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Title VI Disparate Impact Claims Would Not Harm National Security - A Response to Paul Taylor, 46 Harv. J. on Legis. 503 (2009)

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ARTICLE

TITLE VI DISPARATE IMPACT CLAIMS WOULD NOT HARM NATIONAL SECURITY— A RESPONSE TO PAUL TAYLOR

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As Paul Taylor recognizes in the previous issue of this volume of the Harvard Journal on Legislation, Congress is considering amendments to Title VI of the Civil Rights Act of 1964 to explicitly allow private plaintiffs to use the disparate impact theory to prove discrimination by recipients of federal financial assistance. This Article responds to Taylor's assertion that allowing such disparate impact claims could harm national security programs. The authors explore the history of the disparate impact theory under both Title VI and Title VII, explain that use of the theory is consistent with Congress's original intent, and argue that it should be restored through legislation. In particular, this Article shows how the lack of a disparate impact standard under Title VI has left the victims of racial profiling by airlines without effective relief, and it explains why allowing disparate impact claims would enhance national security by subjecting such practices to judicial scrutiny. Particular emphasis is given to the question of the validity of racial profiling and the wisdom of insulating the practice from discrimination claims. The Article concludes that allowing private disparate impact claims under Title VI would serve to better protect against discriminatory policies and would not undermine national security.

I. INTRODUCTION

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal financial assistance.[1] Currently, individuals who exercise their private right of action under Title VI can establish liability only by proving that they were the victims of intentional discrimination targeted at them as individuals, known as disparate treatment discrimination.[2] In contrast, other anti-discrimination laws allow plaintiffs to establish liability either by proving disparate treatment, or by demonstrating that the defendant has a policy or practice that disproportionately affects a protected group if the defendant fails to show that the policy or practice is necessary to achieve a legitimate goal, known as disparate impact discrimination. This anomaly could be corrected by recently proposed legislation to amend Title VI to allow victims of

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[1] Civil Rights Act of 1964, tit. VI, 78 Stat. 241, 252–53 (1964) (current version at 42 U.S.C. §§ 2000d to d-4a (2006)).

[2] *See infra,* Part II.

discrimination in federally-funded programs to establish liability based on disparate impact.[3]

In the previous issue of the *Harvard Journal on Legislation*, Paul Taylor argues that allowing private plaintiffs to bring disparate impact claims under Title VI would undermine our national security by exposing recipients of federal financial assistance to potential liability for racial profiling.[4] According to Taylor, national security would be particularly threatened by allowing disparate impact claims in the context of airline passenger screening.[5] Taylor's argument is fundamentally flawed. As described in detail below, allowing private disparate impact challenges under Title VI would not only protect civil rights and promote racial equality, it would also enhance security by eliminating programs and practices that are not empirically justified.

Part II of this Article will address the history of anti-discrimination laws and describe how the disparate impact theory is necessary to fulfill Congress's goal of eliminating discrimination. Part III will explain the need to allow individuals affected by discriminatory practices to establish claims based on disparate impact. Using recent cases, Part III will examine the nearly insurmountable barriers to proving disparate treatment in the context of post-9/11 racial profiling by airlines, and the ways in which a case brought under a disparate impact theory could help plaintiffs overcome those hurdles. Part IV will explain how the "business necessity"[6] defense would protect legitimate security programs from liability for disparate impact discrimination. It will also discuss the mistaken belief that there is a conflict between security and civil rights, and expose why racial profiling is ineffective and counterproductive. This section will demonstrate that abandoning the practice would enhance national security and advance racial equality.

II. The History of Disparate Impact Claims Under Titles VI and VII

Taylor begins his article with a short history of Title VII,[7] which prohibits discrimination in employment, as a prelude to his discussion of the pro-

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[3] Proposed legislation to this effect was introduced in both houses of the 110th Congress. *See* S. 2554, 110th Cong. (2008); H.R. 5129, 110th Cong. (2008) [hereinafter collectively referred to as "Proposed Legislation"]. The bills in both chambers were identical. Although the proposed legislation has not yet been reintroduced in the 111th Congress, when asked, Senator Kennedy's (D-Mass.) office indicated that he intended to reintroduce the bill either in this form, or perhaps as multiple smaller bills but similar in substance. Telephone Interview with Charlotte Burrows, Counsel to Senator Kennedy (D-Mass.) (Mar. 26, 2009).

[4] *See generally* Paul Taylor, *The Risks Posed to National Security and Other Programs by Proposals to Authorize Private Disparate Impact Claims Under Title VI*, 46 Harv. J. on Legis. 57, 66–73 (2009).

[5] *See id.* at 69–72.

[6] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[7] Civil Rights Act of 1964, tit. VII, 78 Stat. 241, 253–66 (1964) (current version at 42 U.S.C. §§ 2000e to e-17 (2006)).

posed legislation to allow private suits based on disparate impact[8] under Title VI, which prohibits discrimination in programs that receive federal financial assistance.[9] Taylor errs, however, by asserting that Title VII was intended to bar only disparate treatment and thus was not meant to provide a right of action based on disparate impact. To the contrary, "[t]he objective of Congress in the enactment of Title VII . . . 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."[10]

Indeed, the plain language of Title VII as originally enacted did not prohibit only intentional discrimination; rather, it barred discrimination "because of" race or national origin.[11] Accordingly, in *Griggs v. Duke Power Co.*, the Supreme Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[12] The Court recognized that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."[13] In its unanimous decision, the Court found that plaintiffs could establish liability under Title VII where an employment practice has a disparate impact on a protected class of individuals, and the practice is not related to job performance or a matter of business necessity.[14]

The standards that apply to disparate impact claims under Title VII were further refined in *Albemarle Paper Co. v. Moody*[15] and *Dothard v. Rawlinson*.[16] In *Albemarle Paper Co.*, the Supreme Court clarified the standard of proof for demonstrating that an employment practice with discriminatory effect is sufficiently job related to survive a disparate impact challenge.[17] The Court held that assessing job relatedness is a highly fact-specific inquiry. Thus, with respect to an employment test with a racially discriminatory impact, the Court held that the employer must validate the test in accordance with professional standards and Equal Employment Opportunity Commission ("EEOC") guidelines.[18]

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[8] *See* Taylor, *supra* note 4, at 59.

[9] *See* Civil Rights Act of 1964, tit. VI, 78 Stat. 241, 252–53 (1964) (current version at 42 U.S.C. §§ 2000d to d-4a (2006)).

[10] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

[11] Civil Rights Act of 1964 § 703(a)(1), 78 Stat. 241, 255 (1964) (current version at 42 U.S.C. § 2000e-2(a)(1) (2006)) ("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.").

[12] *Griggs*, 401 U.S. at 431.

[13] *Id.* at 432 (emphasis omitted).

[14] *See id.* at 431 ("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.").

[15] 422 U.S. 405 (1975).

[16] 433 U.S. 321 (1977).

[17] *Albemarle*, 422 U.S. at 431, 435.

[18] *Id.*

In *Dothard*, women applicants challenged minimum height and weight requirements that disproportionately excluded them from eligibility for employment as prison guards using the disparate impact theory.[19] The Court permitted the plaintiffs to establish disparate impact based on national statistics.[20] The Court then rejected the employer's argument that the height and weight requirements were job related.[21] Although the employer argued that the requirements were related to strength, the Court found that the employer failed to produce evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance as a prison guard.[22] Further, the Court held that even if a particular amount of strength was required to do the job, the employer's "purpose could be achieved by adopting and validating a test for applicants that measures strength directly,"[23] and "[s]uch a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that 'measure(s) the person for the job and not the person in the abstract.'"[24] These decisions established that employers would need to produce specific evidence of job relatedness and business necessity to sustain the use of practices with a discriminatory effect.

Despite this history, in 1989, the Supreme Court significantly weakened the disparate impact theory articulated in *Griggs* and refined in *Albemarle* and *Dothard*. In *Wards Cove Packing Co. v. Atonio*,[25] the Court shifted the burden of proving business necessity away from the employer, and instead required the employee to show that an employment practice is not justified by business necessity. This decision stood in sharp contrast to the *Griggs* standard, which required an employer to prove, as an affirmative defense to a disparate impact claim, that the discriminatory practice was job related and consistent with business necessity.[26] In response to *Wards Cove Packing*, Congress passed the Civil Rights Act of 1991 to reinstate the *Griggs* standard.[27] In legislatively overruling the Court, Congress stated a clear purpose: "[T]he decision of the Supreme Court . . . has weakened the scope and effectiveness of Federal civil rights protections[, and] legislation is necessary to provide additional protections against unlawful discrimination in employment."[28] Congress's action to restore the disparate impact standard as it

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[19] *Dothard*, 433 U.S. at 324.

[20] *Id.* at 330–31.

[21] *Id.* at 331–32.

[22] *Id.* at 331.

[23] *Id.* at 332.

[24] *Id.* at 332 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

[25] 490 U.S. 642, 660 (1989).

[26] *See Dothard*, 433 U.S. at 329 ("Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet 'the burden of showing that any given requirement (has) . . . a manifest relationship to the employment in question.'") (quoting *Griggs*, 401 U.S. at 432).

[27] Civil Rights Act of 1991, Pub. L. No. 88-352, § 105(a), 105 Stat. 1071, 1074–75 (1991) (current version at 42 U.S.C. § 2000e-2(k) (2006)).

[28] *Id.* § 2, 105 Stat. at 1071.

existed prior to *Wards Cove Packing* reflects an understanding that Title VII was intended to bar discriminatory employment practices regardless of the employer's intent.[29]

In 2005, the Supreme Court again had occasion to consider a statute prohibiting discrimination "because of" a protected characteristic. In *Smith v. City of Jackson,*[30] the Court held that the Age Discrimination in Employment Act of 1967 ("ADEA"),[31] which contains a provision nearly identical to that in Title VII, allows plaintiffs to establish liability for discrimination using the disparate impact theory. The language of both acts prohibits employment actions that "deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's" race (Title VII) or age (ADEA).[32] Concluding that the ADEA, like Title VII, encompasses disparate impact discrimination, the Supreme Court began "with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[33] The Court then reaffirmed that discrimination "because of" a protected characteristic "focuses on the effects of the action on the employee rather than the motivation . . . of the employer."[34]

Taylor's error in asserting that Title VII was designed to prohibit only disparate treatment is based in part on his mistaken belief that disparate impact claims are incompatible with the legislative history.[35] According to Taylor, the legislative history affirms that the Act does not require quotas or statistical parity in the workplace, and thus he concludes that it was not intended to prohibit disparate impact discrimination.[36] Although Taylor is correct that Title VII does not require racially proportionate results,[37] he errs by assuming that a prohibition on disparate impact discrimination will force employers to adopt some form of quota system. First, a showing that a given

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[29] *See infra* note 127. *Wards Cove Packing* was decided on June 5, 1989. The 1991 amendments to Title VII restored the disparate impact standard "as it existed on June 4, 1989[.]" 42 U.S.C. § 2000e-2(k)(1)(C). *See also* 137 CONG. REC. 28,680 (1991) for the interpretive memorandum referenced in section 2000e-2 of the Civil Rights Act of 1991, which states in relevant part that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)."

[30] 544 U.S. 228 (2005).

[31] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(a)(2), 81 Stat. 602, 603 (1967) (current version at 29 U.S.C. § 623(a)(2) (2006)).

[32] *Id.*; *Smith*, 544 U.S. at 235–36.

[33] *Smith*, 544 U.S. at 233.

[34] *Id.* at 236.

[35] *See* Taylor, *supra* note 4, at 59–62.

[36] *Id.* at 60.

[37] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971) ("[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.").

workforce is not racially balanced is insufficient, by itself, to establish a prima facie claim of discrimination based on disparate impact.[38] Rather, a Title VII plaintiff must "demonstrate[ ] that a respondent uses a particular employment practice that causes a disparate impact."[39] This requirement presents a far higher hurdle than simply asserting numerical inequality.[40] The requirement that a plaintiff identify the particular practice responsible for the disparate impact protects against the risk that employers will move toward a quota system to avoid liability and refutes the notion that liability might attach as a result of a failure to use quotas. In fact, "the use of quotas by public employers subject to Title VII can violate the Constitution."[41] Second, achieving racial balance in a workforce will not insulate an employer from liability if it uses discriminatory practices.[42] Thus, contrary to Taylor's premise, the disparate impact theory of discrimination does not conflict with legislative and judicial concern about quotas nor does it require racially proportionate results.

Finally, and most importantly, an employment practice that has a disparate impact on a protected group violates Title VII only if the employer "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[43] Any discriminatory practice that is necessary to serve the employer's legitimate goals will survive a disparate impact challenge.[44] Put another way, if necessary qualifications are not equally distributed among the population in the community from which employees are hired, statistical parity will not be reflected in the workforce, but such an imbalance will not establish a violation of Title VII. Thus, the Supreme Court does "not believe that disparate impact theory need have any chilling effect on legitimate business practices."[45]

Like Title VII, the plain language of Title VI does not appear to limit its reach to cases based on disparate treatment. Section 601 of Title VI reads: "No person in the United States shall, on the ground of race, color, or na-

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[38] In contrast, in the disparate treatment context such a showing, if unexplained, may provide evidence of intentional discrimination. *See, e.g.*, Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 339–40 n.20 (1977) ("Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.").

[39] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[40] *See generally* Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315 (1998); Ian Ayres, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487 (1996).

[41] Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993 (1988).

[42] *See* Connecticut v. Teal, 457 U.S. 440, 442 (1982) (holding that the use of a discriminatory employment practice that cannot be justified as job related and consistent with business necessity violates Title VII even where there is statistical parity in employment outcomes).

[43] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[44] *See id.*

[45] *Watson*, 487 U.S. at 993.

tional origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[46] In addition, Section 602 provides agencies the authority to promulgate implementing regulations.[47]

In an early case interpreting Title VI, *Lau v. Nichols*, the Supreme Court "squarely held . . . that Title VI forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those endeavors that have a disparate impact on racial minorities."[48] In *Lau*, the Court cited Senator Hubert Humphrey's (D-Minn.) floor statement from the debates over the Civil Rights Act of 1964, during which he quoted President Kennedy: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."[49]

Thereafter, a muddle of Title VI jurisprudence led to two important decisions breaking from the Court's earlier decision in *Lau:* first, that the statutory language of Title VI did not, in fact, prohibit disparate impact discrimination,[50] and then, that agencies, by their implementing regulations, could not provide a private right of action to people who suffered disparate impact discrimination.[51] The former holding was reached in 1983 in a splintered decision in *Guardians Association v. Civil Service Commission.*[52] There, the Court decided that *Lau* had been effectively overruled by *Regents of the University of California v. Bakke*, because of broad language in *Bakke* stating that Title VI was "absolutely coextensive" with the Constitution,[53] which prohibits only intentional discrimination.[54]

Notably, two of the nine members of the Court disagreed with the conclusion that *Lau* was overruled and continued to believe that Title VI encompassed disparate impact claims.[55] Justice Marshall, in his dissenting opinion,

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[46] Civil Rights Act of 1964 § 601, 78 Stat. 241, 252 (1964) (current version at 42 U.S.C. § 2000d to d-4a (2006)).

[47] Civil Rights Act of 1964 § 602, 78 Stat. 241, 252–53 (1964) (current version at 42 U.S.C. § 2000d-1 (2006)).

[48] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 589 (1983) (citing Lau v. Nichols, 414 U.S. 563 (1974)).

[49] *Lau*, 414 U.S. at 569 (quoting 110 CONG. REC. 6543 (1964) (statement of Sen. Humphrey (quoting President John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities*, 1 PUB. PAPERS 483, 492 (1963)))).

[50] *See Guardians*, 463 U.S. at 612.

[51] *See* Alexander v. Sandoval, 532 U.S. 275, 286 (2000).

[52] 463 U.S. at 582 (affirming the lower court 5-4).

[53] *Id.* at 614 (O'Connor, J., concurring) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

[54] *See id.* at 589 (majority opinion) (discussing Washington v. Davis, 426 U.S. 229, 239 (1976)).

[55] Those opposing the majority view noted that although the language of *Bakke* was broad, "the issue in *Bakke* . . . was whether Title VI forbids intentional discrimination in the form of affirmative action intended to remedy past discrimination, even though such affirmative action is permitted by the Constitution," *Id.* at 590 (majority opinion), and that the language at issue in *Bakke* was "clearly superfluous to the decision in that case." *Id.* at 624 (Marshall, J., dissenting).

compiled an extensive legislative history demonstrating that disparate impact claims under Title VI are not inconsistent with Congressional intent. First, Justice Marshall noted that immediately following the enactment of Title VI, agencies promulgated implementing regulations that adopted disparate impact theories, including recommended regulations from a presidential task force and the Justice Department (which helped to draft Title VI).[56] Thereafter, "every Cabinet department and about forty federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact."[57] Justice Marshall went on to recount that not only had Congress failed to alter this interpretation of Title VI, but it had in fact rejected affirmative proposals that would have required a showing of intentional discrimination to make out a claim.[58] Finally, Justice Marshall explained that Congress had, up until that time, enacted ten statutes modeled on Title VI without requiring proof of intent in a discrimination claim.[59]

Although this rationale did not prevail in *Guardians*, the legislative history (as summarized by Justice Marshall) casts serious doubt as to whether congressional intent is being fulfilled under the current interpretation of Title VI.[60] Notably, in *Guardians*, five members of the Court agreed that regulations adopted pursuant to Title VI could still prohibit disparate impact discrimination.[61] The right of agencies to make and enforce Title VI regulations prohibiting disparate impact discrimination and providing a cause of action to private parties aggrieved by such discrimination remained undisturbed for the next two decades.

In 2001, the Supreme Court's decision in *Alexander v. Sandoval*[62] announced a major change in Title VI litigation. For almost forty years, private citizens aggrieved by discriminatory federally-funded programs had brought suits based on disparate impact under a variety of agency regulations.[63] In *Sandoval*, the Court took as decided that Title VI itself did not prohibit pro-

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[56] *Id.* at 618 (Marshall, J., dissenting).

[57] *Id.* at 619 (Marshall, J., dissenting).

[58] *Id.* at 620 & n.8 (Marshall, J., dissenting) (citing 112 CONG. REC. 18715 (1966)). The proposed legislation would have added a requirement under Title VI that a plaintiff show "affirmative intent to exclude." *Id.* at 620 n.8 (citing 112 CONG. REC. 18,701 (1966)).

[59] *Id.* at 620 (Marshall, J., dissenting).

[60] *See id.* at 618 (Marshall, J., dissenting).

[61] Those justices included the two who would have found that Title VI itself prohibits disparate impact policies (White & Marshall, JJ.), and three who did not (Brennan, Blackmun, & Stevens, JJ.). *See id.* at 608 n.1 (Powell, J., concurring). However, arguably only two of the justices in *Alexander v. Sandoval* concluded that a private right of action existed under such regulations, while three opined that there was no occasion to reach that question. 532 U.S. 275, 283 (2001) (citing *Guardians*, 463 U.S. at 645 n.18 (Stevens, J., dissenting)). *But see Sandoval*, 532 U.S. at 300–01 n.6 (Stevens, J., dissenting) (claiming that the majority misreads footnote eighteen of his dissent in *Guardians*).

[62] 532 U.S. 275 (2001).

[63] *See generally* Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 538–39 (2006) (explaining that it was common to pair an Equal Protection claim with a Title VI disparate impact claim when it was unclear how the discrimination came about, and thus, that until 2001, the Equal Protection Clause's narrow construction was not fully felt).

grams with a disparate impact,[64] and that as to disparate treatment, Title VI did provide a private right of action.[65] Moreover, the Court assumed, without deciding, that Section 602 regulations prohibiting disparate impact discrimination were valid.[66] However, using the congressional intent standard[67] for determining whether a private right of action exists in a statute, the Court found that regulations proscribing disparate impact—which it found not prohibited by Title VI itself—cannot support a private right of action.[68] The Court held that a private right of action is not available for "a failure to comply with regulations promulgated under § 602 [(authorizing agency regulations)] that is not also a failure to comply with § 601 [(directly prohibiting intentional discrimination by federally funded programs)]. . . ."[69]

The dissent in *Sandoval* clarifies that this result was hardly a foregone conclusion. Justice Stevens described the majority opinion as "unfounded in our precedent and hostile to decades of settled expectations," and pointed out that every court of appeals to consider the question prior to 2001 had decided that agencies could provide a private right of action for disparate impact claims.[70] "The question the Court answers today," Justice Stevens stated, "was only an open question in the most technical sense."[71]

Just as legislation was necessary to override Supreme Court decisions that had weakened Title VII, Congress should amend Title VI to explicitly allow a private right of action for claims of discrimination based on disparate impact. As explained below, such legislation is necessary to eliminate discrimination in federally-funded programs in circumstances where the disparate treatment theory is inadequate to establish liability. As with Title VII, procedural and substantive protections in the proposed legislation amending Title VI guard against the defensive use of quotas by recipients of federal funding. The proposed legislation itself states that the "legal standard for a disparate impact claim has never been structured so that a finding of discrimination could be based on numerical imbalance alone."[72] Specifically, as

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[64] *Sandoval*, 532 U.S. at 280–81 ("Title VI itself directly reaches only instances of intentional discrimination." (quoting Alexander v. Choate, 469 U.S. 287, 293 (1985))).

[65] *Id.* at 279–80 (citing Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (deciding that Title IX of the Education Amendments of 1972 has a private right of action based on the fact that Title VI has one)).

[66] *Id.* at 281–82. However, the Court did call into question whether that assumption was correct: "Though no opinion of this Court has held that [regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups,] five Justices in *Guardians* voiced that view of the law at least as alternative grounds for their decisions. These statements are in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination . . . ." *Id.* at 281–82 (citations omitted).

[67] *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979).

[68] *Sandoval*, 532 U.S. at 289.

[69] *Id.* at 286. For a discussion of how to reconcile some of the apparent gaps in reasoning of this analysis, see John Arthur Laufer, Alexander v. Sandoval *and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613 (2002).

[70] *Sandoval*, 532 U.S. at 294, 295 (Stevens, J., dissenting).

[71] *Id.* at 317 (Stevens, J., dissenting).

[72] Proposed Legislation, *supra* note 2, § 101(6).

with the disparate impact standard codified in Title VII, the proposed legislation provides that a Title VI plaintiff must link any numerical discrepancy to an identifiable policy or practice to establish a prima facie case of disparate impact.[73] Moreover, as with the business necessity defense under Title VII, the proposed legislation provides a defense for any program that can be shown to be necessary to serve a legitimate goal.[74] The proposed legislation would repair the judicially-created oddity that currently excludes disparate impact claims from the reach of Title VI, although those claims are available under many other civil rights laws.

III. Allowing Disparate Impact Claims Under Title VI is Necessary to End Discrimination by Recipients of Federal Funds

In the Title VII context, "[t]he 'disparate impact' theory adopted in *Griggs* paved the way for massive improvement in the occupational position of minorities and women."[75] Congress should extend the gains made in the employment context by allowing liability for disparate impact discrimination in programs funded by the federal government.

Indeed, Congress itself noted, when it reinstated the *Griggs* test, that "the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) ha[d] weakened the scope and effectiveness of Federal civil rights protections."[76] Similarly, the proposed legislation reinstating a private right of action for disparate impact claims under Title VI notes that "Alexander v. Sandoval . . . 'significantly impairs statutory protections against discrimination . . . by stripping victims of discrimination . . . of the right to bring action in Federal court to redress [it].'"[77] The bill also states that the decision "contradicts settled expectations created by title [sic] VI . . . [which was adopted] to ensure that Federal dollars would not be used to subsidize or support programs or activities that discriminated on racial,

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[73] Under the proposed legislation, an aggrieved person must demonstrate that "a policy or practice . . . causes a disparate impact on the basis of race, color, or national origin." *Id.* at § 102(b)(1)(A)(i). Moreover, the bill provides that each specific policy must, on its own, cause a disparate impact, and that if it is demonstrated that the policy does not cause the impact, liability does not attach. *Id.* at § 102(b)(1)(B)(i) ("With respect to demonstrating that a particular policy or practice causes a disparate impact . . . the aggrieved person shall demonstrate that each particular challenged policy or practice causes a disparate impact, except that if the aggrieved person demonstrates to the court that the elements of a covered entity's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as 1 policy or practice."); *id.* at § 102(b)(1)(B)(ii) ("If the covered entity demonstrates that a specific policy or practice does not cause the disparate impact, the covered entity shall not be required to demonstrate that such policy or practice is necessary to achieve the goals of its program or activity.").

[74] *See infra* Part IV.

[75] Alfred W. Blumrosen, *The Legacy of* Griggs*: Social Progress and Subjective Judgments*, 63 Chi.-Kent L. Rev. 1, 3 (1987).

[76] Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (1991).

[77] S. 2554, 110th Cong. § 101(1) (2008); H.R. 5129, 110th Cong. § 101(1) (2008).

color, or national origin grounds."[78] Moreover, eliminating discrimination depends in large part on the use of private lawsuits to enforce federal civil rights law.[79]

Over time, the disparate impact theory has become ever more essential to enforcement of prohibitions on discrimination, because discrimination has become more subtle and harder to prove. "In an era that is characterized by the widespread, explicit adoption of nonracist, egalitarian ideals and the general decline of old-fashioned, overt racial bigotry, fewer individuals than in the past are likely to be motivated by discriminatory animus."[80] Even when the motive exists, plaintiffs encounter problems of proof. As Justice Marshall wrote in a concurring opinion to the Supreme Court's most important decision concerning racial discrimination in jury selection: "Any prosecutor can easily assert facially [race-]neutral reasons for striking a juror, and trial courts are ill equipped [sic] to second-guess those reasons."[81]

Although the proposed amendments to Title VI would apply to a broad range of programs that receive federal financial assistance, Taylor focuses on what he sees as a threat to the use of racial profiling in airline passenger screening if private suits based on disparate impact are allowed.[82] As explained in Part IV below, Taylor's analysis is flawed because any legitimate and effective practice will withstand a disparate impact challenge. Taylor's focus on airline passenger screening is useful, however, because victims of post-9/11 racial profiling by airlines have been unable to secure relief using the disparate treatment theory, even in egregious cases of discrimination. This difficulty demonstrates the need to allow disparate impact claims under Title VI to remedy the systemic problem of racial profiling in aviation. As explained below, if the disparate impact theory were available to victims of racial profiling, the airlines would have to demonstrate that the practice is effective or be held liable for discrimination.

In the aftermath of the terrorist attacks of 9/11, there was a surge in discrimination by airlines and airport screeners against passengers perceived to be of Arab, Middle Eastern, or South Asian descent. Within one month of the attacks, the New York Times reported the use of the phrase "flying while brown" to refer to "reports of Muslim-Americans being asked to get off planes."[83] Between 2001 and 2009, the Department of Transportation

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[78] S. 2554, 110th Cong. § 101(2) (2008); H.R. 5129, 110th Cong. § 101(2) (2008).

[79] For a comprehensive discussion of the benefits of private enforcement over agency enforcement, including incentives for private parties and agency resource constraints, see Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167 (1985).

[80] Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1017 (2004).

[81] Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

[82] Taylor, *supra* note 4, at 90–93.

[83] Somini Sengupta, *Sept. 11 Attack Narrows the Racial Divide*, N.Y. TIMES, Oct. 10, 2001, at B1.

("DOT") received 1022 complaints of discrimination against U.S. airlines,[84] and the Transportation Security Administration ("TSA") received 1080 civil rights complaints about its personnel.[85]

As further evidence of widespread discrimination, DOT's Office of Aviation Enforcement and Proceedings brought administrative enforcement actions against four major air carriers alleging that each had engaged in a pattern or practice of unlawful discrimination against passengers perceived to be of Arab, Middle Eastern, or South Asian descent by either removing them from flights or denying them boarding.[86] Each enforcement action was resolved by the entry of a consent order requiring the airlines to make additional expenditures to provide their employees with civil rights training.[87]

Arab and Muslim civil rights organizations have also documented widespread discrimination since 9/11. The American-Arab Anti-Discrimination Committee Research Institute issued a report on hate crimes and discrimination against Arab Americans from 2003–2007, in which the Committee concluded that "[d]iscrimination at airports based on stereotyping, over-zelousness [sic] or prejudice by airline personnel or even other passengers is now one of the main sources of discrimination facing Arab-American air travelers."[88] In an earlier report, covering only the first year after 9/11, the Committee documented eighty instances of passengers being removed from airplanes based on their perceived ethnicities.[89] Often, the rea-

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[84] *See* Spencer S. Hsu & Sholnn Freeman, *JetBlue, TSA Workers Settle in T-Shirt Case*, WASH. POST, Jan. 6, 2009, at A2. *See also* OFFICE OF AVIATION ENFORCEMENT & PROCEEDINGS, U.S. DEP'T OF TRANSP., AVIATION CONSUMER REPORTS (2009), *available at* http://airconsumer.ost.dot.gov/reports/index.htm (on file with the Harvard Law School Library).

[85] *See* Hsu & Freeman, *supra* note 84.

[86] *See* Am. Airlines, Inc., No. OST-2003-15046 (Dep't of Trans. Feb. 27, 2004) (Consent Order), *available at* http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=DOT-OST-2003-15046; Delta Airlines, Inc., No. OST-2004-16943 (Dep't of Trans. June 21, 2004) (Consent Order), *available at* http://www.regulations.gov/fdmspublic/component/main?main=Document/Detail&o=090000648031aaea; Cont'l Airlines, Inc., No. OST-2004-16943 (Dep't of Trans. Apr. 2, 2004) (Consent Order), *available at* http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648031aade; United Air Lines, Inc., No. OST-2003-14194 (Dep't of Trans. Nov. 19, 2003) (Consent Order), *available at* http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648030df3f (on file with the Harvard Law School Library).

[87] *See* Am. Airlines, Inc., No. OST-2003-15046 (Dep't of Trans. Feb. 27, 2004) (Consent Order), *available at* http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=DOT-OST-2003-15046; Delta Airlines, Inc., No. OST-2004-16943 (Dep't of Trans. June 21, 2004) (Consent Order), *available at* http://www.regulations.gov/fdmspublic/component/main?main=Document/Detail&o=090000648031aaea; Cont'l Airlines, Inc., No. OST-2004-16943 (Dep't of Trans. Apr. 2, 2004) (Consent Order), *available at* http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648031aade; United Air Lines, Inc., No. OST-2003-14194 (Dep't of Trans. Nov. 19, 2003) (Consent Order), *available at* http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=090000648030df3f (on file with the Harvard Law School Library).

[88] AM.-ARAB ANTI-DISCRIMINATION COMM. RESEARCH INST., 2003–2007 REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS 3 (2008), *available at* http://www.adc.org/PDF/hcr07.pdf (on file with the Harvard Law School Library).

[89] AM.-ARAB ANTI-DISCRIMINATION COMM. RESEARCH INST., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11 BACKLASH, SEP-

son given to the passenger was that the crew did not "feel" comfortable allowing that individual on-board.[90] Reports of discrimination were made against virtually every major airline.[91] Indeed, discrimination against Muslim airline passengers is so common that the Council on American-Islamic Relations ("CAIR") publishes a piece entitled "Know Your Rights as an Airline Passenger" as part of an American Muslim Civic Pocket Guide.[92]

Despite numerous incidents of post-9/11 racial profiling by airlines, no victim of such discrimination has yet prevailed in a private action using the disparate treatment theory. For example, in June 2002, the ACLU filed five separate civil rights lawsuits accusing American, Continental, Northwest, and United airlines of intentional discrimination against five men who were ejected from flights based on the perception that they were Arab or Muslim.[93] None of these cases made it to trial.

In *Sader v. American Airlines, Inc.*,[94] an American citizen of Moroccan descent was removed from a flight because another passenger was "not comfortable" having him on board.[95] Although the passenger's case survived an initial motion to dismiss, the case was settled on undisclosed terms shortly after the airline filed its motion for summary judgment.[96] Similarly, in *Bayaa v. United Airlines, Inc.*,[97] an American citizen of Arab descent was removed from a flight because members of the crew "felt uncomfortable" having him on board.[98] The case was settled pursuant to an agreement requiring civil rights training for airline personnel and a modest monetary award.[99] In *Chowdhury v. Northwest Airlines Corp.*, a passenger of Bangladeshi ancestry filed suit because he "was denied boarding on a Northwest Airlines . . . flight even after Northwest, the Federal Bureau of Investigation, and airport security had determined that he did not pose a security risk."[100] The

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TEMBER 11, 2001–OCTOBER 11, 2002 7 (2003), *available at* http://www.adc.org/hatecrimes/pdf/2003_report_web.pdf (on file with the Harvard Law School Library).

[90] *See id.* at 22.

[91] *See id.* at 22–29.

[92] COUNCIL ON AMERICAN-ISLAMIC RELATIONS, KNOW YOUR LEGAL RIGHTS AS AN AIRLINE PASSENGER (2009), *available at* http://www.cair.com/CivilRights/KnowYourRights.aspx (on file with the Harvard Law School Library).

[93] *See* Press Release, ACLU, ACLU, ADC and Relman Law Firm Sue Four Major Airlines Over Discrimination Against Passengers (June 4, 2002), *available at* http://www.aclu.org/racialjustice/racialprofiling/15868prs 20020604.html (on file with the Harvard Law School Library).

[94] Complaint, Sader v. Am. Airlines, Inc., No. 02-1892 (D. Md. filed June 4, 2002).

[95] *Id.* at 3.

[96] Sader v. Am. Airlines, Inc., No. 02—1892 (D. Md. Sept. 10, 2002) (memorandum and order denying motion to dismiss); Defendants' Motion for Summary Judgment, Sader v. Am. Airlines, Inc., No. 02-1892 (D. Md. Nov. 12, 2002); Sader v. Am. Airlines, Inc., No. 02—1892 (D. Md. Nov. 19, 2002) (order dismissing due to settlement).

[97] Complaint, Bayaa v. United Airlines, Inc., No. 02-04368 (C.D. Cal. filed June 4, 2002).

[98] *Id.* at 3.

[99] Settlement Agreement attached as Exhibit A to Motion to Settle, Bayaa v. United Airlines, Inc., Adv. Pro. No. 04-2414 (Bankr. N.D. Ill. filed Mar. 4, 2005) (following transfer to Bankruptcy Court).

[100] Chowdhury v. Northwest Airlines Corp., 238 F. Supp. 2d 1153, 1154 (N.D. Cal. 2002).

district court denied Northwest's motion to dismiss,[101] but the case has been administratively closed[102] following a bankruptcy stay and pending the resolution of collateral litigation over documents withheld from discovery.[103] Finally, in *Dasrath v. Continental Airlines, Inc.*, the ACLU represented two[104] of three men removed from a flight after a passenger reported that "three brown-skinned men" were "behaving suspiciously."[105] Although Dasrath survived Continental's motion to dismiss,[106] the court later granted Continental's motion for summary judgment, finding that "when the circumstances are viewed in their entirety, a jury would be compelled to find that security considerations were the sole reason" for Dasrath's removal, even though Dasrath had not engaged in suspicious behavior.[107] Each of these cases demonstrates the nearly insurmountable barriers faced by victims of racial profiling in aviation when seeking relief under the disparate treatment theory.

Cerqueira v. American Airlines, Inc.[108] was the first case challenging post-9/11 racial profiling by an airline that made it to trial. John D. Cerqueira, an American citizen of Portuguese descent who is often mistakenly perceived to be Middle Eastern,[109] sued American Airlines after the airline removed him from a flight and refused to rebook him even after the police cleared him for travel.

Cerqueira had been seated next to two men who also had a Middle Eastern appearance, but Cerqueira did not know them or interact with them in any way.[110] Cerqueira and the two men seated next to him, but no other passengers, were removed from the plane by the Massachusetts State Police.[111] After two hours of questioning, all three men were cleared for travel but American Airlines refused to rebook them on any other flight.[112] Cerqueira alleged that, by removing him from his flight and refusing to rebook him after he was cleared by the police, American Airlines twice discrimi-

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[101] *Id.* at 1158.

[102] Chowdhury v. Northwest Airlines Corp., No. 02-02665 (N.D. Cal. Oct. 5, 2005) (order closing case).

[103] After the district court recognized an evidentiary privilege allowing Northwest to withhold from discovery certain information that the Transportation Security Administration had designated as "sensitive security information," Chowdhury v. Northwest Airlines Corp., 226 F.R.D. 608 (N.D. Cal. 2004), Chowdhury filed a petition for review of the TSA's non-disclosure determination. Petition for Review, Chowdhury v. TSA, No. 03-40783 (2d Cir. filed Oct. 24, 2003). The Second Circuit heard argument on May 23, 2005, but no decision has been issued.

[104] Dasrath v. Continental Airlines, Inc., 228 F. Supp. 2d 531, 533–34 (D.N.J. 2002). The two plaintiffs, Edgardo Cureg and Michael Dasrath, filed separate suits that were later joined. *Id.*

[105] *Id.* at 536.

[106] *Id.* at 531.

[107] Dasrath v. Continental Airlines, Inc., 467 F. Supp. 2d 431, 446 (D.N.J. 2006).

[108] 520 F.3d 1 (1st Cir. 2008).

[109] Joint Appendix at 257, 281, *Cerqueira*, 520 F.3d 1 (1st. Cir. 2008) (No. 07-1824) (hereinafter App.).

[110] *Id.* at 258–59.

[111] *Id.* at 259–60, 310.

[112] *Id.* at 262, 382, 443.

nated against him because of his perceived race or ethnicity. The airline claimed that its treatment of Cerqueira was justified by security concerns.[113]

The case was tried to a jury under the disparate treatment theory. Cerqueira presented direct evidence of discrimination by lower-level employees who influenced the decisions, and circumstantial evidence of discrimination by the formal decisionmakers. The district court instructed the jury that it was Cerqueira's burden to prove that he was intentionally discriminated against because of his perceived race or ethnicity, and the district court emphasized that airlines are not liable for denial-of-service decisions based on safety.[114] The jury rejected as pretext American Airlines's proffered explanations and concluded that, but for Cerqueira's Middle Eastern appearance, the airline would not have removed him from his flight or refused him further service.[115]

On appeal, the First Circuit vacated the jury verdict and ordered that judgment be entered for American.[116] The First Circuit rested its decision on three conclusions of law. First, the court of appeals found that the district court erred by relying on the doctrine of respondeat superior because it "permitted liability of the air carrier to turn on the purported bias of non-decisionmakers."[117] According to the First Circuit, an air carrier cannot be liable for decisions that are driven by the discriminatory animus of subordinates; rather, to result in liability the removal decision would have to be based only on the formal decisionmaker's own bias.[118] Second, the First Circuit held that circumstantial evidence cannot be used to prove discrimination in an airline refusal-to-transport case because the *McDonnell Douglas* burden-shifting

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[113] The pilot testified that he ordered Cerqueira's removal based on a flight attendant's assertions that Cerqueira: (1) requested a seat change in an insistent manner; (2) might have boarded early; and (3) used the lavatory. App., *supra* note 109, at 295, 300, 363. But the flight attendant admitted nothing she reported to the pilot about Cerqueira ordinarily results in removal and denial of service. *Id.* at 366–70. The pilot claimed that he removed the other two passengers because: (1) one of them had a conversation with the pilot that the pilot considered odd; (2) a flight attendant reported that they had wished other passengers a "happy new year" and were heard "speaking in a different language"; and (3) another flight attendant reported that they joked with her during the exit row briefing. It was undisputed that Cerqueira did not engage in any of these behaviors, and there was nothing that linked Cerqueira to these two men except his Middle Eastern appearance. Further, the flight attendants' trial testimony, and written reports from the day of the incident, showed that the flight attendants became concerned about the exit row passengers because of the flight attendants' perception that the three passengers were from the Middle East. *See id.* at 372, 376–79, 428–36, 452–54. The decision not to rebook Cerqueira on any American Airlines flight was made by American's system operations manager who testified that, although he made the decision to deny rebooking, he has no recollection of the reasons for his decision. An entry in Cerqueira's computerized Passenger Name Record notes that Cerqueira was denied boarding due to unspecified "security issues" and that Cerqueira should not be rebooked on American. *See id.* at 321–23, 423.

[114] App., *supra* note 109, at 394, 412.

[115] *See id.* at 212.

[116] *Cerqueira*, 520 F.3d 1.

[117] *Id.* at 18.

[118] *Id.* at 19.

framework[119] was developed in cases involving employment discrimination.[120] Finally, the First Circuit concluded that the statutory discretion to refuse to transport a passenger for safety reasons, granted to airlines in 49 U.S.C. § 44902(b),[121] creates a conflict between safety and civil rights, and that the former must be prioritized over the latter.[122]

The most striking feature of the First Circuit's decision is its conclusion that there is a conflict between safety and civil rights and that statutes prohibiting discrimination against airline passengers are subordinate to an airline's permissive refusal rights under § 44902(b). Although the First Circuit correctly recognized that § 44902(b) does not protect refusal-to-transport decisions that are arbitrary or capricious,[123] it rejected the district court's conclusion that a jury verdict based on a finding of intentional discrimination on account of race necessarily satisfies the arbitrary or capricious standard.[124] By rejecting the principle that decisions driven by racial stereotypes are unreasonable, the First Circuit's decision condones the use of racial profiling in airline denial-of-service decisions. Indeed, the First Circuit's original slip opinion stated explicitly that "[r]ace or ethnic origin of a passenger may, depending on context, be relevant information in the total mix of infor-

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[119] A plaintiff can prove employment discrimination using indirect evidence under the burden-shifting framework articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–804 (1973), and refined in Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Under *McDonnell Douglas*, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. Establishment of a prima facie case creates a presumption of unlawful discrimination, and the burden of production then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the challenged act. If the defendant fails to carry its burden, the plaintiff is entitled to judgment as a matter of law. If the defendant meets its burden of production, the plaintiff must prove that the reasons proffered by the defendant are a pretext for discrimination. The burden of persuasion remains at all times with the plaintiff. *McDonnell Douglas*, 411 U.S. at 802–04.

[120] *See Cerqueira*, 520 F.3d at 18.

[121] 49 U.S.C. § 44902(b) (2006) provides: "Subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety."

[122] *See Cerqueira*, 520 F.3d at 16.

[123] *Cerqueira*, 520 F.3d at 14 ("We agree with *Williams* and hold that an air carrier's decisions to refuse transport under § 44902(b) are not subject to liability unless the decision is arbitrary or capricious." (citing Williams v. Trans World Airlines, 509 F.2d 942, 948 (2d Cir. 1975) (interpreting 49 U.S.C. § 1511(a), the predecessor to § 44902(b)))).

[124] *Id.* at 17. Several other district courts had reached the same conclusion as the district court in *Cerqueira*. *See* Shqeirat v. U.S. Airways, Inc., 515 F. Supp. 2d 984, 1004 (D. Minn. 2007) ("[A] refusal to board a passenger that is motivated by a passenger's race is inherently arbitrary and capricious."); Dasrath v. Continental Airlines, Inc., 467 F. Supp. 2d 431, 434 (D.N.J. 2006) ("A decision based on race would be arbitrary and capricious."); Alshrafi v. Am. Airlines, Inc., 321 F. Supp. 2d 150, 162 (D. Mass. 2004) ("[A]ctions motivated by racial or religious animus are necessarily arbitrary and capricious, and therefore beyond the scope of the discretion granted by Section 44902."); *Bayaa v. United Airlines, Inc.*, 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) (finding "no merit" to airline's argument that civil rights laws conflict with § 44902(b) and holding that § 44902(b) "does not grant [the airline] a license to discriminate"); *Chowdhury v. Northwest Airlines, Corp.*, 238 F. Supp. 2d 1153, 1154 (N.D. Cal. 2002) ("[T]here is no apparent conflict between the federal statutes prohibiting racial discrimination and the federal law giving air carriers the discretion to refuse to carry passengers for safety reasons.").

mation raising concerns that transport of a passenger 'might be' inimical to safety."[125] The First Circuit later issued an Errata Sheet that eliminated this statement,[126] but the court's conclusion that racial profiling is a legitimate security measure remains implicit in its amended opinion. Thus, the First Circuit's decision in *Cerqueira* protects airline denial-of-service decisions that are based on stereotypes about the propensity of passengers with a Middle Eastern appearance to commit acts of terrorism.

The lack of any successful disparate treatment challenges to racial profiling by airlines demonstrates the need to amend Title VI to allow private disparate impact suits. In *Cerqueira*, the court of appeals entered judgment for the airline notwithstanding the jury's conclusion that Cerqueira's perceived race drove the decisions at issue, because the court concluded that there is a conflict between security and civil rights. That conclusion rested on an assumption that racial profiling enhances aviation safety. But that assumption was not tested at trial; indeed, the airline claimed that it had not engaged in racial profiling at all, but had made its decisions based solely on the behavior of the removed passengers. Had Cerqueira been able to proceed under a disparate impact theory, once he established a prima facie case[127] the burden would have shifted to the airline to prove, as an affirmative defense, that racial profiling is necessary to serve the goal of aviation safety.[128] Thus, allowing disparate impact claims would put the efficacy of racial profiling on trial. As explained in Part IV below, subjecting racial profiling to disparate impact challenge would not threaten the practice if its efficacy can be proved, and, if the practice cannot be defended, its elimination will serve the interests of both security and civil rights.

IV. Private Disparate Impact Claims Would Not Threaten Legitimate Security Programs, But Would Enhance Security and Civil Rights by Eliminating Discriminatory Practices That Cannot Be Justified

Under the proposed amendments to Title VI, any policy implemented by a recipient of federal funding would result in liability only if the policy

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[125] Cerqueira v. Am. Airlines, No. 07–1824, slip op. at 38 (1st Cir. Jan. 10, 2008).

[126] Errata Sheet at 3, *Cerqueira*, No. 07-1824 (Feb. 29, 2008).

[127] Airlines facing disparate treatment challenges to denial-of-service decisions typically deny that they engage in racial profiling and instead claim that they took action because the passenger's behavior was suspicious or the passenger's presence made others uncomfortable. In such cases, the plaintiff would establish a prima facie case of disparate impact by showing that the policy or practice of removing passengers based on assertions of suspicious behavior or causing other passengers discomfort disproportionately burdens passengers perceived to be of Arab, Middle Eastern, or South Asian descent.

[128] Defendants would have an incentive to defend disparate impact challenges rather than try to refute disparate treatment allegations, because only equitable relief is available to prevailing plaintiffs in disparate impact cases. *See Guardians*, 463 U.S. at 602. Thus, an entity found liable under the disparate impact theory will not be subject to compensatory or punitive damages.

causes a disparate impact on a protected group and the recipient "fails to demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program . . . ."[129] Taylor argues that the lack of a specific national security liability exemption, as is found in Title VII, poses a risk to necessary national security programs.[130] However, under the proposed amendment, Title VI would include a clear defense to liability for programs related to and necessary to achieve legitimate goals.[131] National security is a legitimate goal[132] and any programs truly necessary for national security will therefore survive a disparate impact challenge. No additional national security exemption is necessary to protect valuable security programs.

Taylor is correct that the "related to and necessary to achieve" provision is analogous to Title VII's business necessity test.[133] However, courts do not construe the business necessity test as strictly as Taylor suggests.[134] Notably, the Supreme Court—in applying the *Griggs* business necessity standard—has in many instances upheld the legality of employment practices that cause a disparate impact. For instance, in *Washington v. Davis*, applicants for entry-level police officer positions in Washington, D.C. challenged a written test of verbal ability used in hiring.[135] The Court concluded that evidence of a relationship between higher scores on the test and success in the training course—even without evidence of a relationship between high scores and performance as a police officer—was sufficient to satisfy the business necessity test.[136] The Court declared: "It is also apparent to us . . . that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen."[137]

Similarly, in *New York City Transit Authority v. Beazer*, employees challenged a policy barring employment of people taking methadone, including those who were taking methadone as part of a drug treatment program.[138] The plaintiffs relied on substantial evidence that many participants in a methadone maintenance program were capable of performing a variety of jobs with the employer, and that the policy disproportionately affected members of minority racial groups.[139]

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[129] S. 2554, 110th Cong. § 102(a)(2) (2008); H.R. 5129, 110th Cong. § 102(a)(2) (2008).

[130] *See* Taylor, *supra* note 4, at 58–59.

[131] *See* Proposed Legislation, *supra* note 2, at § 102(b)(1)(A)(i).

[132] *See* Korematsu v. United States, 323 U.S. 214, 223 (1944). Although parts of *Korematsu* have been overturned or called into question since the opinion was issued, the proposition that national security is a legitimate state interest has never been questioned.

[133] *See* Taylor, *supra* note 4, at 65.

[134] *See id.* at 61.

[135] 426 U.S. 229, 233 (1976). This case also firmly established that, although disparate impact claims could proceed under Title VII, as to state employers only intentional discrimination was actionable as a Constitutional violation. *See id.* at 239–42.

[136] *Id.* at 250.

[137] *Id.*

[138] 440 U.S. 568, 577 (1979).

[139] *Id.* at 578–79.

Nonetheless, the Supreme Court questioned the validity of the statistical evidence showing a disproportionate impact, and then concluded that "[the employer's] legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbiturates, and amphetamines, and a majority of all methadone users."[140] As Justice Blackmun wrote, "what constitutes a business necessity . . . necessarily involves a case-specific judgment which must take into account the nature of the particular business and job in question."[141] Indeed, both the Supreme Court and lower courts have had no trouble applying the Title VII business necessity test to permit employers to use many practices that may have had a disparate impact on a protected class of individuals, but nevertheless are needed to serve a legitimate non-discriminatory goal.

Although Taylor cites cases that were decided under the Title VII national security exemption, he does not offer any reason why those same policies would not have been upheld under the business necessity defense instead.[142] Taylor assumes that the Title VII national security exemption adds protection for employers, but in fact, it duplicates protection that is already provided by the business necessity defense.[143] Any program that is necessary to advance a legitimate interest will survive a disparate impact challenge, and courts have repeatedly engaged in this type of careful line-drawing.[144]

If a program does not advance legitimate goals, we are better off discarding it. First, any program that lacks a legitimate goal, and which disproportionately burdens a minority group, may be motivated by discriminatory animus or a manifestation of latent or systemic prejudice. Such programs must be eliminated to serve our nation's expressed commitment to racial equality.[145] Second, ineffective programs waste resources and divert attention from more effective alternatives. Thus, the elimination of discriminatory programs found to be illegitimate will help to enhance the legitimate goals

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[140] *Id.* at 585–87 n.31.

[141] Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 1005 (1988) (Blackmun, J., concurring).

[142] *See* Taylor, *supra* note 4, at 63.

[143] Of course, if the programs at issue in the cases relying upon the national security exemption were not in fact necessary to national security, challenges to those programs may have been helpful to national security by weeding out ineffective and discriminatory programs, as discussed *infra* Part IV.

[144] One scholar, advancing a proposal for courts to engage in a cost-benefit analysis when deciding about the legality of racial profiling, points out that the Supreme Court has already drawn lines in different circumstances between legal and illegal profiling in the immigration context. *See* Mariano-Florentino Cuéllar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 30 (2003). *See also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (being of apparent Mexican ancestry alone is sufficient to subject an individual stopped at a permanent inland immigration checkpoint to increased level of search and questioning); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (race as one of multiple factors supports reasonable suspicion of being undocumented and permitting immigration police to stop and question an individual).

[145] *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

of the recipients of federal financial assistance by increasing the overall pool of available resources.

As an example of a program that he considers to be unduly threatened by a disparate impact challenge, Taylor cites the post-9/11 Department of Justice program that authorized thousands of interviews with immigrants based on their country of origin and other factors.[146] The program targeted immigrants from predominantly Arab and Muslim countries, supposedly because these are the countries in which Al-Qaeda has a presence.[147] If such targeting were necessary to achieve a legitimate national security goal, the program would survive a disparate impact challenge. But, as David Cole suggests in his book *Enemy Aliens*, the program did not target individuals from countries with known ties to Al-Qaeda that were not predominantly Muslim or Arab, such as countries in Europe.[148] Thus, perhaps the goal of finding individuals with Al-Qaeda connections could actually be better accomplished by a less discriminatory method. A disparate impact challenge may encourage the government to consider whether a program's first response was really the best policy for security or equality.[149]

Taylor also defends the racial profiling of Arabs and Muslims as a means of thwarting terrorist attacks.[150] As explained below, profiling on the basis of race, religion, or national origin has tremendous social cost and lacks value as a law enforcement tool. Taylor's concern that such programs might not survive a disparate impact challenge belies the problem: such programs are indefensible with empirical evidence,[151] since otherwise they would not be threatened by the proposed addition of a private right of action under Title VI for claims based on disparate impact. And, as stated before, eliminating ineffective programs increases the availability of resources to programs that work. Thus, the elimination of ineffective and damaging racial profiling programs by means of disparate impact challenges would promote both civil rights and security.

Before discussing its defensibility, it is important to understand the types of practices that fall within the term racial profiling.[152] Most commonly, racial profiling refers to treating an individual differently based upon the belief that members of that person's racial or ethnic group are more

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[146] Taylor, *supra* note 4, at 67 & n.45.

[147] *See* DAVID COLE, ENEMY ALIENS 49 (New Press 2003).

[148] *Id.*

[149] *See* Cuéllar, *supra* note 144, at 10 ("law enforcement policies appear to be shaped more by political demands and whether they *seem* useful, rather than by a sustained, reasoned inquiry into whether such policies actually *are* useful." (emphasis in original)). Cuéllar also suggests increased judicial review for racial profiling practices than currently exists under constitutional law as a result of this empirical problem. *Id.*

[150] Taylor, *supra* note 4, at 69–72.

[151] See discussion of empirical support for racial profiling, *infra* Part IV.

[152] This is hardly a settled question. *See generally* Deborah Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003).

likely to commit the type of crime being investigated.[153] The term racial profiling is not typically used to describe an investigation of a particular crime where a victim or witness has identified the race of the perpetrator, and the police consider race in decisions about which suspects to question or otherwise investigate.[154] Thus, courts have sanctioned the use of race in investigations where race is part of a description of a particular suspect,[155] even though the Supreme Court has rejected racial stereotyping.[156]

Investigations of future conduct, such as plots to commit crimes, can also take account of race without being considered racial profiling if conducted in a targeted way. Deborah Ramirez has a particularly nuanced examination of the meaning of racial profiling in a post-9/11 context.[157] She identifies two instances when race should legitimately be considered in a criminal investigation without falling under the rubric of profiling:

1. For a limited time and within a particular vicinity, police are investigating a specific crime committed by a specific person and race or nationality is part of a multi-variable description containing particular readily identifiable and distinctive factors, characteristics or behavior beyond race, ethnicity, or national origin;
2. For a limited period of time and at a specific location, using concrete evidence linking race to a specific, particular criminal

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[153] *See* Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 79 (2004) (citing Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002)).

[154] *See* COLE, ENEMY ALIENS, *supra* note 147.

[155] *See, e.g.*, Brown v. City of Oneonta, 221 F.3d 329, 337–38 (2d Cir. 2000) (distinguishing between permissible use of race to identify suspect based on witness description and unlawful profiling based on racial stereotype); United States v. Avery, 137 F.3d 343, 353 (6th Cir. 1997) (holding that "the Fourteenth Amendment protects citizens from police action, including the decision to interview an airport patron, based solely on impermissible racial considerations"); Buffkins v. City of Omaha, 922 F.2d 465, 468 n.8 (8th Cir. 1990) (holding that detention of airport patron was not racial discrimination under § 1981 because she matched the racial description of the person described in a tip, but noting that its "conclusion would be very different if the officers, acting without a tip, focused their investigation on Buffkins *solely* because of her race," as opposed to using race as an investigative factor following a tip, or as one of several factors). That is not to say, of course, that this use of race cannot be abused as well. In *Brown*, the Second Circuit upheld a finding that police did not violate the Equal Protection Clause by questioning every African American in the town where a crime was allegedly committed by a black man with a cut on his hand. 221 F.3d at 334, 337–8. This decision, widely viewed as problematic (even by the court that made it), shows how difficult it can be to draw a line between the legitimate use of race even in the context of a suspect identification. *See Brown*, 235 F.3d at 769 (petition for rehearing en banc denied, with lengthy dissents from the denial). Taylor cites this decision for the proposition that race can be constitutionally used to investigate a particular crime, Taylor, *supra* note 4, 73 n.68; we add only that as a matter of effectiveness, it is important to note that no perpetrator was found as a result of this practice. *See Brown*, 221 F.3d at 334.

[156] *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630–31 (1991) (prohibiting racial stereotyping in civil jury selection); Batson v. Kentucky, 476 U.S. 79, 85–88 (1986) (prohibiting racial stereotyping in criminal jury selection).

[157] *See generally* Ramirez, *supra* note 152.

> incident, police use race, ethnicity, or national origin as part of a multivariable description.[158]

At least one congressional proposal has also drawn a distinction between profiling and targeted investigation. The proposed End Racial Profiling Act, which otherwise includes a very broad definition of racial profiling, still provides an exception for the legitimate use of race when there is "trustworthy information, relevant to the locality and timeframe, that links a person of a particular race, ethnicity, national origin, or religion to an identified criminal incident or scheme."[159]

Thus, because considerations of race, when part of a specific, limited search for the perpetrator of an identifiable past or future crime, are not understood to be racial profiling, there is no cause for concern that a ban on racial profiling will force officers to ignore known facts about the race of specific sought-out perpetrators.

As to profiling, rather than investigation, the survival of the practice under a disparate impact challenge would depend upon the specific facts of each case. Each profiling challenge would be evaluated to determine if the use of race in that context is related to and necessary to achieve the nondiscriminatory goals of the program. For example, the goals of protecting our national security and preventing terrorist attacks certainly qualify as legitimate nondiscriminatory purposes.[160] In most cases, however, a program that employs racial profiling to meet those goals will likely fail to qualify as "related to and necessary to achieve" those goals. The reason is simple: racial profiling has not been shown to effectively advance law enforcement goals or national security.

There are several reasons why racial profiling is ineffective. First, it is empirically unsuccessful. The most commonly studied racial profiling context is the practice of pretextual traffic stops, where the true reason for the stop is not the minor traffic violation, but that the driver is black.[161] This practice exists despite the fact that "no data demonstrates [sic] either a gen-

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[158] *Id. See also* David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 UTAH L. REV. 913, 926 (2004) ("[P]rofiling's purpose is prediction.").

[159] End Racial Profiling Act of 2005, S. 2138, 109th Cong. § 3(6) (2005).

[160] Indeed, even under the strict scrutiny test used to determine the constitutionality of facially race-based laws, national security has been held to be a compelling governmental interest. *See* Korematsu v. United States, 323 U.S. 214 (1944).

[161] Pretextual traffic stops are so common that they are commonly known as the phenomenon "DWB," or "driving while black." DAVID COLE, NO EQUAL JUSTICE 36 (1999). One Florida study showed that although "5 percent of drivers on [a] highway were dark-skinned, nearly 70 percent of those stopped were black or Hispanic, and more than 80 percent of cars searched were driven by blacks and Hispanics." *Id.* at 37; *see also* Harris, *New Risks, New Tactics*, *supra* note 158, at 925. This practice has been facilitated by the U.S. Supreme Court decision in *Whren v. United States*, 516 U.S. 806 (1996), where the court held that as long as an officer observes a traffic violation, there is no Fourth Amendment violation for stopping a vehicle even if the true motivation for the stop was race.

eral or a circumstantial correlation between race and crime."[162] Although there are data showing correlations between arrest rates and race, and incarceration rates and race, these statistics reflect any and all accumulated bias directing investigations toward black men and other people of color.[163] With regard to drug enforcement—one of the most common purposes for pretextual stops—the fraction of instances that illicit substances are found (known as the "hit rate") does not vary by race; only the police investigation rate varies by race.[164] Thus, the same percentage of African Americans subject to drug searches was found to have drugs in their possession as the percentage of whites subjected to drug searches. But, of course, the percentage of African Americans searched was greater than their representative proportion of the population.[165]

In fact, when the U.S. Customs enforcement agency changed its procedures on searches to exclude race and refocused officers on observational techniques and behavioral characteristics, the overall rate of successful searches improved.[166] Using race as a proxy for potential criminality "moves . . . officers away from what counts—what people under observation are doing—to a factor with little or no predictive value: what people look like."[167]

The numerical success rate of racial stereotyping does not improve in the terrorism context, where profiling tends to target individuals who appear to be Arab or Muslim. First, there are an estimated six million Muslims in the United States,[168] and well over a million individuals who identify as having an Arab ancestry.[169] Thus, identifying a person as Muslim or Arab does not meaningfully narrow the field.[170] Moreover, Muslims and Arabs do not share one readily identifiable appearance even within each of these groups, much less between them. Of the total number of Muslims living in the United States, only twenty-six percent are Arab; thirty-four percent are South Asian and twenty-five percent are African American.[171] Indeed, peo-

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[162] Ramirez et al., *supra* note 152, at 1211.

[163] *See id.*

[164] Deborah Ramirez cites several studies, including one in Maryland where twenty-eight percent of black people subject to search and twenty-eight percent of white people subject to search were carrying contraband. *Id.* Data from New Jersey, North Carolina, California, and U.S. Customs all supported this conclusion. *See id.* at 1212. In fact, many studies suggest that Latinos are less likely to be carrying contraband than whites. *See id.* at 1213.

[165] *See id.* at 1211.

[166] *See id.* at 1213.

[167] Harris, *supra* note 158, at 927.

[168] *See* Andrea Elliott, *Between Black and Immigrant Muslims, an Uneasy Alliance*, N.Y. TIMES, Mar. 11, 2007, at A30.

[169] The 2000 Census reported 1.2 million people as having reported an Arab ancestry. *See* U.S. CENSUS BUREAU, THE ARAB POPULATION: 2000 (2000), http://www.census.gov/prod/2003pubs/c2kbr-23.pdf (on file with the Harvard Law School Library).

[170] Ramirez et al., *supra* note 152, at 1216. ("[T]he more potential suspects who match the general description, the less valuable the information becomes.").

[171] *See* Elliott, *supra* note 168, at A30.

ple from places as diverse as Portugal[172] and India[173] have been subject to racial targeting because of the mistaken perception that they were Arab or Muslim.

Furthermore, many of the most notorious terrorists in recent history do not have a physical appearance that reflects traditional stereotypes of Arabs or Muslims, and thus would not fit any racial description one might decide to use to target either of these populations. The most oft-cited examples of terrorism in the United States, apart from 9/11, include the bombing of the federal building in Oklahoma City (perpetrators were white Americans),[174] the shoe bomber (perpetrator's mother was British and father was Jamaican),[175] the unibomber Ted Kaczynski (white American from Chicago),[176] and Bruce Edwards Ivans, who ultimately committed suicide upon being investigated as a suspect in the post-9/11 anthrax attacks (white American from Ohio).[177] Indeed, not even all members of Al-Qaeda are Arab in appearance; for instance, John Walker Lindh (white American from Maryland) was convicted for activities assisting the Taliban and is known to have been involved with Al-Qaeda.[178]

Apart from problems of accurately identifying Arab or Muslim individuals, racial profiling is also ineffective because a terrorist organization can easily defeat it by using operatives who do not meet the expected racial profile. As one scholar questions, "what are the constraints on terrorist organizations like Al-Qaeda in selecting individuals of different races or ethnicities to carry out terrorist attacks, especially if these groups know in advance what inspectors and investigators are looking for to some degree?"[179] The answer is clear: "It would be surprising if Al Qaeda, which has shown an ability to adjust to efforts to destroy its organization, would not be sufficiently flexible to arm persons who do not meet our profiles."[180]

Some suggest that even behavioral profiling may be easily defeated by terrorists using probes to determine what characteristics are likely to result in enhanced scrutiny. For example, a system of behavioral profiling called the Computer Assisted Passenger Pre-Screening System ("CAPPS") has been in

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[172] *See* Margaret Kwoka, *The Return of Legalized Racial Profiling*, Z MAG., June 2008, at 7.

[173] *See* Ramirez et al., *supra* note 152, at 1225 (Indian-American motorist with his two daughters stopped by Maryland State Trooper who believed they were Arab and asked for proof that they were from India).

[174] *See* Johnson, *supra* note 153, at 176.

[175] *See id.*

[176] *See* Robert D. McFadden, *Prisoner of Rage—A Special Report: From a Child of Promise to the Unabom Suspect*, N.Y. TIMES, May 26, 1996, at A1.

[177] *See Obituary: Dr. Bruce Edwards Ivans*, FREDERICK NEWS POST, July 31, 2008, *available at* http://www.fredericknewspost.com/sections/local/obit_detail.htm?obitID=24497 (on file with the Harvard Law School Library).

[178] *See* CNN.com, John Walker Lindh: Profile, http://www.cnn.com/CNN/Programs/people/shows/walker/profile.html (on file with the Harvard Law School Library).

[179] Cuéllar, *supra* note 144, at 20–21.

[180] David Rudovsky, *Racial Profiling and the War on Terror*, 155 U. PA. L. REV. PENNumbra 173, 176 (2007).

place in the United States since 1999.[181] But in a 2002 study, two computer science graduate students from the Massachusetts Institute of Technology ("MIT") mathematically proved that using random searches would be more effective.[182] Although the parameters of CAPPS are classified, passengers know when they have been selected for secondary screening.[183] The MIT scientists show how terrorists can use testers to determine who does not meet the profile, and they conclude that random searches are statistically more likely to be effective because terrorists cannot practice against the system.[184] Thus, whatever the alternative—behavioral profiling or random searches or some other system of screening—moving away from racial profiling increases the effectiveness of law enforcement investigations.

Further, racial profiling is not only ineffective, it may actually be counterproductive. Profiling that targets a community with a certain religious, ethnic or racial heritage can alienate that community from law enforcement and discourage cooperation with investigations.[185] David Cole explains: "This is not to suggest that otherwise law-abiding individuals will knowingly protect and hide terrorists, but that the kind of routine information and connections that are so critical to identifying active criminals and terrorists will be significantly less forthcoming."[186] In addition, post-9/11 measures taken by the U.S. government have been viewed not only within the Arab American community, but rather all around the world, as being "focused solely on Muslims and Muslim countries," "a war against Muslims," and "a new kind of racial profiling which the U.S. Government applies but denies."[187] One front page article in the Washington Post in 2002 featured Saudis "who once considered America their second home."[188] Nonetheless, the article reports, "the suspicion and sometimes hostility directed at [their] people since Sept. 11, 2001, have left [them] embittered toward a country [they] once admired."[189]

Paul Butler's article in the criminal context, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, is evidence of the power

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[181] *See* Samidh Chakrabati & Aaron Strauss, *Carnival Booth: An Algorithm for Defeating the Computer-Assisted Passenger Screening System*, May 16, 2002, http://groups.csail.mit.edu/mac/classes/6.805/student-papers/spring02-papers/caps.htm (on file with the Harvard Law School Library).

[182] *Id.*

[183] *See id.*

[184] *See id.*

[185] Deborah Ramirez asserts that the use of race in law enforcement "engenders tremendous frustration, anger, and hostility from communities of color" and that "when the community is not invested in the justice system, law enforcement has more difficulty tapping into the community as a resource for invaluable intelligence information." Ramirez et al., *supra* note 152, at 1214–15.

[186] COLE, ENEMY ALIENS, *supra* note 147, at 190.

[187] *Id.* at 195 (quoting articles appearing in London's *Guardian*, Cairo's *Middle East Times*, and Pakistan's *News*).

[188] Peter Baker, *'I'll Never Go Back': Saudis Who Once Embraced America Now Feeling Embittered and Betrayed*, WASH. POST, Nov. 26, 2002, at A01.

[189] *Id.*

this disaffection may have on a targeted community.[190] In this article, Butler presents a moral basis for black jurors to vote to acquit a black defendant of certain nonviolent crimes that the juror believes the defendant did in fact commit.[191] Butler's argument is based on the greater harm to the community that would result from that defendant's incarceration than resulted from the crime itself.[192] Even to advance this argument is a powerful testament to the depth of injury to the integrity of our justice system that can come from marginalizing a part of our own community through race-based policing.

There is evidence that this type of community blocking[193] actually does arise from community dissatisfaction. David Cole lists anecdotes of black juries acquitting black defendants despite strong evidence of guilt.[194] Attorney General Eric Holder has observed that, in his estimation, at least ten cases over which he presided as a trial judge ended in hung juries as a result of a holdout juror who was unwilling to send another young black man to jail for a nonviolent crime.[195] Statistics also show that juries made up predominantly of black and Hispanic jurors acquit minority defendants at a far higher frequency than predominantly white juries.[196] Moreover, black witnesses to a crime involving a black defendant are often reluctant to come forward.[197]

If a similar disaffection has not already been bred among members of the Arab and Muslim communities,[198] we certainly risk that outcome by the continued adoption of ineffective policies that disproportionately burden these communities. First, Arabs and Muslims have long been the target of discrimination; it is not unique to a post-9/11 United States. For example, in 1987 eight students in Los Angeles associated with a group called the Popular Front for the Liberation of Palestine were arrested in raids, detained as national security risks, and put through deportation proceedings.[199] Though the government admitted that none had actually engaged in any criminal

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[190] Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1996).

[191] *See generally id.*

[192] *Id.* Other prominent legal academics viscerally recognize the problem of racial profiling. Harvard Law School Professor Charles Ogletree once put it simply: "If I'm dressed in a knit cap and hooded jacket, I'm probable cause." COLE, ENEMY ALIENS, *supra* note 147, at 47.

[193] Community blocking may be defined as communities becoming more hesitant to engage with authorities.

[194] *See* COLE, NO EQUAL JUSTICE, *supra* note 161, at 169–70.

[195] *See id.*

[196] *See id.* at 170 (Cole reports that in the Bronx, for instance, juries acquit black defendants in felony cases at a rate of 47.6%, as compared to a national average of 17%).

[197] *See id.* at 169.

[198] Indeed, some suggest that not only has such disaffection already been bred, but also that racial profiling and Arab and Muslim targeting for mistreatment has resulted in actual violence and further terrorism. *See* Ruth Singer, *Race Ipsa? Racial Profiling, Terrorism and the Future*, 1 DEPAUL J. SOC. JUST. 293, 312 (2008) (citing the example of the July 7, 2005 London bombers, at least one of whom did not fit the profile of a Muslim fundamentalist, but referenced the mistreatment of other Arabs in his suicide video).

[199] *See* COLE, ENEMY ALIENS, *supra* note 148, at 162.

activity, they were subject to deportation under a now-repealed anti-Communist law that targeted association with various organizations.[200] Although successfully defended in immigration proceedings, "the case took on legendary proportions among Arab Americans, cast a chilling pall over their political advocacy, and raised deep suspicions about the fairness of the government's actions."[201] Indeed, most of the political activists targeted by this exclusion law during the 1980s and 1990s were Arabs and Muslims.[202]

Specific incidents relating to the airline industry have also provoked outrage in the Arab and Muslim communities. In one striking incident, TSA and JetBlue workers refused to let an Iraqi-born U.S. resident board until he covered up the writing on his T-shirt, which was in Arabic.[203] On another occasion in Minneapolis, six imams were removed from a U.S. Airways flight, resulting in the airline's apology for the incident and a subsequent lawsuit.[204] In Seattle, an Iranian-born software developer who worked for American Airlines was kicked off of an American Airlines flight by the pilot.[205] In a particularly ironic turn of events, officers at Logan airport detained the coordinator of the American Civil Liberties Union's Campaign Against Racial Profiling, who is black and has a beard.[206]

These types of outrages continue to this day. In early 2009, AirTran removed nine Muslim American passengers from a flight and refused to rebook them on a later flight.[207] This case, eerily similar to *Cerqueria v. American Airlines*, prompted a complaint to the Department of Transportation filed by the Council on American-Islamic Relations.[208]

Cases such as these have already led the Arab and Muslim communities to fear and distrust law enforcement. They are "subjected to delays, humiliation and periodic roughing up while getting through the United States airports."[209] As a result, some Arab Americans and Muslim Americans now avoid airports, even to pick up passengers, "for fear of a nasty encounter

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[200] *See id.* at 163; McCarren-Walter Act of 1952, 8 U.S.C. §§ 1251(a)(6)(D), (F), (G), (H) (1988) (repealed). *See generally Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995) (describing the case and anti-Communist statute).

[201] COLE, ENEMY ALIENS, *supra* note 147, at 168.

[202] *See id.* at 192.

[203] *See* Spencer S. Hsu & Sholnn Freeman, *JetBlue, TSA Workers Settle in T-Shirt Case*, WASH. POST, Jan. 6, 2009, at A02.

[204] *See* David Hanners, *Imams Asking for 10 Years of Airline Bias Complaints: U.S. Airways Balks, Citing 9/11 Impact*, ST. PAUL PIONEER PRESS, July 15, 2008, at B2.

[205] *See Racial Profiling Allegations Abound in Post-9/11 World*, BOSTON HERALD, Jan. 15, 2007, at 5.

[206] *See* David Abel, *ACLU Coordinator Wrongly Held, Jury Rules: Racial Profiling at Logan Alleged*, BOSTON GLOBE, Dec. 10, 2007, at B2.

[207] *See* Amy Gardner & Spencer S. Hsu, *Airline Apologizes for Booting 9 Muslims*, WASH. POST, Jan. 3, 2009, at A01.

[208] *See id.*

[209] Neil MacFarquhar, *U.S. Muslims Say Terror Fears Hamper Their Right To Travel*, N.Y. TIMES, June 1, 2006, at A1.

with a law-enforcement officer."[210] These experiences will not lead to increased cooperation with law enforcement officials, open lines of communication between law enforcement and Arab Americans, or generally encourage the perception of legitimacy in our law enforcement system. On the contrary, these incidents may actually hinder security efforts.

Finally, and perhaps most importantly, racial profiling and 9/11 must be viewed in a historical context. Just prior to 9/11, racial profiling was widely condemned on all sides of the political spectrum.[211] President George W. Bush, addressing Congress just months before the attacks, declared that he was asking the Attorney General for recommendations to end racial profiling, because "[i]t's wrong, ... [B]y stopping the abuses of a few, we will add to the public confidence our police officers earn and deserve."[212]

It was only after 9/11 that public opinion shifted.[213] One Gallup poll reported that "forty nine percent of Americans would support a practice of Arabs and Arab-Americans, United States citizens or not, being forced to carry a special identification card; fifty-eight percent would support requiring Arabs to undergo more security checks at airports."[214] The events of 9/11, however, should not change our otherwise accepted legal, moral, and practical decision that racial profiling is unacceptable. As the Second Circuit recently stated, "[t]he strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times."[215]

Other "unusual" times in history when we have disregarded or placed on hold our constitutional rights to be free from racial discrimination have proven the necessity of those protections, not the need for exceptions to them. The most notable example is the Japanese internment during World War II. In *Korematsu v. United States*, the Supreme Court infamously upheld this racially discriminatory internment as a result of the purported national

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[210] *Id.*

[211] *See* Harris, *supra* note 158, at 913 (citing a 1999 Gallup poll in which eighty-one percent disapproved of the practice of racial profiling). In an apt description of the practice of racial profiling in the context of "reasonable suspicion" Terry-stops, Justice Thurgood Marshall once stated that "the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*." Florida v. Bostick, 501 U.S. 429, 441 n.1 (1991) (Marshall, J., dissenting).

[212] 147 CONG. REC. 2,347 (2001) (address of President George W. Bush to the Joint Session of Congress).

[213] *See* R. Richard Banks, *Racial Profiling and the War on Terror*, 155 U. PA. L. REV. 173, 175 (2007) ("Many people who condemned racial profiling in the War on Drugs were now convinced that it would be an effective tool in the War on Terror."); Harris, *supra* note 158, at 914 ("Post September 11, polling again showed a strong consensus about racial profiling, but one that was 180 degrees different than it had been before."); Singer, *supra* note 198, at 299.

[214] Ramirez et al., *supra* note 152, at 1225 (citing *Morning Edition: Reactions People are Having to Suddenly Being Suspicious of Anyone Who is Muslim or Arab* (NPR radio broadcast Sept. 20, 2001)).

[215] Iqbal v. Hasty, 490 F.3d 143, 159 (2d Cir. 2007), *rev'd on other grounds*, Ashcroft v. Iqbal, No. 07-1015, 2009 WL 1361536 (U.S. May 18, 2009) (including the right to be free from racial discrimination among those rights not to be suspended in unusual times).

security interest.[216] Since then, however, a 1995 Supreme Court decision denounced the decision,[217] and Justice Scalia has placed *Korematsu* on par with *Dred Scott*.[218] Politicians have vowed such a program will never be implemented again, and the public views that policy as a stain on American history.[219] It is also worth noting that "the Japanese internment . . . found zero terrorists or spies."[220]

While racial profiling in an airport is not equivalent to the drastic measure of indefinite internment in camps, it is naïve to think that targeting an ethnic group on the basis of its race will remain a comparatively minor inconvenience. The L.A. Times reported that in 2002, then-Attorney General John Ashcroft crafted a plan that "would allow him to order the indefinite incarceration of U.S. citizens and summarily strip them of their constitutional rights and access to the courts by declaring them enemy combatants."[221] On July 19, 2002, in a U.S. Civil Rights Commission hearing, Bush-appointee Commissioner Peter Kirsanow opined that if another attack in the U.S. occurred, "and they come from the same ethnic group that attacked the World Trade Center, you can forget about civil rights."[222] Even more disturbing, he raised the possibility of mass detention of Arab Americans in camps as a legitimate response if another attack should occur.[223] This prompted the American-Arab Anti-Discrimination Committee to call for his removal from the Commission.[224] Not only was he not removed, but he was appointed to the National Labor Relations Board thereafter in January, 2006.[225]

Thus, 9/11 prompted policies perhaps different in degree but not in kind from Japanese internment.[226] As Taylor notes, the prevailing view after 9/11 was that although race and ethnicity should play no part in so-called normal

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[216] Korematsu v. United States, 323 U.S. 214 (1944).

[217] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995).

[218] *See* Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

[219] In the 1980s Congress paid reparations to victims of the internments. *See* COLE, ENEMY ALIENS, *supra* note 147, at 98; *see also id.* at 99 (asserting that "[w]hile *Korematsu* itself has not been overruled, it is widely viewed with shame").

[220] Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 417 (2005).

[221] Johnathan Turley, *Camps for Citizens: Ashcroft's Hellish Vision*, L.A. TIMES, Aug. 14, 2005, at B11.

[222] Press Release, Am.-Arab Anti-Discrimination Comm., ADC Update: ADC Calls for the Removal of U.S. Civil Rights Commissioner (July 20, 2002), *available at* http://www.bintjbeil.com/adc/020720_kirsanow.html (on file with the Harvard Law School Library).

[223] *See id.*

[224] *See id.*

[225] *See* U.S. Commission on Civil Rights—Commissioner Kirsanow, http://www.usccr.gov/cos/bio/kirsanow.htm (on file with the Harvard Law School Library).

[226] *See* Taylor, *supra* note 4, at 68–69 (discussing Department of Justice guidance to this effect). After 9/11, the Department of Justice instituted a policy of using immigration policing to identify Arab and Muslim foreign nationals in the country, resulting in the detention in segregated facilities of over seven hundred Arab and Muslim men based on immutable characteristics and not based on individualized suspicion. *See* Banks, *supra* note 213, at 175. Banks details many other programs that targeted men identified as Arab or Muslim. *Id.*

law enforcement, that absolute prohibition should not apply in the context of national security and terrorism, where the consequences may be so much greater.[227] This rationale leads one to wonder, however, whether and how a practice which has been widely deemed ineffective in the normal law enforcement context, suddenly becomes effective in the fight against terrorism.

Perhaps for all these reasons, a government-wide memo written by five intelligence experts distributed after 9/11 cautioned against racial profiling and recommended law enforcement focus on behavior to advance better security.[228] One of the authors, in an anonymous interview, went so far as to say that the failure to prevent the 9/11 attacks was caused, at least in part, by "paying attention to a set of characteristics, instead of a set of behaviors that launch an attack."[229] The memo opined that profiling "draws an investigator's attention toward too many innocent people, and away from too many dangerous ones."[230]

As this memo predicted, racial profiling targeting Muslims and Arabs has been going on since 9/11 and has turned up very little useful evidence of national security threats. As part of a registration program requiring foreigners from most Arab and Muslim countries to submit periodic information, almost 3000 people were detained in the first few months, and none were ever charged with terrorism.[231] In the winter of 2002, the Justice Department conducted interviews with 5000 immigrant men based primarily on their Arab and/or Muslim countries of origin.[232] Further, one report from the Office of the Inspector General revealed that in 738 immigration detentions of foreign nationals of interest in terrorism investigations, not a single one was ever charged with a terrorism-related crime.[233] Despite these and other programs targeting people specifically because of their Arab and/or Muslim heritage, the U.S. government has not destroyed Al-Qaeda, found Osama bin Laden, or held anyone accountable in court for playing a substantial role in the attacks of 9/11.[234]

Because credible evidence does not support the notion that racial profiling is advancing our national security, allowing private rights of action under Title VI will improve our security systems by eliminating ineffective programs that consume resources and distract law enforcement from achieving its goals. All of us will benefit from greater scrutiny of the effectiveness

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[227] Taylor, *supra* note 4, at 71-72 n. 65. *See* Cuéllar, *supra* note 144, at 13 (noting that many proponents of racial profiling cite the idea that "[t]errorism's consequences appear far more devastating than the threat posed by narcotics trafficking or any other traditional crime").

[228] *See* Bill Dedman, *Memo Warns Against Use of Profiling As Defense*, BOSTON GLOBE, Oct. 12, 2001, at A27.

[229] *Id.*

[230] *Id.* (summarizing the memo).

[231] *See* COLE, ENEMY ALIENS, *supra* note 147, at 50.

[232] *See id.* at 49.

[233] *See id.* at 30.

[234] *See generally* page xx in the Forward to the new edition of COLE, Enemy Aliens.

of our law enforcement programs, and from the increased equality of all members of our society.

V. Conclusion

In the conclusion to his article, Taylor notes that Title VI has broad application.[235] He argues that applying the disparate impact theory to Title VI will result in judicial scrutiny of discriminatory practices in a wide variety of activities and programs that receive federal financial assistance.[236] That is, of course, the intent of the proposed amendments to Title VI.[237] But Taylor argues that such a result is undesirable for several reasons, none of which have merit.

First, Taylor asserts that some recipients of federal funding might abandon justifiable discriminatory practices rather than shoulder the burden of defending those practices from disparate impact challenges.[238] He believes that abandoning such practices could have negative consequences. By way of example, Taylor argues that fear of disparate impact suits may have caused some mortgage lenders to stop using creditworthiness standards to judge loan applicants, which, he says, may have been "a prime cause of the current financial crisis because many loans were extended to people who could not reasonably be expected to be able to pay them back."[239] But, even if there were evidence that the weakening of underwriting standards was the result of an effort to avoid disparate impact lawsuits, the resulting foreclosure crisis shows that the more stringent lending criteria could have been successfully defended as "related to and necessary to achieve the nondiscriminatory goals of the program," that is, minimizing loan defaults.[240] Thus, the negative consequences claimed by Taylor can arise only where the discriminatory policy or practice is necessary to serve a legitimate purpose—and thus could be successfully defended—but the recipient of federal funds chooses to abandon the practice rather than demonstrate its legitimacy.

Taylor next asserts that Supreme Court decisions requiring proof of discriminatory intent to establish constitutional claims are a "warning from the Court" that statutes allowing disparate impact claims are ill-advised.[241] To the contrary, conduct that does not violate the Constitution is often made unlawful by statute, and the Court's opinions regarding constitutional claims have no relevance to statutory disparate impact claims. Indeed, the Court has never opined that disparate impact claims, where allowed by statute, are unconstitutional or ill-advised.

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[235] *See generally* Taylor, *supra* note 4, at 105–09.
[236] *See generally id.* at 90–105.
[237] *See supra* Part II.
[238] Taylor, *supra* note 4, at 250.
[239] *Id.*
[240] H.R. 5129, 110th Cong. § 102(a)(1) (2008); S. 2554, 110th Cong. § 102(a)(1) (2008).
[241] Taylor, *supra* note 4, at 251.

Taylor's most fundamental opposition to the disparate impact theory rests on his view that the courts are ill-equipped to determine whether a discriminatory policy, particularly in the national security context, is necessary to serve a legitimate goal.[242] He claims that "courts and judges . . . have no institutional expertise in national security programs[.]"[243] But courts often lack expertise in the subject matters that come before them, which is why judges, as generalists, must rest their decisions on the evidence presented. There is no reason to believe that the courts are ill-equipped to handle tough decisions about the effectiveness of national security programs. Any recipient of federal funds seeking to justify a discriminatory national security program on the basis that it is necessary to serve a legitimate interest will have an opportunity to present expert witnesses, statistical studies, and other evidence.

Moreover, courts show a heightened degree of deference to the judgments of the national security community when called upon to adjudicate claims in that context. As the Supreme Court said in *Department of Navy v. Egan*, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[244] In *Egan*, the Court applied this deferential approach to security clearance requirements,[245] but this judicial standard is exhibited elsewhere as well.[246] Whether or not there is an enumerated exemption pertaining to review of national security decisions, as in Title VII, or whether national security programs simply defeat a disparate impact claim by making the requisite showing of necessity to serve a legitimate interest, it is clear that courts are reluctant to overrule the opinions of national security experts or overturn the government's national security programs. Thus, the courts are not likely to substitute their judgment on matters of national security for that of national security experts, and the threat that Taylor identifies from the proposed legislation is an illusory one.

Similarly, the proposed legislation does not, as Taylor claims, present a separation of powers problem.[247] Indeed, the history of Titles VI and VII shows that Congress intended to prohibit discrimination whether intentional or not.[248] When the courts strayed from the disparate impact approach with respect to Title VII, Congress amended the statute to explicitly reflect its

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[242] *Id.* at 250 n.227.

[243] *Id.*

[244] 484 U.S. 518, 530 (1988).

[245] *Id.*

[246] *See, e.g.*, CIA v. Sims, 471 U.S. 159 (1985) (finding that provision of National Security Act was an Exemption 3 Statute for the purposes of the Freedom of Information Act, thus authorizing withholding of information); Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982) ("For aids entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.").

[247] *See* Taylor, *supra* note 4, at 107–09.

[248] *See supra* Part II.

original intent.[249] Now again, courts have foreclosed the enforcement of Title VI in a way that frustrates Congress's intent, and the proposed legislation would remedy this problem. If anything, a failure to pass this legislation would frustrate the purposes of Congress, not the other way around.[250] The proposed legislation contains sufficient standards to guide the judiciary in determining whether a particular practice should survive a disparate impact challenge, and amending Title VI to allow private disparate impact claims would not grant the courts any extraordinary power over national security programs.

Finally, Taylor concludes his argument with the same error he started with. Taylor states that "[d]isparate impact claims, if authorized, would greatly expand the power of courts and private litigants to invalidate programs that are neutral on their face, and not motivated by bias, on the grounds that the results of such programs simply entail a disparate impact on covered groups."[251] What Taylor fails to mention is that such programs will be found unlawful only if the defendant cannot justify the program by showing that it is necessary to achieve a legitimate goal.[252] If the proponent of the program cannot make such a showing, there is no risk that the disparate impact theory will hamper national security.[253] Rather, private disparate impact claims will serve the interests of justice by eliminating unnecessary barriers to racial equality.

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[249] *See id.*
[250] *See id.*
[251] Taylor, *supra* note 4, at 252.
[252] *See id. See also supra* Part IV.
[253] *See supra* Part IV.