TITLE VII AT FORTY: A BRIEF LOOK AT THE BIRTH, DEATH, AND RESURRECTION OF THE DISPARATE IMPACT THEORY OF DISCRIMINATION[φ]

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I. INTRODUCTION

The year 2004 witnessed the anniversaries of two major milestones in the ongoing effort to make equality a reality in this nation. First, the year 2004 marks the fiftieth anniversary of the 1954 decision of the Supreme Court in *Brown v. Board of Education*.[1] In *Brown*, the Court, in rejecting the "separate but equal" theory of equality, held that segregated schools are inherently unequal.[2] The "separate but equal" theory of equality had been the constitutional theory of equality since 1896, when the Court decided *Plessy v. Ferguson*.[3] The conventional wisdom is that *Brown* adopted a "color-blind" (and sex-blind) theory of equality.[4] In a later case, *Brown II*, the Court ordered the desegregation of public schools "with all deliberate speed."[5]

φ This article is based on a book that the author is writing on the landmark civil rights case of *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). *Griggs* established the doctrinal foundations for the disparate impact theory.

* Professor of Law, Vanderbilt University Law School. These comments are based, in substantial part, on my having been actively involved in the development of employment discrimination law, first as a practitioner and then a scholar, almost from the effective date of Title VII. In the interest of full disclosure, I point out that I had a major role in leading and shaping the NAACP Legal Defense and Educational Fund's litigation campaign that led to the *Griggs* decision.

1. 347 U.S. 483 (1954).
2. *Id.* at 495.
3. 163 U.S. 537 (1896).
4. The genesis of the color-blind theory of equality is deemed to be Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
5. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

The second milestone followed in the wake of the *Brown* decisions. After the *Brown* decisions, civil rights activities, seeking to eliminate racial segregation in education, employment, housing, voting, places of public accommodations, and political and civil rights, intensified. These civil rights activities included sit-ins, boycotts, freedom rides, and the 1963 Civil Rights March on Washington that focused national attention on the pervasiveness of racial discrimination in the United States.[6] These post-*Brown* civil rights demonstrations were the major catalyst that fueled federal legislative and administrative action, ultimately leading to the enactment of the Civil Rights Act of 1964.[7]

The year 2004 also marks the fortieth anniversary of the enactment of the Civil Rights Act of 1964. The Civil Rights Act of 1964 is the most important piece of civil rights legislation that Congress ever enacted to implement our national commitment to equality in a range of activities.[8]

Numerous symposia, articles, books, celebrations and commemorations have been undertaken in recognition of the fiftieth anniversary of *Brown*. However, these activities and events have overshadowed the fortieth anniversary of the Civil Rights Act of 1964.[9] Of the eleven titles in the Civil Rights Act of 1964, [10] Title VII has emerged as having the most

6. *See, e.g.*, JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-1965 (1987). This book and its companion six-part television series chronicle the history of the civil rights movement between the Court's 1954 decision in *Brown* and the passage of the Voting Rights Act of 1965.

7. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). For a powerful narrative about the influence of international relations and foreign affairs on civil rights polices in the United States preceding the Civil Rights Act, see MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

8. *See* Hubert H. Humphrey, *Preface to the First Decade of Title VII of the Civil Rights Act: Past Developments and Future Trends*, 20 ST. LOUIS U. L.J. 219, 219 (1976).

9. The Equal Employment Opportunity Commission, the federal agency established by Congress to enforce Title VII, in cooperation with the American Bar Association/Equal Employment Opportunity Committee, the District of Columbia Bar/Labor & Employment Law Section, the Georgetown University Law Center, and the Lawyers' Committee for Civil Rights Under Law, conducted a program in Washington, D.C., on June 22-23 and June 30, 2004 to commemorate the fortieth anniversary of Title VII. *See* Celebrating the 40th Anniversary of Title VII *at* www.eeoc.gov/abouteeoc/40th/panel (last visited on Apr. 26, 2005).

10. Of the eleven titles, the most consequential are Titles II, VI, and VII. Title II prohibits discrimination in places of public accommodations. In Title VI, Congress made broad use of its spending powers to prohibit racial discrimination in any program or activity receiving federal financial assistance. Title VII prohibits discrimination in employment by covered public and private entities because of race, color, national origin, sex, and religion. Title III covers discrimination in public facilities; Title IV covers desegregation of public schools; Title V amends some of the previously enacted civil rights laws; Title VIII covers voter registration and voting statistics; Title IX provides for the intervention in civil rights cases by the Attorney General of the United States; Title X establishes the Community Relations Service to assist communities and persons on matters of discrimina-

significant impact in helping to shape the legal and policy discourse on the meaning of equality.[11] Title VII prohibits covered employers, labor organizations, and employment agencies from discriminating against applicants and employees because of their race, color, national origin, sex, or religion.[12] Congress established the Equal Employment Opportunity Commission (EEOC) to administratively enforce Title VII.[13] As originally enacted, Title VII was deemed to be a "poor enfeebled thing"[14] because Congress initially gave the Equal Employment Opportunity Commission only the authority to seek enforcement by "informal methods of conference, conciliation, and persuasion"[15] but not the authority to compel compliance.[16]

During its first decade of enforcement, primarily through private public interest efforts, Title VII was transformed from a "poor enfeebled thing" into a powerful engine for social change by equalizing employment opportunities for African-Americans, women, Latinos/as and Asian-Americans.[17] Equally important is that the doctrinal developments during the first decade of enforcement profoundly reshaped the discourse on the meaning of equality. Aside from *Brown v. Board of Education*, the single most influential civil rights case during the past forty years that has profoundly shaped, and continues to shape, civil rights jurisprudence and the discourse on equality is *Griggs v. Duke Power Co*.[18]

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tory practices based on race, color, or national origin; and Title XI covers some miscellaneous matters.

11. ROBERT BELTON, ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 4 (2004).

12. 42 U.S.C. §§ 2000e-2(a)(1) to (c) (3) (2000).

13. *See* 42 U.S.C. §§ 2000e-4 to 2000e-5 (2000).

14. MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 205 (1966).

15. 42 U.S.C. § 2000e-5(b) (2000).

16. Pursuant to the 1972 amendments to Title VII, Congress finally gave the EEOC the authority to seek judicial enforcement. Pub. L. No. 92-261, 86 Stat. 107 (1972) (codified as amended at 42 U.S.C. § 2000e-6(c) (2000)). For an account of the legislative history of the Civil Rights Act of 1972, see Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L. J. 1 (1977).

17. *See* Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 924 (1978); Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225, 227 (1976)

18. 401 U.S. 424 (1971). *See* Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co.*, and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62 (1972) ("*Griggs* is in the tradition of the great cases of constitutional and tort law which announce and apply fundamental legal principles."); HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 383 (1990) (asserting that the "Supreme Court's *Griggs* decision burst like a bombshell in 1971").

In *Griggs*, the Supreme Court embraced a fundamentally new theory of discrimination—the disparate impact theory of discrimination. The disparate impact theory holds that practices and procedures that are facially neutral in their treatment of different groups, but in fact fall more harshly on one group, e.g., blacks or women, than another, e.g. whites or males, and cannot be justified by business necessity, are unlawful employment practices under Title VII.[19] An important feature of the disparate impact theory is that proof of discriminatory intent is not required. The disparate impact theory thus combats not intentional, obviously discriminatory policies, but a type of discrimination in which facially neutral practices are employed to unnecessarily and disparately exclude protected groups from employment opportunities.[20] The *Griggs* disparate impact theory, as later codified by Congress in the Civil Rights Act of 1991,[21] put to rest the view that evidence supporting a finding of intentional discrimination is the only way to establish a violation under civil rights statutes.

19. After more than a decade of judicial developments under Title VII, the Supreme Court, in *International Brotherhood of Teamsters v. United States*, summarized the two basic theories of discrimination on which much of the jurisprudence of employment discrimination law and civil rights law is based—disparate treatment and disparate impact:

> 'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, sex, religion, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp*., 429 U.S. 252, 265-66. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. *See, e.g.*, 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey) ("What the bill does . . . is simply make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States").
>
> Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory.

431 U.S. 324, 335 n.15 (1977) (citation omitted).

See also Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (The Supreme Court observed that it "has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact.").

20. In extending the disparate impact theory to subjective criteria that have a disparate impact on members of classes protected under Title VII, the Court observed in *Watson v. Fort Worth Bank & Trust*, that "even if one assumed that [discretionary subjective decision-making] can be adequately policed through disparate treatment analysis, the problem of subconscious [racial] stereotypes and prejudices would remain." 487 U.S. 977, 990 (1988).

21. 42 U.S.C. § 2000e-2(k) (2000).

The story of the campaign that led to *Brown* and its influence in shaping the discourse on civil rights is widely known.[22] Much has been written about *Griggs*, but what is not so well known is that *Griggs* was the result of a legal campaign that "was almost on par with the campaign that won *Brown*."[23] Both of these campaigns were conducted by the NAACP Legal Defense and Education Fund, Inc. ("Legal Defense Fund" or "Fund"). The Legal Defense Fund is considered to be the first, and one of the most successful, public interest law firms in the history of this nation.[24] The fortieth anniversary of Title VII is thus an appropriate occasion on which to discuss, however briefly, the history of the *Griggs* decision by identifying the genesis (or birth) of the disparate impact theory; to look at its subsequent dismantling (or death); to examine its revival (or rebirth) in the Civil Rights Act of 1991; and to comment upon its impact and future.

II. THE BIRTH OF THE *GRIGGS* DISPARATE IMPACT THEORY

Griggs did not just happen. Nor was *Griggs*, as some have argued, the product of the EEOC's effort,[25] or a "judicially created doctrine" that might have had its genesis solely in constitutional law.[26] On this fortieth anniversary of Title VII, the time is long overdue to begin to set the record straight on the origins of the disparate impact theory.

22. The most definitive narrative of the history and legal strategies that led to the *Brown* story is RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976) (providing a view of the human and legal drama in the years before 1954, and the step-by-step process whereby the "separate-but-equal doctrine" could be successfully challenged). *See also* MARK TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987) (presenting another view of the story of the NAACP's legal campaign against segregated schools).

23. JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT THE CIVIL RIGHTS REVOLUTION 412 (1994).

24. *See* Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961, 282 (1994).

25. *See, e.g.*, Lino A. Graglia, *Lessons From the Ludicrous: How Employment Laws Are Destroying the American Workplace*, 2 TEX. REV. L. & POL. 129, 132 (1997) (book review).

26. *See* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1506 n.6, 1507 n.9 (2004) (claiming that "[t]he Supreme Court invented [the disparate impact theory] for Title VII cases"). If the Supreme Court "invented" the disparate impact theory for Title VII, then it seems to logically follow that the Supreme Court "invented" the disparate treatment theory for Title VII and the "purposeful discrimination" standard for equal protection clause claims. I doubt that the "inventionist" theorists would argue that the Court invented the purposeful discrimination theory. In *Washington v. Davis*, 426 U.S. 229 (1976), the Court held that a plaintiff must prove purposeful discrimination to establish a violation of the Equal Protection Clause. The term "purposeful discrimination" is not used in the Equal Protection Clause, and neither does the term "disparate impact" appear in Title VII prior to 1991.

Griggs, like *Brown*, was the result of a litigation campaign initiated by the NAACP Legal Defense Fund. Jack Greenberg, who, in 1961, succeeded Thurgood Marshall as the Director-Counsel of the Legal Defense Fund, made the decision to initiate a litigation campaign to enforce Title VII in 1964, shortly after President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law.[27] Unlike other titles of the Civil Rights Act, which went into effect on July 2, 1964, Title VII did not become effective until one year later on July 2, 1965.[28] The purpose of the one-year delay was to provide a grace period for those subject to its requirements, so they would have the opportunity to eliminate any discriminatory policies and practices that might have existed before Title VII became effective. The initial phase of the Fund's employment discrimination litigation campaign involved a group of students, community workers, and Fund staff members. These individuals worked with established organizations, such as the NAACP, to visit black churches, black businesses, and black communities to inform blacks of their rights under Title VII and assist them in filing charges with the EEOC. The initial phase of the campaign was very successful because by the end of 1965, the Fund had been instrumental in assisting blacks in filing nearly a thousand charges of employment discrimination with the EEOC.[29]

A second phase of the litigation campaign, which overlapped with the first phase, involved putting together the Fund's litigation team. Greenberg assigned several attorneys who were with the Fund before Title VII became effective as the initial members of the litigation team. I joined the Legal Defense Fund in December 1965, about six months after I had graduated from law school and less than six months after Title VII became effective. In March 1966, Greenberg assigned to me the major responsibility of leading the Fund's nation-wide employment discrimination litigation campaign.[30] Gabrielle (Gaby) Kirk McDonald, who had graduated first in her law class at Howard University Law School, joined the employment litigation team after she became a Fund attorney in 1967.[31] Gaby and I were the Fund's principal full-time attorneys on the team, but other Fund attorneys also served as counsel on some of the employment discrimination cases. A third member of the team was Albert J. Rosenthal, then a law professor at Columbia Law School and also a former law clerk for Supreme Court Justice Felix

27. GREENBERG, *supra* note 23, at 413.
28. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716(a), 78 Stat. 241, 266 (1964).
29. GREENBERG, *supra* note 23, at 304-05.
30. *Id.* at 413.
31. *Id.*

Frankfurter.[32] In addition to drafting briefs and consulting on litigation matters, Al had the important role of pulling together a group of legal scholars (particularly those in labor law and civil rights) and bright young attorneys to draft pleadings, legal memoranda, discovery requests, and appellate briefs.[33] Many of these young attorneys were associates at some of the major law firms in New York City, and provided their services on a pro bono basis. The labor law and civil rights scholars assisted the litigation team in thinking critically and strategically about many of the complex interpretive statutory construction issues raised by Title VII.

A third aspect of the litigation strategy involved identifying potential cases, and /or categories of cases and issues that would advance a programmatic, yet positive, construction of Title VII. The fundamental goal of the litigation team was to try to establish basic legal principles and norms that would provide broad-based relief to victims of racial discrimination in employment. In addition to having to work through a number of procedural hurdles in order to get into federal court, the Fund's litigation team identified early on seniority discrimination and testing cases as major targets for litigation.[34] The success of the Fund's litigation team, particularly during the first decade of developments under Title VII, could not have been achieved without the participation of the cadre of cooperating attorneys. This group consisted primarily of black attorneys, most of who were in private practice in southern states. Many of them had attended historically black undergraduate and law schools, and were solo practitioners, or had very small and often loosely defined law firms. Some of the older black cooperating attorneys were themselves victims of overt racial discrimination, proving that racial discrimination extended even to the practice of law.[35]

One of the effects of the Civil Rights Act of 1964 was to provide an opportunity for blacks to begin to attend historically white law schools in substantial numbers. This development is grounded in Title VI of the Act, which prohibits discrimination by entities receiving federal funds.[36] Beginning in the 1960's, a number of white law graduates, who were interested in practicing civil rights law, also became cooperating attorneys when they joined with black legal practitioners in the South to engage in civil rights litigation.[37] The Legal Defense Fund initiated an internship

32. *Id.*
33. *Id.* at 414.
34. *See id*. at 416.
35. *See generally id*. at 37-41 (discussing how there were few blacks practicing law).
36. 42 U.S.C. §2000d (2000).
37. GREENBERG, *supra* note 23, at 375-78

program to support and encourage recent law graduates, particularly black law graduates, to become involved in civil rights cases in southern states.[38]

The most important unresolved issue in Title VII at the time it was enacted was (and still is) the meaning of discrimination. Although Title VII speaks in grand and majestic language by prohibiting discrimination because of race, color, religion, sex and national origin, the statute does not define the key term, namely, *discriminate*.[39] There is no real dispute that at the time Congress enacted Title VII, it intended to prohibit blatant, overt, or intentional racially discriminatory employment practices in the private sector.[40] The terms "to discriminate," "intended," and "intentionally" are used repeatedly throughout the Act.[41] The disparate treatment theory of discrimination, now a firmly established theory in civil rights jurisprudence, requires proof of intentional discrimination.[42] Had Congress wanted to prohibit only intentional discrimination, it could have easily accomplished that goal by only including section 703(a)(1), which provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or 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."[43] But Congress added another provision in articulating the broad and majestic mandate of Title VII. Section 703(a)(2), provides that:

> It shall be an unlawful employment practice for an employer— (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[44]

The inclusion of section 703(a)(2) raised the issue of whether Congress intended to prohibit more than intentional or disparate treatment

38. *Id*. at 375.

39. 42 U.S.C. §2000e(a) (2000).

40. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." (citing 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphreys)).

41. *E.g.*, 42 U.S.C. §§ 2000e-2(a)(1), (b), (c)(1), (h), e-3(a), e-5(g).

42. *See* Int'l Bhd. of Teamsters, 431 U.S. at 335 n.15 (1977).

43. 42 U.S.C. § 2000e-2(a)(1).

44. 42 U.S.C. § 2000e-2(a)(2).

discrimination because this section fails to mention either the term *intent* or *discriminate*. The legislative history of Title VII, as originally enacted, is silent on the issue.[45]

The Fund's employment discrimination litigation team devoted a substantial amount of time to thinking about this issue of Congress' intent, and questioned whether there were other theories of discrimination, aside from intentional discrimination, that could be embraced by section 703(a)(2). One of the concerns that powerfully informed the team's thinking about theories of discrimination was the frightening prospect that its Title VII race discrimination cases would be decided by white juries. Since the overwhelming number of the Fund's initial employment discrimination cases were filed in federal courts in southern states, the team, rightfully so, had little faith that white jurors, at least during the early years of the enforcement of the Act, would be willing to put aside their racial prejudices in cases involving black plaintiffs.[46] Based on the

45. There is legislative support for the *Griggs* disparate impact theory in the legislative history of the 1972 amendments to Title VII:

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization . . . . Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. The forms and incidents of discrimination which the [EEOC] is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. A recent striking example was provided by the [Court] in its decision in *Griggs v. Duke Power Co*. . . . where the Court held that the use of employment tests as determinates of an applicant's job qualification, even when nondiscriminatory and applied in good faith by the employer . . . was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding business necessity for the use of such criteria.

H.R. REP. NO. 92-238, at 8 (1971), *reprinted in*, 1972 U.S.C.A.N., at 2143-44. *See also* S. REP. NO. 92-415, at 5 (1971). The Supreme Court made specific reference to this legislative history when it noted in *Connecticut v. Teal* that this "history demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*." 457 U.S. 440, 447 n.8 (1982).

46. Although in the last fifty years, the number of white Americans openly espousing racial discrimination has declined, numerous studies show that whites still harbor significant levels of covert prejudice against racial minorities. As recently as 1990, over half the white Americans surveyed rated blacks and Latinos as less intelligent than whites, and 36% rated Asians as less intelligent than whites. Sixty-two percent rated blacks as less hard working than whites, 54% rated Latinos as less hard working, and 34% rated Asian as less hard working. *See* David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 951 (1996) (reviewing studies of racial attitudes). *See generally* Patricia G. Devine & Andrew J. Eliot, *ARE RACIAL STEREOTYPES* REALLY *FADING? THE PRINCETON TRILOGY REVISITED*, 21 PERSONALITY & SOC. PSYCH. BULL. 1139-50 (1995) (concluding that negative stereotypes about

judicial demeanor of many of the southern federal judges who were on the front line in the implementation of *Brown* in school desegregation cases, the Fund's litigation team had ample reason to believe that these same judges would be receptive to a liberal construction of Title VII, due to their first hand experience with the disadvantages blacks faced because of racial discrimination.[47]

Griggs was one of the most important cases litigated in the Fund's nation wide litigation campaign. I served as co-counsel for the plaintiffs.[48] The fortieth anniversary of Title VII thus presents an appropriate occasion on which to begin the process of telling the story, however briefly, of how the disparate impact theory of discrimination evolved.

Like most of the early cases litigated under Title VII, *Griggs* arose against a historical background of many, many years of widespread racial discrimination against blacks in the South. Black employees at the Duke Power Company had been relegated to a handful of physically demanding, low paying, and dead end jobs in the Labor Department.[49] Some of the *Griggs* plaintiffs had even helped to construct the Dan River Steam station at which they worked. The Dan River Steam Station, located on the Dan River in Eden, North Carolina, generates, transmits, and distributes electrical power to the general public in North and South Carolina.[50] Facilities at the Dan River Station, such as locker rooms, showers and drinking fountains were strictly segregated by race. In 1955, some nine years before the effective date of Title VII, Duke Power initiated a new hiring policy. Beginning in 1955, whites who applied for employment in the racially segregated white departments had to have a high school diploma, whereas whites who were hired before 1955 were permitted to move from lower paying to higher paying jobs in the white departments or transfer to jobs among departments, even though they did not have a high school education or diploma.[51]

blacks as a group had not changed since the 1930s).

47. *See generally* JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S *BROWN* DECISION INTO A REVOLUTION FOR EQUALITY (1981) (discussing segregation in the South and the willingness of Fifth Circuit judges to develop key theories to implement *Brown* and strike down segregation laws).

48. One of the ironies of the *Griggs* case is that the Duke Power Company also operated a segregated city bus service in, among other places, High Point, N.C., and I rode on its segregated buses in the 1940s and 1950s. Years later, I served as counsel for the plaintiffs in *Griggs*.

49. *See* Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971).

50. Griggs v. Duke Power Co., 292 F. Supp. 243, 244 (1968). *See generally* Robert F. Durden, *Electrifying the Piedmont Carolina: The Beginning of the Duke Power Company, 1904-1977*, 76 N.C. HIST. REV. 410 (1999).

51. *See Griggs*, 401 U.S. at 427.

On July 2, 1965, the same date on which Title VII became effective, Duke Power adopted an additional hiring requirement. After July 2, 1965, applicants for all departments, except the labor department, were required to have both a high school diploma and passing scores on two pen and paper tests - the Wonderlic Intelligence Test and the Bennett Mechanical Comprehension Test. [52] To show what it deemed to be its good faith effort to comply with Title VII, the Duke Power Company agreed to waive the testing requirements for blacks who wanted jobs in the historically white departments if they had or obtained a high school diploma or its equivalent.[53]

Why did Duke Power adopt the testing and high school diploma hiring requirements? Its asserted reason at trial was that the adoption of the new screening requirements was necessary because the company was in the process of upgrading its facility for the nuclear energy age and this transition demanded more qualified employees.[54] However, the fact that this new hiring policy was instituted on the same date that Title VII became effective, indicates that there were probably other reasons motivating Duke Power to adopt its new hiring criteria. The first is that the use of these objective criteria substantially, if not entirely, eliminates discriminatory decision making. Another reason, based on economic efficiency, is that the high school diploma and testing requirements were a very cost effective way of getting relevant and pertinent information about job applicants.[55] In any event, these two threshold hiring requirements (presumably imposed on all employees hired after 1965), coupled with its newly adopted policy statement that it does not discriminate on the basis of race in the hiring of employees and applicants, were Duke Power Company's way of attempting compliance with the recently enacted Title VII.

Griggs began in March 1966, when all fourteen of the black employees sent a written notice to Duke requesting to be considered for jobs in some of the departments historically reserved for whites. Not satisfied with the employer's response, which was its willingness to waive the testing requirements for a high school diploma, thirteen of the fourteen black employees filed a charge of discrimination with the EEOC on

52. The cut off scores for hiring and transfer eligibility was the median performance of high school graduates. Thus, half of the population of high school graduates could not have qualified. *Id.* at 428.

53. *See* Griggs v. Duke Power Co., 420 F.2d 1225, 1229 (4th Cir. 1970).

54. *See id.*

55. *See generally* Paul Burstein & Susan Pitchford, *Social-Scientific and Legal Challenges to Education and Testing Requirements*, 37 SOC. PROBS. 243, 244-45 (1990).

March 15, 1966. After an investigation of the charge, the EEOC attempted to conciliate the case with Duke Power, but without success.[56] The plaintiffs then filed suit in federal court after receiving a right-to-sue letter from the EEOC. Duke Power denied that it had discriminated against the plaintiffs, so the issue of discrimination *vel non* was joined.

The set of problems facing the parties in *Griggs* paralleled the set of statutory interpretive problems that all of the parties faced in the early Title VII cases. First, the plaintiffs had to advance a theory of discrimination. Next, they had to adduce evidence to support their theory or theories. Finally, the plaintiffs had to be prepared to meet and rebut any defense asserted by Duke Power. The problems facing Duke Power were similar. Like the plaintiffs, Duke Power had to advance a theory of discrimination, evidence to support its theory, and be prepared to present a defense should the plaintiffs succeed in persuading the trial court to adopt their theory and the evidence supporting that theory. The primary source on which each party had to rely was the statute—Title VII. The statutory provisions themselves offered little or no assistance at all on the set of problems each side faced. Sections 703(a)(1)[57] and 706(g) strongly supported Duke Power's argument that plaintiffs had to prove subjective intent to discriminate because of race in order to prevail on the liability issue. Section 706(g) provides that a court may grant appropriate relief if it "finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice."[58] Section 703(a)(2) offered the best option to the plaintiffs because it permitted the argument that the disparate treatment theory was not the only theory available to them to prove a violation of Title VII. [59] In addition, section 703(h) was a provision on which both parties could rely. It provides, in relevant part, that it is not a violation of Title VII for "an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."[60] As a defense, Duke Power argued that the Wonderlic and Bennett Mechanical tests were "profes-

56. Duke Power finally eliminated its racially segregated locker rooms, showers, and drinking fountains shortly after a visit by the representatives from the EEOC, who visited the plant in an attempt to conciliate the case. Immediately after these facilities were desegregated, one of the plaintiffs who was assigned to clean the white locker and shower room used the shower in the white locker room, after which white employees refused to use that shower for a period of time.

57. *See supra* notes 41-47 and accompanying text.

58. 42 U.S.C. § 2000e-5(g) (2000).

59. *See supra* notes 48-49 and accompanying text.

60. 42 U.S.C. § 2000e-2(h) (2000).

sionally developed."[61] But the plaintiffs countered that even if the tests were "professionally prepared," Duke nevertheless *used* them in a way that treated the plaintiffs differently because of their race.

The case went to trial on February 6, 1968 with the fundamental issue of the appropriate theory of discrimination not having been resolved by the parties or the court. Although the trial was conducted on two different days, the total time of trial was less than one day. None of the plaintiffs personally testified at trial because the court allowed the depositions taken by Duke to be introduced as exhibits in the plaintiffs' case-in-chief. The plaintiffs faced a dilemma because their expert witness on testing had a major conflict and was not available to testify on the first day of trial. The court delayed the trial for several days in order to give the plaintiffs an opportunity to resolve this dilemma. Although their original expert ultimately could not rearrange his schedule, the plaintiffs were fortunate in retaining Dr. Richard Barrett, an industrial psychologist whose work focused on testing, to testify as their expert witness. I contacted Dr. Barrett on Tuesday, February 7, 1968. He flew from New York to Durham, North Carolina on Wednesday, February 8, 1968, to meet with plaintiffs' counsel after reading some of the pre-trial discovery. He then testified on Thursday, February 9, 1968, after which he immediately flew back to New York.[62] Dr. Dannie Moffie, a professor at the University of North Carolina, testified as Duke Power's testing expert.

A case that is now rarely discussed and too often overlooked in the intellectual history of the disparate impact theory, but which is critical to the doctrinal developments of that theory, is *Quarles v. Philip Morris*.[63] The *Quarles* case represents the judicial acceptance of one of the initial theories of discrimination that the Fund's litigation team advocated as an alternative to a pure intent standard - the present-effects-of-past-discrimination theory. This theory embraced both an "intent" and an "effect" standard.[64] It was the Fund's initial effort to harmonize the language of section 703(a)(1), which uses the term *discriminate*, and section 703(a)(2), which does not contain either the term *intent* or *discriminate*, but speaks in terms of limiting "in any way which deprive[s] or tend[s] to deprive . . . or otherwise *adversely affect*[s] . . ."[65]

61. Griggs v. Duke Power Co., 292 F. Supp. 243, 250 (M.D.N.C. 1968).

62. *See* RICHARD BARRETT, CHALLENGING THE MYTHS OF FAIR EMPLOYMENT PRACTICES xi (1998).

63. 279 F. Supp. 505 (E.D. Va. 1968).

64. *See id.* at 510, 515-16.

65. *See supra* notes 41-49 and accompanying text (emphasis added).

The "past discrimination" portion of the proposed theory would require proof of intentional discrimination and focus on the employer's overtly discriminatory practices that resulted in a racially segregated work force, thus embracing section 703(a)(1).[66] The "present-effects" portion of the proposed theory would focus on a facially neutral practice that tended to continue the effects of prior discrimination into the post-Act period, thus embracing section 703(a)(2).[67]

Quarles, like *Griggs*, was a case that arose in the context of the Fund's litigation campaign and so, the plaintiffs in *Griggs* relied upon *Quarles*' present-effects-of-past-discrimination theory.[68] *Quarles* was among the first in a group of cases to be tried on the merits under Title VII, challenging a seniority system that had it origins in overt racially discriminatory motivation prior to 1965. The employer and union in *Quarles* had maintained racially discriminatory departments at the Philip Morris cigarette manufacturing facilities in Richmond, Virginia, but they abandoned this openly racially discriminatory practice on January 1, 1966, about six months after the effective date of Title VII.[69] Under their new employment policy, black employees in the all-black departments could transfer to the previously all-white departments if recommended by their supervisors.[70] Upon transfer to the all-white departments, black employees were treated as new employees for seniority purposes because they were not allowed to benefit from their seniority status obtained in the all-black departments.[71] Judge Butzner, the trial judge, described the effect of the new transfer policy on the employment opportunities of blacks who transferred, as follows:

> The present discrimination resulting from historically segregated departments is apparent from consideration of the situation of a Negro who has worked for ten years in the [all-black] department . . . [He is required] to sacrifice his employment seniority and take a new departmental seniority based on his transfer date. Thus a Negro with ten years employment seniority transferring . . . from the [all-black] de-

66. *See Quarles*, 279 F. Supp. at 515-16.

67. *See id*.

68. *See* Griggs v. Duke Power Co., 292 F. Supp. 243, 249 (M.D.N.C. 1968).

69. The defendants in *Quarles* began to take steps to modify the company's rigidly racially segregated workforce in 1955. However, these steps were not taken out because of the defendants' own volition, but rather as a result of Presidential Executive Order No.11246, which requires government contractors, such as Philip Morris, to refrain from discriminating on the basis of race. *Quarles*, 279 F. Supp. at 508.

70. *See id.* at 512.

71. *See id.* at 513.

> partment to the [all-white department] takes an entry level position with departmental seniority lower than a white employee with years less employment seniority. These restrictions upon the present opportunities for Negroes result from the racial pattern of the company's employment practices prior to January 1, 1966. The restrictions do not result from lack of merit or qualification. A transferee under any plan must satisfy ability and merit requirements regardless of his seniority.[72]

The *Quarles* court accepted the present-effects-of-past-discrimination theory that the Fund's litigation team had advocated.[73] The theory, as adopted by *Quarles*, established a two-prong test for a finding of unlawful employment discrimination under Title VII. The first prong was satisfied with evidence that the challenged employment practice antedated the effective date of Title VII and was motivated by discriminatory intent to treat blacks and whites differently because of their race. The second prong was satisfied with proof of a facially neutral practice, operative in the post-July 2, 1965 period, that still had an adverse effect on blacks, as reflected in a racially stratified workforce.[74]

The present-effects-of-past-discrimination theory attempted to accommodate several objectives. The first concern was based on the fact that many of the early Title VII cases were brought against employers and labor unions, particularly in southern states with long histories of engaging in overtly racially discriminatory employment practices. Even though many of these employers, such as Duke Power and Philip Morris, had adopted new facially neutral employment policies after 1965, the effects of prior overt racially discriminatory practices continued to be manifest in the post-1965 period. A second concern was whether a theory of unlawful discrimination could be teased out of the statutory provisions of Title VII that would provide plaintiffs a full and fair opportunity to prove unlawful discrimination when proof of subjective motivation was difficult or impossible to obtain. The new policies adopted by the defendants in *Quarles* and *Griggs* were facially neutral, but the overarching concern of the Fund's litigation team was whether the courts were prepared to construe either section 703(a)(1) or section 703(a)(2) as embracing a non-intent based theory of discrimination.[75] The *Quarles*

72. *Id*.

73. *See id*. at 519.

74. *See id*. at 517-18.

75. The Supreme Court ultimately rejected the present-effects-of-past-discrimination theory in the seniority discrimination case of *International Board of Teamsters v. United States*, 431 U.S. 324, 357 (1977).

court, like the parties themselves, relied on and cited both of these sections without specifically identifying whether either or both supported the present-effects-of-past-discrimination theory.[76] In a line of reasoning that is remarkably similar to the one adopted by the Court in *Griggs* in recognizing the disparate impact theory, the court in *Quarles* reasoned that "[p]resent discrimination may be found in contractual provisions that appear fair upon their face, but which operate unfairly because of the historical discrimination that undergirds them."[77]

The *Quarles* case is also important because it established the doctrinal foundations for the business necessity defense that the Supreme Court ultimately adopted in *Griggs*.[78] Thus, the business necessity defense in the disparate impact cases is a judicially constructed defense[79] that was only later statutorily endorsed by Congress.[80] This defense first entered into the jurisprudence by way of the National Labor Relations Act[81] in *Whitfield v. United Steelworkers of America, Local No. 2708*,[82] which was the major case on which the defendants in *Quarles* relied. The defendants argued that the modifications they made in January 1966 supported their view that its current seniority policies were not unlawful under Title VII because of section 703(h).[83] The facts of *Whitfield* and *Quarles* were analogous. In *Whitfield*, the employees in a steel mill were divided into two lines of progression for seniority purposes: one black, the other white.[84] The more skilled jobs were in the white line of progression and the unskilled jobs were placed in a separate line of progression for black employees.[85] In 1956, the company and the union entered into an agreement that allowed black employees to bid for jobs in the white line of progression as jobs became vacant;[86] they also agreed that all new employees would begin their employment in the previously all-black department.[87] Black employees bidding for a vacant position in the

76. *See Quarles*, 279 F. Supp. at 514.

77. *Id*. at 518 (citing NLRB v. Local 269, IBEW, 357 F.2d 51 (3rd Cir. 1966)).

78. *See id.*

79. I use the term "judicially constructed" to mean that the courts could not point to any specific statutory provision in Title VII on which to ground the defense, at least before the Civil Rights Act of 1991.

80. *See* 42 U.S.C. § 2000e-2(k) (2000).

81. 29 U.S.C. §§ 151-169 (2000).

82. 263 F.2d 546, 550 (5th Cir. 1959) (*Whitfield* arose under the NLRA and not under Title VII.).

83. *See Quarles*, 279 F. Supp. at 518.

84. *Whitfield*, 263 F.2d. at 548.

85. *Id.*

86. *Id*. at 549.

87. *Id.*

all-white line of progress were required to pass a test to demonstrate their ability to perform the job in which the vacancy existed, but white employees who were currently working in the white department were not required to do so, even when bidding for the same vacancy.[88] Blacks who were successful in passing the test had to begin at the bottom of the seniority line in the white department and were not allowed to use their accrued seniority to obtain jobs above the entry level.[89]

A group of black employees brought a class action against the company and union seeking relief under the theory that the union had breached its duty of fair representation because the new seniority arrangement still discriminated against them based on race.[90] The duty of fair representation, which the Supreme Court read into the NLRA even though that duty was not specifically provided for in the statutory provisions,[91] holds that a union's status as the exclusive bargaining agent of a unit of employees imposes an obligation on the union to deal fairly with the unit employees in performing its representational functions, and that this obligation requires the union to serve the interests of all of the members in the unit, in good faith, without hostility or discrimination toward any member or group of members.[92] In *Whitfield*, the Fifth Circuit rejected the black plaintiffs' claim for a merger of the black and white seniority lines of progress on the ground that business necessity dictated the separate lines.[93] The court's finding of business necessity was based on its factual determination that the white line of progress consisted of skilled jobs, while the black line of progression consisted only of unskilled jobs, and therefore blacks could not expect to start in the middle of the white line of progression, even though they may have had more seniority than some whites, because they did not have the proper training.[94] The court in *Quarles* distinguished *Whitfield* on the grounds that:

> *Whitfield* does not stand for the proposition that present discrimination can be justified simply because it was caused by conditions in the past.

88. *Id.*

89. *Id*. at 550.

90. *Id*. at 546-47.

91. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944); Tunstall v. Bhd. of Locomotive Firemen, 323 U.S. 210, 213 (1944). Although *Steele* and *Tunstall* involve unions certified as exclusive bargaining units under the Railway Labor Act, the same principles apply to unions certified under the NLRA. *See Whitfield*, 263 F.2d at 550-51.

92. *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967).

93. *Whitfield*, 263 F.2d at 550.

94. *See id*.

> Present discrimination was allowed in *Whitfield* only because it was rooted in the Negro employees' lack of ability and training to take skilled jobs on the same basis as white employees. The fact that white employees received their skill and training in a discriminatory progression line denied to the Negroes did not outweigh the fact that the Negroes were unskilled and untrained. *Business necessity, not racial discrimination, dictated the limited transfer privileges under the contract.*[95]

Duke Power Company argued that a showing of specific intent was required for conduct to constitute discrimination.[96] However, the favorable decision in *Quarles*, adopting the present-effects-of-past-discrimination theory, strongly suggested to the Fund's litigation team that the time might be ripe to advance the argument that specific intent to discriminate is not required in all cases arising under Title VII. Federal courts had sent out a strong signal that they were inclined to liberally construe Title VII.[97] The Fund's litigation team determined that it must be careful in advancing the argument that specific intent is not required in all cases brought under Title VII. Therefore, it decided to make alternative arguments in the district court in *Griggs*, on the theory of liability under Title VII. Like the plaintiffs in *Quarles*, the *Griggs* plaintiffs relied upon both sections 703(a)(1) and (a)(2).[98] Also, like the plaintiffs and the court in *Quarles*, the plaintiffs in *Griggs* initially relied upon the present-effects-of-past-discrimination in their opening brief.[99] The facts in *Griggs* fit that theory rather neatly. But unlike the post trial brief in *Quarles*, here the litigation team also structured an argument that specific intent is not required in all Title VII cases. In doing so, it relied heavily on constitutional cases and cases arising under the National Labor Relations Act. Thus, the plaintiffs argued that specific intent to discriminate is not required to establish a violation under Title VII:

> The Supreme Court has long held that the validity of an act must be 'tested by its operation and effect.' *Near v. Minnesota*, 283 U.S. 697 (1931). In *Griffin v. Illinois*, 351 U.S. 12 (1962), the Supreme Court stated: 'A law [or as here, a seniority system] non-discriminatory on its face, may be grossly discriminatory in its operation.' This principle has

95. *Quarles*, 279 F. Supp. at 518 (emphasis added).
96. *See* Griggs v. Duke Power Co., 420 F.2d 1225, 1232 (1970).
97. *See* Belton, *supra* note 17, at 303.
98. Griggs v. Duke Power Co., 292 F. Supp. 243, 246 (M.D.N.C. 1968).
99. *See id.* at 247-49.

> been applied by the court with special vigor in determining validity of acts which result in the denial of equal rights to Negroes.
>
> The administrative and judicial interpretations of the National Labor Relations Act, upon which the provisions of Title VII are in a large measure patterned, follow this principle. Section 8(a)(3) of the N.L.R.A. prohibits an employer from discriminating with regard to hire, tenure, or terms and conditions of employment 'to encourage or discourage' union membership. In *Erie Resistor Co. v. N.L.R.B.*, 373 U.S. 221 (1963), at issue was whether an employer discriminated within the meaning of that law by giving super-seniority to replacements for economic strikers. The employer defended granting super-seniority to non-striking employees on the ground that its conduct was not intended to discriminate against the strikers but flowed from the necessity to keep its plant open during the strike. The N.L.R.B. found that the employer's conduct violated Section 8(a)(3) and the Supreme Court agreed, stating (373 U.S. at 229):
>
> > . . . . the employer may counter [a finding of discrimination] by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. *Nevertheless, his conduct does speak for itself – it is discriminatory and it does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.*[100]

The district court issued its decision in *Griggs* on September 30, 1968.[101] As for the theory of discrimination under Title VII, the trial court held that specific intent is required.[102] Based on its view of the theory of liability under Title VII, the court ruled against the plaintiffs on the ground that they failed to carry their burden in proving that Duke Power had intentionally discriminated against them because of their race in violation of Title VII.[103]

The trial court also rejected the *Quarles* present-effects-of-past-discrimination theory on essentially two grounds. First, the court at-

100. Post-trial brief for plaintiffs at 33-35, Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D.N.C. 1968) (some citations omitted).

101. *Griggs*, 292 F. Supp. at 243.

102. *See id.* at 251.

103. *See id.*

tempted to distinguish *Quarles* on the ground that Philip Morris had failed to prove a legitimate business purpose for its policy of restricting the transfer opportunities of black employees.[104] Second, the district court held that Duke Power's high school requirement served a legitimate business purpose[105] because the policy was intended to assist the company's eventual upgrade of its entire work force.[106] Even though the court found that the testing requirements were never intended to measure the ability of an employee to perform his particular job, it nevertheless found that the use of such tests did not violate Title VII because they were professionally developed within the meaning of section 703(h).[107] On the testing issue, the court adopted the view that any test, so long as it satisfies some notion of being "professionally prepared," survives a Title VII challenge because (1) "[n]owhere does the Act require that employers . . . utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs," and (2) "[a] test which measures the level of general intelligence, but is unrelated to the job to be performed is just as reasonably a prerequisite to hiring or promotion as is a high school diploma."[108] Although not specifically addressing the plaintiffs' argument that specific intent is not required in all Title VII cases, the court nevertheless rejected the argument by concluding that the plaintiffs failed to prove that Duke Power had intentionally discriminated against them because of their race.[109]

The plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit, and the case came before a panel consisting of Judges Boreman, Bryan, and Sobeloff.[110] Judges Boreman and Bryan had a reputation of not being particularly sympathetic to civil rights claims. One of his colleagues on the court of appeals, Judge Donald Russell, described Judge Boreman as "a conservative of conservatives."[111] Judge Bryan has been described as being a "legal conservative and a strict constructionist."[112] Judge Sobeloff, on the other hand, was known as an advocate of civil rights. While serving as the Solicitor General of the United States, Judge Sobeloff presented the federal government's argu-

104. *Id*. at 249.
105. *Id*. at 251.
106. *Id.* at 248.
107. *See id.* at 250.
108. *Id*.
109. *Id.* at 251.
110. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970).
111. Fourth Circuit History, *Remembering the Fourth Circuit Judges: A History from 1941 to 1998*, 55 WASH. & LEE L. REV. 471, 482 (1998).
112. *Id*. at 484.

ments on the implementation of the *Brown v. Board of Education* decision in *Brown II*.[113] In commenting on Judge Sobeloff's career as a judge, one of his colleagues stated that:

> . . . Judge Sobeloff made great contributions toward race relations. His opinions advocated removing the basis of racism and addressed its immorality. From his perspective, racism was "morally and constitutionally untenable," and court decisions allowing racism to persist would perpetuate community resistance to desegregation.
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> * * *
>
> . . . He left as his legacy educated and well-reasoned opinions that formed the basis of many of the Supreme Court's decisions and provided a profound and permanent influence on American law.[114]

In a majority opinion authored by Judge Boreman, the Fourth Circuit affirmed in part and reversed in part the decision of the district court in *Griggs*.[115] The entire panel, in reversing the district court, endorsed the present-effects-of-past-discrimination theory.[116] Judge Boreman's opinion for the court, however, applied the theory to the facts of the case in a very limited way. The majority held that only those six plaintiffs who were hired before 1955, the year Duke Power adopted the high school diploma requirement, were entitled to recovery under the theory.[117] However, the four plaintiffs who did not have a high school education or its equivalent were not entitled to any relief.[118] The court explained that its reason for denying relief to these four plaintiffs was that even though Duke Power had engaged in intentional discrimination against all the plaintiffs before the effective date of Title VII, the evidence supported the district court judge's finding that Duke had adopted the testing requirements without an intent to discriminate, and had a genuine business purpose for adopting this employment practice.[119] The panel majority also rejected the view that an employer must prove that

113. 349 U.S. 294, 297 (1955).
114. Fourth Circuit History, *supra* note 111, at 514.
115. *Griggs*, 420 F.2d at 1237.
116. *Id.* at 1230.
117. *Id.* at 1230-31.
118. *Id.* at 1231.
119. *See id.* at 1232.

an employment test is job related in order to successfully assert section 703(h)'s statutory defense of a professionally prepared test.[120]

Judge Sobeloff wrote a very powerful opinion, concurring, in part, and dissenting, in part.[121] He agreed with Judges Boreman and Bryan in finding that six of the plaintiffs were entitled to relief,[122] but he reshaped the present-effects-of-past-discrimination theory to eliminate the need for a plaintiff to prove intentional discrimination in cases challenging facially neutral employment policies and practices.[123] His view of the meaning of discrimination under Title VII endorsed the view that had been advocated by the Fund's litigation team. After specifically citing the two substantive provisions of Title VII, sections 703(a)(1) and (a)(2), Judge Sobeloff wrote that:

> The statute is unambiguous. Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that "objective" or "neutral" standards that favor whites but do not serve business needs are indubitably unlawful employment practices. The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end.[124]

Judge Sobeloff particularly relied upon an article written by Professors George Cooper and Richard Sobel on the legality of testing and seniority systems[125] in structuring his argument.[126] Professor Cooper served as co-counsel for the plaintiffs in *Griggs* in both the court of appeals and the Supreme Court, and was principally responsible for developing the plaintiffs' theoretical approach to the testing requirements.[127] Professor Cooper advocated a construction of Title VII that does not always require a showing of specific intent to discriminate[128] and his views on this issue were adopted by the Fund's litigation teams.[129]

120. *Id.* at 1235.
121. *Id.* at 1237.
122. *Id.* (Sobeloff, J., concurring in part, and dissenting in part).
123. *Id.* at 1246.
124. *Id.* at 1238.
125. George Cooper & Richard Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1989).
126. *Griggs*, 420 F.2d at 1237 n.2 (citing Cooper & Sobel, *supra* note 125, at 1237).
127. *See* GREENBERG, *supra* note 23, at 418.
128. Cooper & Sobel, *supra* note 125, at 1674-76.
129. *See* GREENBERG, *supra* note 23, at 418.

With some minor modifications in the wording, the Supreme Court, in *Griggs*, endorsed Judge Sobeloff's view that specific intent, i.e., disparate treatment, is not the only theory of discrimination that is embraced in Title VII: The Court stated, "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice . . . cannot be shown to be related to job performance, the practice is prohibited."[130] Building on his argument that Title VII "interdicts practices that are fair in form but discriminatory in substance,"[131] Judge Sobeloff more forcefully planted the seeds for the disparate impact theory when he argued that "the state of mind of an employer whose policy, in practice, effects discrimination" is "irrelevant to Title VII."[132] Judge Sobeloff argued that his view - that specific intent is not the only theory of discrimination under Title VII - was supported by voting rights cases precedents. In these voting rights cases, the courts, including the Supreme Court, struck down facially neutral voting requirements that some jurisdictions adopted after overtly discriminatory voting requirements had been struck down.[133] After the Supreme Court's decision in *Griggs*, Judge Sobeloff again wrote another opinion that was pivotal to the maturation of the disparate impact theory.[134]

The opinion of Judge Sobeloff in *Griggs* was the deciding factor that convinced the Legal Defense Fund to seek review by the Supreme Court.[135] The Supreme Court granted certiorari,[136] but only after request-

130. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

131. *Griggs*, 420 F.2d at 1238.

132. *Id*. at 1246.

133. *Griggs*, 420 F.2d at 1247 (citing Louisiana v. United States, 380 U.S. 145 (1965); United States v. Duke, 322 F.2d 759, 768 (5th Cir. 1964)).

134. *See infra* note 176-86 and accompanying text (discussing Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971)).

135. There was some opposition in asking the Supreme Court to grant certiorari in this case. *See* GEORGE COOPER & HARRIET RABB, EQUAL EMPLOYMENT LAW AND LITIGATION 497-99 (1972) (discussing a letter drafted by George Cooper, then a professor of law at Columbia Law School, arguing that it would be unwise to file a petition for certiorari because he thought the record was weak and that other more promising testing cases were in the litigation pipe line); HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 385 (1990) (reporting on a letter written but never sent by John Pemberton, deputy general counsel for the EEOC, urging the Legal Defense Fund not to seek certiorari). Professor Cooper later changed his opinion about certiorari and then played a major role in drafting the petition for certiorari and the plaintiffs' briefs on the merits after the Court had granted certiorari.

136. The question raised in the petition for certiorari was framed in terms of the disparate impact theory ultimately endorsed by the Supreme Court in order to delink the present-effects-of-past-discrimination theory from a specific intent requirement:

> Whether the intentional use of psychological tests and related formal education requirements as employment criteria violates the racial discrimination prohibition of Title

ing the views of the Solicitor General.[137] In its decision, the Court unanimously endorsed the position so ably articulated by Judge Sobeloff.[138] However, the Court went one step further by specifically decoupling the present-effects-of-past discrimination theory from a specific intent requirement: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[139] The result in *Griggs* was that the Court, for the first time in this nation's history, endorsed two theories of discrimination in civil rights jurisprudence: disparate treatment, which requires proof of intent to discriminate, and disparate impact, which does not.[140]

Until the Court's decision in *Connecticut v. Teal*,[141] it was unclear which, if not both, of the two major substantive provisions of Title VII, section 703(a)(1) or section 703(a)(2), was the basis of the disparate impact theory. Neither the plaintiffs, the defendants, nor the courts, had clearly identified, as a general practice, which of the two provisions supported the disparate impact theory.[142] In *Teal*, decided eleven years after *Griggs*, the Court held that the disparate impact theory is grounded in a construction of 703(a)(2).[143] But for the decoupling of the present-effects-of-past discrimination from a specific intent requirement in *Griggs*, it is highly likely that the disparate impact theory would not have survived as a viable theory of discrimination after the Supreme Court rejected the present-effects theory in *Teamsters* in 1977.[144]

III. THE MATURATION OF THE DISPARATE IMPACT THEORY

Unlike *Brown*, the profound impact and far-reaching effects that *Griggs* would have on discriminatory practices and its influence on the

VII . . ., where

(1) the particular tests and standards used exclude Negroes at a high rate while having a relatively minor effect in excluding whites, *and*

(2) these tests and other standards are not related to the employer's jobs.

Griggs v. Duke Power Co., 401 U.S. 424 (1971), *petition for cert. filed*, (No. 124).

137. Griggs v. Duke Power Co., 398 U.S. 926 (1970).

138. *See Griggs*, 401 U.S. at 425.

139. *Id*. at 430.

140. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

141. 457 U.S. 440 (1982).

142. *See, e.g*., *Griggs*, 401 U.S. at 426 n.1 (both provisions cited); Griggs v. Duke Power Co., 401 U.S. 424 (1971), *petition for cert. filed*, (No. 124) (both provisions cited).

143. *Teal*, 457 U.S. at 448.

144. In *Teamsters*, the Court stated that "[w]ere it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale." 431 U.S. at 349.

meaning of equality was apparent to only a small group of individuals at the time the Court handed down the decision in 1971. Also, unlike *Brown*, *Griggs* did not garner the big headlines in newspapers when the decision was announced by the Court. *Griggs* not only revolutionized employment discrimination law, but it also sent a powerful message to lower courts that they should continue to liberally construe civil rights statutes, including Title VII. Heeding this message, the lower courts began to develop a substantial body of law to support the disparate impact theory. One of the most critically important post-*Griggs* cases, decided shortly after *Griggs* was handed down, was *Robinson v. Lorillard Corp.*[145] *Robinson* began to put teeth in the disparate impact theory. The Supreme Court did not flesh out the business necessity defense in *Griggs*, except to allocate the burden of pleading and persuasion to the defendant.[146] In *Robinson*, Judge Sobeloff again wrote a major Title VII opinion, in which he adopted a stringent test of business necessity with the aim of assuring that Title VII would be a "potent tool" for making equality a reality in the work place.[147] *Robinson* was a seniority discrimination case litigated by the Fund and tried before Judge Gordon, the trial court judge in *Griggs*.

The Fourth Circuit handed down its decision in *Griggs* about three months before Judge Gordon issued his opinion in *Robinson* on March 12, 1970.[148] Therefore, Judge Gordon had to apply the 'present-effects-of-past discrimination' theory in *Robinson* because the court of appeals had reversed his contrary ruling on this theory in *Griggs*.[149] Judge Gordon first found that the seniority system was unlawful under the present-effects theory.[150] The defendants argued that the departmental seniority system at issue was justified by business necessity because it was an efficient way of identifying qualified employees for promotions within each department who had the necessary skill set for advancement to the next higher job.[151] The plaintiffs argued for a company-wide seniority system that would more quickly redress the continuing racial discrimination on which the departmental seniority system was constructed.[152]

145. 444 F.2d 791 (4th Cir. 1971).

146. *Griggs*, 401 U.S. at 431.

147. *See Robinson*, 444 F.2d at 798.

148. Robinson v. Lorillard Corp., 319 F. Supp. 835, 835 (M.D.N.C. 1970).

149. *See supra* notes 127-35 and accompanying text (discussing the majority opinion of the Fourth Circuit in *Griggs*).

150. *Robinson*, 319 F. Supp. at 841-42.

151. *See Robinson*, 444 F.2d at 799.

152. *See, e.g.*, *Robinson*, 319 F. Supp. at 838.

Judge Gordon considered two alternative theories of the business necessity test.[153] The first theory, he reasoned, offered no absolution for an employment practice that operates in a discriminatory manner, even if it serves a valid business purpose.[154] Under this theory, Judge Gordon easily rejected the defendants' business purpose argument.[155] The second theory involved a balancing test: The defendants' asserted business reason is to be balanced against the "anti-value of discrimination or its continuing effects."[156] Judge Gordon, opting to apply the balancing test theory of business necessity, found that the defendants' asserted business purpose did not outweigh the plaintiffs' statutory protection against racial discrimination.[157] The court then entered judgment in favor of the plaintiffs and awarded them partial relief.[158]

The Fourth Circuit affirmed the district court's finding of liability in an opinion authored by Judge Sobeloff. He grounded his test of business necessity, in substantial part, on the Supreme Court decision in *Griggs*:

> Collectively these cases conclusively establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[159]

Other courts soon adopted Judge Sobeloff's stringent test of business necessity.[160] To carry the burden of persuasion on the business ne-

153. *Id. at 841*.

154. *Id.*

155. *Id*.

156. *Id*.

157. *Id*. at 842.

158. *Id*. at 843.

159. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir.1969). Subsequently, in the wake of later Supreme Court decisions, the lower courts began to retreat from a strict test of business necessity. *See, e.g*., Contreras v. City of Los Angeles, 656 F.2d 1267, 1276 (9th Cir. 1981) (ruling that the employer was not required to show that the policy was absolutely necessary for the operation of the business).

160. *See, e.g*., Sagers v. Yellow Freight Sys., Inc., 529 F.2d 721, 730 n.18 (5th Cir. 1976) (not-

cessity defense, employers were required to validate employment policies and practices that had an adverse impact on groups and individuals who are the principle beneficiaries of Title VII.[161] As a plurality of the Court correctly recognized in *Watson v. Fort Worth Bank and Trust Co.*,[162] validation can be difficult, costly and time consuming.[163]

The expansive role of statistical evidence that the courts adopted also put teeth into the disparate impact theory. It is difficult, if not impossible, to prove a claim under the disparate impact theory without the statistical evidence. In the *Teamsters* trilogy, a trio of cases decided in 1977, the Supreme Court broadly endorsed the use of statistical evidence to prove employment discrimination claims.[164] Defining the role of statistical evidence in Title VII was not an easy task because almost from the effective date of the Act, defendants argued that section 703(j) barred the use of statistical evidence.[165] Section 703(j), which some deem to be an anti-preferential treatment provision, provides that employers are not required to "grant preferential treatment to any individual or any group" because of an imbalance between the protected class members under Title VII and the percentage of protected class members in the employer's workforce.[166] In the *Teamsters* trilogy, the Court rejected the employers' argument that 703(j) bars the use of statistical evidence to prove liability in employment discrimination litigation,[167] and in doing so, it endorsed a rather liberal view of the role and relevancy of statistical evidence.[168]

ing that the test applied is a "strict one"); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973) (finding that the lower court failed to properly apply the test of business necessity as developed in *Robinson*); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) (requiring a business necessity test that not only asks whether the business practice serves a legitimate interest essential to the firm's goal, but also whether a reasonable alternative was available). *See generally* Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 98-99 (1974) (discussing the nature of the business necessity test under Title VII).

161. *See Contreras*, 656 F.2d at 1281 (explaining that validation requires a study to show a relationship between the selection criteria and job requirements).

162. 487 U.S. 977 (1988) (plurality opinion).

163. *Id.* at 998.

164. Dothard v. Rawlinson, 433 U.S. 321 (1977); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

165. *See, e.g.*, *Teamsters*, 431 U.S. at 339 n.20.

166. 42 U.S.C. § 2000e-2(j) (2000).

167. *See Teamsters*, 431 U.S. at 339-40 n.20; *see also Hazelwood Sch. Dist.*, 433 U.S. at 307.

168. *See, e.g.*, *Hazelwood Sch. Dist.*, 433 U.S. at 313 (Brennan, J., concurring) ("It should be plain . . . that the liberal substantive standards for establishing a Title VII violation, including the usefulness of statistical proof, are reconfirmed.").

The Court's decision in the *Teamsters* trilogy of cases provided plaintiffs in employment discrimination cases with a powerful evidentiary tool.[169]

The Fund's litigation team took a lead role in making effective the use of class actions in employment discrimination cases, which it used in both the pre-*Brown* and post-*Brown* school desegregation cases.[170] Perhaps one of the main reasons courts were more willing to recognize class action claims in the school desegregation cases was that the Fund was not seeking monetary damages on behalf of the plaintiffs' class, only injunctive relief. Unlike the equal protection clause, on which the school desegregation cases were brought, section 706(g) of Title VII provides for monetary relief in the form of back pay.[171] The availability of back pay presented two issues. The first was whether courts would allow class actions in cases where the plaintiffs sought back pay.[172] The second was whether a claim for back pay was a legal claim, and thus entitled the defendant to a jury trial under the Seventh Amendment to the Constitution of the United States. [173] Title VII was silent on both, and both issues presented the Fund's litigation team with potentially formidable barriers in its aim to maximize limited financial and human resources and to provide relief to large numbers of discriminates who otherwise would not be able to bring actions. Whether the courts would be as receptive to class action employment discrimination claims was far from clear, and defendants vigorously resisted efforts by plaintiffs to bring class actions under Title VII.[174]

A development that preceded *Griggs*, but also one that took on added significance after that case, was the willingness of courts to allow broad-based class actions. Broad-based class actions allowed organizations such as the Legal Defense Fund to use precious limited resources to provide representation to large groups of individuals who otherwise would be unable to finance such costly litigation or even find attorneys willing to represent them (since only small number of attorneys were willing to become involved in employment discrimination litigation).

The Fund's litigation team pushed both the class action and back pay issues. The first breakthrough was on the class action issue. In a

169. *See, e.g.*, *id.* at 307-13.

170. *See* GREENBERG, *supra* note 23, at 415-16.

171. 42 U.S.C. § 2000e-5(g) (2000).

172. *See* Robinson v. Lorillard, 444 F.2d 791, 802 (4th Cir. 1971).

173. The Seventh Amendment provides, in pertinent part, that "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury [is] preserved. . . ." U.S. CONST. amend. VII.

174. *See, e.g.*, Jenkins v. United Gas Corp., 400 F.2d 28, 33-34 (5th Cir. 1968).

1966 case, decided less than one year after the effective date of Title VII, the Fund was successful in convincing the district court in *Hall v. Werthan Bag Corp*.,[175] to allow the case to proceed as a class action.[176] The court held, among other reasons, that "[r]acial discrimination is by definition a class discrimination. If it exists, it applies throughout the class . . . . And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class."[177] *Hall* was a major legal victory for the Fund and set the stage for broad recognition of employment discrimination class actions. Although the law on class actions in employment discrimination was well-settled by 1971,[178] the *Hall* development took on added significance after *Griggs* by making Title VII a potent tool for achieving equality in the work place.[179]

The issue of whether a defendant is entitled to a jury trial in Title VII cases, where the plaintiffs seek back pay under section 706(g),[180] was raised in a number of the early Title VII cases, particularly those where plaintiffs sought class action certification.[181] The defendants argued that they were entitled to a jury trial under the Seventh Amendment since monetary damages available under section 706(g) must be deemed to be legal in nature. The law was (and still is) well settled that a jury trial attaches as a matter of right under the Seventh Amendment to any

175. 251 F. Supp. 184 (M.D. Tenn. 1966).

176. *Id*. at 188.

177. *Id*. at 186.

178. *See, e.g*., Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969).

179. The courts recognized the right of private plaintiffs to bring class actions based upon three interrelated theories. The first is the "private attorney's general" theory, which holds that a private action is more than a private claim by a single individual seeking to vindicate purely private rights because "[w]hether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated." *Jenkins* at 33. Second, the court adopted the "across-the-board" theory under which a single plaintiff or a representative group of plaintiffs were allowed to represented all similarly situated persons affected by an employer's discriminatory practices. *Id.* The rationale for the "across-the-board" class actions was that they were necessary to effectuate the broad remedial purposes of antidiscrimination statutes. *See, e.g*., Senter v. Gen. Motors Corp., 532 F.2d 511, 524 (6th Cir. 1976). The seminal case adopting the "across-the-board" class action theory is *Johnson*, 417 F.2d at 1124. Third, the courts held that class actions were appropriate from a policy perspective because this mode of adjudication promotes judicial economy, eliminates the possibility of inconsistent and varying outcomes, and protects the employer from the possible burden of defending multiple lawsuits challenging the same employment practice. *See, e.g*., Mack v. Gen. Elec. Co., 329 F. Supp. 72, 74-75 (E.D. Pa. 1971).

180. 42 U.S.C. § 2000e-5(g) (2000).

181. *See, e.g.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 442-43 (1975) (Rehnquist, J., concurring).

legal claim, even if both legal and equitable claims are sought in the same case.[182]

The Fund's litigation team decided to actively pursue monetary damages in the employment discrimination cases on the theory that the possibility of having substantial monetary damages imposed upon discriminating employers would induce such employers to begin taking voluntary measures to eliminate unlawful discriminatory employment practices. In *Albemarle Paper Co. v. Moody*,[183] the Supreme Court finally accepted this view of the purpose of back pay.[184] In order to avoid the prospect of trying discrimination cases, and particularly race discrimination cases, before potentially hostile white jurors, the Fund's litigation team argued that all forms of relief under Title VII, including monetary relief in the form of back pay, should be deemed equitable, so that the defendants were not entitled to a jury trial. The lower courts agreed with the plaintiffs' argument,[185] and the Supreme Court agreed as well, holding in *Albemarle Paper Co.* that all forms of relief under Title VII, including back pay, are equitable in nature.[186] The Court also established a strong presumption that all members of the plaintiffs' class should be awarded back pay if they have suffered economic injury because of a defendant's unlawful discrimination, and that this presumption is rebutted only upon a proof that the denial of back pay would not frustrate the national mandate of eradicating discrimination in employment throughout the country.[187] In a later case, the Court held that the

182. *See, e.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471 (1962); Beacon Theatres v. Westover, 359 U.S. 500, 508 (1959).

183. 422 U.S. 405 (1975).

184. The Supreme Court deemed the argument to be meritorious in *Albemarle Paper Co*., when it relied upon *Griggs* to support its ruling on back pay:

> The District Court's decision must therefore be measured against the purposes which inform Title VII. As the Court observed in *Griggs v. Duke Power Co.*, . . . the primary objective was a prophylactic one:
>
> > "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."
>
> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

Id. at 417-18 (citation omitted).

185. *See, e.g.*, *Johnson* v. Ga. Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

186. *Albemarle Paper Co.*, 422 U.S. at 418.

187. *Id*. at 421.

presumptive entitlement to back pay is seldom overcome once the court has found unlawful discrimination.[188]

Another major development that made the impact theory a potent tool to remedy employment discrimination was when, in the wake of the Supreme Court decisions in *Albemarle Paper Co.* and *Franks v. Bowman Transportation Co.*,[189] courts began to develop a substantial body of law on various forms of appropriate relief, such as back pay, front pay, reinstatement, and injunctive relief.[190] The twin developments of a post-*Griggs* emergence of a coherent body of substantive law on disparate impact and the emergence of "rightful place" and "make-whole" monetary remedies sent a clear message to defendants in employment discrimination cases: either affirmatively prove that challenged employment practices were mandated by business necessity or face a substantial risk of liability and the imposition of remediation costs imposed by courts.[191] One response of employers to the formidable mandate created by the twin post-*Griggs* developments was to seek relief from the federal government, i.e., the EEOC, the Department of Justice and the federal Civil Service Commission.[192] These federal agencies, after resolving some policy differences, endorsed the bottom-line defense,[193] which holds that an employer's policies or practices that have an adverse effect on a protected class would not result in a finding of a violation by federal agencies if the bottom line result in the decision making process did not show disparate impact, even if one of the criteria used in the process did have a disparate impact on a protected class.[194] The Supreme Court

188. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 719 (1978).

189. 424 U.S. 747 (1976).

190. *See generally* ROBERT BELTON, REMEDIES IN EMPLOYMENT DISCRIMINATION LAW (1992) (covering a broad range of make-whole and rightfully place forms of relief).

191. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 1006 (1988) (plurality opinion).

192. *See generally* Alfred W. Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of* Connecticut v. Teal, 20 HARV. J. ON LEGIS. 99 (1983).

193. *See id*.

194. The following is a simple illustration of the bottom-line approach. The employer bases its hiring decisions on the applicant's score on an employment examination and on the results of an interview used to evaluate subjective criteria. The following table shows the results of each step of the hiring process for black and white applicants.

rejected the bottom-line defense in *Connecticut v. Teal*,[195] holding that it does not preclude a plaintiff or a class of plaintiffs from establishing a prima facie case of discrimination, nor may a defendant raise it as a defense to a prima facie case.[196]

Another response was that employers, in adopting affirmative action policies, began to take into account race or sex as a factor in making employment decisions. By taking race or sex into account, if an employer could reduce the statistical disparity between the number of qualified blacks and women in the relevant labor market and the number of blacks and women in its workforce, then the employer was in a good position to successfully defend a disparate impact claim. The Supreme Court provided support for employers' reliance on affirmative action plans in certain limited circumstances in *United Steelworkers v. Weber*.[197] In *Weber*, the employer, Kaiser Aluminum, and a union, the Steelworkers, adopted an affirmative action plan, pursuant to which they agreed to establish a program to train production workers to be apprentices to fill craft openings.[198] Selection of apprenticeship trainees would be made on the basis of seniority, with the proviso that fifty percent of employees selected would be black and fifty percent would be white.[199] The district court found that the defendants adopted the plan to satisfy their obligation under Executive Order 11246 and to avoid "vexatious litigation by minority employees."[200] The same two defendants had been

	Blacks	Whites
No. of Applicants	100	100
No. Failed the Test	60	10
No. Interviewed	40	90
No. Offered Employment	10	10

Although blacks are disproportionately eliminated by the test, the final selection process, based on the interviews, shows that black applicants are offered employment at a rate equal to white applicants. The bottom-line defense requires that, in determining whether disparate impact has been shown, one must look to the bottom line of the selection process—here the relative proportion of applicants of each race offered employment—rather than the adverse impact of a specific criterion that is used in the course of selection process.

195. 457 U.S. 440 (1982).

196. *Id.* at 442.

197. 443 U.S. 193 (1979).

198. *Id*. at 198-99.

199. *Id.* at 99.

200. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 765 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd and remanded sub nom.* United Steelworkers v. Weber, 443

sued successfully in an earlier employment discrimination case.[201] The central issue in *Weber* was whether the defendants could lawfully take reasonable race-conscious action to remedy the effects of apparent or potential violations of Title VII, without admitting and proving that it had previously engaged in racial discrimination.[202]

In *Weber*, the Court held that an affirmative action policy survives a Title VII challenge if it satisfies a three-pronged test.[203] First, the purpose of the affirmative action plan must be to "break down old patterns of racial segregation and hierarchy;"[204] second, the plan must not "unnecessarily trammel the interest of white employees;"[205] and third, the plan must be a "temporary measure" that is not "intended to maintain racial balance."[206]

The post-*Griggs* developments, as described above, effectuated the dream of Judge Sobeloff that Title VII should be construed so that it "remain[s] a potent tool for equalization of employment opportunity" for all of those who fall within its protection.[207]

IV. THE "DEATH" OF THE DISPARATE IMPACT THEORY

As the membership of the Supreme Court began to change, so too did the jurisprudence on Title VII. Many date the demise of the *Griggs* disparate impact theory with the Court's 1989 decision in *Wards Cove Packing Co. v. Atonio.*[208] My assessment is that the onset of the Court's dismantling of the legal edifice surrounding *Griggs* began with the Court's 1976 decision in *Washington v Davis*.[209] In that case, the Court held that the disparate impact theory is inapplicable to discrimination claims based solely on the Equal Protection Clause; purposeful or intentional discrimination must be proven in an Equal Protection Clause

U.S. 193 (1979)*; see also* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 234 (5th Cir. 1977) (Wisdom, J., dissenting) (noting that the defendants were facing "arguable violations" of Title VII), *rev'd and remanded sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

201. *See* Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374 (5th Cir. 1978).

202. The Court framed the question as "whether Congress, in Title VII . . . left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories." *Weber*, 443 U.S. at 197.

203. *See id.* at 208.

204. *Id.*

205. *Id.*

206. *Id.*

207. Griggs v. Duke Power Co., 420 F.2d 1225, 1238 (4th Cir. 1970) (Sobeloff, J., concurring in part and dissenting in part).

208. 490 U.S. 642 (1989).

209. 426 U.S. 229 (1976).

claim.[210] *Washington v. Davis* can be seen as the opening legal salvo that ultimately reached its intended outcome in *Wards Cove*, where the Supreme Court completely dismantled the disparate impact theory.[211]

In the Term following the *Washington v. Davis* decision, the Court continued to dismantle the legal edifice that supported the *Griggs* disparate impact theory. There were very few dissents in the Court's Title VII cases prior to its 1976 Term.[212] In a series of cases decided during its 1976 Term, most of which had dissenting opinions, the Court, *inter alia*, held that discrimination because of pregnancy is not sex discrimination;[213] began to limit the reach of the "continuing violation" theory to determine whether a charge had been timely filed with the EEOC;[214] began to endorse more stringent rules on certifying class actions;[215] rejected the present-effects-of-past discrimination as a theory of discrimination;[216] and narrowly construed the reasonable accommodation provision for religious discrimination claims.[217] The Court in these cases established a trend of narrowly construing issues arising under Title VII.

Although, the Court laid the foundations for dismantling *Griggs*' disparate impact theory in *Watson v. Fort Worth Bank & Trust*,[218] it did not have the votes to actually do so because Judge Kennedy had not yet joined the Court. In *Watson*, the plurality adopted the view that the disparate impact theory is, in effect, the disparate treatment theory masquerading in drag:

> The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is

210. *See id*. at 238-39.

211. *See Wards Cove*, 490 U.S. at 650-51.

212. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Brown v. GSA, 425 U.S. 820 (1976); Chandler v. Roudebush, 425 U.S. 840 (1976); Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 96-99 (1973) (Douglas, J., dissenting); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973) (unanimous); Love v. Pullman, 404 U.S. 522, 522 (1972) (7-0 decision); Griggs v. Duke Power Co., 401 U.S. 424, 425 (1971) (8-0 decision); Phillips v Martin Marietta Corp., 400 U.S. 542, 544-47 (1971) (Marshall, J., concurring); Crosslin v. Mountain States Tel. & Tel. Co., 400 U.S. 1004, 1004-05 (1971) (Douglas, J., dissenting).

213. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976). Congress overturned *Gilbert* in the 1978 amendments to Title VII. 42 U.S.C. § 2000e-k (2000).

214. *See* United Air Lines, Inc. v. Evans, 431 U.S. 553, 560 (1977).

215. *See* E. Tex. Motor Freight, Inc. v. Rodriguez, 431 U.S. 395, 405-06 (1977).

216. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 341 (1977).

217. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 85 (1977).

218. 487 U.S. 977 (1988).

> different than in cases where disparate treatment analysis is used. (citation omitted). Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination. Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.[219]

The plurality in *Watson* also seemed to express a clear hostility to the disparate impact theory because, in its view, the liberal use of statistics and the rigorous business necessity test inevitably left defendants no choice but to adopt racial and sexual quotas in order to avoid liability under the theory:

> We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. (citation omitted). It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided [in section 703(j) of Title VII] that employers are *not* required to avoid "disparate impact . . . ."[220]

The Court went on to say that:

> Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution (citation omitted), and it has long been recognized that legal rules leaving any class of employers with "little choice" but to adopt such measures would be "far from the intent of Title VII." (citation omitted). Respondent and the United States are thus correct when they argue that extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quo-

219. *Id.* at 987.
220. *Id*. at 992.

> tas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent, and it should not be the effect of our decision today.[221]

With this foundation laid, the Court was finally able to completely dismantle the disparate impact theory in *Wards Cove Packing Co. v. Atonio*.[222] In *Wards Cove*, with Judge Kennedy then sitting, the Court made it more difficult for plaintiffs to establish a prima facie case of disparate impact discrimination by adopting a more rigorous standard for the use of statistical evidence and substantially easing the burden of defendants to prove they meet the business necessity test.[223]

A question that has always intrigued me is why the Court in *Wards Cove* did not completely overturn *Griggs*, if the majority of the Justices subscribed to the view that the disparate treatment theory of discrimination should be the only theory of discrimination that represents this nation's policy on equality. The Court adopted that view in *Washington v. Davis* with respect to claims based on the Equal Protection Clause.[224] One answer might very well be that the Court would have had to overturn *Washington v. Davis* as well, because in *Davis*, the Court drew a clear line of distinction between equal protection claims, where the disparate impact theory is not applicable, and Title VII claims, where the Court recognized the legitimacy of disparate impact claims.[225]

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221. *Id*. at 993.

222. 490 U.S. 642 (1989). *See* Robert Belton, *The Dismantling of the* Griggs *Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 YALE L. & POL'Y REV. 223, 224 (1990).

223. *See* Belton, *supra* note 222, at 240-41.

224. *See supra* note 209-11 and accompanying text.

225. In *Washington v. Davis*, the Court held that:

> Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. It is necessary, in addition, that they be "validated" in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability, or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question. However, [as] this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.

426 U.S. 229, 246-48 (1976).

V. THE CODIFICATION OR REBIRTH OF THE IMPACT THEORY

The Court's decision in *Wards Cove* was only one of a number of cases the Supreme Court had decided during its 1989 Term that set into motion the events that led to the codification of the disparate impact theory in the Civil Rights Act of 1991. In section 2(b) of the Findings to the Civil Rights Act of 1991, Congress found that "the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio* has weakened the scope and effectiveness of Federal civil rights protections."[226] Congress' first attempt to correct the Supreme Court decisions that had weakened the scope and effectiveness of Title VII was the Civil Rights Act of 1990.[227] President George Bush vetoed the Civil Rights Act of 1990 on October 22, 1990.[228] One of the most contentious issues in the debate about the Civil Rights Act of 1990, and the later enacted legislation - the Civil Right Act of 1991 - was whether the *Griggs* disparate impact theory should survive as a matter of law and national policy in the ongoing effect to remedy discrimination in this nation.[229] Just over a year after President Bush vetoed the Civil Rights Act of 1990, he signed into law the Civil Rights Act of 1991. One of the prevailing views about the Civil Rights Act of 1991 is that it would have met the same fate as the 1990 Act, but for the intervening controversial appointment of Justice Clarence Thomas to the Supreme Court of the United States.[230] A week after Justice Thomas was confirmed, the 1991 Act passed by overwhelming majorities in both houses.[231]

The Civil Rights Act of 1991 overturned or otherwise modified twelve Supreme Court decisions that limited or severely curtailed civil rights law.[232] One of the most important provisions of the 1991 Civil Rights Act is where Congress statutorily endorsed the disparate impact theory,[233] with the proviso that a related purpose was to "codify the concepts of 'business necessity' and 'job related' enunciated by the Su-

226. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

227. *See* Cynthia L. Alexander, Note, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595, 596 (1991).

228. 136 CONG. REC. 31,828 (1990) (reprinting President Bush's veto message, which expressed concern that the disparate impact theory would lead to quota hiring).

229. *See*, Helen Dewar, *Senate Upholds Civil Rights Veto, Dooming Measure for 1990*, WASH. POST, Oct. 25, 1990, at A15.

230. *See* Ann Defroy, *Bush Saw Gains in Deal, Officials Say: President Sought to Secure Domestic Victory, Avoid Veto Showdown*, WASH. POST, Oct. 26, 1991, at A1.

231. *See id*. at A7.

232. *See* Robert Belton, *The Civil Rights Act of 1991 and the Future of Affirmative Action: A Preliminary Assessment*, 41 DEPAUL L. REV. 1085, 1085 n.1 (1992).

233. 42 U.S.C. § 2000e-2(k) (2000).

preme Court in *Griggs v. Duke Power Co*. . . .and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*."[234]

VI. SOME CONCLUDING OBSERVATIONS

Griggs has been described as "[t]he single most important Title VII decision, both for the development of the law and in its impact on the daily lives of American workers."[235] Without the *Griggs* disparate impact theory, I doubt seriously whether we could have made the same degree of progress under the disparate treatment theory of discrimination alone, because the observations that the courts made in the early Title VII cases are probably as true today: "[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it"[236] and "[u]nless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree."[237]

The present-effects-of-past-discrimination theory, which is the theoretical predecessor of the disparate impact theory, began to open up employment opportunities for the beneficiaries of Title VII in a meaningful way. Without the willingness of federal courts to entertain this theory of discrimination, it is highly unlikely that the disparate impact theory would have evolved as it did. The present-effects-of-past-discrimination theory is no longer viable under Title VII, but a variant of that theory is found in the American with Disabilities Act of 1990.[238]

There appears to be a general consensus that we have now arrived at a point in our effort to remedy discrimination in employment when we can acknowledge that some progress has been made in implementing the national commitment to the principle of equality. Nevertheless, we continue to disagree about the meaning of "equality" and the nature of "discrimination" as a social, moral, and political problem. We also disagree about the extent to which discrimination on the basis of race, sex, national origin, religion, age and disability continues to shape employment

234. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071, 1071 (1991).

235. H.R. REP. NO. 102-40(I), pt. 1, at 23 (1991), *reprinted in*, 1991 U.S.C.C.A.N. 549.

236. Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987).

237. Thornbrough v. Columbus & Greenville R.R., Co., 760 F.2d 633, 638 (5th Cir. 1985).

238. *See* 42 U.S.C. § 12112(b)(2) (2000). The ADA is the only federal statute that defines "discrimination." Many of the theories of discrimination first developed under Title VII are included in the statutory definition of "discrimination" in the ADA, including the disparate impact theory. *Id.* § 12112(b).

and other decisions on the allocation of goods and services in our society. I doubt that this disagreement is likely to end soon.

A point that is often overlooked and too often overshadowed by the Court's most recent equal protection affirmative action cases[239] is that *Griggs* provides the doctrinal foundations for legitimizing affirmative action in the employment context, particularly in the private sector.[240] The Court has thus adopted two different tests to determine the legality of affirmative action plans. The strict scrutiny theory controls on determining the legality of affirmative action plans when challenged on equal protection grounds.[241] A three-pronged test controls when the legality of an affirmative action plan is challenged solely on Title VII grounds.[242] *Griggs* opened up a completely new remedial approach to eradicating unlawful discrimination in our society, including affirmative action.[243] *Griggs* not only established the doctrinal foundations for the develop-

239. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003). In both of these cases, the Supreme Court endorsed the notion of racial diversity as a compelling state interest that supports affirmative action in higher education. The Court struck down the affirmative action plan in *Gratz*, which involved an undergraduate race-based admission policy, but upheld the affirmative action plan in *Grutter*, which involved a race-based admission policy used by a law school.

240. *See* Belton, *supra* note 222, at 247-48.

241. *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 308.

242. *See* Johnson v. Transp. Agency, Santa Clara County, 480 U.S. 616, 617 (1987) (dealing with a plan adopted by a public employer); United Steelworkers v. Weber, 443 U.S. 193, 195 (1979) (dealing with an affirmative action plan adopted by a union and a private employer).

243. There is no consensus on a definition of "affirmative action." As one commentator has explained:

> To its critics, affirmative action is both a euphemism for discrimination against white men and a system that bureaucratizes the entire society at the cost of meritocratic decision making; it is a symbol for all that has gone wrong with American society since the sixties. To its supporters, it is a first step towards remedying the crime of slavery and eliminating the discriminatory preferences that have guaranteed white men the easiest paths to wealth and power; it is a symbol of justice, and a promise of a future of hope.

David Benjamin Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN'S L.J. 42, 42 (1988-89). Previously, I have defined "affirmative action" as follows:

> The affirmative action concept embodies a policy decision that some forms of race-conscious remedies are necessary to improve the social and economic status of blacks in our society. That policy decision, however, cannot be isolated from the history that gave rise to the affirmative action concept. When viewed in light of that history—decades of blatant public and private discrimination against blacks *as a group*—the underlying premise of affirmative action is manifest: If the chasm between "equality" as an abstract proposition and "equality" as a reality is to be bridged, something more is needed than mere prohibitions of positive acts of discrimination and the substitution of passive neutrality. That something more, the affirmative action concept dictates, must include race-conscious remedies.

Robert Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C. L. REV. 531, 534 (1981).

ment of employment discrimination law generally, but also provided the doctrinal transition from a human relations/administrative enforcement model to a public law enforcement model.[244] Literally hundreds of minorities and women have benefited immensely from *Griggs* in ways that probably could not have been accomplished under a human relations/administrative enforcement model or under an interpretation of Title VII that limited relief only to those parties who could prove subjective, intentional discriminatory conduct.[245]

We are witnessing a number of record-breaking class action settlements in employment discrimination cases. Some of the more well-known and highly visible settlements include cases against Shoney's, Texaco, and Coca-Cola.[246] It seems, without a doubt, that the disparate impact theory may be a factor that is either in the forefront or in the background of these settlements.

Now that Congress has codified the disparate impact theory, a question raised is whether this codification is likely to have the same effect in the future as it has had in the past. In addressing this question, one commentator has identified the following reasons for what seems to be present underutilization of the theory.[247] The first is that the disparate impact theory may not be as attractive as the disparate treatment theory because compensatory and punitive damages are not recoverable under the disparate impact theory.[248] The second is that the impact theory is "inherently a class-based theory and class actions are difficult, if not impossible, for private parties to undertake unless they involve the possibility of very large damage awards."[249] The third is that the world has changed since Title VII has been on the books; the employers now know

244. *See* Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1360, 1403 (1990); *see also* L. Camille Hébert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive* Wards Cove *and the Civil Rights Act of 1990*, 32 B.C. L. REV. 1, 45-46 (1990) (noting that *Griggs* sparked a debate in Congress between administrative enforcement and public law enforcement).

245. *See generally* Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 906-07 (1978) (discussing how judicial enforcement gave those injured by a Title VII violation meaningful relief).

246. *See generally* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination and Its Effects*, 81 TEX. L. REV. 1249, 1249 (2003) (citing the multi-million dollar settlements by these major corporations).

247. Elaine Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 598 (2004).

248. *See id.; see also* 42 U.S.C. § 1981a(b)(1) (2000) (allowing recovery of punitive damages if malice or reckless indifference is proven).

249. Shoben, *supra* note 247, at 598.

the rules, and "the *Griggs* revolution has been spectacular and employment practices across America have been influenced by the holding."[250] The fourth is that the disparate impact theory is under attack as illustrated by the split in the circuits on whether the theory applies to claims arising under the Age Discrimination in Employment Act.[251] The theory is not dead, but what happens to it in the future remains to be seen. And, it should be noted, that developments of the theory in the future will not necessarily be left to the federal government because states are beginning to adopt the theory as well.[252]

Griggs is not without its critics. The disparate impact theory, like the Court's decision in *Brown*, has generated an ongoing judicial and scholarly debate about the legitimacy of the theory and the Court's underlying rationale. As one scholar stated, "missing from the Burger Court's opinions was a clear explanation of the theory underlying disparate impact law. Was the theory bottomed on the existence of past or present discrimination against minorities?"[253] Another scholar has argued that *Griggs* was wrongly decided because Congress intended to prohibit only disparate treatment discrimination.[254] As with the *Brown* decision, much of the criticism of *Griggs* is grounded, at bottom, on the ongoing debate about the meaning of equality, and the debate about the meaning of equality goes back to the very beginning of this country.[255] The efforts of the Legal Defense Fund in its employment discrimination litigation campaign were an attempt to reshape the contours of the de-

250. *Id.*

251. *Id.* at 599. The Supreme Court has granted certiorari in Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 1724 (2004), to resolve the circuit split.

252. *See, e.g.*, Thomas v. Anchorage Tel. Util., 741 P.2d 618, 628 (Ala. 1987); Racine Unified Sch. Dist. v. Labor & Indus. Comm'n., 476 N.W.2d 707, 718 (Wis. Ct. App. 1991).

253. Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1281 (1992).

254. Michael Gold, Griggs' *Folly: An Essay on the Theory, Problems, and the Origins of Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985). Professor Richard Epstein, one of the harshest critics of employment discrimination law, has argued that, "[i]f in 1964 any sponsor of the Civil Rights Act had admitted Title VII on the ground that it adopted the disparate impact test read into it by the Supreme Court in *Griggs*, Title VII would have gone down to thundering defeat." RICHARD EPSTEIN, FORBIDDEN GROUND: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 197 (1992).

255. *See, e.g.*, DERRICK BELL, RACE, RACISM AND AMERICAN LAW 13-62 (5th ed. 2004). Professor Derrick Bell, who many deem to be the "father" of critical race theory, has articulated several reasons to explain the unsteady progress this country has made in dealing with racial injustice. His first theory is the cyclical nature of racial progress. The second is that significant racial progress for African Americans occurs when the goals of African Americans coincide with the perceived needs of whites. The third is that serious differences between the races are often resolved through compromise that sacrifices the rights of African Americans. *See id.* at 18.

bate about equality. Understanding the history of the litigation strategy that led to the *Griggs* decision is essential to reformulating that debate.