DISPARATE-IMPACT LIABILITY: UNFOUNDED, UNCONSTITUTIONAL, & NOT LONG FOR THIS WORLD*

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For more than fifty years—ever since the Supreme Court decided *Griggs v. Duke Power Co.*[1]—almost all legal commentators have accepted that decision's insistence that Title VII of the Civil Rights Act of 1964 imposes liability on employers for policies that yield disparate impacts across different groups defined by their race, color, national origin, religion, or sex. They first claimed the original Act imposed that liability. When the Supreme Court began to correct its course and reconsider elements of *Griggs*, commentators asserted that Congress's 1991 amendments to the Civil Rights Act closed that door by ratifying the decision.

These commentators have always been wrong and remain wrong now. No Congress ever passed, no President ever signed, and as a result Title VII never contained (and does not contain now) any language outlawing employment policies bearing disparate impacts across demographic groups or imposing disparate-impact liability on employers for using such policies. Our entire 54-year foray since *Griggs* has been an unwarranted mistake, which has harmed employment law and infected other areas with concepts incompatible with core constitutional commitments.

We are long overdue for a reversal of the direction of American employment law. The Supreme Court's recent decision in *Muldrow v. City of St. Louis, Mo.*[2] unavoidably (whether or not intentionally) invites that reversal.

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. To join the debate, please email us at info@fedsoc.org.

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[1] 401 U.S. 424 (1971).

[2] 601 U.S. 346 (2024).

I. TITLE VII AND THE RISE OF DISPARATE-IMPACT LIABILITY

A. Congress Acts Against Intentional Discrimination

In Title VII, Congress enacted specific language through bicameralism and presentment. While Title VII includes separate prohibitions for employers, employment agencies, unions, and training programs, they run parallel in prohibiting each from discriminating in employment actions against: "any individual" "because of" his or such individual's "race, color, religion, sex, or national origin."[3]

Purely as a linguistic matter, these provisions focus on the intent of the governed parties as much as on their actions. They ban actions taken "*because of*" demography, not actions taken that *result in* any particular effect across demographics.

This was how the main architects of Title VII understood their work. Senator Hubert Humphrey, the statute's main author, relied on the advice of Department of Justice lawyer Richard K. Berg in crafting this language.[4] Berg explained in a contemporaneous law review article: "Discrimination is by its

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[3] *Compare* 42 U.S.C. §§ 2000e-2(a) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color religion, sex, or national origin."), *with* 2000e-2(b) ("It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin."), *with* 2000e-2(c) ("It shall be an unlawful employment practice for a labor organization—(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or an an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."), *with* 2000e-2(d) ("It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.").

[4] Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & LIBERTY 1, 8 (2020), *available at* https://ssrn.com/abstract=3482015.

nature intentional. It involves both an action and a reason for the action."[5] "To discriminate 'unintentionally' on grounds of race" "appears a contradiction in terms."[6]

Furthermore, Title VII's legislative history teems with further support for this interpretation of its language as the dominant one in its original interpretive community.[7] The Senate passed Title VII only when it was satisfied that it dealt solely with intentional discrimination, and it very clearly would not have passed it without that firm understanding.[8]

B. The EEOC Takes Over

Through Title VII, Congress created the Equal Employment Opportunity Commission to help administer the statute. Whatever Congress wrote and however the original interpretive community understood what it had written, once up and running, the EEOC had other plans.[9] The EEOC's first Chief of Conciliations rejected limiting Title VII enforcement to instances of intentional discrimination, instead openly advocating for imposing "fair qualification standards."[10] His superiors listened and "interpret[ed] Title VII a step further than other agencies" had for other provisions of the Civil Rights Act. The EEOC "reason[ed] that *in addition to discrimination* in employment, it is also an unlawful practice to [use] criteria which prove to have a demonstrable racial effect without a clear and convincing business motive."[11]

Whatever Congress and the President had legislated, the EEOC "interpreted" Title VII to impose liability on employers for policies bearing disparate impacts across demographic groups. These are not mere post-hoc impressions of the EEOC's motivations or unfavorable readings imposed with the benefit of hindsight. "The EEOC's own official history of these early years records with unusual candor the commission's fundamental disagreement

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[5] *Id.* at 8-9 (citing Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 71 (1964)).

[6] *Id.* at 9 (citing Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. at 71).

[7] *Id.* at 11-25.

[8] *Id.* (giving details of legislative deal-making that was essential to passing Title VII).

[9] This history, too, is most succinctly explained by Professor Heriot. *Id.* at 25-33.

[10] *Id.* at 30-31.

[11] *Id.* at 31 (citing Samuel C. Jackson, *EEOC v. Discrimination, Inc.*, THE CRISIS, at 16-17 (Jan. 1968)) (emphasis added).

with its founding charter, especially Title VII's literal requirement that the discrimination be intentional."[12]

C. In Griggs*, the Supreme Court Defers to the EEOC's Misreading*

Nonethless, overcoming clear text, historical context, and the preponderant weight of indisputable legislative history, the Supreme Court chose in 1971 in *Griggs* to defer to the EEOC's interpretation.[13] It did so unanimously,[14] on the purported basis that "the Act and its legislative history support the Commission's construction," "afford[ing] good reason to treat" the disparate-impact theory conjured by the EEOC "as expressing the will of Congress."[15]

It is worth noting *how* the Justices discerned that "the Act and its legislative history support[ed]" this conclusion. They did *not* interpret or even rely on any language from section 2000e-2(a)(1), the statute's main prohibitory section for employers.[16] Instead, they purported to divine an "objective of

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[12] *Id.* at 33 (citing HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA 248-49 (1990) (citing EEOC, *Administrative History*)).

[13] *Griggs*, 401 U.S. at 433-34 ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference.") (citations omitted).

[14] The 8-0 Court spoke with one voice in *Griggs* (Justice Brennan did not participate in the case), with no Justice dissenting or concurring. *Id*.

[15] *Id.* at 434.

[16] *Griggs* relegates to a footnote the only language of Title VII it mentions at all. *Id.* at 425 n.1 (quoting 42 U.S.C. § 2000e-2(a)(2)). Interestingly, the Seventh Circuit in 2017 referred to that section as "an infrequently litigated provision in Title VII." Equal Emp. Opportunity Comm'n v. Autozone, Inc., 860 F.3d 564, 565 (7th Cir. 2017). Section 2000e-2(a)(2) prohibits "classify[ing] employees or applicants for employment in any way which would . . . tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." That section's tortured history is overdue for its own telling, but that is beyond the purview of this piece. For now, it is sufficient to note that—treating *Griggs*'s own text precisely as carefully as *Griggs* treated that of Title VII—later courts often read *Griggs* as setting forth a theory of liability under § 2000e-2(a)(1). *See*, *e.g.*, Meditz v. City of Newark, 658 F.3d 364, 370 (2d Cir. 2011) ("Title VII makes it unlawful 'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.' 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has long recognized that Title VII plaintiffs can make out a viable employment discrimination claim without alleging or proving discriminatory intent. *See* Griggs v. Duke Power, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)."); *cf.* Adams v. Fla. Power Corp., 255 F.3d 1322, 1324 (11th Cir. 2001) ("The language of the ADEA closely parallels that of Title VII. In fact, the sections forbidding discrimination are almost identical. *Compare* 29 U.S.C. § 623 (a)(1) (ADEA) with 42 U.S.C. § 2000e-2(a)(1) (Title VII). The Supreme Court has held that Title VII supports a cause of action for employment discrimination based on a disparate impact theory. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971).") (additional citations omitted).

Congress in the enactment of Title VII" as "plain from [unspecified] language of the statute."[17] Despite that enacted language prohibiting acts taken "because of" demography, the Justices asserted that Congress had acted

> to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, *and even neutral in terms of intent*, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[18]

Without explanation of whether they found such commands in any particular statutory language or where such commands might be found, the Justices declared that:

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification . . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.[19]

In 1971, the terms "artificial," "arbitrary," "unnecessary," "barriers," and "business necessity" appeared nowhere in Title VII. In their absence, relying entirely on ether and vibes, the Supreme Court declared that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[20] On that basis, "good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[21]

The Justices asserted the support of legislative history for this result through what can only be described as chicanery, even by the low standards of arguments from legislative history.[22] The *Griggs* Court picked out congressional authorities the Justices seemingly believed to carry gravitas, quoted

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[17] *Griggs*, 401 U.S. at 429.

[18] *Id.* at 430 (emphasis added).

[19] *Id.* at 431.

[20] *Id.* at 432 (emphasis in original).

[21] *Id.*

[22] Justice Scalia later famously rejected the notion of relying on legislative history as a "trick" in which you "look over the heads of the crowd and pick out your friends" to quote them saying what you want to hear. ANTONIN SCALIA, A MATTER OF INTERPRETATION 35-36 (1997).

their statements, and bald-faced lied about what they meant. The unanimous Court referenced the history of senators adopting language allowing employers to use professionally crafted intelligence tests—the very tests at issue in the suit before it—name-checking "Senators Case of New Jersey and Clark of Pennsylvania, co-managers of the bill on the Senate floor, [for having] issued a memorandum explaining that the [relevant language] 'expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications*."[23] The Court continued to quote the same senators' conclusion from that memo: "Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[24] Yet, according to *Griggs*, with only the sparsest explanation of any interstitial reasoning,[25] the resulting provision of Title VII allowed only "employment tests [proven by an employer to] be job related."[26]

At the end of the day, *Griggs* made two epochal errors—one methodological, one factual. First, the *Griggs* Court chose to base its statutory interpretation on an indefensible purposivist methodology. Second, its purposivism badly missed the mark in its fact-finding, concluding that Congress's purposes were other than what they were.

As Justice Robert H. Jackson had written of another matter a generation earlier, the Supreme Court's *Griggs* opinion was "not final because we are infallible, but . . . infallible only because we are final."[27] Despite resulting from a mistaken application of an indefensible methodology, *Griggs* enshrined disparate-impact liability under Title VII in Supreme Court precedent. And that flawed precedent remained untouched for quite some time.

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[23] *Griggs*, 401 U.S. at 434-35 (emphasis in original).

[24] *Id.*

[25] That reasoning, such as it is, can be found at page 436, n.12. There, *Griggs* notes that in dialogue with Senators Case and Clark, Senator John Tower offered a pair of amendments. The first, which the Senate rejected, would have made tests "permissible 'if . . . in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved . . . .'" The second, which the Senate passed and which therefore entered the enacted statute, included no parallel language. From this negative, *Griggs* concludes without analysis that "The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first."

[26] *Griggs*, 401 U.S. at 436.

[27] Brown v. Allen, 344 U.S. 443, 540 (1952) (Jackson, J., concurring).

II. THE USUAL TELLING OF THE CIVIL RIGHTS ACT OF 1991

A. Tightening Disparate-Impact Analysis

It took almost two decades for the Supreme Court to express second thoughts over *Griggs*'s unanimous defacement of Title VII. Those second thoughts took clearest shape in Justice Byron White's 1989 majority opinion in *Ward's Cove Packing Co. v. Atonio*.[28]

Ward's Cove involved a challenge to a seafood cannery's policies as both intentionally discriminatory and having disparate impacts across races.[29] The district court entirely dismissed the case, and a Ninth Circuit panel affirmed; then the en banc court reversed the panel on the plaintiffs' disparate-impact claims.[30] The en banc Ninth Circuit concluded that, "in such a case, '[o]nce the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer,' to 'prov[e the] business necessity' of the challenged practice."[31]

Justice White did *not* revisit whether Title VII authorized disparate-impact suits. He didn't reverse the Ninth Circuit's burden allocation in the suit, either. Instead, the *Ward's Cove* majority faulted the Ninth Circuit primarily for failing to employ the proper comparator for the plaintiffs' racial statistics in assessing whether a disparate impact had been proven,[32] as well as for failing to require a causal link between the policies challenged and those racial statistics.[33] The opinion then sought to clarify how lower courts should assess the "business necessity" defense created from whole cloth by the *Griggs* Court.[34] With regard to the comparator, *Ward's Cove* reiterated that in assessing whether a plaintiff has proven any disparate impact, the courts must compare "the racial composition of [the at-issue jobs]" to "the racial composition of the qualified . . . population in the relevant labor market."[35] In addressing the need for a causal link, *Ward's Cove* made plain that "a plaintiff

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[28] 490 U.S. 642 (1989). Justice White had served since President Kennedy appointed him in 1962. White thus both joined the *Griggs* opinion and authored the Supreme Court's effort to partially correct it 18 years later.

[29] *Id.* at 648.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 650-55.

[33] *Id.* at 656-58.

[34] *Id.* at 658-61.

[35] *Id.* at 650 (citing Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08 (1977)).

must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII."[36] In clarifying the business necessity analysis, *Ward's Cove* held that, once a plaintiff shows a disparate impact, a defendant has the "burden of producing evidence of a business justification for his employment practice," although the "burden of persuasion . . . remains with the disparate-impact plaintiff."[37] The *Ward's Cove* Court clarified that all that was necessary was showing that "a challenged practice serves, in a significant way, the legitimate employment goals of the employer," with "no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business."[38]

B. Ward's Cove*'s Rhetorical Move Away from* Griggs

On a substantive level, that was all that *Ward's Cove* did. It did not address the propriety of disparate-impact liability. It did not address the propriety of a burden-shifting rule. It just altered the standard a defendant-employer had to meet at the second stage of that burden-shifting analysis. The firestorm that followed would be inexplicable but for the atmospherics of Justice White's opinion; *Ward's Cove* rhetorically went further than its holding, seemingly inviting a successor case to ask the Supreme Court to take additional steps.

The relevant rhetorical flight explored how the en banc Ninth Circuit had found the plaintiffs to have proven there was a disparate impact. By failing to identify a proper comparator, the court of appeals had allowed "any employer who had a segment of his work force that was—for some reason—racially imbalanced" to "be haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his work force."[39] This was unacceptable, because it would leave as the "only practicable option for many employers . . . to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII."[40] The Court rejected the

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[36] *Id.* at 656.
[37] *Id.* at 659.
[38] *Id.*
[39] *Id.* at 652.
[40] *Id.* (citing 42 U.S.C. § 2000e-2(j)).

Ninth Circuit's test for disparate impact as one that "would leave the employer little choice . . . but to engage in a subjective quota system of employment selection."[41] And Justice White went further, insisting that

> Racial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions, even where workers for the different positions may have somewhat fungible skills . . . . As long as there are no barriers or practices deterring qualified [individuals from underrepresented groups] from applying for [such] positions, . . . if the percentage of selected applicants who are [from those groups] is not significantly less than the percentage of qualified applicants who are [from the same], the employer's selection mechanism probably does not operate with a disparate impact on [those groups].[42]

C. The Usual Telling of the 1991 Civil Rights Act: Ward's Cove *Repudiated*

Ward's Cove's refinement of the business-necessity defense was meaningful but comparatively trivial, so it is perhaps surprising that *Ward's Cove* set off a sufficient kerfuffle to trigger passage of the Civil Rights Act of 1991. But that is exactly what happened.

Perhaps Justice White's rhetoric was to blame. After all, while he was exactly right about how the en banc Ninth Circuit's analysis would play out, his critique employed more horsepower than necessary to make his point. His digression on the unfairness of hauling an employer through an allegation of discrimination applied equally well to an employer like Duke Power, the employer in *Griggs* which had proven that it had no discriminatory intent,[43] yet still found itself "haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select its workers."[44] Such employers surely *did* find themselves confronted—as Justice White feared the lower court's rule would confront others—with a situation where the "only practicable option [was] to adopt racial

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[41] *Id.* (internal quotation and citation omitted).

[42] *Id.* at 653-54.

[43] *Griggs*, 401 U.S. at 432 ("The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees.' We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent . . .") (internal citations omitted).

[44] *Ward's Cove*, 490 U.S. at 652.

quotas, insuring that no portion of their work forces deviated in racial composition from"[45] anticipated norms.

The critique hit so true and so broadly against the entire disparate-impact machinery—quite possibly more true and more broadly than Justice White meant it to—that, even though *Ward's Cove* only tweaked the minorest of that machinery's outlines, one might have reasonably read it as implying an openness to reconsidering the justness of the whole game.

For that reason or whatever other, Congress was sufficiently scandalized by the *Ward's Cove* opinion to write and pass the Civil Rights Act of 1991.

Commentators almost invariably describe the 1991 Act as having overturned *Ward's Cove*'s purported attack on disparate-impact liability and having codified *Griggs*.[46] While there is a reason for this description, it misunderstands what *Ward's Cove* did that Congress felt it necessary to address.

First the reason: the 1991 Congress included in the passed bill a statement of the Act's purpose. Section 3 reads:

> The purposes of this Act are— . . . (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964.[47]

Pay attention to Congress's specific statements and omissions. Section 3 states that Congress sought to unwind *Ward's Cove*—which did not reach the propriety of disparate-impact liability—and to "codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs*." It does *not* say that Congress sought to codify *disparate-impact liability* as

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[45] *Id*. *See Griggs*, 401 U.S. at 431-32 ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used . . . . In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case the Company has made no such showing.").

[46] *E.g.*, Ricci v. DeStefano, 557 U.S. 557, 578 (2009) ("Twenty years after *Griggs*, the Civil Rights Act of 1991, 105 Stat. 1071, was enacted. The act included a provision codifying the prohibition on disparate-impact discrimination.").

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

enunciated in *Griggs*, an issue *Ward's Cove* did not address. Section 3 does state that Congress sought to "confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits." Even there, though, it never states that Congress intended to codify a cause of action assigning liability on this basis. Providing "statutory authority . . . for the adjudication" of suits allows courts to *hear* such suits; it does not authorize any party to *file or litigate* them. And "providing statutory guidelines for the adjudication" of disparate-impact suits means setting the parameters for how to decide such cases if they exist, but it does not necessarily address the issue of whether they exist at all.

More importantly, Section 3 is a statement of purpose. The substance of the 1991 Act lay elsewhere. To conclude anything about what that substance actually does to the nation's laws, we need to review not only what Congress *said it meant* to do, but also what Congress *did* in the rest of the Act. Congress put the relevant substantive language in Section 105 of the 1991 Act.[48]

III. THE TEXT OF THE 1991 ACT AND WHAT IT REALLY DID

There is no question that the 1991 Congress *sought* to codify *Griggs*'s version of the business-necessity defense. But the business-necessity defense is not the totality, or even the most important part, of *Griggs*. *Griggs*'s most important effect was to read disparate-impact liability into Title VII, which is different. Notice how—there—the pieces come together. Or rather, notice how they don't.

The 1991 Congress knew how to amend the U.S. Code. Section 105 expressly *does* amend the U.S. Code to set out its allocation of burdens in the litigation of a business-necessity defense to any validly brought Title VII disparate-impact claims. But the 1991 Congress chose *not* to codify the statement of purposes they included in Section 3. The 1991 Act did *not* enact those purposes into the U.S. Code.

Nor did the 1991 Congress amend 42 U.S.C. § 2000e-2(a)'s actual prohibitory language. Or add in the new section 2000e-2(k) any supplement to Title VII's pre-existing, closed, defined set of "unlawful employment actions." Instead, the 1991 Act left Title VII prohibiting exactly what it had prohibited in 1964: employment discrimination against "any individual" "because of" that individual's "race, color, religion, sex, or national origin."

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[48] *Id*. The full text of the Civil Rights Act of 1991, including Sec. 105, is available at https://www.eeoc.gov/civil-rights-act-1991-original-text.

The new section (k) provides no more than that "[a]n unlawful employment practice based on disparate impact is established under this title only if" its criteria are met.[49] *If Congress had* written the law to render policies bearing disparate impacts unlawful employment practices, section (k) would dictate what would need to be established to prove such practices. But passing section (k) does not mean the 1991 Congress *made* such policies unlawful employment practices, *created* such a claim, or *established* that such policies were already unlawful or that such a claim already existed.

Think of it this way: imagine Congress passed a statute providing that one's status as a 5-star Admiral is established *only if* one proves one is in the Navy. Would that statute mean that anyone proving they were in the Navy had thereby established that they were a 5-star Admiral? Obviously not. Could you even conclude from the fact that Congress had passed such a statute that there were *any* 5-star Admirals? Again, the answer is no.[50]

Nor does the new language infer a silent redefinition of the prior statutory language. Imagine that, in 1964, Congress had passed a statute forbidding anyone from bringing a dog into the Capitol building and that ordinary usage, the straightforward meaning of the text, the historical context, and the clear, uniform legislative history all conveyed that when they did so, they were talking about man's best canine friends. Imagine that subsequently, in 1991, the Congress amended that Dog Ban to add a statement that, nonetheless, if one establishes that a hot dog is kosher, one may bring it into the Capitol. That amendment would certainly clarify the legality of bringing kosher hot dogs into the building. But would its blessing of kosher hot dogs retroactively alter the meaning of the original Dog Ban to prohibit individuals from bringing *non*-kosher hot dogs into the Capitol? Again, the answer is no. So long as this hypothetical Congress chose not to amend the original ban's prohibition, it would remain true in 1992 that no Congress ever had banned such "dogs" from the Capitol. The new language would clarify the legality of something no prior statute had prohibited. That might "gild the lily," but it would fall well within the power of Congress. One cannot and should not—just to render the new, confirmatory language more clearly non-superfluous—read the 1991 amendment to do something it did not do: alter the original Dog Ban to prohibit the bringing of non-kosher weiners into the Capitol.

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[49] 42 U.S.C. § 2000e-2(k).

[50] Indeed, there are no 5-star Admirals in the Navy and have been none for decades. *See Fleet admiral (United States)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Fleet_admiral_(United_States) (last visited Feb. 14, 2025).

Congress's language in section 2000e-2(k) assigns burdens in the litigation of defenses available to a valid disparate-impact claim if there is such a claim. It goes no further. It addresses the small alteration of law effected by *Ward's Cove*. Like *Ward's Cove*, it does not address more fundamental issues that were uncontested in that litigation.

Section (k) establishes necessary but insufficient predicates for prevailing on disparate-impact claims. It does not establish that the claims themselves are available. And the modern Court has been deeply hostile to the judicial creation of new causes of action unauthorized by Congress.[51]

The usual telling of the 1991 Act's impact on Title VII both over-reads Congress's stated purpose in enacting the 1991 Act *and* wrongly assumes that the language Congress actually codified through the 1991 Act achieved that artificially broader end. On close reading, though, just as *Ward's Cove* did not go as far as its logic could have been read to extend, neither did the actual text of the 1991 Act go as far as the usual telling claims it did in responding to *Ward's Cove*.

As textualism has taught us over its decades-long rise, what matters in determining the meaning of a law is the enacted, codified text of that law. The codified text of the 1991 Act does not say what the usual telling would have us believe. It does not create or establish the existence of a cause of action for employment discrimination based on disparate impact.

IV. FURTHER BUTTRESSING: THE CANON OF CONSTITUTIONAL AVOIDANCE

In *N.L.R.B. v. Catholic Bishop of Chicago*, applying the doctrine of constitutional avoidance, the Supreme Court declined to interpret a statute in a way that would require it to resolve "difficult and sensitive" constitutional questions.[52] Disparate-impact liability's constitutionality is, at best, "difficult and sensitive."[53] Under *Griggs*, where a facially neutral, even-handedly

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[51] *E.g.*, Egbert v. Boule, 145 S. Ct. 1793, 1809 (2022).

[52] 440 U.S. 490 (1979).

[53] *Id. See also, e.g.*, *Ricci*, 557 U.S. 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? The question is not an easy one."); *Restoring Equality of Opportunity and Meritocracy*, Exec. Order of Donald J. Trump, Apr. 23, 2025, https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-

applied policy "would have a disparate impact, a decision-maker is often compelled to act intentionally on the basis of racial considerations to avoid the disparate impact, thus disparate impact regulations require decision makers 'to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.'"[54]

It has been clear since the 1950s that the Constitution imposes the same constraints on the federal government that the Fourteenth Amendment's Equal Protection Clause imposes on the states.[55] At least seven of the current Justices have recognized this parallelism. Chief Justice John Roberts did so in *Sessions v. Morales-Santana*[56] and—with Justice Samuel Alito—in *Ashcroft v. Iqbal*.[57] Justices Sonia Sotomayor and Elena Kagan have done so repeatedly, including in *Morales-Santana*. In *United States v. Madero*,[58] Justice Clarence Thomas agreed, anchoring this constraint in the Fourteenth Amendment's Citizenship Clause, but continuing to find it imposed the same limits. Justice Neil Gorsuch's concurrence in *Madero*, slightly less explicitly, recognizes the same contours.[59] In 2021, Justice Brett Kavanaugh joined a concurrence to a denial of certiorari which agreed (by citation to *Sessions* and other authorities) that the "Fifth Amendment to the United States Constitution prohibits the Federal Government from discriminating" in terms paralleling the Court's application of the Equal Protection Clause of the Fourteenth Amendment.[60] Justices Amy Coney Barrett and Ketanji Brown Jackson appear to have not yet taken a position on this question since their investitures.

Regardless of *where* this constraint on federal power is most properly found in the Constitution, the constraint's *existence* is by now a truth universally acknowledged. Exactly coterminous with the Equal Protection Clause,

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meritocracy/ ("Disparate-impact liability is wholly inconsistent with the Constitution and threatens the commitment to merit and equality of opportunity that forms the foundation of the American dream.").

[54] Louisiana v. EPA, 712 F. Supp. 3d 820, 843 (W.D. La. 2024) (quoting *Ricci*, 557 U.S. at 595-96 (Scalia, J., concurring)).

[55] Bolling v. Sharpe, 347 U.S. 497 (1954).

[56] 582 U.S. 47, 159 n.1 (2017).

[57] 556 U.S. 662, 675 (2009).

[58] 142 S. Ct. 1539, 1544 (2022).

[59] *Madero*, 142 S. Ct. at 1556 (noting that the majority, on the theory that the relevant constitutional provision of the Fifth Amendment was "fundamental," had applied Fourteenth Amendment jurisprudence, and had held it to have been satisfied, and writing separately only to object to any analysis of what portions of the Constitution are sufficiently "fundamental" to apply).

[60] Nat'l Coal. for Men v. Selective Serv. Sys., 141 S. Ct. 1815 (2021).

it renders *all* federal racial discrimination odious, no matter the context.[61] It "demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[62] "That principle"—the core of equal protection—"cannot be overridden except in the most extraordinary case," where racial classification and disparate treatment satisfy strict scrutiny.[63]

What once satisfied strict scrutiny may not always continue to satisfy it.[64] Is intentional employment discrimination so pervasive and hard to suss out today that disparate-impact liability satisfies strict scrutiny? These questions and their answers are, at least, "difficult and sensitive." Against this backdrop, the canon of constitutional avoidance furnishes a strong additional reason for the Court to address *Griggs*'s lack of merit as a statutory precedent. Why deal with the thorny question of whether Congress violated the Constitution by imposing disparate-impact liability when it's both easier and more accurate to say that Congress never actually imposed it? Reversing *Griggs*'s statutory mistake would free the Court from needing to resolve these nettlesome, difficult, and sensive matters of constitutional law.

V. *MULDROW*: AN INVITATION TO REVISIT *GRIGGS*

Perhaps you grant all this. Still, why bother speculating about whether the Supreme Court might have any interest in revisiting *Griggs* after 54 years? A recent Title VII decision of the Court provides an answer.

A. Muldrow v. City of St. Louis

Muldrow was a Title VII case, but it involved no disparate-impact claims. It saw allegations of intentional sex-based discrimination. The Supreme Court considered only one issue: the compatibility with Title VII of some courts of appeals' adoption of a requirement that only "materially significant disadvantage" from discrimination would be litigable.[65]

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[61] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. 143 S. Ct. 2141, 2162 (2023).

[62] *Id.* at 2141 (internal citation omitted).

[63] *Id.* at 2163, 2162.

[64] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2630-31 (2013) (holding Voting Rights Act's coverage formula to have once been constitutional under the Fourteenth and Fifteenth Amendments, but to have ceased to be so, due to changed circumstances).

[65] *Muldrow*, 601 U.S. at 353.

But these particulars are not why *Muldrow* matters to the future of *Griggs*. Shifting our focus to the statutory language at issue and the Court's reasoning makes the case's relevance clear.

B. The Court's Unanimous Interpretation of Title VII (as Amended in 1991)

In *Muldrow*, Justice Kagan wrote for a six-Justice majority.[66] While three Justices filed concurring opinions, none provided a different assessment of any point relevant here.[67] On all of the following points, Justice Kagan spoke for a unanimous court.

Justice Kagan began by noting that Title VII prohibits "discriminat[ion] against any individual . . . because of such individual's race, color, religion, sex, or national origin."[68] She emphasized that "the statutory language . . . prohibits 'discriminat[ing] against' an individual . . . because of that individual's" demography and clarified that "the statute targets practices that 'treat[] a person worse' because of sex or other protected trait'"—"'Discriminate against' means treat worse."[69] Justice Kagan said that was sensible because "the anti-discrimination provision . . . 'seeks a workplace where individuals are not discriminated against' because of traits like race and sex. The provision thus flatly 'prevent[s] injury to individuals based on' status . . . without distinguishing between" them.[70]

The Court admitted that there were policy arguments to the contrary, but it rejected them because "policy objections cannot override Title VII's text."[71] Still, Justice Kagan addressed the merits of one of those policy arguments: that "a significant-injury requirement is needed to prevent transferred

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[66] *Id*. at 348.

[67] Justice Thomas and Justice Alito each wrote separately, expressing doubt that the Court's correction of the lower courts on how much damages must be alleged before discrimination is actionable would meaningfully alter how lower court judges would handle cases in the future. *Id.* at 360-62 (Thomas, J., concurring); *id.* at 362-63 (Alito, J., concurring). Justice Kavanaugh, on the other hand, wrote separately to express that he *did* expect the alteration to change how the lower courts would handle future cases, that he would have preferred to adopt a standard that would have altered that handling slightly *more*, but that he could live with the new rule as an improvement unlikely to yield different results from what his preferred rule would yield in a material number of cases. *Id*. at 363-65.

[68] *Id.* at 354 (citing 42 U.S.C. § 2000e-2(a)(1); Bostock v. Clayton Cnty., 590 U.S. 644, 657-58 (2020)).

[69] *Id.*

[70] *Id.* at 358 (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006)). The cited language specifically spoke to the statute's lack of distinguishment between "significant and less significant harms."

[71] *Id.*

employees from 'swamp[ing] courts and employers' with insubstantial lawsuits requiring 'burdensome discovery and trials.'"[72] The Court found "reason to doubt that the floodgates will open in the way feared." "Perhaps most notably," the Court doubted the sky would fall because Title VII "requires that the employer have acted *for discriminatory reasons*—'because of' sex or race or other protected trait," and because "a court may consider whether a less harmful act is, in a given context, less suggestive of *intentional discrimination*."[73] The Court clearly believed this factor would successfully prevent a flood of cases. But it also addressed the possibility that the flood could come anyways:

> even supposing the City's worst predictions come true, that would be the result of the statute Congress drafted. As we noted in another Title VII decision, we will not "add words to the law" to achieve what some employers might think "a desirable result." Had Congress wanted [to write a law aimed at a different result,] it could have done so. By contrast, this Court does not get to make that judgment.[74]

C. Implications of Muldrow*'s Reasoning for Title VII Disparate-Impact Liability*

The statutory language at issue in *Muldrow*—barring discrimination "because of" demography—is present in *all* the subparts of Title VII's prohibitions.[75] Thus, *Muldrow* interpreted the same statutory language that *Griggs* did. As *Muldrow* hammered home relentlessly, that language bans "treating people worse" "because of" their demographic status, and it provides justification for punishing only (and all) defendants who "acted for discriminatory reasons" (however damaging their discriminatory acts).

But the defining feature of *Griggs*'s disparate-impact regime is its assignment of liability to those who acted *without* discriminatory reasons. This means *Griggs* and *Muldrow* are fundamentally incompatible. This is most clearly seen in the *Muldrow* Court's discussion of Title VII's built-in gatekeeper. Justice Kagan suggested that the lower courts would be able to weed out small-potatoes cases by considering whether a "less harmful act" would be "less suggestive of intentional discrimination." But that can only

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[72] *Id.* (citing Brief for Respondent at 45, 49, Muldrow v. City of St. Louis, 601 U.S. 346 (2024) (No. 22-193)).

[73] *Id.* (emphasis added).

[74] *Id.* (citing Equal Emp. Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 774 (2015)).

[75] *See supra* note 3.

meaningfully help reduce courts' case loads if intentional discrimination is a necessary component of a valid claim. If *Griggs* is good law and disparate-impact claims remain valid, that gatekeeper can't work, because there is no gate to keep.

Griggs stands as perhaps the modern Court's most prominent example of adding words to the law to achieve what some might think a desirable result.[76] It did so through quite possibly the modern Court's most aggressively purposivist decision, relying for its interpretation of Title VII *entirely* on policy arguments and the unfounded assertion that those policy goals were in the mind of Congress when it passed the Civil Rights Act of 1964. But *Muldrow* rejects the whole premise of such arguments, flatly declaring both that the Court "does not get to make [such] judgment[s]" and that courts should *never* allow policy arguments to override enacted text.

This 2024 case deals with the statute as it exists post-1991. Justice Kagan and the Justices who joined and concurred in her opinion knew full well of the existence of subsection (k), but they rightly did not read it to have altered the text or meaning of subsection (a)'s prohibitions. After *Muldrow*, it is clear that all nine Justices read the modern version of Title VII to mean that *Griggs* is entirely wrong.

D. Stare Decisis Factors Support Griggs*'s Vunerability*

Though *Muldrow* shows that the current Court would likely not decide *Griggs* the same way, the Supreme Court does not always overturn precedents simply because it thinks they were wrongly decided. The Supreme Court most recently addressed statutory stare decisis in *Loper Bright Enterprises v. Raimondo*.[77] The *Loper Bright* analysis simplified the broader discussion of stare decisis from *Dobbs v. Jackson Women's Health Organization*.[78] As discussed in these cases, the traditional factors to be weighed in determining whether to overturn a mistaken precedent include:

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[76] *See Muldrow*, 601 U.S. at 358.

[77] 144 S. Ct. 2244 (2024). *Loper Bright* involved a challenge to agency action as inconsistent with the underlying statute. While it could thus be described as an administrative law decision, not a statutory one, the point of the decision is to reject that false dichotomy and to require courts to independently assess the meaning of the statutes before them. Most noted for overturning *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *Loper Bright* established that "courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority [and both] need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright*, 144 S. Ct. at 2273.

[78] 597 U.S. 215 (2022).

- The nature of its error;[79]
- The quality of its reasoning;[80]
- The "workability" of its rule;[81]
- The consistency of the opinion with related opinions;[82]
- The disruptive effect of its rule on other areas of the law;[83]
- The presence or absence of concrete reliance interests;[84]
- Intervening changes of law or facts.[85]

None of these factors *clearly* favor retaining *Griggs*.

1. Nature of the Error and Quality of Reasoning

Griggs's purposivist methodology has been categorically rejected by the Supreme Court. *Griggs* lacks even a rudimentary textual peg to any language that ever overcame bicameralism and presentment. It entirely lacks any discussion of how any portion of Title VII's language could possibly be interpreted to impose disparate-impact liability, as the opinion held. This is a categorical, not an incremental, error.

The *Griggs* Court not only employed indefensible methods, it employed them badly, reaching an assessment of purpose clearly disproven by the congressional record. Congress did *not* mean to say what the *Griggs* Court ventriloquized into its mouth—that employers should be liable for nondiscriminatory policies bearing unintended disparate impacts across demographic groups. Congress's actual enacted words—as the *Muldrow* Court recently reminded us—do not say that.

Griggs's doubly-flawed reasoning places it in the far-low-tail of the judicial quality distribution. If these factors *ever* favor overturning a precedent, they do so here.

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[79] *Id.* at 584.
[80] *Loper Bright*, 144 S. Ct. at 2280.
[81] *Id.*
[82] *Id.*
[83] *Dobbs*, 597 U.S. at 584.
[84] *Loper Bright*, 144 S. Ct. at 2280.
[85] Ramos v. Louisiana, 590 U.S. 83 (2020).

2. Concrete Reliance Interests

Could anyone ever have relied on *Griggs*'s holding that Title VII provides a cause of action for disparate impacts across demographic groups in structuring *any* employment affairs? As Professor Gail Heriot has written, *all* employment practices have disparate impacts across some forbidden demographic groups.[86] No employer can ever structure its affairs to completely avoid any disparate impacts. All any employer can ever rely on in structuring its employment decisions to seek to avoid liability is the EEOC's guidance on what disparate impacts will interest it sufficiently for it to bring litigation. That guidance shifts more-or-less continuously with the EEOC's majority. The very fact that the EEOC's guidance shifts so frequently demonstrates that employers *cannot* have any fixed, justified reliance on *Griggs* itself. Thus this factor cannot favor *Griggs*'s retention either.

3. Workability

Workability is a closer call, depending on whose vantage the Court adopts in assessing the workability of *Griggs*'s rule and any potential replacement. To the extent this factor gauges the workability of disparate-impact liability *for courts*, it would be hard to argue after five decades that *Griggs*'s standard is unworkable. Courts have worked with it throughout that time. They could continue to do so.

Still, the factor remains at best ambiguous. If the Court instead focused on the workability of *Griggs* as guidance *to employees and employers* seeking to comply with Title VII, it would find that the disparate-impact liability *Griggs* established is completely unworkable. Since *all* employment policies have a disparate impact across *some* relevant demographic threshold, how workable would the Court find a rule that makes every policy presumptively illegal, subject only to a business-necessity defense?

4. Consistency With and Disruptive Effect on Other Areas of Law

Griggs's inconsistency with and disruptive effect on other areas of law, on the other hand, are so pronounced that these factors cut against retaining *Griggs* as clearly as they could ever cut against retaining any mistaken decision. *Griggs*'s logic has long bedeviled other areas of law and continues to conjure problems for them. More than a half century later, we continue to litigate theories of disparate-impact liability under the regulations for Title

[86] Heriot, *supra* note 4, at 8.

VI of the Civil Rights Act,[87] under the regulations for Title IX of the Educational Amendments of 1972,[88] and under the Fourteenth Amendment's Equal Protection Clause.[89] This is true despite the fact that the courts have consistently held for decades that Title VI and Title IX's nearly identical language to that in Title VII *does not* make them disparate-impact statutes,[90] and their even longer-standing insistence that the Equal Protection Clause bans only intentional discrimination rather than facially neutral policies bearing disparate impacts across demographic groups.[91]

5. Intervening Changes of Fact or Law

Finally, intervening changes of fact and law strongly counsel against retaining *Griggs*'s error. On the factual side, *Griggs*'s issuance in 1971 followed the passage of the Civil Rights Act of 1964 by only seven years. As demonstrated in contemporaneous school-desegregation cases,[92] among many other examples, *Griggs* was decided at a moment when it was arguable that Jim Crow yet clung to life and might resurge if given the chance. Today, such facts feel as though they are from another age of the world. Justice Thomas spent his early years attending segregated schools in the Deep South,[93] and he is now America's leading opponent of disparate-impact theory from his perch on the highest Court in the land.[94] America's two largest states have no

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[87] Rollerson v. Brazos River Harbor Navigation Dist., 6 F.4th 633, 649-50 (5th Cir. 2021) (Ho, J., concurring) ("To be sure, then, citizens can debate in good faith whether disparate impact theory is the right way to eliminate the scourge of racial bigotry from our Nation. To some, it is the cure. But to others, it is worse than the disease. My point is simply this: if disparate impact theory is going to be incorporated in federal law, it should be done by Congress—not agency regulators.") (citing Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 550-53 (2015) (Thomas, J., dissenting)); *Louisiana v. EPA*, 712 F. Supp. 3d 820.

[88] *E.g.,* Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91 (4th Cir. 2011).

[89] *See* Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for the City of Bos., 89 F.4th 46 (1st Cir. 2023), *cert. denied*, 220 L.Ed.2d 262 (U.S. 2024); Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023), *cert. denied*, 218 L.Ed.2d 71 (U.S. 2024); Chinese Am. Citizens All. of Greater N.Y. v. Adams, 116 F.4th 161 (2d Cir. 2024).

[90] *Students for Fair Admissions*, 143 S. Ct. at 2156 n.2 (Title VI); Polenco v. Dall. Indep. Sch. Dist., 826 Fed. Appx. 359, 362 (5th Cir. 2020) (Title IX) ("Under Title IX, 'schools are liable only for *intentional* sex discrimination.'") (citations omitted).

[91] *Students for Fair Admissions*, 143 S. Ct. at 2156 n.2.

[92] *E.g.*, Davis v. Bd. of Sch. Comm'rs of Mobile Cnty., 402 U.S. 33 (1971).

[93] *See* CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007).

[94] *E.g.*, *Inclusive Cmtys. Project*, 576 U.S. at 555 (2015) (Thomas, J., dissenting) ("Disparate-impact liability is thus a rule without a reason, or at least without a legitimate one.").

racial majority.[95] The nation as a whole is projected to follow them by 2045.[96] Our major parties are now both multi-racial, multi-confessional coalitions.[97] There is no audience or appetite for more racial discrimination by governments, a point that the public has insisted on consistently for decades.[98] These are precisely the kind of facts that tip the factor toward favoring reversal of a precedent.

On the legal side, as noted, the Supreme Court's *Muldrow* decision interprets the same language of the same statute that *Griggs* did in an irreconcilable way. *Griggs* adopted its incompatible interpretation of Title VII, in part, based on the alleged propriety of judicial deference to an administrative agency's interpretation of a statute.[99] The Supreme Cout has since abandoned such deference and recommitted the judiciary to performing its independent constitutional obligation to deterimine and apply the most accurate interpretation of statutes possible.[100] Intervening legal changes thus also favor reconsideration of *Griggs*.

6. In Sum: Stare Decisis Factors Counsel Overturning *Griggs*

Of the seven factors furnished by the Court's precedents on precedent, at least six—and arguably all seven—weigh against retaining *Griggs*. The decision is therefore not just wrong; it is precisely the *kind* of wrong that stare decisis does not protect.

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[95] *U.S. States by Race 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/states/by-race (last visited Feb. 26, 2025).

[96] William H. Frey, *The U.S. Will Become 'Minority White' in 2045, Census Projects*, THE BROOKINGS INST. (Mar. 14, 2018), https://www.brookings.edu/articles/the-us-will-become-minority-white-in-2045-census-projects/.

[97] *E.g.*, *Changing Partisan Coalitions in a Politically Divided Nation: The Changing Demographic Composition of Voters and Party Coalitions*, PEW RSCH. CTR. (Apr. 9, 2024), https://www.pewresearch.org/politics/2024/04/09/the-changing-demographic-composition-of-voters-and-party-coalitions/.

[98] The exhaustive extent of public polling and electoral results demonstrating the national supermajority consensus on this topic is documented in the Brief of the Californians for Equal Rights Foundation as Amicus Curiae in Support of the Petitioner in the *SFFA* cases. *See ACR Project Files with Supreme Court Merits Amicus Brief on Behalf of CFER Foundation in SFFA's Litigation Against Harvard and UNC*, AM. CIV. RTS. PROJECT (May 9, 2022), https://www.americancivilrightsproject.org/blog/acr-project-files-with-supreme-court-merits-amicus-brief-on-behalf-of-cfer-foundation-in-sffas-litigation-against-harvard-and-unc/.

[99] *See supra* Section I.C.

[100] *Loper Bright*, 144 S. Ct. at 2273.

VI. HOW TO CORRECT *GRIGGS*

The Supreme Court has invited what appears to be a thoroughly justified challenge to *Griggs* and its creation from whole cloth of a cause of action against employers whose facially neutral, even-handedly applied policies produce disparate impacts across demographic groups. President Trump has even more clearly invited such a challenge by either a federal agency or a private actor.[101] Someone still must *bring* that challenge to court for it to make its way to the Justices. There are a few different options for how a party could get such a challenge into court: (a) through action of the EEOC; (b) through assertion of a straightforward defense against a pending disparate-impact claim that such a claim is unavailable under Title VII; and (c) through an employer's pursuit of a declaratory judgment.

A. Dance With the One that Brung Ya: The EEOC Option

Our disparate-impact journey started with the EEOC embracing an interpretation of Title VII through its guidance offered to American employers. The cleanest way to end this journey would be for the EEOC to end what the EEOC began using the same mechanism.

Perhaps uniquely among America's federal agencies tasked with enforcing substantive laws, the EEOC has next to no substantive rulemaking authority.[102] Title VII does not empower the EEOC to write substantive regulations. As a result, the EEOC has no Title VII rules that it could change only through notice-and-comment rulemaking. Instead, the EEOC simply issues "guidance" documents to inform its regulated community of the priorities the EEOC intends to emphasize and the theories under which it intends to bring enforcement actions. Those documents do not—and cannot—alter substantive law. Nonetheless, they often affect the behavior of the regulated community, and they have been subjected to litigated challenges determining their legal merits.[103]

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[101] *Restoring Equality of Opportunity and Meritocracy*, *supra* note 53. Admittedly, President Trump invited such action against the *constitutionality* of disparate-impact liability, rather than against *Griggs*'s fidelity to Title VII. This distinction does not appear material, and one might expect the President to welcome *all* challenges to the propriety of the case first adopting disparate-impact analysis for the federal courts.

[102] There are exceptions. The Pregnant Workers Fairness Act empowers the EEOC to craft substantive regulations. 42 U.S.C. § 2000gg-3(a).

[103] Tenn. v. Dep't of Educ., 104 F.4th 577, 586 n.4 (6th Cir. 2024); Texas v. EEOC, 2022 WL 4835346 (N.D. Tex. 2022).

The EEOC thus can simply correct its erroneous legal interpretation of Title VII, to which the Supreme Court deferred in *Griggs*. It would not be the first time the EEOC reversed a position it had previously taken, which in the meantime had become enshrined in precedent.[104] Such a self-correction is long overdue in the disparate-impact context. Indeed, given President Trump's recent directive to the EEOC concerning disparate-impact litigation, it may even be required.[105]

Once the EEOC self-corrected, it could begin advancing its corrected interpretation of Title VII in the courts through amicus filings and interventions in ongoing litigation.[106] Or it could simply defend its guidance when challenged by a plaintiff in a declaratory judgment action.[107] Through any of these mechanisms, the EEOC could assure that litigation considered the propriety of its position and could advance that position through appeal toward confirmation at the Supreme Court.

B. The Private Options

Private parties need not wait on the EEOC to clean its house, though. They could take action right now to advance a correct understanding of the law. The two most obvious ways for a private party to do so would be for it to either (a) assert as a defense the absence of any Title VII cause of action to hold liable employers whose facially neutral, even-handedly applied policies have disparate impacts across demographic groups, or (b) file a declaratory

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[104] This is what happened in *Bostock v. Clayton County*. 590 U.S. at 688 n.7 (Alito, J., dissenting) ("The EEOC first held that 'discrimination against a transgender individual because that person is transgender' violates Title VII in 2012 in *Macy v. Holder*, though it earlier advanced that position in an amicus brief in Federal District Court in 2011. It did not hold that discrimination on the basis of sexual orientation violated Title VII until 2015.") (citations omitted).

[105] Executive orders do not and cannot legally require actions. However, to the degree that the EEOC, as a law-enforcement agency, is part of Article II's unified executive (a position this administration affirmatively embraced in dismissing two commissioners earlier this year), it is subject to the President's directives and effectively bound by the April 23, 2025, order referenced above. *See* Alexandra Olson & Claire Savage, *Trump Fires Two Democratic Commissioners of Agency that Enforces Civil Rights Laws in the Workplace*, Assoc. Press, Jan. 29, 2025, https://apnews.com/article/trump-eeoc-commissioners-firings-crackdown-civil-rights-c48b973cb32bad97e9da9e354ba627db; *see also Restoring Equality of Opportunity and Meritocracy*, *supra* note 53.

[106] For the latter statutory authority, see 42 U.S.C. § 2000e-4(g)(6).

[107] As it did in defending different guidance in the cases cited above. *See supra* note 103. Indeed, even without the EEOC correcting its guidance, some enterprising plaintiff could challenge President Trump's April 23, 2025, order. *Restoring Equality of Opportunity and Meritocracy*, *supra* note 53. This piece takes no position on the propriety or ripeness of any such preemptive challenge to guidance not yet offered.

judgment action against the EEOC seeking a ruling that, should the employer pursue a particular employment policy that has a disparate impact across groups, it will not incur liability under Title VII for doing so.

1. Defensive Assertion

While there are comparatively few disparate-impact claims filed annually, they do happen. The simplest way to challenge the disparate-impact theory of liability in court would be for a defendant in such a suit to assert as a defense that Title VII gives rise to no such claim. Given the existence of *Griggs*, the defendant should expect to lose on this point in a district court. They would also need to resist settling their suit long enough to get to a final judgment that they could appeal, lose at a court of appeals, and convince the Supreme Court to grant cert, before—hopefully—prevailing with the Justices. There are countless reasons an accused employer might prefer not to take this route. Nonetheless, it is unquestionably the least problematic way to present the merits of the matter to the only Court that can undo *Griggs*.

2. Declaratory Judgment Action

Under 28 U.S.C. § 2201, any party that *could* be named as a defendant in an action has the right to preemptively bring into federal court a declaratory judgment action against the party that could have otherwise sued it in such an action. Since the EEOC has the enforcement power to tee up Title VII enforcement actions, a private employer could therefore file a declaratory judgment action against the EEOC asking for a declaration of its right under Title VII to pursue a facially neutral, even-handedly applied employment policy that it has reason to believe will carry disparate impacts across demographic groups.

Take a concrete example. Last year, the EEOC brought an enforcement action against Sheetz, Inc. and its affiliates challenging their practice of screening all job applicants for records of criminal convictions.[108] The suit argues that this practice violates Title VII because it "disproportionately screened out Black, Native American/Alaska Native and multiracial applicants."[109] Expressly, this disparate-impact claim "does not allege that Sheetz was motivated by race when making hiring decisions."[110]

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[108] Press Release, Equal Emp. Opportunity Comm'n, EEOC Sues Sheetz, Inc. for Racially Discriminatory Hiring Practice, Press Release (Apr. 18, 2024), *available at* https://www.eeoc.gov/newsroom/eeoc-sues-sheetz-inc-racially-discriminatory-hiring-practice.

[109] *Id.*

[110] *Id.*

An employer that is subject to Title VII and motivated to overturn *Griggs* could file a declaratory judgment action asserting that (a) it wishes (with only non-discriminatory motivations) to screen job applicants for criminal backgrounds, (b) it intends to even-handedly apply such a policy to avoid hiring all those—from any demographic groupings—who have parallel criminal histories, (c) the EEOC's policies, as most recently represented by the Sheetz litigation, give it good reason to believe that doing so would subject it to Title VII litigation, (d) it does not understand such a policy to violate the text of Title VII, and (e) it wants a federal court to declare its relevant rights before undertaking action that would expose it to damages. Such a suit should be procedurally ripe and proper. It should allow a party to establish this point of law without exposing itself to potentially ruinous penalties.

VII. CONCLUSION

Griggs was wrong the day it was decided. It ignored statutory text, misstated historical context, played fast and loose with legislative history, and invented a reverse-burn congressional purpose which it allowed to override all of those. As judges have noted for decades, disparate-impact theory is not just wrong, but wrong in ways that systematically require illegal behavior that could not be constitutionally mandated. Yet *Griggs*'s extraordinarily poor reasoning has spread like a virus, infecting other areas of law and undermining core values of our legal system.

Despite the evident unsoundness of *Griggs* and disparate-impact theory, many believe that Congress subsequently changed the law to ratify *Griggs*'s wrongness. A close reading of the 1991 Act shows that this, too, is not the case.

We don't have to go on like this. No Congress ever passed, no President ever signed, and no code section requires us to maintain this mistake. And both the very recent ruling of the Supreme Court in *Muldrow* and our general rules governing stare decisis indicate that, if given the chance, the Justices would (or at least should) correct course. We only need to let them.