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The Accumulation of Disadvantages

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The continued subjugation of a historically disadvantaged group is the product of policies that cut across all walks of life. Members of such a group are personally shunned, their educational opportunities are impaired, the jobs open to them are limited, and they are confined to living with one another in the same neighborhood, usually in the oldest and most dilapidated housing, unable to count on the most rudimentary public services. Often, members of such a group are even denied the right to vote.

The Second Reconstruction—a reform program aimed at eradicating the subordination of Blacks in the United States—was comprehensive in its aspirations and eventually reached all spheres of social activity, but it must be remembered that it evolved in a piecemeal fashion. The reform program was formally launched in 1954 with the Supreme Court's decision in *Brown v. Board of Education*,[1] and its edict requiring desegregation of public education was soon extended to all state activities. Nevertheless, the country had to wait until 1964 for Congress to guarantee Blacks equal employment opportunities with private firms and equal access to privately owned hotels and restaurants. Still later, in 1967, the Supreme Court stepped forward once again and struck down state laws that interfered with the most private of relationships between Blacks and whites and that forbid them from marrying one another. In 1968, the reach of the Second Reconstruction was again extended, this time by Congress, which then enacted a measure to ensure equal access to housing.

Voting was also a subject of reform during this period. Although the right of Blacks to vote had been enshrined in the Constitution in the years immediately

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1. 347 U.S. 483 (1954).

following the Civil War, it remained an unfulfilled promise for almost one hundred years. It was not until 1965 that the nation made good on this promise when Congress, responding to the dramatic march from Selma to Montgomery, banned a large number of devices that had been used by the Southern States to disenfranchise Blacks.

None of these guarantees of equal treatment, regardless of whether they were fashioned by the Supreme Court or Congress, were self-implementing. Lawsuits had to be brought to enforce them, which only accentuated the already fragmented quality of the Second Reconstruction. Lawsuits, after all, cannot be brought against society in general, but only against particular institutions that have acted improperly. As a result, almost an endless number of lawsuits had to be brought against local educational authorities that operated their schools on a segregated basis, against individual firms that refused to hire Blacks, against landlords that excluded them, and against police departments that used the force of arms to abuse them. Each suit had its own victims and perpetrators; each was managed by its own legal team; and each was heard by one of many federal judges located throughout the nation.

THE *GRIGGS* PRINCIPLE AND ITS ORIGINS

In 1969, fifteen years after the Supreme Court handed down its decision in *Brown v. Board of Education*, the Court finally recognized the artificiality of the fragmented approach to reform and announced a doctrine founded on an understanding of the interconnection between practices that disadvantaged Blacks. That case—*United States v. Gaston County*[2]—condemned the practice of denying Blacks the right to vote for failing a literacy test when they had been systematically denied equal educational opportunities as children. It was irrelevant to the Court's analysis that the actions of a voting authority rather than a school board were before it and that some Blacks seeking the right to vote had received their education in other counties, indeed, some in other states. In essence, the Justices were driven by an idea—let's call it the theory of cumulative responsibility—which condemns any institution, regardless of its own past actions, from engaging in a practice that aggravates, perpetuates, or merely carries over a disadvantage Blacks had received at the hands of some other institution acting at some other time and in some other domain.

Congress soon gave further sweep to this decision by passing a statute that imposed a nationwide ban on literacy tests.[3] This measure, as well as the judicial ruling that prompted it, was bolstered by the democratic sentiment that favors the enlargement of the franchise—the more the better. The Court and Congress were also aided, at least philosophically, by the fact that the right to vote is not a scarce resource: allowing one person to vote does not deny another that

2. 395 U.S. 285 (1969).
3. Voting Rights Amendments Act of 1970, PUB. L. NO. 91-285, 84 Stat. 314, 315 (1970).

opportunity. Yet, as the Court soon made clear, the theory of cumulative responsibility implicit in *Gaston County* could not logically be confined to voting.

In the spring of 1971, in a case entitled *Griggs v. Duke Power Company*, the Supreme Court applied the theory of cumulative responsibility in the employment context and barred private employers from using tests or other educational requirements that would, because of the inferior quality of the schooling that Blacks had received, result in disparate impact on them.[4] The opinion was unanimous and delivered by the new Chief Justice, Warren Burger. He did not recognize a difference between voting and employment, and, in fact, *Gaston County*—a voting case—was the only precedent he cited in what has now come to be understood as the landmark employment decision of the Second Reconstruction.

In the years immediately following the *Griggs* decision, the Court formulated a three-step process for evaluating employment requirements: (1) the plaintiff must show that the challenged test has an adverse disparate impact on Blacks by denying employment opportunities to a disproportionately higher number of them; (2) if the plaintiff makes that showing, the burden shifts to the firm to demonstrate that the test is reasonably designed to measure job performance. If the firm fails to make that showing, the test will be barred; (3) even if the defendant firm is able to show that the employment test is an adequate measure of job performance, the plaintiff still has the opportunity to show that another test exists, which measures job performance equally well, but has less of an adverse impact on Blacks than the one preferred by the firm. If the plaintiff makes this showing, the test that the firm proposed will be barred, and presumably the alternative will be instituted.[5]

This three-step mode of analysis, commonly known as the *Griggs* principle, operates to generate pressure on firms to develop and institute employment tests that minimize disparate impact on Blacks. Although this pressure is limited—it is never so great as to require firms to hire individuals who cannot adequately perform the job in question—it does, in fact, impose affirmative obligations on employers and exacts economic sacrifices from them. First, it requires businesses to dedicate resources to developing tests that can be proven to measure job performance. Second, it obliges employers to utilize a test, among the ones that measure job performance, that has the least disparate impact on Blacks—even if that test is more costly to administer, assuming of course that the additional costs are not prohibitive. The theory of cumulative responsibility, as applied in *Griggs*, does not impose these obligations on the firm solely because of its own actions, specifically, that it chose to screen employees on the basis of the disputed test, but also because Blacks had received, at some earlier time, an inferior education.

4. 401 U.S. 424, 429–30 (1971).
5. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1971).

Both *Gaston County* and *Griggs* were based on laws that, in so many words, prohibited discrimination based on race. But the officials and businessmen who had been called to account in these cases could not literally be charged with discrimination on the basis of race—that is, using race as a criterion for determining who could vote or who should get the job. The tests invalidated in these cases were applied to all applicants—white or Black—and it was assumed that the tests would be administered in an even-handed manner—that is, there would be no favoritism based on race when grading performance on the test. Admittedly, it is always possible to impugn the motives of officials who choose tests that have predictable disparate results. Yet, in these two cases, the Court did not take that path. There was no talk of animus. The Court operated on the assumption that the tests in question were adopted as part of a good-faith effort to identify good workers or qualified voters.

In his opinion in the *Griggs* case, Chief Justice Burger introduced the idea of "indirect discrimination,"[6] thereby suggesting that a practice that has the effect of perpetuating a previous discrimination based on race should itself be viewed as a discrimination based on race. Such a view, however, is not entirely convincing, for one thing, because it fails to supply a reason for treating the two practices the same. We might well prohibit the use of race when selecting employees or in allocating the franchise on the ground that it constitutes a form of unfair treatment since race is an irrelevant criterion for determining productivity or judging whether individuals are qualified to vote. The same cannot be said of a test—as was true of the ones used in *Griggs* and *Gaston County*—that seems to serve a legitimate social purpose, such as choosing good workers or qualified voters.

Nor can the theory of "indirect discrimination" justify the third step entailed in the *Griggs* principle—the obligation of a firm or a public agency to adopt an alternative test that serves its legitimate needs but has less of an adverse effect on Blacks. The remedy for discrimination, whether it be direct or indirect, is a ban prohibiting the discrimination, not an affirmative obligation to minimize disparate impact. Moreover, and most importantly, the idea of "indirect discrimination" that Chief Justice Burger offered does not explain why it is legitimate to hold one firm (Duke Power Company) or one voting district (Gaston County) responsible for the racial discrimination perpetrated by educational authorities, some from different states, over which they had no control whatsoever.

We should, I maintain, not view decisions such as *Griggs* and *Gaston County*, or for that matter, the theory of cumulative responsibility in general, as applications or even extensions of individual-focused antidiscrimination norms. Rather, these judicial decisions should be seen as driven by larger, more

6. *See Griggs,* 401 U.S. at 430 ("There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race.").

structural considerations—a desire to end the social stratification, rooted in slavery and maintained by Jim Crow, that treats Blacks as pariahs.[7] Discrimination based on race is only one of the many techniques that have been used to create and maintain that structure; it is an instrument for achieving the wrong, not the wrong itself. The wrong is the perpetual and systematic subordination of a group that is racially defined.

The theory of cumulative responsibility appreciates the interconnected character of social life and the fact that people carry the disadvantages they receive in one domain, say education, to others, such as employment. It is predicated on the sad truth that inequality begets inequality. The *Griggs* principle is founded on this theory and requires firms to take action, consistent with their interest in employing qualified workers, that minimizes the disadvantages imposed on Blacks in other domains and at other times. Specifically, it directs each firm to make certain that the tests it uses are job related and, beyond that, to institute screening devices that might serve its business interests, while also minimizing the exclusion of Blacks.

This obligation is not imposed because we assume or even believe that the firm in question has played a role in creating the racial caste system that now subjugates Blacks. Rather, it arises from a proper understanding of the responsibility that every member of the community, even one born yesterday, now has to eradicate the stratified social structure that has marred American society since its inception. All of us, simply because we live together and are members of the same polity, must do what we can to honor the values of the Constitution and to make good on its promise to transform America into a community of equals.

The *Griggs* principle is not self-enforcing. It often requires implementation by the judiciary and the issuance by the court of an order or decree. In such a case, a judge might condemn an employment test because the firm is unable to demonstrate that the test causing disparate impact was a good predictor of job performance. Or the judge might order the firm to institute a test proposed by the plaintiff on the ground that the firm's test does not minimize the disparate impact on Blacks, even though it adequately measures job performance. In such litigation, we can well imagine the head of a firm asking, "Why me? Why do I have to adjust or change my practices to account for the deficiencies that were imposed by the educational system?"

This query stems from a mismatch between the structural character of the reform sought by the *Griggs* principle and the necessity of adjudication to implement that principle in the day-to-day practices of the business community. The aspiration is societal but the method is individuated. Although the ultimate aim of the *Griggs* principle is structural in nature—that is, to eradicate the racial

7. Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); *see also* Owen Fiss, *Another Equality*, 2 ISSUES LEGAL SCHOLARSHIP: ORIGINS & FATE ANTISUBORDINATION THEORY 20 (2004).

stratification that has survived the abolition of slavery and the dismantling of Jim Crow—to the extent we rely on lawsuits to achieve that purpose, we will need to proceed in a piecemeal fashion. We will have to sue one firm at a time.

The aggrieved CEO in our imagined lawsuit must come to understand that the firm is not being held accountable for shortcomings in the education that Blacks had received. Rather, the firm is being held accountable for its own actions, the method it chose for selecting its employees. On the surface this method may seem innocent enough, but in truth it will, due to a myriad of factors including the inferior character of the education that Blacks had received, have unfortunate social structural consequences.

As a substantive matter, legal doctrine must reflect all dimensions of disadvantage, otherwise the subordination of Blacks will never be brought to an end. Procedurally, however, we must confront one social actor at a time, leaving the rest for another day, on the theory that we must begin somewhere. The hope is that the victory achieved in any one lawsuit will guide the industry and then spread to other domains and eventually become the law of the land.

FROM CONSTITUTION TO STATUTE

Although the aim of the Second Reconstruction—the eradication of the racial caste structure that has long disfigured American society—is indeed admirable, the commitment to the project began to wane in the early 1970s. A number of the Justices who had been responsible for *Brown* and its implementation stepped down, and in their place, two Republican Presidents, Richard Nixon and then his replacement, Gerald Ford, appointed Justices who were less committed—maybe some were even opposed—to the reform that *Brown* had promised.[8]

American society also began to change. The War in Vietnam increased distrust of government authority, and spiraling inflation brought an end to the sense of affluence that underwrote much of the idealism of the 1960s. Classical understandings of the market gained greater ascendancy and people began to view private, bilateral exchange, rather than the action of public authorities, as the primary ordering mechanism of society.[9]

In its 1976 decision in *Washington v. Davis*,[10] the Supreme Court responded to these developments, but in an odd way. The majority drew a bold distinction between constitution and statute and downgraded the *Griggs* principle to a statutory rule. Such a move has always struck me as a strained reading of *Griggs*. Although as a purely technical matter, *Griggs* had been brought under Title VII of the Civil Rights Act of 1964, the Chief Justice's

8. *See* LAURA KALMAN, THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT (2017).

9. Richard Posner's THE ECONOMIC ANALYSIS OF LAW, first published in 1973, is illustrative of this development.

10. 426 U.S. 229 (1976).

opinion in that case had a constitutional quality. The crucial precedent upon which Chief Justice Burger relied, namely, *Gaston County*, was based on the Constitution (the Fifteenth Amendment or its codification in the Voting Rights Act of 1965). Moreover, the attention Justices ordinarily pay to the language of a statute was replaced by a reference to the ancient fable of the stork and fox, a mode of analysis more suited to constitutional exegesis than statutory interpretation.

The Chief Justice well understood that in enacting Title VII, Congress was merely trying to extend the interpretation of equal protection articulated by the Supreme Court in *Brown* to entities or activities not covered by that decision because of the Fourteenth Amendment's state action requirement.[11] The legislators did not imagine that they were creating a new substantive rule of conduct. It was therefore not surprising that, from 1971 (when *Griggs* was decided) until the Court's decision in *Washington v. Davis* in 1976, the legal profession treated the *Griggs* principle as governing both statute and Constitution.

The proceeding that gave rise to *Washington v. Davis* was initially brought against the Washington, D.C., police department under the Constitution (specifically the equal protection component of the Fifth Amendment). During the pendency of the suit, Congress amended Title VII to apply to the employment practices of government agencies, but the lawyers for the rejected Black applicants persisted in their constitutional claims. Although a majority of the Justices eventually denied the Title VII claim on the merits (finding that the challenged employment test was related to job performance), they first ruled that *Griggs*'s disparate impact standard did not govern constitutional claims.

This was a most irregular way of proceeding—the Court usually seeks to avoid constitutional rulings, if another ground of decision is available. In accordance with this precept, the Court could have first denied that the requirements of the *Griggs* principle were satisfied, regardless of whether the principle had a statutory or constitutional basis, and in that way eliminated the need to decide whether the principle was of constitutional proportions. The decision of the Court to reach out and deny the constitutional status of the *Griggs* principle was especially puzzling, because that issue was neither raised nor briefed by the parties. Nor was it one of the questions formally presented to the Court.

In electing to decide *Washington v. Davis* in the way that it did, the Supreme Court, in effect, renounced its leadership of the Second Reconstruction. The Court decided to step back, and for the next twenty years, until January 1995,

11. *See*, *e.g.*, 110 CONG. REC. 1517 (1964) (statement of Rep. Celler, the sponsor of the legislation) ("The legislation before you seeks only to honor the constitutional guarantees of equality under law for all.") Referring to the provisions in the proposed act governing state supported public accommodations, Representative Celler added: "Discrimination of that type has already been declared unconstitutional by any number of cases." 110 CONG. REC. 1518.

when the Republicans, led by Newt Gingrich, took control of Congress, primary responsibility for America's civil rights agenda moved across the street to Capitol Hill.[12] During this period, Congress broke new ground when, in 1990, it enacted the Americans with Disabilities Act, requiring covered entities to make reasonable accommodation for the needs of persons with disabilities.[13] For the most part, however, during this particular phase of the Second Reconstruction, Congress did not embark on a bold and dynamic expansion of civil rights. Rather, Congress limited itself to undoing select decisions of the newly constituted Court that it felt had cut back or diluted earlier achievements.

In the Pregnancy Discrimination Act of 1978, for example, Congress amended Title VII of the 1964 Civil Rights Act to prohibit employment decisions based on pregnancy in much the same way as the 1964 Act regulated employment decisions based on sex.[14] In 1980, Congress authorized the Attorney General to commence and participate in lawsuits to protect the civil rights of individuals confined to hospitals and prisons.[15] In enacting this measure, Congress was primarily responding to an opinion that was filed by William Rehnquist (then an Associate Justice), joined by Justice Lewis Powell and Chief Justice Burger, dissenting from the denial of certiorari. In that opinion, Rehnquist indicated his disapproval of a ruling by the lower courts that allowed the Attorney General to intervene in the omnibus Texas prison litigation.[16] Congress saw the handwriting on the wall.

In the 1982 amendments to the Voting Rights Act of 1965, Congress proscribed practices that had the effect, not just the purpose, of disadvantaging Blacks in the electoral process. In enacting this measure, Congress was responding to the then recent decision of the Supreme Court permitting Mobile, Alabama, to continue its at-large system for electing members of the city council, an arrangement that effectively denied Blacks the opportunity to elect representatives of their choice.[17] In yet another such legislative intervention, the Civil Rights Restoration Act of 1987,[18] Congress overturned the decision of the Supreme Court that had narrowed the scope of civil rights laws that prohibited discrimination in a program or activity that received federal financial assistance. The 1987 statute enlarged the scope of these civil rights measures in such a way as to make the recipient of federal funds accountable for the discrimination that occurred in any of its programs or activities.

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12. *See* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613 (1991).

13. 42 U.S.C. §§ 12101–12213 (2012).

14. General Electric Co. v. Gilbert, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012), PUB. L. NO. 95-555, 92 Stat. 2076 (1978).

15. Civil Rights of Institutionalized Persons Act, PUB. L. NO. 96-247, 94 Stat 349 (1980).

16. W.J. Estelle, Jr. v. Justice, 426 U.S. 925 (1976) (Rehnquist, J., dissenting).

17. Mobile v. Bolden, 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendment of 1982, PUB. L. NO. 97-205, 96 Stat. 131 (1982).

18. Grove City College v. Bell, 465 U.S. 555 (1984), *superseded by statute*, Civil Rights Restoration Act of 1987, PUB. L. NO. 100-259, 102 Stat. 28 (1988).

This pattern repeated itself once again with the Civil Rights Act of 1991.[19] The primary purpose of this statute, arguably the most significant of all these rear-guard measures, was to overturn a 1989 decision of the Supreme Court that, according to the sponsors of the legislation, had weakened the disparate impact doctrine of *Griggs*.[20] The 1991 Act proceeded not by amending the prohibition against discrimination based on race that was enacted in 1964, but by adding a separate provision governing disparate impact liability. In crafting this provision, the sponsors of the 1991 Act did not attend with much specificity to the wording of the rule of law that they were enacting. They merely adopted wholesale language from a number of earlier Supreme Court decisions, while at the same time disapproving of the latest Supreme Court application of those precedents.[21]

Such an exercise of the legislative power seems at odds with the underlying theory of *Washington v. Davis*. Although that ruling was not faithful to the legislative history of the Civil Rights Act of 1964, and although the Court's willingness to embrace disparate impact liability was not in any obvious way derived from the language of that measure, the Court's decision to downgrade the *Griggs* principle from a constitutional to statutory rule, in effect, enlarged Congress's power to supervise the application and interpretation of disparate impact doctrine. In thus handing responsibility for the *Griggs* principle to Congress, *Washington v. Davis* can be read as furthering majoritarian values. Yet the 1991 Act confounded this understanding of *Washington v. Davis*, for in crafting that Act in the way that it did, Congress refused to assume responsibility for the disparate impact doctrine and instead insisted upon treating it as a judicial creation. After this inter-branch game of hot-potato, one could only wonder: Who is in charge here? Is it the Court or Congress?

In the quarter of a century following the enactment of the 1991 Act, the Supreme Court has largely been governed by a conservative bloc. Indeed at all

19. PUB. L. NO. 102-166, 105 Stat. 1071 (1991) (the provisions of the Act governing disparate impact liability are codified at 42 U.S.C. § 2000e-2(k)).

20. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

21. Section 2(2) of the Civil Rights Act of 1991 declared, "The Congress finds 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 . . . ." Congress, in particular, made clear that it was objecting to the way *Wards Cove* altered the burden of proof governing disparate impact claims. While *Wards Cove* held that the employer bore the burden of producing evidence that the test is job related, the Court in that case allocated the burden of persuasion to the plaintiff. The 1991 Act signaled its objection to this feature of the decision by placing the burden of persuasion on the employer. From there on in, however, the changes the Act wrought to *Wards Cove* and disparate impact doctrine generally remain unclear. Congress issued an interpretive memorandum to accompany the 1991 Act, and it said that the *Wards Cove* Court had misinterpreted the terms "business necessity" and "job-relatedness." However, rather than providing a correct interpretation of those terms, it merely referred to the Supreme Court's annunciation of those terms in *Griggs* and its progeny. *See* 137 CONG. REC. S28,623 (daily ed. Oct. 25, 1991) (interpretive memorandum) ("The terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*.") (internal citations omitted).

times, a clear majority of the Justices who were on the bench had been appointed by Republican presidents, some by Nixon and Ford, others by Ronald Reagan, George H. Bush, and his son, George W. Bush. Remarkably, however, on two separate occasions during this twenty-five-year period, the Court considered the place of the *Griggs* principle in American law, and in both instances, one of these Republican appointees, Justice Anthony Kennedy, wrote an opinion sustaining that principle.

The first of these occurred in the *Ricci* decision of 2009 involving the firefighters of New Haven, Connecticut.[22] The second consisted of the *Inclusive Communities* decision of 2015, in which the Court extended the disparate impact doctrine from Title VII to Title VIII, the fair housing law that was enacted in 1968.[23] There were, however, features of Kennedy's opinions in both of these cases that might seem in tension with the *Griggs* principle as traditionally understood.[24]

In deciding *Ricci*, Kennedy was careful to structure his opinion within the terms of Title VII, though he understood that the case was no ordinary exercise of statutory interpretation, but rather entailed a clash between two fundamental principles. One was *Griggs* and its command that employers minimize disparate impact. Following *Washington v. Davis*, this principle was rooted in the ban on discrimination in the original version of the Civil Rights Act of 1964 and, later, in the explicit codification of disparate impact liability by the 1991 amendments to that Act. The other principle, now understood as being grounded in Title VII as originally enacted, prohibited disparate treatment—it provided that employment opportunities cannot be allocated on the basis of race.

At the outset, Kennedy announced that his purpose was to give effect to both principles (disparate impact and disparate treatment), but in truth he assigned a priority to disparate impact. He in effect ruled that if the *Griggs* principle requires an employer to jettison the results of a test to avoid disparate impact liability, any objection based on disparate treatment a disgruntled white applicant who succeeded on that test might raise to the employer's action would be defeated. In assigning a priority to disparate impact, Kennedy might be reflecting a belief in the special role that doctrine can play in achieving racial equality. On a more technical level, his position might be based on a rule of statutory interpretation, which assigns a priority to the more recently enacted measure (1991 Act). Or, Kennedy might possibly be reflecting a commitment to adhere to precedent, namely *Washington v. Davis*, for it construed the ban on discrimination contained in Title VII as the source of the disparate impact

22. Ricci v. DeStefano, 557 U.S. 557 (2009).

23. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015).

24. The two most important articles on the *Griggs* principle, one written before *Ricci,* the other after *Ricci* but before *Inclusive Cmtys.,* are Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) and Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

principle and thus could not possibly prohibit action that was taken pursuant to that principle.

Ricci, however, entailed a further element that complicated the application of the framework Kennedy created. It was not at all clear that New Haven's action discarding the results of a test that entailed disparate impact was based on a desire to comply with the *Griggs* principle. The city had acted on its own—without a court order implementing the *Griggs* principle—after reviewing the results of a test governing promotions, and after it became public knowledge that the test, if allowed to take effect, would lead to the promotion of numerous white applicants and no Black applicants. The prospect of such an outcome triggered a hostile public reaction, and in the face of that outcry, the city council annulled the results of the test on the stated ground that there were alternative, equally valid tests or methods of screening that would minimize the disparate impact on Blacks.

Under these circumstances, Kennedy worried that the stated reason New Haven offered for throwing out the test might be a pretext and that, in reality, the reason for rejecting the applicants who scored the highest on the test was because of their race—they were white. To guard against this contingency, Kennedy ruled that an employer, acting on his own, would be permitted to discard the results of a validated test on the assumption that there are alternative, equally valid tests that would minimize disparate impact only if there was, in his terms, "a strong basis in evidence" that the action was necessary to avoid disparate impact liability.[25] In the specific case before him, Kennedy concluded that this "strong basis in evidence" requirement was not satisfied. Once that claim was rejected it appeared that New Haven's action throwing out the test was largely based on "the raw racial results"—the successful applicants were white—which would constitute a violation of the disparate treatment provision of Title VII.[26]

The Court was divided 5-4. Justice Ruth Ginsburg filed a dissent on behalf of the liberal bloc, but the limited nature of that dissent must be underscored.[27] She agreed with Kennedy that the case involved a tension between the two fundamental principles—disparate treatment and disparate impact—that are embodied in Title VII. She also agreed with the order Kennedy had established between these two principles: disparate impact is prior, or as she would put it, "foundational."[28] This means, Ginsburg believed, as did Kennedy, that if a decision to jettison a test is made in order to implement the *Griggs* principle and to minimize disparate impact as required by that principle, white applicants hurt by that decision would have no claim under Title VII.

Ginsburg objected, however, to the standard Kennedy had crafted to determine, when there is a voluntary settlement, whether the employer's desire

25. *Ricci*, 557 U.S. at 584.
26. *Id.* at 593.
27. *Id.* at 621 (Ginsburg, J., dissenting).
28. *Id.* (quoting *id.* at 581 (majority opinion)).

to avoid disparate impact liability is in fact the basis of its action. Specifically, she complained of the stringency of Kennedy's "strong basis in evidence" test to guard against disparate treatment. But the rule that Ginsburg offered to guard against this very same contingency was remarkably similar to Kennedy's. While Kennedy insisted on a "strong basis in evidence," Ginsburg demanded that, in discarding the results of a test, the employer must have "good cause" to believe that there were equally valid alternative tests that would minimize disparate impact.[29] The similarity between the two standards—"strong basis in evidence" and "good cause"—became especially apparent in a 2017 voting rights case, where Kennedy, in a majority opinion joined by Ginsburg, used the two standards interchangeably.[30]

Ginsburg was on firmer, though still limited, grounds when she objected to Kennedy's application of his standard in the *Ricci* case itself. She believed that the district court should apply the "strong basis in evidence" test in the first instance on a remand. That standard, drawn from an opinion by Justice Sandra Day O'Connor in the Richmond affirmative action case,[31] had never been applied in the *Griggs* context and, in any event, the application of such a standard to the record was not in the Supreme Court's wheelhouse.

After voicing this objection, Ginsburg applied virtually the same standard as Kennedy to the same record and came to the opposite conclusion.[32] She concluded that the city's action, jettisoning the test, was based on a well-grounded judgment that there were equally valid, alternative methods of selection that would produce less disparate impact and that the city's action was not based on the race of the successful applicants on the test that had been discarded. But this conclusion primarily constitutes a difference over the facts, not in the legal framework, though her reading of the record may well have been guided by her understanding of the law or, more specifically, by a doubt she

29. *Id.* at 625–26 (Ginsburg, J., dissenting) ("I would therefore hold that an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity.").

30. Cooper v. Harris, 137 S. Ct. 1455, 1464 (2017) (citation omitted) ("When a State invokes the VRA to justify race-based districting, it must show (to meet the 'narrow tailoring' requirement) that it had 'a strong basis in evidence' for concluding that the statute required its action. Or said otherwise, the State must establish that it had 'good reasons' to think that it would transgress the Act if it did *not* draw race-based district lines.").

31. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

32. In a separate concurrence, Justice Samuel Alito complained of Ginsburg's willingness to grant summary judgment to the city, for that would require a finding that no rational juror could find for the rejected white applicants. *Ricci*, 557 U.S. at 597 (Alito, J., concurring). Yet Ginsburg was clear that she favored a remand and further proceedings (which might well include a trial) and declared that she was willing to dispose of the case on a motion for summary judgment (in her case, by granting the city's motion) because the majority had granted the rejected white applicants' motion for summary judgment and thus took the view that "final adjudication by this Court [was] appropriate." *Id.* at 632 n.10 (Ginsburg, J., dissenting); *see also id.* at 639 ("I would not oppose a remand for further proceedings fair to both sides.").

might have harbored about whether the ban on disparate treatment provides as strenuous protection to whites as it does to Blacks.

In speaking for the majority, Kennedy ruled that New Haven did not have a "strong basis in evidence" for throwing out the test and that its action therefore was not dictated by the *Griggs* principle. He then went on to conclude that New Haven had violated the ban on disparate treatment contained in Title VII.[33] Resolving the case in this manner eliminated the need for Kennedy to address whatever constitutional objections might be raised to the 1991 Act. Justice Antonin Scalia, however, was not prepared to leave the matter in this way.[34] He joined the opinion Kennedy wrote for a majority of five, but also filed a separate concurrence—perhaps a wink and nudge to future litigators—indicating in his inimitable manner that he had doubts about the constitutionality of the federal statute (the 1991 Act) that had codified the *Griggs* principle. Scalia's doubts stemmed from the fact that the 1991 Act required or encouraged race conscious action by employers.

Two years earlier, Kennedy had indicated his disagreement with this line of analysis. In his concurring opinion in the 2007 *Parents Involved* case,[35] Kennedy made clear that consciousness of the racial impact of a policy or practice was not unlawful under equal protection, nor did it even trigger strict scrutiny. He put the use of racial classifications to allocate scarce opportunities in another category altogether. Although the use of racial classifications was not necessarily prohibited, such a practice would trigger strict scrutiny and be deemed unlawful, unless there was a showing that the use of a racial classification served a compelling purpose and was narrowly tailored (that is, there is no other alternative for achieving that purpose). From this perspective, no constitutional objection could be raised to the 1991 Act. It does not require employers to use a racial classification as the basis of awarding jobs. Granted, the Act requires employers to be mindful of the racial impact of the tests or other seemingly innocent standards they might use to select employees, but such racial consciousness, whether practiced by public officials or required by them of private actors, is not unlawful or even suspect. In *Parents Involved*, Kennedy rejected the idea of a color-blind Constitution, when it is taken as a statement of the constitutional restraints on what may be seen or known by public officials or what they might require of others.

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33. Justice Kennedy treated the disparate treatment ban of Title VII in more absolutist terms than constitutional equal protection. Under equal protection, a race-based decision triggers strict scrutiny and can only be allowed if it serves some compelling purpose and is narrowly tailored to serve that purpose. Under Title VII, a race-based decision is not just a reason for strict scrutiny, but rather flatly forbidden. *Ricci*, 557 U.S. at 579.

34. *Id.* at 594 (Scalia, J., concurring) ("I join the Court's opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?").

35. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

In sum, Kennedy, unlike Scalia, did not believe that there was a "war between disparate impact and equal protection."[36] On this issue, Kennedy represented the views of Ginsburg and the three other Justices who joined her *Ricci* dissent, as well as himself—in other words, a majority of the Court. We might well forgive Kennedy for failing to address the musings Scalia expressed in his concurrence in *Ricci*, since they seemed to be aimed at launching a war that Scalia had already lost.

Kennedy's second majority opinion concerning the *Griggs* principle, in the *Inclusive Communities* case, took the disparate impact test from Title VII and grafted it onto Title VIII. This ruling, in contrast to Kennedy's opinion in *Ricci*, did not trouble Ginsburg or the other liberal Justices. Indeed, they all joined Kennedy's *Inclusive Communities* opinion and thus formed a majority of five to extend the *Griggs* principle from employment to housing—a most remarkable achievement, given that Title VIII, unlike Title VII after the 1991 amendment, did not contain a separate provision endorsing disparate impact liability.

The case in question concerned the practices of a state agency charged with the duty of awarding federal tax credits to real estate developers in a manner designed to best promote the development of affordable housing. The plaintiffs, a group dedicated to promoting residential integration, argued that the state agency should be required to award these tax credits to developers who sought to build new, low-cost housing in suburban, white communities as opposed to developers who were proposing to build new, low-cost housing in inner-city ghettos and, in that way, seeking to revitalize those communities.

Faced with two alternative, arguably reasonable policies, Kennedy was reluctant to have a federal court, by means of disparate impact doctrine, make the choice for the state agency or, as he put it, "second guess" the agency.[37] In that sense, he seemed to have watered-down the *Griggs* principle, which effectively requires an employer to adopt the least disadvantaging alternative test.[38] Yet we should not lose sight of the unusual context of *Inclusive*

36. *Ricci*, 557 U.S. at 595 (Scalia, J., concurring).

37. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2512 (2015) ("Here, the underlying dispute involves a novel theory of liability that may, on remand, be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in allocating tax credits for low-income housing."). Later, he repeats the same thought. *Id.* at 2522 ("This case, on remand, may be seen simply as an attempt to second-guess which of two reasonable approaches a housing authority should follow in the sound exercise of its discretion in allocating tax credits for low-income housing.").

38. Hills v. Gautreaux, 425 U.S. 284 (1976), casts considerable doubt on the reasonableness of one of those alternatives—making grants to support the construction of affordable housing in the inner-city ghetto. In that decision, the Supreme Court upheld the order entered by a district court requiring the Department of Housing and Urban Development to provide vouchers to families living in inner-city public housing projects that would enable them to move to white suburban communities. This order was predicated not on a finding that the federal housing agency discriminated on the basis of race in the construction and location of the public housing project, but only that it supplied the funds to the municipal housing authority, which had located the projects in Black neighborhoods because the residents were likely to be Black. The vouchers enabled the public housing residents to move to a new

Communities itself, that it involved the allocation of scarce tax credits. Kennedy appeared willing to apply the *Griggs* principle with all its force in a case that fell within what he termed the "heartland" of disparate impact doctrine—that is, when a court confronted barriers, analogous to those arising in the employment context, that Blacks might encounter in obtaining access to housing.[39] Such a case might arise, for example, when a suburban town prohibits the construction of apartment buildings with low-cost rentals on the ground that such facilities would cause traffic congestion. In the employment context, once disparate impact is shown, the defendant would be given the opportunity to prove that the contested barrier is job-related and in that sense serves a legitimate business interest. In the housing case I imagined, once disparate impact is shown to have been caused by the contested policy, the defendant municipality would be given an opportunity to show that the policy in fact serves a legitimate public interest (traffic management). If that showing is adequately made, the plaintiff would then be given the opportunity to demonstrate that there are alternative ways of satisfying the needs of the public (for example, by rerouting traffic) that would entail less disparate impact.

In *Inclusive Communities* as in *Ricci*, Kennedy attributed responsibility to Congress for this extension of disparate impact doctrine to housing and characterized the Court's role as merely carrying out a congressional mandate. This enabled him to reconcile his ruling with *Washington v. Davis* and to give a nod to the familiar conservative tenet that might have given rise to that decision—that political branches, not the judiciary, should be primarily responsible for the reconstruction of American society. Yet we can see how strained this account of *Ricci* and *Inclusive Communities* is when we focus on the alleged legislative mandate Kennedy cited in each case.

In *Ricci*, he pointed to the Civil Rights Act of 1991, though, as we have seen, that statute entailed an odd division of responsibility between Congress and the judiciary and represents anything but the prototypical congressional command. In *Inclusive Communities*, Kennedy pointed to the 1988 amendments to the federal Fair Housing Act, but this attribution of responsibility to Congress is even more strained. In contrast to the 1991 Act, the 1988 amendments did not codify or in any other way adopt disparate impact doctrine; they only added protections against discrimination based on family status or disability and enhanced the enforcement mechanisms of the Act.

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integrated community and thus could be justified on the ground that maintaining the inner-city ghetto would have the effect of perpetuating the subordination of Blacks. *See generally* OWEN FISS, A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM (2003). For a comprehensive empirical study of the benefits of deconcentration policies, see Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).

39. *See* Daniel Sheehan, *Disparate Impact Liability Under the Fair Housing Act After Inclusive Communities*, 25 J. AFFORDABLE HOUS. 391, 399 (2017).

In searching for the legislative mandate required by *Washington v. Davis*, Kennedy pointed to three disclaimers included in the 1988 amendments. One disclaimer provided that nothing in the Fair Housing Act shall stop appraisers from taking into account factors other than those specifically enumerated as protected characteristics: race, religion, national origin, sex, handicap, or family status. A second disclaimed any intent of Congress to interfere with housing decisions based on convictions for the manufacture and distribution of drugs. The third provided that nothing in the Act should be construed as interfering with housing decisions seeking to limit the maximum number of people in a dwelling.

Kennedy was surely right in saying that these three disclaimers would be superfluous if Congress had assumed that disparate impact doctrine was not applicable under the Act. But there is a decisive difference between, on the one hand, Congress assuming disparate impact liability might be applicable to housing if the Supreme Court allows the line of circuit court decisions adopting disparate impact doctrine in housing cases to stand or eventually follows a similar path and, on the other hand, Congress mandating, directing, or even endorsing such doctrine. In choosing the first alternative, Congress was only preparing for a contingency.

It is indeed noteworthy, as Kennedy remarked, that in the course of the legislative process that led to the 1988 amendments, Congress did not repudiate the circuit court decisions that had previously extended disparate impact liability to housing. However, such congressional inaction is hardly a sufficient basis, under the ordinary rules governing the legislative process, to allow Kennedy to conclude, as he did, that in the 1988 amendments Congress had "accepted," "affirmed," and "ratified" disparate impact doctrine.

Arguably, the requisite congressional intervention occurred in 1968, when Congress originally enacted the Fair Housing Act, not when it amended that Act in 1988. The original Fair Housing Act contained a ban on discrimination in housing and it constitutes as good a statutory basis for disparate impact doctrine as the ban on employment discrimination originally enacted by Congress when it adopted Title VII of the Civil Rights Act of 1964.[40] Although all the world had thought that the original *Griggs* decision was more an exercise in constitutional

40. Although Kennedy deemed the 1988 amendments of the Fair Housing Act to be "of crucial importance" to his argument defending the extension of disparate impact liability to housing, he also managed to find within the Fair Housing Act, as originally enacted, a rule requiring that housing policies be judged on the basis of their effects, not just their purposes. *Inclusive Cmtys.*, 135 S. Ct. at 2519. Specifically, he pointed to the phrase "otherwise make unavailable" in Section 804 of the 1968 act. *Id.* That provision made it unlawful: "To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race . . . ." Justice Kennedy's reading of the 1968 statute appears as a stretch, for, in context, "otherwise make unavailable" appears as a catch-all phrase designed to cover the multiplicity of ways in which a property owner may discriminate on the basis of race. It is noteworthy that the distinction between effect verses purpose played little or no role in the evolution of civil rights legislation in the 1960s and in fact achieved its significance in the law only after the 1976 decision in *Washington v. Davis*.

lawmaking than statutory interpretation, in *Washington v. Davis* the Court held otherwise. The Court ruled that the original ban on discrimination in employment included a ban on disparate impact and thus, as odd as it may seem, that decision might be viewed as providing the basis for the Court's ruling in *Inclusive Communities*. The majoritarian values that justified *Washington v. Davis* would be served by the fact that Congress possesses the same power to supervise the administration of disparate impact doctrine in the housing field as it does in employment. In truth, although Kennedy pointed to the 1988 amendments, his mind must have been on 1968. He did for housing in *Inclusive Communities* what Chief Justice Burger had done for employment in *Griggs* itself.

GRIGGS AT SEA

From the perspective of *Ricci* and *Inclusive Communities*, the requirement for legislative endorsement of the disparate impact test has taken on a formal, almost ritualistic, character. The Court used it in those cases as an ideological fig leaf, allowing constitutional rulings to be presented as exercises in statutory interpretation. Admittedly, in the employment and housing contexts, as was true in voting, this development has been, for the most part, benign. Yet the victories achieved in *Ricci* and *Inclusive Communities* should not blind us to the real harms imposed by the legislative-mandate requirement of *Washington v. Davis* and to the fact that it created a significant roadblock to effective relief in other domains, most notably in elementary and secondary education.

While the Civil Rights Act of 1964 contained several provisions relating to public school desegregation, they were largely devoted to enhancing techniques to enforce the Supreme Court's edict in *Brown*. For example, the 1964 Act authorized school suits by the Department of Justice[41] and allowed the Department to intervene in any civil suit predicated on an equal protection claim.[42] The 1964 Act did not, however, promulgate a substantive rule, as it had in the employment context, prohibiting discrimination in public education. In the eyes of Congress, there was no need for such a measure because *Brown*'s declaration that segregated education is inherently unequal was already on the books. It was the law. So, ironically, when the Court in *Washington v. Davis* denied the applicability of disparate impact doctrine to equal protection claims, it left school desegregation more vulnerable to the perils of fragmentation than statute-based voting, employment, and eventually housing claims, all of which could be presented as based on a statute.

As a result, by the mid-1970s, when the time came to consider the applicability of *Brown* to the North and West and thus to evaluate the common practice in those areas of assigning students to schools on the basis of their neighborhoods, the Supreme Court lacked the means to link the forces

41. Civil Rights Act of 1964, Title IV, § 407 (codified as amended at 42 U.S.C. § 2000c-6).
42. Civil Rights Act of 1964, Title IX, § 902 (codified as amended at 42 U.S.C. § 2000h-2).

responsible for the creation of racially segregated neighborhoods to the segregated pattern of school assignments. Accordingly, the Court limited the force of *Brown* to cases where the local school board had used a racial criterion to assign students to schools. It ignored the role that government agency played in constructing the residential patterns through racial zoning, enforcement of racially restrictive covenants, refusal to ensure mortgages in so-called changing neighborhoods, and locating public housing projects only in Black neighborhoods. Schools were schools, housing was housing. Cumulative responsibility was denied. To be precise, this turn in the law occurred shortly before *Washington v. Davis* was handed down, specifically in the 1974 decision rejecting the metropolitan school desegregation plan in the Detroit case.[43] Yet the ruling of the Court in *Washington v. Davis* confining the *Griggs* principle to statutory claims, cut off any further efforts to redress elementary and secondary school segregation through a theory that linked student assignment patterns to housing discrimination.

Title VI of the Civil Rights Act of 1964 proved incapable of curing this default.[44] Although that statute did not address elementary and secondary education with any specificity, it did impose a broad ban on racial discrimination in any program or activity receiving federal financial assistance, and this category included public education, especially after the massive infusion of federal funds to state and local authorities under the Elementary and Secondary School Act of 1965. Section 602 of Title VI specifically authorized federal funding agencies to implement the broad ban on racial discrimination contained in the initial provision of that title (Section 601). The regulations that had been promulgated by various funding agencies under Section 602 explicitly prohibited practices that had the effect, not just the purpose, of discriminating on the basis of race, and the prohibition on discriminatory effects was understood to impose disparate impact liability on all recipients of federal financial assistance. In the 2001 decision in *Alexander v. Sandoval*,[45] however, the Supreme Court held that there was no private right to enforce regulations that imposed disparate impact liability. The case arose from a class action challenging the decision of the Alabama Department of Public Safety to conduct driving tests only in English.

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43. *See* Milliken v. Bradley, 418 U.S. 717, 728 n.7 (1974). In footnote seven, the Court refused to consider the impact residential segregation might have on the racial character of student attendance patterns. In *Milliken* itself, this action was justified on the limited ground that the lower courts' approval of the inter-district remedy was not predicated on a consideration of the impact of residential segregation. The willingness, however, of the Supreme Court to set aside the inter-district remedy without ever considering the significance of residential segregation implied a far broader rule rendering the forces creating the residential patterns irrelevant. *See* Myron Orfield, Milliken*,* Meredith*, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 369–70, 412–13 (2015). For the responsibility of federal, state, and local governments in creating residential segregation in Detroit, even outside the city limits, see RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA xii–v, 23–24, 26–27, 74, 81–82, 97–99, 104–05, 128–29, 146–47 (2017).

44. 42 U.S.C §§ 2000d–2000d-7.

45. 532 U.S. 275 (2001).

Scalia wrote the majority opinion in *Alexander v. Sandoval.* He not only barred a private right to enforce the regulation proscribing discriminatory effect or disparate impact, but, in his inimitable fashion, also created a doubt as to whether such a regulation, even if it were enforced by administrative action, would be a lawful exercise of the authority granted to the funding agency under Section 602. Although Scalia said that he was prepared to assume, but not decide, that a regulation proscribing discriminatory effect that was to be enforced by administrative action would constitute a lawful exercise of that authority, he repeatedly stressed that Section 601 proscribed only intentional discrimination. Moreover, while he denied a private right to enforce the disparate impact regulation on the basis of the rule disfavoring implied causes of action, he indicated a willingness to honor the precedent that had allowed private rights of action under Title VI for regulations that proscribed intentional discrimination.

The cloud that Scalia created over the legality of disparate impact regulations did not lead the funding agencies, including those in charge of dispensing funds to public schools, to repeal such regulations or to prevent them from issuing new regulations to the same effect. But it was not at all clear how such regulations were to be enforced. Federal funding agencies possess a big stick (fund termination), but the stick is so big—a fund cut-off would harm all the school children of the district—that everyone understood that in all likelihood it would never be used. In the late 1960s, when the Office of Civil Rights of the Department of Health, Education and Welfare was at the forefront of the effort to implement *Brown*, the judiciary sought to fill this remedial gap by transforming the demands of an administrative agency into constitutional requirements and by allowing these demands to be judicially enforced.[46] But *Washington v. Davis* foreclosed this option for those regulations imposing disparate impact liability.

Similarly, were it not for *Washington v. Davis*, the *Griggs* principle would have almost certainly reformed public higher education in a fundamental way. For competitive admissions processes, state universities rely on standardized tests that carry over the disadvantages that Blacks receive in elementary and secondary education—the exact same situation presented by the facts in *Griggs*. However, once *Washington v. Davis* denied the applicability of disparate impact doctrine to equal protection claims, these institutions of higher education were not put to the burden of demonstrating in a court of law that the tests they used were adequately related to predicting academic performance. Nor were aggrieved Black applicants given the opportunity to show that alternative methods were available for predicting academic performance and that these methods would lessen the disparate impact on Blacks.

46. *See* FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 432–45 (1978).

State universities were free voluntarily to follow the procedures required by their understanding of the *Griggs* principle. Presumably, some did. Others, along with a number of private universities, chose to increase the enrollment of Black students by awarding Black applicants a modest advantage—an indeterminate but non-predominant plus—in the admissions process. This practice, generally known today as affirmative action, became prominent by the early 1970s and at its inception was viewed in much the same terms as the *Griggs* principle itself—as a strategy to end racial subordination. It was thought that affirmative action would accelerate the upward mobility of Blacks as a group and thus help bring to an end the social stratification at the heart of the racial caste system.[47]

The Supreme Court has, after endless and still continuing battles, upheld such racial preferences when practiced by state universities, but never on such terms.[48] Instead, the Court has allowed preferential treatment for Blacks on the theory, first articulated in 1978 by Justice Lewis Powell in the *Bakke* case[49] and then used in 2003 by Justice Sandra Day O'Connor in *Grutter v. Bollinger*. Speaking for a majority, she declared that affirmative action would provide "educational benefits that flow from student body diversity."[50]

O'Connor's diversity rationale saved the day, at least as a strategic matter, but it left the policy of preferential treatment without a justification that has the gravity required to offset the sense of unfairness it gives to many. It also rendered affirmative action especially vulnerable to the political dynamics of statewide referenda, including the one the Supreme Court upheld in 2014, that prohibited officers of state universities in Michigan from giving race-based preferences in admissions.[51] If preferential treatment can only be defended on the grounds that it provides educational benefits, then the state electorate might well decide to forgo such benefits or seek to achieve them through alternatives that avoid the grievance felt by white applicants who were rejected because Blacks had been preferred.

The Court in the Michigan case was badly divided. Kennedy announced the judgment of the Court and wrote an opinion that John Roberts and Samuel Alito joined (though Roberts also wrote a separate concurrence). Much of Kennedy's opinion was a paean to democracy—a moving expression of his faith in the capacity of an electorate to understand and deliberate upon a complex and difficult issue of public policy. While he also acknowledged the limits—constitutional limits—on the prerogatives of the demos, he rendered them

47. Owen Fiss, *Affirmative Action as a Strategy of Justice*, 17 PHIL. & PUB. POL. 37 (1997).
48. Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016).
49. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
50. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).
51. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (*BAMN*), 134 S. Ct. 1623 (2014).

irrelevant in this case by taking the purpose of race-based preferential treatment to be nothing more than a matter of educational policy.

At the center of Kennedy's opinion is the political process doctrine, which, for Kennedy, stemmed from three decisions of the Supreme Court: the 1967 decision in *Reitman v. Mulkey*,[52] the 1960 decision in *Hunter v. Erickson*,[53] and the 1982 decision involving elementary and secondary school desegregation in Seattle.[54] In *Reitman v. Mulkey*, the Supreme Court invalidated an amendment to the California constitution that protected the right of landowners to sell their property to whomever they wished, thereby precluding the enactment of a fair housing law by the California legislature. In *Hunter v. Erickson*, the city charter of Akron, Ohio, had been amended to require that any ordinance prohibiting racial discrimination in housing had to be approved by a referendum before it could take effect; the Court found this special requirement a denial of equal protection. In the 1982 Seattle case, the Supreme Court struck down a statewide initiative that banned busing that had been or might be adopted by local school boards to achieve school desegregation.

On one reading, the changes in the political processes condemned in these three cases might be characterized as circumscribing the political power of a racial minority, making it more difficult for Blacks to secure laws or government action that "inures primarily to the benefit of the minority."[55] Kennedy refused to accept the political process doctrine on those terms, and rightly so. Such a theory assumes that a minority has one view about fair housing laws or busing directives and, even more importantly, mistakenly treats such measures as nothing more than the product of interest group politics. These measures benefit all of society.

Starting over, Kennedy read the political process doctrine in general, and the three cases that he treated as the source of that doctrine, as embodying a view of equal protection that prohibits changes in political processes that would have the effect of hindering or impeding the enactment or promulgation of measures that were designed to protect against racially specific injuries. The referendum in California and the charter change in Akron were viewed as a denial of equal protection because these measures, adopted in the heat of battle, made it more difficult for fair housing laws to be enacted; and the Washington initiative against busing was struck down because that measure, a response to the bold action of the Seattle school board, made it more difficult for local school districts to achieve school desegregation.

It is possible to characterize the effect or consequence of the Michigan referendum in similar terms. The change it effectuated in the political process—taking the authority to institute race-based preferential treatment from the elected

52. 387 U.S. 369 (1967).
53. 393 U.S. 385 (1969).
54. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).
55. *Id.* (quoting *Seattle*, 458 U.S. at 472).

trustees of the universities within the state and vesting it with the body capable of amending the state constitution (a majority of the entire state electorate)—imposed a racially specific harm by making it more difficult for state universities to adopt or institute affirmative action programs. In *Hunter v. Erickson* and *Reitman v. Mulkey*, the changes of the political process at issue hindered, almost in the heat of battle, the enactment of laws prohibiting racial discrimination in housing. Granted, the Michigan referendum may seem quite different because it prohibited race-based preferences. Yet those preferences should not be seen as an effort to obtain the educational benefits that flow from a diverse student body, but, rather, like the *Griggs* principle, to eradicate the subordination of Blacks that is rooted in the history of slavery and Jim Crow. Fair housing laws serve this very same purpose. They are not instruments to promote the freedom of Blacks as consumers, but rather to end the residential segregation or ghettoization that long nourished and perpetuated their subordination.

The 1982 Seattle case is even more clearly on point. The ban on busing imposed by the statewide initiative at issue in that case denied local school boards the freedom to depart from the neighborhood school assignments in ways that the board found necessary to integrate the schools. Here, integration was understood as a means of providing Black children with equal educational opportunities—an indispensable first step, much like race-based preferences in higher education, for ending racial subordination. Although Kennedy attempted to distinguish the 1982 Seattle ruling on the basis of a *de jure/de facto* distinction, this was made more difficult by his concurrence in the 2007 decision in *Parents Involved*. In that case, Kennedy treated the segregation the local school board sought to correct as *de facto* rather than *de jure*, meaning that it was not the product of state racial discrimination. In the Michigan referendum case, which was handed down seven years later, however, he was prepared to assume—though he did not decide—that the school segregation in Seattle had been *de jure* (on the assumption that in the past there were race-based transfers—whites could transfer out of Black schools and Blacks could transfer out of white schools). Even granting this assumption, the 1982 Seattle decision would still seem controlling, for that decision viewed equal protection as prohibiting changes in the political process that made it more difficult, as did the Michigan referendum, to institute measures to correct for, or remedy, past discrimination or its consequences and, in that way, create racially specific injuries.[56]

Justice Scalia, joined by Justice Clarence Thomas, concurred in the judgment in the Michigan case, though they would have overturned the political process doctrine altogether and discarded any precedents upon which it rested. They faulted Kennedy for following these precedents and for looking to the

56. Justice Kennedy gets close to this issue in this rather fractured sentence: "Voters might likewise consider, after debate and reflection, that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism." *BAMN*, 134 S. Ct. at 1638.

effects or consequences of changes in the political process, which they regarded as a betrayal of *Washington v. Davis*. With a familiar rhetorical flourish, Justice Scalia began his opinion by saying that he was baffled: how could there even be a question of the constitutionality of the Michigan amendment since it only decreed what the Equal Protection Clause itself mandated. As he put it, "Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text *plainly* requires?"[57] Scalia's bafflement is predicated on a view that actually disregards the text of the Equal Protection Clause and reduces it to a ban on the use of racial classifications (and, as we saw in his concurrence in *Ricci*, a ban on consciousness of race). In truth, however, the Equal Protection Clause has never been so limited. Rather, it should be understood to prohibit any state measure that has the inevitable effect of perpetuating the subordination of Blacks and the caste system from which it stems. Jim Crow laws were one, but only one, instance of such a measure.

Justice Sonia Sotomayor, joined by Justice Ginsburg, dissented. Most of her dissent is devoted to a moving insistence that "race matters." In these passages, she comes close to placing the diversity rationale to one side and putting preferential treatment prohibited by the Michigan referendum on its proper basis—as a remedy for caste. But she stops short, denying that her broader observations about race have any legal significance, or as she put it, "that the virtues of adopting race-sensitive policies should inform the question before the Court."[58] This odd turn in her opinion stemmed from the fact that she was working within a version of the political process doctrine that made the purposes of affirmative action (or as she describes them, "racially sensitive admissions policies") almost irrelevant. Under her view, the political process doctrine is violated when any changes in the political process impaired or hindered the capacity of minorities to pass a measure that "inures primarily to their benefit"—a view of the political process doctrine that Kennedy properly rejected.

Justice Stephen Breyer came closest to grasping the significance of taking the decision to implement race-based preferential treatment out of the hands of the elected university trustees and placing it in the state constitution. Yet remarkably, Breyer joined the judgment of the Court.[59] At the outset of his concurring opinion, Breyer emphasized that the judgment of the Court and Kennedy's opinion did not address the situation where race-based preferences might be seen as a remedy for "past exclusionary racial discrimination or the direct effects of that discrimination."[60] He acknowledged that if this issue were presented, another result might be warranted, but he then went on to insist that this issue was, in fact, not before the Court.

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57. *Id.* at 1639 (Scalia, J., concurring in judgment).

58. *Id.* at 1683 (Sotomayor, J., dissenting).

59. Since Justice Elena Kagan did not participate in the proceedings before the Court, the case was decided 6–2.

60. *BAMN*, 134 S. Ct. at 1649 (Breyer, J., concurring in judgment).

Breyer's evasive stance, and thus his willingness to concur in the judgment of the Court, seems odd. Almost the entire legal academy,[61] and many of those on the bench, perhaps including Breyer himself, understand diversity as code for racial integration, which, in the context of higher education, acquires its appeal as a strategy, not to enrich classroom discussion, but to end the subordination of Blacks. In his concurrence, Breyer insisted that the "sole"—his term—justification for the race-based preferences at issue in the Michigan case is the educational benefits of a diverse student body.[62] In saying this, he pointed to *Grutter v. Bollinger*, but, in so doing, seems to have confused the grounds upon which the policy was allowed by a majority of the Justices and the grounds upon which that policy was instituted and defended by the university and its board of trustees. In his dissent in *Parents Involved*, Breyer addressed Kennedy's unease in using racial classifications as part of a program to achieve school integration and then said that whatever costs might be entailed in such a practice would be dwarfed by "the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation."[63]

The Court's failure to protect against cumulative disadvantage has not been confined to the constitutional realm and thus cannot solely be attributed to its decision in *Washington v. Davis*. On occasion, the Court has stumbled even when it has entered the domain governed by *Griggs* itself—Title VII and employment. The most notable example occurred in 1979, in *New York City Transit Authority v. Beazer*,[64] where the plaintiffs challenged a policy of denying employment to anyone enrolled in a methadone maintenance program. These individuals were banned from all types of jobs, from washing buses to driving them, and the racial significance of this blanket exclusion was manifest. Approximately 63 percent of patients in methadone clinics in the city at that time were Black or Hispanic, even though, according to the then current census, only 20 percent of the working age population of New York belonged to one of these two groups.

Justice John Paul Stevens wrote the majority opinion in this case. He had been appointed to the Supreme Court in 1975 by President Ford to replace one of the spark plugs of the Second Reconstruction, William O. Douglas, and the difference in outlook between the two was unmistakable. Stevens began by trying to poke holes in the plaintiffs' effort to show a disparate impact

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61. *See, e.g.*, Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003); Colin S. Diver, *From Equality to Diversity: The Detour from* Brown *to* Grutter, 2004 U. ILL. L. REV. 691 (2004).

62. *BAMN*, 134 S. Ct. at 1649. In treating the educational benefits of a diverse student body as the sole justification of affirmative action, he ignores the rationale couched in terms of legitimating institution by visibly demonstrating that the leadership of these organizations was open to all. Many think that this legitimacy rationale is the only justification for the expectation expressed in the Court's opinion that the race-based preferences will sunset in twenty-five years. *See*, *e.g.*, Vikram David Amar & Evan Caminker, *Constitutional Sunsetting: Justice O'Connor's Closing Comments in* Grutter, 30 HASTINGS CONST. L.Q. 541 (2003).

63. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 867 (2007) (Breyer, J., dissenting).

64. 440 U.S. 568 (1979).

attributable to the Transit Authority's policies. Yet the inference of the requisite disparate impact seemed near-compelling. As Justice Byron White explained in his dissent, it arose, first from the fact that although 20 percent of the working age population were either Black or Hispanic, 63 percent of the patients in the methadone clinics were members of these racial or ethnic groups; and second, from the absence of any plausible hypothesis to explain why Blacks and Hispanics would not, save for the Transit Authority's policy, seek or be qualified to work for the Transit Authority in proportion to their numbers in the workforce.

In response, Stevens had little to say, only quibbles. At one point, he objected to the 63 percent figure, insisting that it was too high because it did not include a breakdown of the racial composition of patients in private as opposed to publicly funded clinics. White pointed to the evidence in the record indicating that Stevens was mistaken and that the 63 percent included all methadone clinics in the city, both public and private. White also insisted that if Stevens had any doubts on this score, or on any other facet of the plaintiffs' showing of the requisite disparate impact, the proper response would be a remand. In saying this, White was objecting to Stevens's claim that the plaintiffs had failed to show the requisite disparate impact, and even more, to the strange and somewhat condescending aside of Stevens that "at best" plaintiffs' showing of disparate impact was "weak."[65]

Under *Griggs*, once the plaintiff shows disparate impact, the defendant must demonstrate that the challenged rule against methadone users is a reasonable measure of job performance. This seems a burden the Transit Authority could not, in all likelihood, have sustained since it acknowledged that the blanket exclusion had been instituted without any meaningful study of its relationship to job performance. Stevens was of another mind, however, and mistakenly concluded that the rule excluding methadone users from safety positions—only 25 percent of the Transit Authority's workforce—could justify the blanket exclusion of methadone users from all Authority positions.

Perhaps sensing the flaw in this reasoning, Stevens quickly added, "The District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination."[66] This addendum reflects, however, a confusion of disparate impact with disparate treatment and a misunderstanding of the *Griggs* principle, which makes impact alone a sufficient basis for invalidating barriers to employment once the employer fails to demonstrate that the requirement is related to job performance.

To compound this error, Stevens did not allow the plaintiffs to show, as the *Griggs* principle requires, that there were alternative methods for selecting employees that both satisfy the valid interests of the Transit Authority in safety

65. *Id.* at 587.

66. *Id.* Conceivably, this sentence was intended to defeat an equal protection rather than a disparate impact claim under Title VII.

and reduce the disparate impact. In this instance, the alternative selection method would have been the procedures ordinarily applied by the Authority to choose employees. In considering applicants for employment, the Authority would have been free to refuse to hire individuals for safety-sensitive positions on the ground that they were on, or using, methadone. What the Authority cannot do, however, is to apply an across-the-board or blanket exclusion of methadone users and deny them eligibility for any position in the transit system that the Authority operates.

Such individualized procedures may misfire and result in a situation where, for example, the Authority mistakenly hires a person on methadone to drive a bus. But as Justice White emphasized in his dissent, such a mistaken personnel decision may occur under the ordinary selection procedures when, for example, the Authority places someone with mental illness or an addiction to alcohol behind the wheel. Members of those groups, unlike persons enrolled in a methadone maintenance program, are not subject to a blanket exclusion from any job in the system including maintenance and cleaning. Fairly applied, the *Griggs* principle does not guarantee those who use methadone will be hired for any position they wish, but only that such persons will be fully considered for employment in the broad array of positions that are not safety-sensitive. Such a change in the personnel policies of the Transit Authority would make an enormous contribution to equalizing employment opportunities for Blacks and Hispanics who are truly down and out but nonetheless had resolved to end their addiction to heroin by participating in a methadone program.

Admittedly, the social dynamics that produce the disproportionate number of Blacks and Hispanics on methadone are less easily described than the social dynamics—Jim Crow schools—responsible for the disparate impact in *Griggs* and, before that, in *Gaston County*.[67] But, as the more recent applications of the *Griggs* principle in *Ricci* and *Inclusive Communities* indicate—the first was rendered in 2009, the other in 2015—the theory of cumulative responsibility is not so confined. It extends to situations where the causal dynamics for the disparate impact are complex and diffuse, though still critically tied to the disadvantages Blacks have suffered, and continue to suffer, in American society.

These dynamics were identified in a report, issued in February 1968, by a commission appointed by President Lyndon Johnson and chaired by the former governor of Illinois, Otto Kerner, to study the riots in Black neighborhoods that had engulfed a number of cities in the United States, including the deadly and destructive one that erupted in Detroit in July 1967. The report pointed to the manifold ways in which "[s]egregation and poverty have created in the racial

67. It is especially noteworthy that in *Dothard v. Rawlinson*, 433 U.S. 347 (1977), a near contemporary of *Beazer*, the Supreme Court applied disparate impact doctrine to set aside height and weight standards that disproportionately disadvantaged women seeking jobs as prison guards. There was no suggestion in the Court's opinion that the plaintiff show that sex discrimination or other social injustices were part of the causal dynamic that led to the disparate impact—the fact that 41 percent of all the women in the nation failed to meet the height and weight standards.

ghetto a destructive environment totally unknown to most white Americans," adding: "What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it."[68] Almost fifty years later, we were reminded of the Kerner Commission report by Justice Kennedy, who both began and concluded his opinion in *Inclusive Communities* by invoking the dire warning of that report: "Our nation is moving toward two societies, one black, one white—separate and unequal."[69] Kennedy understood America's predicament in a way that eluded Stevens and the other Justices who joined Stevens's opinion in *Beazer*.

THE WAY FORWARD

In the fifty years since the publication of the Kerner Commission's report, we in the United States have made great progress in dismantling the racial caste structure that has long been our curse. The policies set in motion by the Second Reconstruction have brought into existence a Black middle class whose members enjoy the privileges and riches of the nation and honor its basic norms and aspirations. The most vivid manifestation of this achievement can be found in the election of Barack Obama, a Black man, as President of the United States, an extraordinary, world historic event for a nation that began its history as a slave society.

We should not forget, however, that a significant portion of the Black community, defined by class as well as race, has been left behind and that this group, sometimes referred to as the Black underclass, continues to bear the burden of our past. Its members encounter inadequate educational opportunities and strikingly high rates of unemployment. They remain isolated in inner-city ghettos and are often deprived of essential public services and are subject to almost unimaginable levels of violence at the hands of both police and gangs. Perhaps it is no longer true, as the Kerner Commission once proclaimed, that we are moving toward two societies, one white, and the other Black, separate and unequal. Much of white society has been integrated by those Blacks who have advanced to the middle class, but another Black community—not just Black but also poor—persists, and remains separate and grossly unequal. The lives of those in this group are hard, sometimes brutal, and the injustices they suffer affect the fate of all Blacks.

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68. NAT'L ADVISORY COMM'N ON CIVIL DISORDER, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968). When completed, the Commission's report was controversial, so much so that President Johnson refused to accept it. *See* STEVEN M. GILLON, SEPARATE AND UNEQUAL: THE KERNER COMMISSION AND THE UNRAVELING OF AMERICAN LIBERALISM (2018).

69. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516, 2525 (2015) (quoting NAT'L ADVISORY COMM'N ON CIVIL DISORDER, *supra* note 68, at 1).

In recent years we have become increasingly aware of the plight of the Black underclass. The killing of young Black men in the ghetto by the police has been broadcast on television and has become the subject of widespread public protests. It has given rise to a social movement that proclaims, "Black Lives Matter."[70] We have also come to fully understand the consequences of "mass incarceration"—the startlingly high percentage of Black men who have spent and will continue to spend much of their lives in prison.[71] Their lives are placed on hold while they are incarcerated. On their release, some may be barred from voting and all will encounter enormous difficulties in finding jobs. Mass incarceration also has unfortunate consequences for the families and communities on the outside, particularly wives or partners and their children, who must face life in the ghetto on their own. To compound these hardships, Blacks, particularly those who are poor, have encountered new waves of disenfranchisement in jurisdictions as diverse as Texas, Indiana, North Carolina, and now Ohio.[72]

These developments have stirred a new racial awakening in the United States: an increasing awareness of the tragic dimensions of the racial subordination that still persists. This awakening has been nourished by Obama's presidency, largely by his own being and the dignified way he discharged the duties of his office. His inclination was to cast the reform programs he sponsored in terms of class rather than race, but he, in fact, delivered a number of memorable speeches on race. One such speech was delivered during the 2008 campaign responding to the attacks on him for the radicalism of his pastor;[73] another followed the killing of Trayvon Martin, an unarmed Black teenager shot by a white man who acted under a Florida law that allowed him to "stand his ground."[74] In this call to justice, Obama has not been alone. Many of those who today occupy positions of great privilege and power in American society, in some instances thanks to the policies of the Second Reconstruction, have also spoken of the hardships and needs of the Black underclass.

Blacks are not the only ones who now seek equal justice. Today we face demands for equality from a plethora of disadvantaged groups, including those defined by gender, immigration status, economic criteria, physical and mental disabilities, or religious beliefs. We must attend to these claims. But as Goodwin Liu rightly insists,[75] it would be most unfortunate if our recognition of the multitude of claims for equal justice now being pressed blinded us to those being

70. *See* CHRISTOPHER J. LEBRON, THE MAKING OF BLACK LIVES MATTER: A BRIEF HISTORY OF AN IDEA (2017).

71. MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

72. *See generally* Daniel P. Tokaji, *The New Vote Denial*, 57 S. CAROLINA L. REV. 689 (2006).

73. Senator Barack Obama, A More Perfect Union (Mar. 18, 2008).

74. President Barack Obama, Remarks on Trayvon Martin at White House Briefing Room (July 13, 2013).

75. Goodwin Liu, *Racial Justice in the Age of Diversity*, 106 CALIF. L. REV 1977 (2018).

advanced by the Black community or in any way tempered our appreciation of the urgency of these claims.

The special urgency of the claim for racial justice stems from the severity of the hardship the members of the Black underclass are suffering right now. They are among the worst-off. The urgency of their claims also stems from the critical role race has played in the epic that is America—slavery at the founding, division and compromise during the 1840s and 1850s, a bloody Civil War, a reconstruction program abandoned after little more than a decade, followed by a century of Jim Crow, and then, thank God, another attempt, in the second half of the twentieth century, at reconstruction. This record of progress—and I insist it is progress—played a crucial role in shaping the identity of the United States over the last two centuries; and in the years ahead the nation will be judged by its capacity to renew and extend this process of reconstruction. Other disadvantaged groups have, as a purely historical matter, benefited from legal doctrine and social understandings that were forged by the struggle for civil rights for Blacks, including the theory of cumulative responsibility, and I have every expectation that this process of learning from the civil rights experience will continue in the years ahead.

The task now facing the United States is to turn this new awakening of which I have spoken into a positive and effective program of reform dedicated to the eradication of the racial subordination that persists—a Third Reconstruction? Such an effort will require the mass mobilization of ordinary citizens and the emergence of a social movement that is capable of both appealing to the conscience of politicians as well as their desire for self-preservation. It will also require endorsement, maybe even leadership, by the judicial branch, for as we learned during the civil rights era that began with *Brown*, it is difficult, maybe impossible, to effectuate deep structural reform of American society without presenting those changes as a requirement of justice, backed by the country's commitment to the rule of law.

Granted, the judicial appointees of President Trump and his administration are not likely to be receptive to the claims of racial justice, nor sensitive to any demands of equal protection. We must, however, take the long view: not to think about what will happen tomorrow, but what will happen over the next five years or the next decade, as the racial awakening I sense deepens and matures. We must also remember that no president writes on a clean slate. The opportunities for appointment to the federal bench, especially to the Supreme Court, are limited and, in any event, must be acceptable to the Senate, one-third of whose membership is up for election every two years. We may also find guidance in the journey of Anthony Kennedy.

Kennedy was appointed to the Court by Ronald Reagan, a stalwart Republican. He served for some thirty years and towards the end of his tenure charted a course for himself on issues of racial justice that must have surprised and disappointed many of his sponsors. He upheld the affirmative action policies

of the University of Texas; he acknowledged the urgency of ending racial isolation in the public schools and, in the context of assessing the school desegregation programs of Seattle and Louisville, affirmed the right of local school boards to achieve integration through strategic site selection or geographic zoning; and, especially relevant for our purposes, he endorsed the *Griggs* principle in the employment context in *Ricci* and extended it to housing in *Inclusive Communities*. In reading these opinions of his, and contrasting them with his earlier ones,[76] I cannot help but wonder whether Kennedy is among those who have been moved by the racial awakening that is so much a part of the fabric of American life these days. In 2016, speaking generally, Kennedy acknowledged, "To re-examine your premise is not a sign of weakness of your judicial philosophy. It's a sign of fidelity to your judicial oath."[77]

In fashioning the much-needed reform program I envision, the judiciary need not begin afresh. It can build on the achievements of the Second Reconstruction, most notably the *Griggs* principle, which thanks to *Ricci* and *Inclusive Communities* is now an integral part of American law. Although we must be wary of failures of application, as exemplified by Justice Stevens's opinion in the *Beazer* case, there is still considerable work that disparate impact doctrine can do. It can force a re-examination of bars to employment, such as rules against hiring those with a criminal record that especially burden the Black underclass. In addition, disparate impact doctrine, viewed as a statutory rule based on Section 2 of the Voting Rights Act of 1965 (as amended in 1982), can breathe new life into the challenge against felon disenfranchisement laws and can become the basis for attacking new limits on the right to vote, such as laws requiring photo IDs. The disparate impact caused by such measures, especially on those who are marked by race and class, is manifest.[78] The *Griggs* principle can also be used to challenge barriers to geographic mobility, such as those posed by minimum lot requirements and bans on rental housing that limit the opportunities of inner-city residents to move to suburban communities and thus to escape the unique hardships of life in the ghetto. To eradicate the remnants of caste, we must learn to use disparate impact doctrine forcefully and effectively.

That is not enough, however. We must go beyond the current reach of the *Griggs* principle to spheres of social action, like public education and perhaps even police practices that, thanks to *Washington v. Davis*, do not appear to be

76. *See, e.g.,* Metro Broadcasting v. FCC, 497 U.S. 547, 631–38 (1990) (Kennedy, J., dissenting from a ruling upholding the FCC policy of giving preference in the award of broadcasting licenses to minority-owned businesses).

77. Mark Sherman, *Justice: Changing Course on the Bench is Not Weakness*, AP NEWS (Sept. 23, 2016), https://apnews.com/93476b06b78c409393f38df4d5d507b7 [http://perma.cc/QH67-B6X6].

78. *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, YALE L.J. (forthcoming); Daniel Hopkins, Marc Meredith, Michael Morse, Sarah Smith & Jesse Yoder, *Voting But for the Law: Evidence from Virginia on Photo Identification Requirements,* 14 J. EMPIRICAL LEGAL STUD. 79 (2017); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015).

covered by disparate impact doctrine. It would be foolish, I admit, to expect *Washington v. Davis* to be overruled anytime soon, but we are not without recourse. One strategy would allow the judiciary to give a nod to *Washington v. Davis*'s legislative mandate requirement, but then construct that mandate out of grains of sand, as Kennedy did in *Inclusive Communities*, where, worried about "the grim prophecy" of the Kerner Commission report, he extended disparate impact liability to housing.

Another strategy would be to bypass *Washington v. Davis* altogether and to turn to the Constitution to provide authority for the much-needed reform. In this instance, reliance on the *Griggs* principle as a formal legal doctrine would be foregone. But the judiciary could use two of the key ideas that had served as the building blocks of disparate impact doctrine in the effort to forge equal protection into an effective instrument of racial justice.

One such idea consists of focusing on effects rather than purpose. Disparate impact of the type proscribed by the *Griggs* principle is an effect or consequence, but it is not the only kind of effect or consequence of which the judiciary might take cognizance—there are others. These, too, can be proscribed once it is understood that equal protection bans any state practice that systematically disadvantages Blacks and thus perpetuates their subordination and the racial caste system.

In the course of downgrading the *Griggs* principle from a constitutional to a statutory rule, the Court restricted equal protection in a way that made an illicit purpose or intent necessary for a violation. In 1980, a majority of the Justices in the *Mobile* case extended this view of equal protection to the Fifteenth Amendment. In short order, however, Congress decisively responded to this ruling and amended Section 2 of the Voting Rights Act of 1965 to outlaw practices that had either the purpose or effect of depriving Blacks the right to vote. In the Americans with Disabilities Act of 1990, an essential precursor to the Civil Rights Act of 1991 and the codification of disparate impact doctrine, Congress required firms and public agencies to make reasonable accommodations for disabilities and proscribed practices (like not having ramps) that might have been motivated by a desire to minimize expenses but which had the effect of disadvantaging the disabled.

The struggles that produced these measures, underscored by Reva Siegel,[79] have not been confined to the halls of Congress; they have also been extended to the deliberations of the Supreme Court. In the 1982 decision of *Plyler v. Doe*, handed down six years after *Washington v. Davis*, and only two years after the *Mobile* decision, Justice William Brennan focused on the effects of a Texas law denying public education to children not lawfully in the United States. Brennan put aside any inquiry into the statute's purpose or motivation or intent, and yet

79. Reva Siegel, *The Constitutionalization of Disparate Impact—Court-Centered and Popular Pathways: A Comment on Owen Fiss's Brennan Lecture*, 106 CALIF. L. REV. 2001 (2018).

condemned it as a violation of equal protection because he feared that the statute would have the effect or consequence of creating a new kind of underclass—"a subclass of illiterates."[80]

A second idea that served as a building block for disparate impact doctrine is the theory of cumulative responsibility. That theory acknowledges the interconnected character of social life and requires the judiciary to set aside any policy that carries over from one domain to another disadvantages inflicted on Blacks, provided suitable alternatives exist for achieving the legitimate ends served by that policy. Although the theory of cumulative responsibility originally gave rise to disparate impact doctrine and accounts for its continuing vitality, there is no reason to confine its reach to that doctrine.

We should also remember that *Washington v. Davis*, the decision that denied constitutional status to disparate impact claims, was but a contrivance and should be construed accordingly—narrowly. It should not be read as a final and comprehensive statement on the terms of racial justice in American law.[81] No, we must free the theory of cumulative disadvantage from the grasp of *Washington v. Davis* and understand that this theory and the principle to which it gave rise are not legislative creations, but constitutional in nature. They are predicated on a proper understanding of what is needed to end caste and to fulfill the vision of American society vindicated by the Civil War and inscribed in the Constitution by the amendments that war had brought into being.

80. Plyler v. Doe, 457 U.S. 202, 230 (1982).

81. Justice White, the author of the majority opinion, did not understand *Washington v. Davis* in such broad terms. His ruling seems primarily to have been motivated by a fear of the potential breadth of disparate impact claims under equal protection—would, he worried out loud, such universal application of disparate impact doctrine require that a sales tax be struck down because of its disparate impact on the poor? White, it should also be noted, dissented in *Beazer* and the Detroit metropolitan school decision and forcefully objected to the 1980 decision in *Mobile v. Bolden*, which had extended *Washington v. Davis* from the Equal Protection Clause of the Fourteenth Amendment to the Fifteenth Amendment.