessity.” Among her observations were the following:

Statistics “... come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances.”

“Employers are not required, even when defending standardized or objective tests, to introduce formal “validation studies” showing that particular criteria predict actual

⁶ Gottfredson, L. & Sharf (guest Eds.). Fairness in employment testing: Litigating personnel measurement policy. *Journal of Vocational Behavior*, 33(3), 235-271

⁷ *Watson v. Fort Worth Bank & Trust*, 487 U.S. (1988). A plurality opinion held that a minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination, which would amount to a *de facto* quota system, in which a “focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.” *Watson*, 487 U. S., at 992 (plurality opinion).

on-the-job performance. In the context of subjective or discretionary decisions, the employer will often find it easier than in the case of standardized tests to produce evidence of a "manifest relationship to the employment in question."

"We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain the myriads of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically

provided that employers are not required to avoid "disparate impact" as such.

(Justice O'Connor's decision quoted the Civil Rights Act of 1964) "Nothing contained in (Title VII) shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

1989 In *Wards Cove*,⁸ the Supreme Court questioned the statistical "adverse impact" definition of discrimination as follows:

"The proper comparison is generally between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market."

"Under the Court of Appeals' method of comparison, any employer having a racially imbalanced segment of its workforce could be hauled into court and made to undertake the expensive and time-consuming task of defending the business necessity of its selection methods. For many employers, the only practicable option would be the adoption of racial quotas, which has been rejected by this Court and by Congress in drafting Title VII."

1990 As Special Assistant to EEOC's Chairman, I was invited by the President's lawyer to the White House to face the Secretary of Labor. My objective was to dissuade DOL from dropping the General Aptitude Test Battery ("GATB"). Had GATB been used objectively, it would have resulted in "adverse impact." DOL had "race normed" the reported GATB scores, however, to reduce "adverse impact" where minority percentile scores were compared non-minority percentile scores – different standards based on the test taker's race. The civil rights bar chose to avoid defending the Federal Government's **Disparate Treatment** of individuals which required using different cut-scores based on an individual's race. DOL subsequently abandoned GATB, this well studied measure of the generalizability of general cognitive ability as a valid predictor

⁸ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). This decision made it more difficult for employees to prove that an employer's personnel practices, neutral on their face, had an unlawful [disparate impact](#) on them by requiring that they identify the particular policy or requirement that allegedly produced [inequalities in the workplace](#) and show that it, in isolation, had that effect.

of job performance. GATB had served, nonetheless, as the empirical data base for Schmitt and Hunter's peer-reviewed, meta-analysis "validity generalization" – I/O's significant and substantial contribution to behavioral science.

1991 Reacting to the *Watson* and *Wards Cove* decisions, the civil rights bar was successful in getting Congress to pass the **Civil Rights Act of 1991**⁹ (CRA 91) which codified the **Disparate Impact** ("adverse impact" and the "4/5ths Rule") *prima facie* triggers advocated in EEOC's 1978 *Uniform Guidelines*. The civil rights bar was also successful, however, in inserting language in CRA Sec.105 (C) & (2)(b) specifically restricting "adverse impact" and "business necessity" legal precedents to the day before *Wards Cove* was decided by the Supreme Court in 1989. In effect, the *Uniform Guidelines*' statistical definition of discrimination was now codified in Federal Law passed by Congress somewhat negating these two Supreme Court decisions. This classic example of legislative legerdemain behind closed doors and illustrates how legislation is made through special interest group advocacy but without the benefit of Legislative Branch deliberation and without the benefit of informed public debate.

1994 My co-author, Linda Gottfredson, published *The Science and Politics of Race Norming* in *The American Psychologist*:

"The quandary for employers is that, on the one hand, using merit-based, color-blind tests generally guarantees disparate impact and thus invites litigation under the disparate impact standard of discrimination. On the other hand, using racial preferences is often the only feasible way for an employer to eliminate adverse impact in the short run, but such preferences constitute discrimination against non-minorities and thus invite litigation under the disparate treatment standard."¹⁰

2009 In Federal District Court, I was the expert witness for plaintiff firefighters in their ultimate successful *Ricci* Supreme Court decision holding that the city's abandoning job-related promotion test scores (which would have resulted in adverse impact) constituted **Disparate Treatment** discrimination¹¹. In March 2004 the New Haven Civil Service Board (CSB) refused to certify the results of promotional exams for the positions of Lieutenant and Captain in the New Haven Fire Department. Plaintiffs were white and Hispanic candidates who took the promotional exams but received no promotion because without the CSB's certification of the test results, the promotional process could not proceed. Given the number of vacancies and following the public sector's "rule of three" for hiring those with the highest scores, had the exam results been implemented, promotions would have gone to 7 whites, 2 Hispanics and no blacks; all ten Lieutenants would have been white.

⁹ Pub. L. 102-166 (1991), passed in response to *Wards Cove* and other Supreme Court decisions, although it left in place the language of *Wards Cove* describing the plaintiff's burden with respect to statistical proof: "The mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a *prima facie* case of disparate impact violation."

¹⁰ Gottfredson, L. S. (1994). The science and politics of race-norming. *American Psychologist*, 49(11), 955–963. <https://doi.org/10.1037/0003-066X.49.11.955>

¹¹ *Ricci v. DeStefano*, 557 U.S. 557 (2009), where the Court adopted the strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII; however, the Court did not address the constitutionality of the measures taken in purported compliance with Title VII.

The Federal District Court held that pass rates for minorities were too low under *Uniform Guidelines*' "4/5ths Rule" and were therefore sufficient to justify the City's "voluntary race-conscious remedies." The plaintiff firefighters went to the Court of Appeals (argued before now- Associate Supreme Court Justice Sotomayor) who also ruled in the City's favor. Sotomayor's Court of Appeals decision was successfully appealed when the Supreme Court agreed to hear oral arguments. The Supreme Court's 2009 *Ricci* decision held that in discarding the exams, the city had violated Title VII of the Civil Rights Act of 1964. The majority held that before taking an action of intentional discrimination (**Disparate Treatment**) in order to prevent disparate impact, an employer must have a strong basis in evidence that they will be subject to disparate impact liability. The court found that the city had failed to do so, as the exams were "job-related," consistent with "business necessity," and there was no evidence that an equally valid, less discriminatory alternative was available.

2025 On April 23, 2025, the President Trump issued Executive Order 14281 shifting Federal enforcement of Title VII of the Civil Rights Acts of 1964 & 1991. The Executive Order is based on the premise that "disparate-impact liability all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability."

Essentially, the EO is based on the claim that disparate impact analysis is "inconsistent" with the US Constitution and that in order to avoid violating the Constitution, all federal agencies must deprioritize enforcement of statutes and regulations that include disparate impact liability.

Plaintiff attorneys, however, will continue to file disparate impact claims under Title VII until such time as either:

- 1) Congress amends Title VII given the web of Federal, state and local of laws and regulations premised on adverse impact (unlikely); or
- 2) the Supreme Court opines on the Constitutionality of the adverse impact definition of discrimination (more likely).

It is critical to recall that nowhere in the legislative history of Title VII was there any discussion of a results-oriented definition of employment discrimination. The adverse impact definition of employment discrimination was created as a result of the plaintiffs' bar's successful advocacy in the Supreme Court's 1971 *Griggs* decision comparing group outcomes. Two decades later, the plaintiffs' bar was also successful codifying the adverse impact definition of employment discrimination in the Civil Rights Act of 1991 without the benefit of Congressional deliberation and without the benefit of informed public debate. As for the future of the Uniform Guidelines, the thrust of EO 14281 should not be adopted without a clear expression by Congress and/or the Supreme Court. The I/O community's historic development and delivery of employment assessments, including cognitive ability measures, personality inventories, structured interviews, work samples, simulations, and technology-enabled assessment solutions have been well-served by the Uniform Guidelines. For test publishers, the Guidelines serve as an essential reference point for professional expectations related to validity, reliability, documentation, and appropriate test use.

The Guidelines promote consistency across the profession by providing shared standards that support responsible assessment development and implementation. This benefits employers and candidates by improving the likelihood that selection tools are built correctly, used appropriately, interpreted correctly, and supported by evidence.

Rejection of the Guidelines would result in a more fragmented and uncertain environment, including:

- inconsistent employer expectations regarding validation evidence and documentation;
- increased risk of misapplication or misuse of selection tools;
- reduced clarity regarding compliance obligations across jurisdictions;
- greater likelihood of unvalidated selection practices entering the marketplace; and
- heightened legal uncertainty for employers and vendors.

The removal of uniform federal guidance would also increase the burden on organizations attempting to maintain scientifically defensible selection systems, particularly those operating across multiple states or regulatory environments.

CONCLUSION

Today, industrial psychology's empirical development of meta-analysis psychometrics has contributed significantly and substantially to the science of the generalizability of evidence-based behavioral "validity generalization" research. However, I question whether contemporary I/O has lost sight of our empirical foundation built of reliably measured individual differences. In my opinion, academic-oriented journals calling for group-comparison DEI research is flawed by the absence of behaviorally defined, reliable *diversity, equity, inclusion* variables which would facilitate estimates of reliability and permit the replication of what industrial psychologists are being urged to study. If research can't be replicated, industrial psychology is NOT contributing to behavioral science. Absent DEI variables that can be reliably measured and replicated, any such called-for research will be a collection of virtue affirming anecdotes better suited for political science and sociology.

Urging DEI *Equity* research is defined by group comparisons. **Disparate Treatment** is treating an individual based on that person's group membership. The meaning of **Disparate Treatment** has been redefined by the civil rights bar from a negative under *Griggs* to a positive by the cacophony of voices in the "social justice" chorus line advocating for group-defined *equity*. But, as Stanford psychologist John Gardner presciently observed half a century ago, "the further one goes in seeking equality of results, the more one must resort to government intervention." No doubt, there are many well-intended commenters who encourage more government intervention based on an individual's group membership, but such decision-making constitutes **Disparate Treatment**.

Advocacy for group-defined "social justice" *equity* based on adverse impact will inevitably end up in the Supreme Court challenged under the Equal Protection Clause guaranteed by the

Fourteenth Amendment to the Constitution. As the late Supreme Court Justice Scalia opined in the 2009 *Ricci* decision: ¹²

“I join the Court’s opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”¹³

As Supreme Court Chief Justice John Roberts emphatically stated: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Given the DEI public policy challenges by special interest groups, it is inevitable that the Supreme Court will be asked to decide the Constitutional challenge: Equal Opportunity (individuals) v Equal Results (groups). Science is prediction: The testing community should stay tuned!

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¹³ Id.

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