

EXPERT INSIGHT | Higher Education Reform Initiative

RESTORING EQUAL TREATMENT UNDER THE LAW: ENDING DISPARATE IMPACT DOCTRINE

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TOPLINE POINTS

- ★ Disparate-impact doctrine is an aberration in U.S. civil rights law. Its use by federal courts and regulators undermines equality (equal treatment), meritocracy, and post-secondary education and labor markets.
- ★ Under President Trump, the federal government is limiting the use of disparate impact doctrine under Titles VI (education) and VII (employment) while also setting the stage for a broader constitutional challenge.
- ★ The implications of recent administration actions are considered, including how the progress of disparate impact claims through the Title VII burden-sharing framework is likely to change in response to a recent legal opinion by the Department of Justice Office of Legal Counsel.

What is Disparate Impact Doctrine?

Disparate impact doctrine holds that a policy or practice can be considered “discriminatory” even when it does not intentionally treat people differently based on a protected characteristic, such as race or sex. Instead, the focus is on whether the policy has substantially different *effects* on protected groups. This understanding inverts the traditional understanding of discrimination (treating people differently), otherwise known as “disparate treatment.”

Where Does Disparate Impact Doctrine Come From, and How Does it Apply?

Disparate impact doctrine entered federal civil rights law through multiple mechanisms. Under Title VII, the doctrine originated through judicial interpretation. In [*Griggs v. Duke Power Company*](#), the U.S. Supreme Court determined facially neutral employment practices with disparate racial effects can

constitute prohibited discrimination if employers cannot demonstrate such requirements to be both: 1) job-related and 2) consistent with business necessity. *Griggs* addressed employment discrimination under Title VII of the [1964 Civil Rights Act](#); however, disparate impact law covers anti-discrimination (civil rights) law in other contexts as well, including [housing](#) and [age](#) discrimination.

The application of disparate impact doctrine has shifted over time in response to changing guidance from the Supreme Court (e.g., [Wards Cove Packing Co. v. Antonio](#)) and Congressional action (e.g., the [Civil Rights Act of 1991](#)). In the Title VII (employment) space, disparate impact claims ordinarily proceed through a three-stage “burden-sharing” process in which:

1. Plaintiffs must identify a specific employment practice that causes a disparity along protected group lines.
2. The employer must demonstrate that practice to be both job-related and consistent with “business necessity.”
3. Plaintiffs must identify an available alternative employment practice that would serve the employer’s legitimate needs while producing less disparate impact.

If plaintiffs succeed at Stage 3, the employment practice is deemed unlawful discrimination.

Why is Disparate Impact Doctrine a Problem?

Courts and federal regulators have wielded disparate impact doctrine to force employers to abandon neutral (i.e., non-discriminatory) policies. Examples include prohibiting [police](#) and [fire departments](#) from requiring written and physical fitness assessments linked to job duties. In these cases, the application of the disparate impact doctrine clearly undermines public safety: police officers must know the law and be physically able to apprehend suspects; firefighters must be strong enough to rescue fire victims, and so on. However, the damage caused by sacrificing merit to equity (equal outcomes) extends further. In *any* endeavor, the pursuit of excellence, or even basic competence, entails upholding standards linked to desired outcomes.

Abandoning merit also results in abandoning fairness. If treating employees *equally* creates disparate impact liability, the safer course of action for employers may be to treat employees *unequally*. The City of New Haven [made this determination](#) in 2004 when it jettisoned the results of a firefighter promotion exam after discovering racial disparities in applicants’ performance.¹ More recently, K-12 schools across the U.S. appear to have made [similar determinations](#) regarding school discipline policies following a 2014 Department of Education (ED) and Department of Justice (DOJ) [guidance letter](#) warning that discipline disparities (e.g., if more students of a particular race or group are disciplined) could expose them to disparate impact liability.

The selective application of disparate impact law by federal regulators also harms students, workers, and families by distorting post-secondary education and labor markets. For reasons unclear, the Equal

¹ In [Ricci v. DeStefano \(2009\)](#), the Supreme Court invalidated New Haven’s decision to discard those results on disparate treatment grounds. Paradoxically, both *using* and *not using* the promotion tests would have potentially violated Title VII under disparate-impact and disparate treatment, respectively.

Employment Opportunity Commission (EEOC) has failed to challenge the proliferation of [college degree job requirements](#), despite such requirements being associated with substantial racial disparities. This oversight contributes to excessive college enrollment due to the proliferation of college degree job requirements which [employers use](#) to sift through applicant pools in the absence of other (prohibited) screening mechanisms. This selectivity is a glaring inconsistency in the application of the disparate impact doctrine.

More fundamentally, disparate impact doctrine rests on shaky conceptual foundations. Any neutral policy is likely to produce disparate impacts (disparities) of one kind or another for the simple reason that no natural law dictates the random distribution of individual interests and aptitudes across whichever demographic characteristics happen to be of interest to courts, regulators, or lawmakers. Disparate impact *theory*, therefore, contains no obvious limiting principle. Instead, the scope of disparate impact liability is constrained largely by the operation of the burden-shifting framework rather than by the underlying concept of discrimination itself. In principle, even ordinary workplace rules—such as attendance requirements and prohibitions on workplace intoxication or violence—could be challenged if they produced sufficiently disparate outcomes. Employers would almost certainly prevail in such cases (business necessities), thereby affirming the practical necessity of this “discrimination.” The result is an intellectually incoherent doctrine that, in practice, simply places a thumb on the scale in favor of levelling outcomes in arbitrarily enforced settings.

Evolution of Disparate Impact Law

The [1991 Civil Rights Act](#) codified disparate impact doctrine in federal statute, thereby providing it with a degree of insulation from judicial reinterpretation (as in [Wards Cove Packing Co. v. Antonio](#)). However, in [Ricci v. DeStefano](#), the Court held an employer's race-based decision to discard an otherwise valid employment test in response to disparate impact liability concerns constitutes disparate treatment unless the employer has a “strong basis in evidence” for believing that it would otherwise be liable. Additionally, in [Alexander v. Sandoval](#), the Court held that Title VI prohibits only disparate treatment and that enforcement of Title VI (education) disparate impact regulations rests with federal agencies rather than private litigants.

Accordingly, on April 23, 2025, the Trump Administration established a policy of eliminating disparate impact liability “in all contexts to the maximum degree possible.” [Executive Order 14281](#) further directs federal agencies to “deprioritize enforcement of all statutes and regulations to the extent they include disparate impact liability” and to repeal or amend disparate impact “regulations, guidance, rules, or orders” issued under Title VI. The order also directs the Attorney General to investigate state disparate impact policies and recommend whether federal action is warranted. On December 9, 2025, the DOJ announced the termination of disparate impact provisions from [Title VI regulations](#).

AFPI's Title VII Recommendations

In a recent America First Policy Institute report, [Schorr and Menees](#) propose several reforms to mitigate the impact of disparate impact doctrine under Title VII. These include several options by which federal regulators can:



- Strengthen requirements for plaintiffs asserting disparate impact claims.
- Revise (loosen) guidance related to recognizing aptitude tests, criminal background screens, and merit-based policies as presumptively legitimate business necessities.
- Clarify that the burden rests with plaintiffs to propose and defend the viability of any proposed alternatives to challenge job policies.

The report also recommends leveling the playing field between college-educated and non-college-educated workers by requiring the EEOC to subject college degree requirements to the same disparate impact review as other job requirements (e.g., high school diplomas).

Recent Actions by the Trump Administration

On June 9, 2026, the DOJ's Office of Legal Counsel (OLC) issued [an opinion](#) concluding that existing EEOC interpretations of disparate impact liability under Title VII are unconstitutional because they permit liability based on disparate effects without regard to discriminatory intent and pressure employers to engage in race-based decision making. In its opinion, the OLC rejects the notion that disparities are discriminatory *in –and –of themselves*, emphasizing instead that disparities may suggest the presence of intentional discrimination (i.e., disparate treatment). This conceptual re-grounding addresses the flawed foundations of disparate impact doctrine while setting the stage for a broader constitutional challenge to disparate impact liability.

The OLC opinion also adopts principles consistent with AFPI's recommendations at each stage of the three-part burden sharing framework, although it does not adopt every specific recommendation. Practical examples of how this guidance could impact disparate impact claims are considered in **Table 1**.

Less than two months after the release of the DOJ opinion, ED announced the [rescission](#) of disparate impact provisions from its Title VI regulations in accordance with [Executive Order 14281](#). Unlike Title VII, Congress has never expressly codified disparate impact liability in Title VI; rather, federal agencies incorporated the doctrine into their implementing regulations under Sec. 602 of that title. The Administration was therefore able to eliminate the relevant Title VI regulatory provisions without congressional involvement.

It is important to note that while the DOJ opinion addresses disparate impact doctrine under Title VII, should the Supreme Court accept its reasoning, the implications would likely extend to Title VI and other disparate impact regimes. For now, the Trump Administration has eliminated disparate impact provisions from federal Title VI regulations and substantially restricted their application in federal employment law. These actions make important progress toward the broader goal of equal treatment for all under law, although the ultimate constitutional status of disparate impact liability remains for the courts to determine.

These accomplishments are substantial and laudable: they make important progress toward the final resolution of an incoherent, unjust, and counterproductive [aberration in U.S. civil rights law](#). When that victory finally arrives, the American people will have the Trump Administration to thank for advancing the cause of equal treatment under law for all Americans.



Table 1

Potential Effects of the DOJ's 2026 OLC Opinion on Title VII Disparate Impact Litigation

Pre-2026 Guidance Example	Possible Post-Guidance Application
1. Written and physical fitness tests (e.g., U.S. v Maryland Police Department, 2024). In October of 2024, Maryland agreed to revise job requirements for police recruits following a two-year DOJ investigation of pass-rate disparities associated with the department's written (race) and physical fitness (sex) tests. Despite Maryland's interest in ensuring police officers understand and can physically perform their job duties, disparate impact doctrine, as applied, put the onus Maryland to justify specific test designs and cutoff thresholds as predictive of successful job performance. Absent this, reasonable job requirements could be invalidated by the presence of statistical disparities. Upon concluding Maryland had not adequately validated its race-blind tests as job-related and consistent with business necessity, the DOJ secured an agreement requiring the state to revise its standards. 2. Criminal background checks (e.g., EEOC criminal background guidance). Per a 2012 EEOC guidance, blanket criminal background exclusions can trigger disparate impact liability due to higher rates of criminal convictions in specific racial communities. On these grounds, the EEOC sued the convenience store Sheetz in April of 2024. The EEOC later withdrew the case, following a 2025 executive order deprioritizing enforcement of disparate impact doctrine. New DOJ guidance challenges the constitutionality of the EEOC's prior guidance. 3. Credit checks (e.g., EEOC v. Kaplan Higher Educ. Corp., 2014). In December of 2010, the EEOC sued Kaplan Higher Education over disparate impacts associated with pre-employment credit history checks for certain positions. Kaplan succeeded due to the EEOC failing to demonstrate a racial disparity to the court's satisfaction (Stage 1); however, the case did not resolve the question of whether employer credit checks create disparate impact liability. 4. Cognitive aptitude tests (e.g., Griggs v Duke Power Co., 1971). Duke Power Company required applicants for certain positions to possess a high school diploma or pass two cognitive aptitude tests. These requirements created a disparate impact along racial lines. Duke Power Company did not demonstrate either requirement to be meaningfully predictive of successful job performance. In ruling against Duke Power Co., the Supreme Court established the broad contours of the Title VII disparate impact burden-sharing approach. 5. Height and Weight (e.g., Dothard v. Rawlinson, 1977). Alabama enforced minimum height and weight requirements for prison guards to ensure guards could adequately defend themselves and maintain security. These requirements applied equally to male and female guards. The legitimacy of Alabama's interest was not in dispute; however, the state did not demonstrate the link between its specific requirements and job performance.	Detailed description: - Stage 1: Plaintiffs establish a disparity resulting from a business practice (written and physical fitness tests). ✓ - Stage 2: An employer establishes a valid business purpose. Given the physical and knowledge demands of police work, these tests would likely be regarded as reasonable. Aptitude tests are "presumptively job related." ✓ - Stage 3: Plaintiffs propose a less disparity-inducing alternative practice that equally meets employers' legitimate needs (public safety). ✗ - Stage 1: Criminal background exclusions. ✓ - Stage 2: Background checks are "presumptively job related." ✓ - Stage 3: Alternative must equally prevent theft and protect customers and staff. ✗ - Stage 1: Establishing a disparity is feasible. ✓ - Stage 2: Credit (background) checks are "presumptively job related." ✓ - Stage 3: Alternative must equally protect student privacy and prevent theft. ✗ - Stage 1: High school diploma requirement and aptitude tests. ✓ - Stage 2: Aptitude tests are "presumptively job related." ✓ - Stage 3: Alternative must equally recruit capable employees, especially in leadership roles. Job-relevant skills assessments might satisfy this requirement. ✓ - Stage 1: Sex-neutral height and weight requirements. ✓ - Stage 2: Establishing minimum physical requirements for physically dangerous work is neither irrational nor arbitrary. ✓ - Stage 3: Alternative must equally meet physical requirements; however, more accurate assessments exist, including physical strength/fitness tests. Yet, such tests could exclude as many (or more) applicants. ?

Legend. ✓ Likely satisfied ✗ Likely not satisfied ? Fact-dependent/uncertain

