DISPARATE IMPACT AS A NON-DELEGATION VIOLATION AND MAJOR QUESTION

ALISON SOMIN*

The major civil rights laws generally prohibit two types of discrimination. The first and best known is disparate-treatment discrimination, or discrimination actually motivated by race, sex, national origin, or another prohibited characteristic. The second type—disparate impact—is quite different. There, the discriminating actor need not be motivated by the prohibited characteristic. It is enough that the discrimination has an adverse effect on individuals from a particular race, national origin, or other covered group and that the discrimination is not justified by necessity.

Disparate impact is one of the most controversial concepts in civil rights law and policy partly because just about everything has a disparate impact. Professor and United States Commission on Civil Rights member Gail Heriot has offered a check for $10,000 to anyone who can name a job qualification without a disparate impact on some group covered by Title VII, the statute that prohibits discrimination in employment.[1] Nobody has ever taken her up on the offer. Sometimes adverse effects are traceable to past or present invidious discrimination.[2] But others are more innocuous. Cambodians are overrepresented in the doughnut industry because of a single entrepreneur's successes in the 1980s.[3] Manicurists are disproportionately Vietnamese because refugees saw actress Tippi Hedren's elaborate nails during a camp visit and were inspired to go to manicure school.[4] The same ubiquity of adverse effects exists in every other area of civil rights law, like housing[5] or education,[6] where disparate impact has been adopted.

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[1] *See Gail Heriot – How Legal Changes to the Civil Rights Act Turbocharged the Woke Regime*, HIGH NOON PODCAST WITH INEZ STEPMAN (May 17, 2023), *available at* https://www.iwf.org/2023/05/17/gail-heriot-legal-changes-to-the-civil-rights-act-woke-regime/.

[2] *See id.*

[3] *See* The Indie Foodie, *How Cambodian Refugees Built a Donut Empire in the United States*, MEDIUM (Feb. 25, 2023), https://medium.com/the-indie-foodie/why-do-so-many-cambodians-own-donut-shops-f06adf4c0205 [https://perma.cc/4VTK-ZMX8].

[4] *See* Regan Morris, *How Tippi Hedren Made Vietnam Refugees into Nail Salon Magnates*, BBC NEWS (May 3, 2015), https://www.bbc.com/news/magazine-32544343 [https://perma.cc/D2BP-8LG6].

[5] *See* Press Release, *HUD Restores "Discriminatory Effect" Rule* (Mar. 17, 2023), https://www.hud.gov/press/press_releases_media_advisories/hud_no_23_054 [https://perma.cc/TKS4-DB7B].

[6] U.S. Dep't of Justice Civil Rights Div., Title VI Legal Manual, Section VII – Proving Discrimination – Disparate Impact, *available at* https://www.justice.gov/crt/book/file/1364106/dl?inline [https://perma.cc/3HX7-DZXA].

Because disparate-impact violations can result from so many innocuous decisions, agencies that enforce disparate impact have virtually unfettered discretion to decide what disparate-impact violations to pursue. Even under the deferential "intelligible principle"[7] standard, such a grant of virtually unlimited power violates the Constitution's prohibition on delegation of congressional power. But even if nondelegation challenges to disparate impact fail, some particular disparate-impact rules may address major questions and thus be unlawful. This Article proceeds as follows: the first section introduces the concept of disparate impact and explains why it is, as currently interpreted, essentially limitless. The second section will summarize the overlapping nondelegation and major-questions doctrines. Finally, this Article will discuss why disparate impact violates the nondelegation doctrine and why some disparate-impact rules constitute major-questions violations, looking carefully at two particular disparate-impact rules (criminal background checks and school discipline) as case studies.

One note before proceeding: disparate impact exists in different guises. First, some statutes give rise to a private cause of action for disparate impact (or have been interpreted by courts to do so). For example, the Civil Rights Act of 1991 prohibits disparate impact in employment, and the Supreme Court has interpreted the Fair Housing Act to prohibit housing practices with a disparate impact.[8] These statutes are enforced both by federal agencies and by private right of action.[9] The nondelegation argument in this paper does not apply to disparate impact enforcement by private suits. Note, however, that because of disparate impact's breadth, some such statutes may be invalid under the similar void-for-vagueness doctrine.[10] Second, some statutes that prohibit only disparate treatment have been interpreted to authorize disparate-impact rules. Title VI of the Civil Rights Act of 1964 prohibits disparate treatment based on race, color, or national origin by recipients of federal funding.[11] But federal agencies have nonetheless interpreted it to allow disparate-impact rules that aim at enforcing Title VI's prohibition on disparate-treatment discrimination. Some of these rules are binding rules issued pursuant to notice-and-comment rulemaking procedures under the Administrative Procedure Act.[12] Others are informal rules, or interpretative guidance, issued without notice-and-comment rulemaking.[13] This Article's core claim—that disparate impact's sprawl renders it a nondelegation violation—

[7] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

[8] *See* Texas Dep't of Hous. & Cmty. Affairs v. The Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015).

[9] *See id.* at 543.

[10] *See* Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & LIBERTY 1, 154–65 (2020) (discussing why Title VII disparate impact liability might be void for vagueness); Todd Gaziano & Ethan Blevins, *The Nondelegation Test Hiding in Plain Sight: The Void-for-Vagueness Standard Gets the Job Done*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE (Peter Wallison & John Yoo eds., Am. Enter. Inst. 2022). Justice Gorsuch has also noted that void-for-vagueness challenges became significantly more common after the Supreme Court relaxed its approach to legislative delegations. Private disparate-impact Title VII lawsuits are rare, likely because only back pay is available as a remedy. More generous remedies are available for Title VII disparate-treatment claims. The Equal Employment Opportunity Commission (EEOC) therefore has significant practical influence over what types of disparate-impact liability employers face.

[11] *See* 42 U.S.C. § 2000d *et seq*.

[12] *See* 5 U.S.C. §§ 551–559.

[13] *See id.* at § 553.

applies to disparate impact in all these guises, although the analysis looks somewhat different in each.[14]

I. BACKGROUND ON DISPARATE IMPACT

Disparate impact was born in the employment context, and though it has since spread to other areas of civil rights law, the legal and policy arguments for and against it have been most fully developed there.[15] Title VII of the Civil Rights Act prohibits employment discrimination based on race, sex, national origin, or religion. Its legislative history makes clear that Congress intended it only to apply to disparate treatment employment discrimination.[16] Notably, an Illinois hearing examiner had already interpreted Illinois's state fair employment law to prohibit employer use of standardized tests that had a racially disproportionate effect but were not intentionally discriminatory. Some members of Congress spoke on the floor about the importance of avoiding this result.[17]

Yet almost from the moment the Civil Rights Act became law, the Equal Employment Opportunity Commission (EEOC) promulgated rules interpreting Title VII as a disparate-impact statute.[18] Although the 1971 Supreme Court case *Griggs v. Duke Power*[19] does not use the term "disparate impact," it likewise interpreted Title VII to prohibit employment practices with a racially disproportionate impact, even if the employer did not intend to discriminate.[20] Later Supreme Court cases interpreted Title VII to cover disparate impact liability in sex discrimination cases. In 1991, Congress amended Title VII to cover disparate impact.[21] The Supreme Court has also interpreted the Fair Housing Act to cover disparate impact discrimination.[22]

Disparate impact has spread from employment into other areas of civil rights law. Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin by federal funding recipients.[23] In a 2001 case, *Alexander v. Sandoval*,[24] the Supreme Court held that

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[14] Another aside: the Supreme Court has interpreted the Age Discrimination in Employment Act (ADEA) to prohibit employment practices with a disparate impact based on age, but that the scope of ADEA disparate-impact liability is narrower than under Title VII. *See* Smith v. City of Jackson, 544 U.S. 228 (2005). Specifically, employment practices based on a reasonable factor other than age are permissible under the ADEA, and "reasonable" has been interpreted by the Supreme Court as easier for employers to meet than "necessity." 544 U.S. at 240–42. Because disparate-impact liability for age discrimination does not sweep as broadly as Title VI- or Title VII-based liability, it is outside the scope of this Article, though future authors might wish to consider nondelegation or major questions challenges to ADEA disparate impact.

[15] For a summary of the relevant legislative history, *see* Heriot, *supra* note 10 at 6–25.

[16] *Id.*

[17] The Illinois decision, *Myart v. Motorola*, is included in Title VII's legislative history at 110 CONG. REC. 5662 (1964).

[18] *See* Heriot, *supra* note 10 at 25–33 for a history of the EEOC's early disparate-impact rules.

[19] 401 U.S. 424 (1971).

[20] *See id.* A number of senators feared that Title VII might produce a similar result. *See* 110 CONG. REC. 5614–16 (statement of Sen. Ervin), 5999–6000 (statement of Sen. Smathers), 7012–13 (statement of Sen. Holland), 8447 (statement of Sen. Hill), 9024 (statement of Sen. Tower), 9025–26 (statement of Sen. Talmadge), 9599–9600 (statement of Sen. Fulbright), 9600 (statement of Sen. Ellender).

[21] *See* Heriot, *supra* note 10 at 83–103 for a summary of the legislative history. Briefly, the agreed-to language was thought by Republicans to establish a strict business-necessity defense, while many Democrats saw it as enacting a much more lenient one.

[22] *See* Tex. Dep't of Hous. and Cmty. Affs. v. The Inclusive Cmtys. Project, 576 U.S. 519 (2015).

[23] *See* 42 U.S.C. § 2000d.

[24] 532 U.S. 275 (2001).

Title VI itself reaches only disparate treatment.[25] But *Sandoval* explicitly left open whether agencies could issue disparate impact rules intended to enforce Title VI's prohibition on disparate treatment discrimination. Some federal agencies have since interpreted *Sandoval* as a green light to issue both formal and informal rules prohibiting a range of activities with disparate impacts. During the Obama administration, for example, Assistant Secretary for Civil Rights in Education Russlyn Ali told the media that "disparate impact is woven through all civil rights enforcement of this administration."[26] That administration issued Title VI disparate-impact guidance on topics ranging from school discipline[27] to technology[28] to gifted education.[29] Some of this guidance—notably the school discipline letter—was subsequently withdrawn by Trump officials but later revived (although in weakened form) by Biden officials.[30] The Biden administration has also pushed disparate impact in novel areas. It has issued an executive order and brought cases to further "environmental justice," or targeting pollution that has a disparate impact on racial and ethnic minorities.[31] The Federal Communications Commission (FCC) has also issued a rule that prohibits disparate impact in "digital discrimination," which has since been challenged by the Chamber of Commerce.[32] See U.S. Dep't of Educ. Office for Civil Rights & U.S. Dep't of Justice Civil Rights Div., Resource on Confronting Racial Discrimination in Student Discipline (May 2023), available at [https://perma.cc/QHR6-599U]

A. Disparate impact rules are problematic because they lead to quotas and give government virtually unlimited enforcement discretion.

1. Disparate impact leads to quotas and unequal treatment on the basis of race, yet the Supreme Court has never squarely held that it violates the Constitution's Equal Protection Clause.

Most lawyers and scholars who criticize disparate impact have focused on the tension between disparate-impact liability and the Constitution's guarantee of equal protection under the laws. In *Ricci v. DeStefano*,[33] the New Haven, Connecticut fire department used a standardized

[25] *See id.* at 29.

[26] Mary Ann Zehr, *Obama Administration Targets 'Disparate Impact' of Discipline*, EDUCATION WEEK (Oct. 7, 2010), https://www.edweek.org/leadership/obama-administration-targets-disparate-impact-of-discipline/2010/10 [https://perma.cc/58A7-YU2F].

[27] U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline (Jan. 8, 2014) (*rescinded* July 30, 2021), *available at* [https://perma.cc/7U47-C9HN].

[28] U.S. Dep't of Educ., Dear Colleague Letter from the Assistant Secretary (OCR) (Oct. 1, 2014) [https://perma.cc/5JN5-WENV].

[29] *Id*.

[30] *See* U.S. Dep't of Educ. Office for Civil Rights & U.S. Dep't of Justice Civil Rights Div., Resource on Confronting Racial Discrimination in Student Discipline (May 2023), available at [https://perma.cc/QHR6-599U]; *Race & School Discipline*, FEDSOC.ORG (Aug. 24, 2023), https://fedsoc.org/events/race-school-discipline (panelists debate and discuss how to interpret most recent version of discipline guidance).

[31] *See* Exec. Order No. 14,096, 88 FR 25251, Revitalizing Our Nation's Commitment to Environmental Justice for All (Apr. 21, 2023); Lisa Friedman, *Biden to Create White House of Environmental Justice*, N.Y. TIMES, April 21, 2023, https://www.nytimes.com/2023/04/21/climate/biden-environmental-justice.html [https://perma.cc/RZ24-ZDFE] (giving additional background and context for the EO); Complaint, State of Louisiana v. EPA, No. 2:23-cv-00692 (W.D. La. May 24, 2023).

[32] *See* Petition for Review, Chamber of Commerce v. FCC, (Jan 30, 2024) (No. 24-60048), *available at* https://www.uschamber.com/assets/documents/Filestamped-CA5-Petition-USCC_2024-01-31-171248_ehaq.pdf [https://perma.cc/7UZK-DT5K].

[33] 557 U.S. 557 (2009).

test to determine firefighter promotions. The City used various standardized validation procedures to ensure the test assessed only job-related knowledge and skills and that the questions were not contaminated by racial bias.[34] Despite these efforts, the exam yielded a disproportionate number of white candidates for promotion.[35] Because New Haven was concerned about disparate impact lawsuits from black firefighters, it threw out the test results.[36] A group of white firefighters then brought a disparate treatment suit challenging the decision to abandon the test.[37] The Supreme Court ruled for the firefighters,[38] but the majority did not directly address the catch-22 into which employment discrimination law put the New Haven Fire Department. Concurring, however, Justice Scalia said, "I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[39]

Justice Scalia summarized what he termed "the war between disparate impact and equal protection" as follows: "The difficulty is this: Whether or not Title VII's disparate impact provisions forbid 'remedial' race-based actions when a disparate impact violation would not otherwise result—the question resolved by the Court today—it is clear that Title VII not only permits but affirmatively requires such actions when a disparate impact violation would otherwise result. . . . But if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—e.g. employers . . . discriminate on the basis of race. . . . Title VII's disparate-impact provisions place a racial thumb on the scale, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory."[40]

Although *Ricci* was decided 13 years ago, the Court has never struck down a disparate impact statute or rule on equal protection grounds. It heard one case holding that disparate impact claims are cognizable under the Fair Housing Act.[41] But Justice Kennedy's majority opinion ducks the constitutional issue by finding that the Fair Housing Act limits disparate impact "in key respects that avoid the serious constitutional questions," notably by giving "housing authorities and private developers leeway to state and explain the valid interest served by their policies."[42]

Why no constitutional challenge? Low enforcement of disparate impact does not seem to be the answer; as is discussed below, federal agencies have been active in the intervening years in promulgating disparate impact rules. One possible explanation may be the particular difficulties equal protection plaintiffs face in proving standing or surviving challenges under other

[34] *See id.* at 570.
[35] *See id.* at 562.
[36] *See id.*
[37] *See id.* at 562–63.
[38] *See id.* at 563.
[39] *Id.* at 594 (Scalia, J., concurring).
[40] *Id.*
[41] *See* Tex. Dep't of Hous. & Cmty. Affs., 576 U.S. 519 (2015).
[42] *Id.* at 521.

justiciability doctrines. Under these circumstances, new approaches—including nondelegation and major questions challenges to disparate impact rules—may be appropriate complementary litigation strategies.

2. Disparate impact has been enforced by federal agencies in an arbitrary and likely politically and ideologically skewed manner.

Title VII disparate impact rules make virtually any employer selection practice presumptively illegal. Yet the EEOC has not sued every employer in the country and, given finite budget and staff, could not even if it wanted to. So in practice, the EEOC must choose which disparate impact violations to pursue and which to ignore. Its choices over the last few decades appear to have been driven by the mostly progressive EEOC staff's values and priorities, rather than by any intelligible principle found in Title VII's text. In 2012, for example, the EEOC issued an exhaustive "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act."[43] Briefly, it noted the adverse effect of criminal background checks on African Americans and strongly advised employers against background checks in nearly any context, including even situations (as with child or elder care providers) where state or local law requires them.[44] The impetus for this guidance seemed to be the "Ban the Box" movement to discourage criminal background checks in employment for mostly non-racial reasons.[45] By contrast, because African Americans were less likely to get the COVID-19 vaccine than whites, employer vaccine mandates had a disparate impact on African Americans. Yet the EEOC never issued interpretative guidance or conducted any disparate impact investigations into vaccine mandates. The most commonly offered explanation is political; vaccines are more popular with Democrats than with Republicans, and at the time, the EEOC had a Democratic majority, which ignored the disparate impact of vaccine requirements because it was politically and ideologically inconvenient.

Title VI disparate impact enforcement seems similarly driven by partisan or ideological priorities than by any intelligible principle enshrined in the statute. Stopping the school to prison pipeline—or school disciplinary policies that channel students into court—was a priority of the Obama administration.[46] Although the students who get pulled into juvenile court under these policies are disproportionately Black or Hispanic, there is nothing inherently racial about this phenomenon; youth of all races respond to peer effects. Disparate impact guidance was a convenient tool to go after what administration officials saw as a genuine injustice. But it is far

[43] U.S. Equal Employment Opportunity Commission, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions [https://perma.cc/WH6G-DQRD].

[44] *See id.*

[45] Roy Maurer, *'Ban the Box' Turns 20: What Employers Need to Know*, SHRM (Nov. 12, 2018), https://www.shrm.org/topics-tools/news/talent-acquisition/ban-box-turns-20-employers-need-to-know [https://perma.cc/VN23-GZXK].

[46] *See* Press Release, *Attorney General Eric Holder & Secretary of Education Arne Duncan Announce Effort to Respond to School-to-Prison Pipeline by Supporting Good Discipline Practices* (July 21, 2011), https://www.justice.gov/opa/pr/attorney-general-holder-secretary-duncan-announce-effort-respond-school-prison-pipeline [https://perma.cc/5NWY-ERXE].

from clear that it was really a discrimination-fueled injustice.[47] COVID-19-driven public school closures are widely thought to have had a disparate impact on minority students because their families on average had fewer resources to pay for alternatives like private school or "learning pods."[48] But the Biden administration never chose to investigate extended school closures or offer advisory guidance on the civil rights implications of these closures. Again, the explanation seems political.

The usual rejoinders to claims that disparate impact makes everything presumptively illegal are that (1) the business necessity defense (or the educational necessity defense and its other cousins outside employment) and (2) the four-fifths rule significantly limits disparate impact's sprawl.[49] As for the necessity defenses, disagreement remains on how strong they are. Michael Carvin, a prominent attorney who served in the Civil Rights Division under President Reagan, has written that the business necessity defense is met so long as the practice is "connected with" or "related to" the job.[50] That standard would allow virtually any employment practice that has some business-related purpose and is not a pretext for discrimination. On the other hand, William and Mary Professor Susan Grover argues that "an employer must prove that the goal it seeks to achieve through the practice is crucial to its continued viability and, in turn, that the practice selected is crucial to the achievement of that goal."[51] She added that "continued viability" means that "relinquishing the discriminatory practice will compel the employer to cut back its business, resulting in employee layoffs."[52] Elsewhere, Professor Andrew Spiropoulos tried to discern an elusive "golden mean" among different interpretations of business necessity and concluded that Title VII establishes "different standards for different types of jobs. . . . A more flexible standard of business necessity should be applied to qualifications for positions that, because of their difficulty, great responsibility, or special risks to the public, require skills or intangible qualities that cannot be measured empirically."[53] But whatever the best of those competing interpretations, the practical result has been that many employers take the most risk-averse course and act as though business necessity gives them no real protection.

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[47] The studies the administration cited to argue that discipline disparities are caused by discrimination are highly questionable. *See* Gail Heriot & Alison Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in Student Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 TEX. REV. L. & POL. 473 (2018).

[48] Derek Thompson, *School Closures Were a Failed Policy*, THE ATLANTIC (Oct. 26, 2022) https://www.theatlantic.com/newsletters/archive/2022/10/pandemic-school-closures-americas-learning-loss/671868/ [https://perma.cc/UBF7-PV24].

[49] A third potential rejoinder is that disparate impact only applies to practices that adversely affect historically marginalized groups, such as racial minorities or women. *See* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505. But Title V, Title VII, and the Fair Housing Act's text applies to all discrimination of the enumerated types, not just discrimination against disadvantaged groups. The federal courts have repeatedly interpreted antidiscrimination statutes this way. *See, e.g.*, McDonald v. Santa Fe Trail, 427 U.S. 273 (1976) (interpreting Title VII and 42 U.S.C. § 1981 to cover discrimination against whites). If Congress did pass a disparate-impact statute that applies to minorities and women, it would lessen the nondelegation problem. But such a statute would have to pass at least intermediate scrutiny (for disparate impact on women) or strict scrutiny (for disparate impact on men). To solve a nondelegation problem, Congress would be creating a bigger equal protection problem.

[50] Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1158 (1993).

[51] Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 430 (1996).

[52] *Id.* at 387.

[53] Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479 (1996).

Agencies that enforce disparate-impact rules also have generally not seen necessity as much of a constraint. Shortly after issuing its guidance on criminal background checks, the EEOC opened up extensive investigations into G4S, a company that contracts security guards out to private businesses. Because security guards carry guns, and giving individuals with criminal records guns creates opportunities for violent misconduct, G4S would seem to have had an especially strong business-necessity defense.[54] That the EEOC did not see it that way suggests it interprets the business-necessity defense narrowly. A few years later, the Education Department issued guidance on school discipline. Under a broad interpretation of educational necessity, at least some school districts investigated by the Office for Civil Rights (OCR) should have been able to show that their discipline practices were justified by the need to keep basic order at school. Yet records of investigations I uncovered through a Freedom of Information Act request indicate that this educational-necessity requirement failed to stop often protracted OCR investigations.

Disparate impact's supporters sometimes argue that its breadth is not a problem because of the atextual four-fifths rule used by some agencies, including the EEOC. While not found in the text of any civil rights statute, under the Uniform Guidelines on Employee Selection Guidelines, if a job qualification leads to a "selection rate for any race, sex, or ethnic group" that is "greater than four-fifths" of the "rate for the group with the highest rate" it will not be regarded as evidence of adverse impact. In general, an agency's choice to adopt a limiting construction of a statute does not cure an unlawful delegation of legislative power.[55] The four-fifths rule is further not much of a practical limitation, because employers won't often know the adverse effects of a particular job qualification until it is actually used. Also, in many contexts, selection rates of less than four-fifths will be the norm and not the exception.[56] So the four-fifths rule is not much of a limitation either.

B. Disparate Impact as a Nondelegation Violation

1. Because disparate impact is virtually an unlimited grant of power to agencies, it is likely a nondelegation violation.

The nondelegation doctrine requires Congress, when delegating its legislative power to the executive branch, to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[57] Until recently, nondelegation decisions have been rare – the Supreme Court had handed down just two, both in 1935. The first, *A.L.A. Schechter Poultry v. United States*,[58] addressed a portion of the National Industry Recovery Act, in which Congress delegated authority to the President to prescribe "codes of competition" for the purpose of "rehabilitation of industry and industrial recovery."[59] The Court rejected this broad delegation because it "does not undertake to prescribe rules of conduct to be applied to particular states of

[54] *See* Testimony of Julie Payne, Senior Vice President and Counsel, G4S Solutions, in United States Commission on Civil Rights, Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity's Conviction Records Policy, 54–56 (2013).

[55] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.").

[56] Heriot, *supra* note 10 at 38-40.

[57] J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

[58] 295 U.S. 495 (1935).

[59] *Id.* at 496.

fact determined by appropriate administrative procedure."[60] In a concurring opinion, Justice Cardozo called this delegation "unconfined and vagrant" and said that the codes of competition acted as a "roving commission to inquire into evils and upon discovery correct them."[61] A few months later, the Court decided *Panama Refining Co. v. Ryan*,[62] about a Code of Fair Competition for the Petroleum Industry, one section of which gave the President "unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."[63] But the Supreme Court has not found a violation of the nondelegation doctrine since then. Law professor Cass Sunstein has quipped that the doctrine had had one good year and 211 bad ones.[64]

Yet some recent decisions suggest that the nondelegation doctrine's fortunes may soon reverse. In June 2019, in *Gundy v. United States*,[65] all justices agreed that the Sex Offender Registration and Notification Act would present a nondelegation question if read as Gundy read it; the plurality upheld it only because they thought a narrower reading was more correct.[66] Also, four justices (Alito, Thomas, Gorsuch, and Roberts) suggested their willingness to revisit the nondelegation doctrine, and Justice Gorsuch wrote a dissent criticizing the "intelligible principle" test as having "no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."[67] It "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional," he wrote.[68]

Although uncertainty therefore remains about the nondelegation doctrine's current status, challenges to agencies' disparate-impact rules might be good vehicles for revitalizing it. As discussed above, disparate impact as currently interpreted gives the agencies that enforce it basically unlimited power to choose which violations to pursue. It resembles the "unconfined and vagrant" "roving commission" the Supreme Court rejected in the canonical nondelegation cases. In none of its guises does disparate impact give "rules of conduct" that can be applied to "particular states of fact determined by appropriate administrative procedure." Nor, under the later cases, is there any "intelligible principle" guiding agencies' enforcement decisions.

Disparate impact is, as far as I am aware, unique in that it commonly subverts the core principle of its enabling statute. As in *Ricci*, sometimes concerns about disparate-impact liability drive employers to disparate treatment. In the Depression-era cases, the invalidated statutory sections were broad grants of power for the general purposes of industrial recovery. Imagine if President Roosevelt promulgated a code of competition under the National Industrial Recovery Act that was widely understood to actively undermine industrial recovery. Such a rule should have posed even more serious delegation problems than President Roosevelt's actual rules challenged during this era.

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[60] *Id.* at 498.
[61] *Id.* at 551.
[62] 293 U.S. 388 (1935).
[63] *Id.* at 415.
[64] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). To be fair, in this same piece, Professor Sunstein acknowledged that courts had sometimes used nondelegation as an avoidance canon in the intervening years.
[65] 139 S. Ct. 2116 (2019).
[66] *See id.* at 2126 ("This Court has long refused to construe words 'in a vacuum,' as Gundy attempts.").
[67] *Id.* at 2139 (Gorsuch, J., dissenting).
[68] *Id.* at 2140.

But even if the Court rejects nondelegation claims against disparate impact, nondelegation's close cousin, the major questions doctrine, might present opportunities to challenge particular disparate-impact rules. The next part of this Article discusses some such rules.

2. Some disparate-impact rules may qualify as violations of the major questions doctrine.

"When one legal doctrine becomes unavailable to do its intended work," Justice Gorsuch has written, "the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. . . . We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names. Consider, for example, the 'major questions' doctrine."[69]

A major question is present when an agency purports to discover an "unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant"[70] statute. When a statute authorizes a federal agency to act, an important interpretive question is: did Congress intend to confer that authority on that agency?[71] In some such cases, the "history and the breadth of the authority" that the agency has asserted and the assertion's "economic and political significance" provide a "reason to hesitate before concluding that Congress" meant to confer such authority.[72] Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle devices."[73] Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency may add pages and change the plot line."[74] Or, as the Supreme Court once colorfully put it, Congress rarely hides elephants in mouseholes.[75] If an agency intrudes into an area that is generally the particular domain of state law, that is another sign a major question is present.[76] Courts may also consider the consistency of an agency's views when they weigh the persuasiveness of any interpretation it proffers in litigation.[77]

Although the major questions doctrine has roots in cases going back decades, or by some accounts even centuries,[78] the last two years have been its finest moments at the Supreme Court, with four different successful major questions challenges to federal rules.[79] As other pieces in this Symposium discuss, what exactly the major questions doctrine is (is it even a doctrine? Maybe

[69] *Id.* at 2141.
[70] West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).
[71] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).
[72] *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60).
[73] *Id.* at 2609, (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).
[74] *Id.*, (quoting E. Gellhorn & P. Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999)).
[75] *Whitman*, 531 U.S. at 468.
[76] *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).
[77] Biden v. Nebraska, 143 S. Ct. 2355, 2389 (2023) (Barrett, J., concurring).
[78] Louis J. Capozzi, III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO STATE L.J. 191 (2023).
[79] *See* Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485 (2021) (eviction moratorium); NFIB v. OSHA, 142 S. Ct. 661 (2022) (vaccine mandate); West Virginia v. EPA, 142 S. Ct. 2587 (2022) (Clean Power Plan); Biden v. Nebraska, 143 S. Ct. 2355 (2023) (student loan relief).

it's a canon?[80]) remains an open question, as does how broadly it applies. Notably, three of the four most recent major cases struck down expansive rules connected to combating COVID-19, and it remains to be seen whether the Court is also willing to identify major questions in cases unrelated to COVID.

What about the relationship between major questions and nondelegation cases? Again, because of both doctrines' recent revivals, it is less than crystal clear, and this Article can only offer partial solutions. But the cases indicate that the nondelegation doctrine applies to a delegation of authority that is exceedingly broad and unguided by meaningful standards on its face. By contrast, the major questions cases feature statutes that are facially clear and that pose no apparent delegation problems, but that the agency has interpreted in a novel manner going beyond the statute's previously understood meaning. In this context, disparate impact on its face is standardless enough that it can be a nondelegation violation. But some specific rules based on disparate impact may also be major questions violations.

Even under less robust formulations of the doctrine, some recent disparate-impact rules look like good candidates for major questions challenges. One federal district court has already struck down an Environmental Protection Agency disparate-impact rule as a major question, finding that "imposing disparate-impact liability to effectuate § 601 [Title VI's core prohibition on race, color, and national origin discrimination] transforms the statute into something radically different."[81] Because environmental disparate impact is "an extraordinary case of economic and political significance" and because the EPA's construction of Title VI "invade[s] the purview of the State's domain," this rule constituted a major question.[82] Similarly, a recent Chamber of Commerce suit challenges a new Federal Communications Commission rule on disparate impact in telecommunications as a major question. Appended to their brief petition are dissenting statements from FCC commissioners that lay out the major questions arguments against this rule.[83]

The EEOC's criminal background checks guidance from 2012 may be another example. As discussed briefly above and more fully in other sources, Title VII's legislative history suggests that Congress in 1964 did not intend to confer disparate-impact authority on the EEOC, and it is at best ambiguous whether the Civil Rights Act of 1991 conferred the broad disparate impact authority asserted by the EEOC. The legislative history is also silent on the more specific issue of disparate-impact rules governing criminal background checks. Congress's withholding rulemaking authority was another signal that Congress intended to limit the agency's discretion to expand Title VII's core prohibition on employment discrimination. The economic and political significance of essentially prohibiting criminal background checks by every employer in the

[80] *See* Biden v. Nebraska, 143 S. Ct. at 2376 (Barrett, J., concurring) (summarizing the "ongoing debate" about the "major questions doctrine" and concluding it is best understood as "a tool for discerning—not departing from—the text's most natural interpretation.").

[81] Louisiana v. EPA, 2:23-CV-00692, 65 (W.D. La. 2024).

[82] *Id.* at 90.

[83] *See* Fed. Comms. Comm'n, Report and Order and Further Notice of Proposed Rulemaking (Nov. 20, 2023) at 219 (dissenting statement of Commissioner Brendan Carr), 231 (dissenting statement of Commissioner Nathan Simington), https://docs.fcc.gov/public/attachments/FCC-23-100A1.pdf [https://perma.cc/7PTK-36XC].

country is also vast.[84] The guidance also intruded on a traditional area of state authority by claiming that it preempted state or local laws that require certain employers to conduct criminal background checks.

Some major questions factors may cut the other way, although it is far from clear that those should doom any challenge. History and consistency are potential problems. The EEOC almost immediately asserted authority over disparate-impact employment discrimination. But the EEOC officials who did so were bracingly candid that they didn't think Title VII supported their actions: "Creative administration converted a powerless agency operating under an apparently weak statute into a major force for the elimination of employment discrimination," Alfred Blumrosen, the EEOC's first chief of conciliations, once observed in 1971.[85] This forthrightness about not actually following the law suggests that this history should not weigh heavily in its favor. Some earlier guidance documents from 1987 and 1990 also suggest a consistent pattern of interpreting Title VII to reach disparate impacts of criminal background checks.[86] But those guidance statements were more limited: they did not claim Title VII preempted state and local criminal background check requirements, for example. Coupled with the earlier forthrightness about disparate-impact rules not being authorized by Title VII, it is far from obvious that these earlier guidance documents should authorize EEOC's broad assertion of authority here.

While the Supreme Court's opinion in *Bostock v. Clayton County*[87] also arguably cuts against any major questions challenge to Title VII, *Bostock* does not suggest that Title VII is so broad that agencies can interpret it to create violations of its central prohibition. *Bostock* held that Title VII's prohibition on sex discrimination extends to employment discrimination based on sexual orientation and gender identity.[88] The employers argued in their defense that it would be extraordinary to extend a statute understood to apply to male versus female discrimination to sexual orientation and gender identity discrimination.[89] Writing for the *Bostock* majority, Justice Gorsuch quoted the no-elephants-in-mouseholes line and agreed that *Bostock*'s holding was "an elephant. But where's the mousehole?" he asked.[90] He noted that Title VII is written in "starkly

[84] The EEOC Guidance itself cites a study that says that 92% of employers used criminal background checks in making some or all employment decisions. An anecdote: as a junior counsel at the Civil Rights Commission, I worked on a report about this Guidance. An acquaintance of mine, who worked for a state based legal reform group in a deep blue state, was aware of my background and views on this topic and sent me a "ban the box" bill from her state to get my views on it. Although she expected me to find it enraging, I had almost the opposite reaction. While I still would have opposed it were I a legislator in that state, it was a much better crafted document than the EEOC Guidance. It actually attempted to strike a balance between helping ex-offenders who would benefit from a second chance and employers' interest in a safe workplace. It contained explicit exceptions for prospective employees who had committed particularly serious crimes and for employers who work with particularly vulnerable populations. The contrast between this bill and the EEOC's guidance shows how sweeping the EEOC's assertion of authority in this Guidance was.

[85] ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 57 (1971), cited in Heriot, *supra* note 10, at 9; *see also* Heriot, *supra* note 10, at 25–33 for a history of how the EEOC stretched its legal authority in those early days to reach disparate impact.

[86] EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (February 4, 1987); *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII*, U.S. Equal Emp't Opportunity Comm'n (Sept. 7, 1990), https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions [https://perma.cc/UVS5-RHEB].

[87] 590 U.S. 644 (2020).

[88] *See id.*

[89] *See id.* at 655.

[90] *Id.* at 680.

broad terms. It has repeatedly produced unexpected applications. . . . This elephant has never been hidden in a mousehole; it has been standing before us all along."[91] So Title VII is broad. But, as discussed above, reading Title VII broadly enough to encompass disparate impact leads to disparate treatment violations. The EEOC Criminal Background Guidance[92] appears to be no exception. Justice Gorsuch's concurrence in *Students for Fair Admissions v. President and Fellows of Harvard College*[93] also emphasizes that Title VI's prohibition on discrimination forbids all discrimination, even discrimination that served a university's purportedly benign interest in student body diversity[94]. Title VII may be broad, but it is not limitless.

The Department of Education's 2014 Title VI guidance on disparate impact in student discipline may be another example of a guidance statement that addressed a major question. Title VI is not a disparate-impact statute, although it authorizes disparate-impact rules if those rules are congruent and proportional to correcting disparate-treatment violations.[95] Because Title VI is not a disparate-impact statute, the legislative history says almost nothing about specific applications of disparate impact. Student discipline also had traditionally been considered under the authority of state, local, and school authorities. All this suggests that the guidance is the kind of transformative expansion of regulatory authority that the major questions doctrine prohibits. While the economic impact of an educational policy is inherently difficult to calculate, it is politically significant. Several advocacy groups have proposed reforms, and federal and state bills on the topic are under consideration across the country. It is implausible that Congress envisioned itself settling this contentious debate in 1964.

The future of school discipline regulation is uncertain. The Department of Education issued a Notice of Proposed Rulemaking that conveyed intent to revive the 2014 guidance but codified as a formal rule. Rather than issue that formal rule, it eventually issued a guidance document that states that the Department of Education will use disparate impact only to identify school districts that are engaged in disparate-treatment discrimination. But some critics charge that the Department is still using disparate impact almost exactly as broadly as before.[96] Whatever the proposed rule's status, should the 2014 guidance come back in some form, attorneys challenging it should consider adding nondelegation and major questions claims alongside their equal protection arguments.

CONCLUSION

Although the boundaries of the recently revitalized nondelegation and major questions doctrines remain uncertain, disparate impact appears to be in the heartland of the conduct they prohibit. The nondelegation and major questions doctrines protect individual liberty. By making huge swaths of private conduct presumptively illegal, disparate impact as currently understood have significantly infringed individual liberty. Most critics of disparate impact, following Justice

[91] *Id.*
[92] *See supra* note 30.
[93] 600 U.S. 181 (2023).
[94] *Students for Fair Admissions v. Harvard*, 143 S. Ct. 2141, 2216 (2023.)
[95] Heriot & Somin, *supra* note 27, at 530–58.
[96] *See supra* note 21.

Scalia's famous concurrence in *Ricci*, have focused on equal protection as a strategy for stopping disparate impact. Strong as those claims are, more should consider adding nondelegation and major questions arguments as additional weapons in our arsenal.