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# TOWARD SYSTEMIC EQUALITY: REINVIGORATING A PROGRESSIVE APPLICATION OF THE DISPARATE IMPACT DOCTRINE

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## I. INTRODUCTION

The disparate impact doctrine emerged to more effectively remedy the policies and practices that cause or maintain disparities based on a protected class—even when the discriminatory intent is not explicit. Unlike individual disparate-treatment claims, disparate-impact claims more directly address and remedy implicit bias and discrimination. Although judicial hostility to robust enforcement of civil rights has diluted the power of the disparate impact doctrine in recent years, this vital doctrine still offers great promise to rectify past and ongoing wrongs. The disparate impact doctrine continues to be an essential tool for accomplishing what

has eluded the nation to date: wholesale eradication of discrimination based on a protected class.

This article considers the continuing importance of the disparate impact doctrine and how it has been severely limited by extremist interpretation. In Part II, this article introduces the origins of the disparate impact doctrine, highlighting the reasons for a progressive application that are as relevant today as when the Supreme Court adopted the doctrine fifty years ago.[1] Part III discusses the politically orchestrated attacks on the disparate impact doctrine.[2] Part IV analyzes the barriers that judicial activists have erected against a meaningful application of the disparate impact doctrine.[3] Part V discusses recent positive developments in the application of the disparate impact doctrine, including the Supreme Court explicitly recognizing the existence of, and need to remedy, "unconscious prejudice."[4] This article concludes by calling for an application of the disparate impact doctrine that returns to Congress's manifest intent when it enacted the nation's leading civil rights statutes and that comports with the Supreme Court's clear precedent when it first adopted the doctrine.[5] In this way, the American Dream can become a reality for everyone, instead of primarily for the privileged.

## II. THE EXPANSION OF CIVIL RIGHTS ENFORCEMENT THROUGH THE ADOPTION OF THE DISPARATE IMPACT DOCTRINE (1960S–1970S)

### *A. The Enactment of Title VII of the Civil Rights Act of 1964*

The Civil Rights Act of 1964, a landmark development in civil rights, was enacted to halt the problem of intentional discrimination based on race, color, sex, religion, and/or national origin.[6] The Act, which Congress set forth in eleven sections, required that voting rights be the same for all people; prevented access to public facilities from being denied based on race, religion, or national origin; outlawed discrimination in public

1. *See infra* Part II.
2. *See infra* Part III.
3. *See infra* Part IV.
4. *See infra* Section V.A.
5. *See infra* Section V.B.
6. *See* RAYMOND F. GREGORY, THE CIVIL RIGHTS ACT AND THE BATTLE TO END WORKPLACE DISCRIMINATION 11–12 (2014).

places; ended segregation in schools; and outlawed discrimination by employers and government agencies.[7]

Although the Act extended protections to *all* Americans to guard everyone from discrimination on the basis of race, color, sex, religion, or national origin, the law emerged from the long struggle to eliminate discrimination against African Americans, in particular. Before President John F. Kennedy proposed the Act to Congress, he stated to the American public that "[i]t ought to be possible . . . for every American to enjoy the privileges of being American without regard to his race or his color" but emphasized that this was not yet true because of significant disparities between African Americans and whites in educational achievement, employment prospects, and life expectancy.[8] Although President Kennedy focused on equal rights for all citizens, the Act emanated directly from "the social impulse toward political, economic, and dignitary equality for *African Americans*,"[9] in particular. Moreover, Title VII of the Act sought to "eliminate workplace discrimination, the basic cause of the disparities that had developed between African American and white workers."[10] The history and context of Title VII's passage remind us that, although the law seeks to protect *all*, Congress specifically enacted the law to end discrimination against African Americans.[11]

7. *See* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 432 n.10 (2005).

8. John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), http://www.presidency.ucsb.edu/ws/?pid=9271.

9. *See* GREGORY, *supra* note 6, at 9 (emphasis added).

10. *Id.* at 10.

11. Current anti-discrimination law creates additional challenges of discrimination at the intersection of protected classes. Because Title VII is framed to protect individuals from discriminatory employment practices based on race, color, religion, sex, or national origin, it essentially forces claimants to "self-identify using [one of the] established legal categories to situate their claim." Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R.L.J. 199, 207 (2006). A disparate-impact case that clearly exemplifies this problem is *DaGraffenreid v. General Motors Assembly Division*, 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977). In *DaGraffenreid*, black female employees brought a claim against General Motors under Title VII alleging a seniority system that was discriminatory towards black women. *Id.* at 143. The discrimination the women were facing was not simply a matter of their race or a matter of their gender, but rather the intersection of both protected classes. *Id.* The court responded to this claim by

The legislative history and text of Title VII plainly indicate that the law targets explicit discrimination, otherwise known as disparate treatment.[12] Congress did not, however, expressly codify a prohibition against disparate-impact discrimination—that is, conduct that appears to be nondiscriminatory but nonetheless has a discriminatory effect.[13] As written in 1964, Title VII stated in section 706(g) that if the "respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice charged in the complaint," the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate."[14] Title VII remained silent as to whether an employer's facially neutral policy or practice that resulted in a disproportionate effect on a protected class also constituted illegal discrimination.[15] Title VII's silence about disparate-impact claims left the courts to interpret whether Congress intended for plaintiffs to be able to obtain remedies concerning "neutral" policies that result in disparities between members of protected classes and others.

saying that the women were "combin[ing] statutory remedies" and as a result trying to "create a new 'super-remedy' that would give them relief beyond what the drafters . . . intended." *Id.* The court held that the "lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both." *Id.*

Although the court ultimately "dismissed the race-based claim, its treatment of the sex-based claim illuminate[d] potential intersectional claimants' precarious legal position." Areheart, *supra*, at 199–200. While General Motors did hire white women before Title VII was passed, they did not hire black women until after Title VII was passed. *Id.* at 200. A recession occurred later, and because of the seniority system in place at General Motors, "all of the black women were laid off." *Id.* The court ultimately interpreted these facts as evidence that General Motors had hired women, and as a result, there was no sex-based discrimination. *Id.* Using that same analysis, "even if the *DaGraffendreid* court had heard the race-based claim . . . the employer could have disproved it by showing a lack of discrimination against black men." *Id.* at 200–01. The end result is a "catch-22," where "black women are only protected to the extent that their experiences coincide with those of white women or black men." *Id.* at 201.

12. *See* Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 427–28 (1995).

13. *Id.* at 427 ("[T]he statute does not define the term 'discrimination' . . . [and is therefore] uninformative about the role of discriminatory effects . . . .").

14. Civil Rights Act of 1964, 78 Stat. 241, 261 (1964) (codified as amended at 42 U.S.C. § 2000e-5(g)(1) (2016)) (emphasis added).

15. *See id.*

### *B. The Affirmation of the Disparate Impact Doctrine Under Title VII:* Griggs v. Duke Power Co.

The Supreme Court first recognized the disparate impact doctrine when it interpreted Title VII in the landmark case *Griggs v. Duke Power Co.*[16] In *Griggs*, the Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[17] The Court explained that the purpose and intent of Title VII were clear:

> [A]chieve 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]

In other words, the existence of a disparate impact resulting from a neutral employment policy or practice is sufficient to establish liability under Title VII.[19]

Following *Griggs*, the "[d]isparate impact theory became an important tool for addressing more hidden discrimination," and "[a]dministrative agencies and the courts began applying disparate-impact analysis to other statutes, including Title VI of the Civil Rights Act of 1964, the Fair Housing Act of 1968, and the Age Discrimination in Employment Act of 1967."[20] For instance, in *United States v. City of Black Jack*, the Eighth Circuit held that a zoning ordinance with a racially discriminatory effect violated Title VIII, commonly known as the Fair Housing Act.[21]

16. *See* 401 U.S. 424 (1971).

17. *Id.* at 431 ("If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.")

18. *Id.* at 429–30.

19. *See id.*

20. Kristen Galles, *The Supreme Court's Assault on Civil Rights and Access to Justice*, 41 A.B.A. HUM. RTS. 1, 4 (2015).

21. 508 F.2d 1179, 1188 (8th Cir. 1974) ("We hold that Zoning Ordinance No. 12 of the City of Black Jack violates Title VIII, because it denies persons housing on the basis of race, in violation of [42 U.S.C. §] 3604(a), and interferes with the exercise of the right to equal housing opportunity, in violation of [§] 3617.").

### C. *A Progressive Application of the Disparate Impact Doctrine in the Wake of* Griggs

Throughout the 1970s, courts consistently and robustly interpreted the disparate impact doctrine as set forth in *Griggs*.[22] Through such precedent, the courts clarified and refined the mechanics of applying the doctrine under an array of circumstances.[23]

The first Supreme Court case addressing the disparate impact doctrine after *Griggs* was *Albemarle Paper Co. v. Moody*.[24] *Albemarle* clarified the burden-shifting framework for the disparate impact doctrine, which *Griggs* did not directly address.[25] Adding the burden-shifting framework represented an important development because "[t]he order and allocation of the burdens of proof on the parties in a civil action . . . governs the fact-finding process and factual disputes that lie at the heart of virtually every discrimination case"; furthermore, burdens of proof have a "significant effect on the outcome of a case and frequently may be dispositive of which party wins or loses."[26]

In *Albemarle*, the Court used the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*[27] for disparate-treatment cases.[28] Under the burden-shifting methodology, the plaintiff must first present statistical evidence to demonstrate a prima facie case of disparate-impact discrimination.[29] Once the plaintiff establishes a prima facie case, the burden shifts to the employer to show that the policy or practice in question is "job related."[30] Finally, if the employer demonstrates that the policy or practice is job-related, the burden shifts back to the plaintiff to prove "that the asserted business justification [was] pretext for

22. *See* ROBERT BELTON, THE CRUSADE FOR EQUALITY IN THE WORKPLACE: THE *GRIGGS V. DUKE POWER* STORY 196 (2014).

23. *Id.*

24. 422 U.S. 405 (1975).

25. *See* BELTON, *supra* note 22, at 196.

26. *Id.*

27. *See* 411 U.S. 792, 802–03 (1973).

28. *Albemarle*, 422 U.S. at 425.

29. *See id.* (explaining that a prima facie case of discrimination has been made when "the tests in question select applicants for hire or promotion in a racial pattern significantly different from the pool of applicants").

30. *Id.*

unlawful discrimination."[31] A plaintiff can show pretext by, *inter alia*, demonstrating the existence of a less-discriminatory alternative.[32]

*Albemarle* strengthened the disparate impact doctrine because it placed a greater burden of proof on the defendant. Specifically, "the burden imposed upon employers under the business necessity defense was a substantial one—the burden of persuasion—that was difficult to meet in a large number of the disparate-impact cases."[33]

After *Albemarle*, the disparate impact doctrine continued to pick up steam in 1982 when the Supreme Court decided *Connecticut v. Teal*.[34] In *Teal*, the employer defended its procedure for employee promotions that had a disproportionate impact on African Americans.[35] The employer argued that its non-job-related test for promotions should be allowed because the "bottom-line"[36] result of its "promotional process was an appropriate racial balance."[37] The Court rejected the employer's bottom-line rationale in light of *Griggs*.[38] The Court reasoned that "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to

31. BELTON, *supra* note 22, at 197.

32. *See Albemarle*, 422 U.S. at 436.

33. BELTON, *supra* note 22, at 197.

34. 457 U.S. 440 (1982).

35. *See id.* at 442.

36. "Bottom-line" refers to the type of defense the employer used in this case. The bottom-line defense focuses on the overall results of a selection procedure used by an employer. David N. Yellen, *The Bottom Line Defense in Title VII Actions: Supreme Court Rejections in* Connecticut v. Teal *and a Modified Approach*, 68 CORNELL L. REV. 735, 738 (1983) ("The bottom line defense is applicable when one step in a multistep hiring or promotion process has a disparate impact on a protected class but the overall process is nondiscriminatory."). In *Teal*, the ultimate results of the selection procedure used were more favorable to blacks than to whites. *See* 457 U.S. at 444 ("The overall result of the selection process was that, of the 48 identified black candidates who participated in the selection process, 22.9 percent were promoted and of the 259 identified white candidates, 13.5 percent were promoted."). The employer argued in *Teal* that the bottom-line result of its promotion policy should be a complete defense to the suit. *Id.* However, black applicants who were disqualified in the first stage were still victims of disparate-impact discrimination, even though black applicants as a whole did better than white applicants. *See id.* at 456 ("In sum, petitioners' nondiscriminatory 'bottom line' is no answer, under the terms of Title VII, to respondents' prima facie claim of employment discrimination.").

37. *Teal*, 457 U.S. at 442.

38. *See id.* at 445–51.

whether members of the applicant's race are already proportionately represented in the work force."[39] In other words, the Court determined that attaining a racially balanced work force was not a defense to a Title VII violation.

## III. THE RETREAT FROM CIVIL RIGHTS ENFORCEMENT THROUGH THE DILUTION OF THE DISPARATE IMPACT DOCTRINE (1980S)

### *A. The Reagan Administration–Engineered Attack on the Disparate Impact Doctrine*

The political—and, thus, judicial—climate that allowed the disparate impact doctrine to flourish dramatically changed in the 1980s: with the election of President Reagan, a concerted and expanding attack on the disparate impact doctrine began.[40] "President Ronald Reagan took office in 1981 during a time when claims of reverse discrimination were on the rise and affirmative action was constantly under attack in the political and legal arenas."[41] During President Reagan's eight-year tenure, "his administration conducted a sustained political and legal campaign to get rid of the disparate impact theory because of the belief that the disparate treatment theory of discrimination, which requires proof of discriminatory intent, is the *only* theory of discrimination that is embraced in our national commitment to equality."[42]

The Reagan administration wanted to nullify *Griggs* and "engaged in an all-out assault on the disparate impact theory and affirmative action."[43] As part of this attack, the Department of Justice's Office of Legal Policy published a report to the Attorney General that highlighted the purported absence of intent needed

39. *Id.* at 454–55.

40. BELTON, *supra* note 22, at 268 ("President Reagan's election and his appointment of conservative Justices to the Supreme Court were among the most important developments that set into motion events that eventually led to the death of the *Griggs* disparate impact theory.").

41. *Id.*

42. *Id.* (emphasis added).

43. *Id.* at 277–78; *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: REDEFINING DISCRIMINATION: "DISPARATE IMPACT" AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION (1987) [hereinafter DOJ REDEFINING DISCRIMINATION REPORT] (stating in the Executive Summary that "if 'discrimination' is understood to mean statistically disproportionate effects *alone*, the result will be nothing less than the permanent institutionalization of race- and gender-conscious affirmative action").

to prevail under the disparate impact doctrine.[44] The report stated that the only supposedly legitimate concept of discrimination, as originally interpreted by Congress, required an element of explicit intent or purpose.[45] The report concluded, "[t]he redefinition of discrimination in civil rights jurisprudence which has been underway in this country since the early 1970's is fraught with portentous consequences."[46] The report also condemned the *Griggs* decision, stating that it "marked a tragic turn in American civil rights jurisprudence, one away from non-discrimination and toward 'an open contest for social and economic benefits conferred on the basis of race or other classifications previously thought to be invidious.'"[47]

In addition to constructing and disseminating the Office of Legal Policy report, the Reagan administration shaped disparate-impact jurisprudence by significantly altering the composition of the Supreme Court.[48] President Reagan first appointed Justice Sandra Day O'Connor in 1981.[49] He then promoted right-wing Justice William Rehnquist to Chief Justice and appointed right-wing judge Antonin Scalia to Justice Rehnquist's open seat in 1986.[50] Two years later, Reagan appointed right-leaning Justice Anthony Kennedy[51] to replace centrist Justice Lewis Powell.[52] These appointments created a right-wing majority and set the stage for the Supreme Court decisions to come, which ultimately dismantled *Griggs* and severely weakened the disparate impact doctrine.[53]

44. *See* DOJ REDEFINING DISCRIMINATION REPORT, *supra* note 43.

45. *See id.* at 7 ("Discrimination . . . is deemed culpable precisely because it results from an intent or purpose . . . .").

46. *Id.* at ii.

47. *Id.* at 156 (quoting Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1313 (1986)).

48. George Lovell, Michael McCann & Kirstine Taylor, *Covering Legal Mobilization: A Bottom-Up Analysis of* Wards Cove v. Atonio, 41 L. & SOC. INQUIRY 61, 90 (2016).

49. William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980–89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645, 651 (1994).

50. *Id.*

51. *Id.* at 690.

52. Marcy C. Daly, *Affirmative Action, Equal Access and the Supreme Court's 1988 Term: The Rehnquist Court Takes a Sharp Turn to the Right*, 18 HOFSTRA L. REV. 1057, 1113 n.232 (1990).

53. *See* BELTON, *supra* note 22, at 268.

### *B. The Creation of the Federalist Society and the Resulting Intensification of the Campaign Against a Progressive Application of the Disparate Impact Doctrine*

The establishment of the Federalist Society in the 1980s strengthened the Reagan administration's attack on the disparate impact doctrine. The Federalist Society consists largely of right-wing lawyers, law students, and scholars.[54] The organization began as a student organization at Yale Law School in 1980 and quickly spread to Harvard and the University of Chicago.[55] With powerful forces supporting the group, the organization became a national organization within two years.[56]

Soon after the organization's founding, members of the Federalist Society began to enter key positions of leadership within the Reagan administration; in fact, the Reagan administration actively sought out members of the group to work for the administration.[57] President Reagan's Director of the Office of Management and Budget, Michael Horowitz, "contacted the Society's founding members and began introducing them to key people in the Reagan administration."[58] Tellingly, several of the founding members[59] of the Federalist Society occupied influential

54. *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 15 (2007) (discussing the origins of the Federalist Society as a Yale student organization that intended to "serve as a platform to discuss and advocate conservative ideas in legal thought").

55. *See id.* The University of Chicago chapter's "founders 'questioned the prevailing notion that big government could solve our country's social, political, and economic problems,' according to a chapter history. The students teamed with conservative professors, including Antonin Scalia, Frank Easterbrook, Richard Posner, and Richard Epstein to found the organization." Meredith Heagney, *Law School Federalist Society Chapter to Host National Convention*, U. CHI. L. SCH. (Apr. 15, 2014), http://www.law.uchicago.edu/news/law-school-federalist-society-chapter-host -national-convention. *See generally* Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RES. Q. 366 (2009).

56. *See generally* Scherer & Miller, *supra* note 55, at 366–78 (discussing the Federalist Society's history and analyzing the connection between membership in the Federalist Society and political views on the bench).

57. *See* TOOBIN, *supra* note 54, at 16 ("[T]he Reagan administration began hiring Federalist members as staffers and, of course, appointing them as judicial nominees, with Bork and Scalia as the most famous examples.").

58. Scherer & Miller, *supra* note 55, at 367.

59. Heagney, *supra* note 55.

policy-making positions within the Reagan administration's Justice Department.[60]

Edwin Meese, a prominent Federalist Society member, served as Counselor to the President from 1981 to 1985 and as Attorney General from 1985 to 1988.[61] In short order, Attorney General Meese "began elevating Federalist Society members to positions of importance in the Reagan Justice Department," and "[b]y 1986, all 12 of the Assistant Attorneys General in the Justice Department were tied to the Federalist Society."[62] At one point, "one of the first Federalist Society members . . . described the Meese DOJ as a 'Federalist Society shop.'"[63]

Attorney General Meese presided over the Department of Justice precisely when the Office of Legal Policy published the report entitled *Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action*, which targeted disparate impact doctrine's purported lack of an intent requirement.[64] Attorney General Meese, however, did not stop there. The Department of Justice published numerous reports that "informed the legal and constitutional agenda for conservatives inside and outside the government . . . ."[65] These "reports," including the one criticizing the disparate impact doctrine, reflected the Federalist Society's views. The Federalist Society has continued up to the present day with its campaign against the disparate impact doctrine.[66]

Along with infiltrating the Executive Branch, the Federalist Society secured extensive power within the Judicial Branch during

60. *See* Scherer & Miller, *supra* note 55, at 368.

61. *See id.* at 367.

62. *Id.*

63. MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY 27 (2013).

64. *See* DOJ REDEFINING DISCRIMINATION REPORT, *supra* note 43.

65. *Id.* at 28.

66. *See generally* Carissa Mulder, *The Kudzu of Civil Rights Law: Disparate Impact Spreads Into Educational "Resource Comparability,"* 16 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 7 (2015) (arguing that October 2014 guidance of the U.S. Department of Education, Office of Civil Rights encourages disparate treatment in the distribution of school resources through misuse of the disparate impact doctrine); Roger B. Clegg, *OCR's Testing (Mis)Guidance: Anti-Education, Anti-Civil Rights*, 3 C.R. PRAC. GROUP NEWSL. 3 (2000) (arguing that the U.S. Department of Education, Office of Civil Rights has misappropriated the disparate impact doctrine from employment law to standardized tests in higher education).

the reign of the Reagan administration. Justice Scalia, appointed by President Reagan to the Supreme Court in 1986, was one of the original Federalist Society faculty advisors.[67] President Reagan also appointed Frank Easterbrook and Richard Posner to the Seventh Circuit; J. Harvie Wilkinson to the Fourth Circuit; Edith Jones to the Fifth Circuit; Alex Kozinski to the Ninth Circuit; and Kenneth Starr to the D.C. Circuit.[68] All of these judges had close ties to the Federalist Society.[69]

## IV. A REGRESSIVE APPLICATION OF THE DISPARATE IMPACT DOCTRINE (1990S–2010S)

Although President Reagan left office in 1989, the right-wing majority he created on the Supreme Court and the growing Federalist Society influence over the lower courts escalated the hostility toward the disparate impact doctrine. First, in *Watson v. Fort Worth Bank & Trust*[70] and *Wards Cove Packing Co. v. Atonio*,[71] the Court modified the burden-shifting framework to make it easier for employers to defend against disparate-impact claims.[72] Second, although Congress sought to preserve disparate-impact liability through the Civil Rights Act of 1991, the largely toothless remedy provided in that Act marked another victory for opponents of the disparate impact doctrine.[73] Third, as shown in *Ricci v. DeStefano*,[74] growing tensions between disparate-impact and reverse-discrimination claims of disparate treatment impeded the ability to truly remedy discrimination, especially discrimination resulting from implicit bias.[75] Fourth, *Wal-Mart v. Dukes*[76] created unnecessary and onerous obstacles to the effective prosecution of disparate-impact claims.[77] Each of these hurdles has decreased the viability of disparate-impact claims in rectifying institutional discrimination against protected classes. Eviscerating the disparate impact

67. AVERY & MCLAUGHLIN, *supra* note 63, at 21–22.
68. *Id.* at 22.
69. *Id.*
70. 487 U.S. 977 (1988).
71. 490 U.S. 642 (1989).
72. *See Watson*, 487 U.S. at 998; *Wards Cove*, 490 U.S. at 656.
73. *See infra* Section IV.C.
74. 557 U.S. 557, 578 (2009).
75. *See infra* Section IV.D.2.
76. 564 U.S. 338 (2011).
77. *See infra* Section IV.E.

doctrine in these ways has undermined its capacity to remedy more fully the policies and practices that have caused or maintained disparities based on a protected class, especially when the discriminatory intent is not explicit.

### A. *A Harbinger of the Legal Machinations to Come:* Watson v. Fort Worth Bank & Trust

The Supreme Court decided *Watson v. Fort Worth Bank & Trust* in 1988.[78] In doing so, it planted the seeds for the ultimate dismantling of the disparate impact doctrine as set forth in *Griggs*.[79] On its face, *Watson* appeared to strengthen the disparate impact doctrine. Prior to *Watson*, the Court had not spoken as to whether the disparate impact doctrine applied in cases where subjective criteria[80] were used in making employment decisions.[81] The majority[82] in *Watson* held that employment practices that were subjective[83] could be analyzed under the disparate impact doctrine.[84] This was an important development in anti-

78. 487 U.S. 977 (1988).

79. While President Reagan's election in 1981 has been credited with beginning the retrenchment of the disparate impact doctrine because of his appointment of right-wing Justices to the Supreme Court—which ultimately resulted in the *Wards Cove* decision, known as the "civil rights massacre of 1989"—it has also been noted that the Supreme Court began its attack on the disparate impact doctrine as early as 1976 when it handed down the decision in *Washington v. Davis*. *See* BELTON, *supra* note 22, at 268–70.

80. "Subjective criteria," as opposed to "objective criteria," refers to when an employer allows a manager to use his discretion to decide, for example, who gets hired or fired, or promoted or not promoted. *See* Anita M. Alessandra, Comment, *When Doctrines Collide: Disparate Treatment, Disparate Impact, and* Watson v. Fort Worth Bank & Trust, 137 U. PA. L. REV. 1755, 1763 (1989). Examples of subjective criteria could include an employee's confidence, friendliness, and attitude. Given this subjectivity, managerial decisions could be based on subjective criteria that may be the result of hidden biases or personal stereotypes. *Id.* at 1776.

81. *Watson*, 487 U.S. at 989.

82. A majority of the Court, seven members, agreed in Parts I, II-A, II-B, and III of the opinion that in a Title VII action (1) "disparate impact analysis may be applied to . . . subjective or discretionary" employment practices, and (2) certain evidentiary standards applied. *Id.* at 977, 985–86.

83. Whereas subjective employment practices leave much discretion to a manager, objective employment practices limit managerial discretion by basing decisions on objective criteria, such as test scores, physical assessments, skills measurements, training, education, and experience. Alessandra, *supra* note 80, at 1763.

84. *Watson*, 487 U.S. at 991.

discrimination law because plaintiffs can now challenge subjective employment practices under the disparate impact doctrine.[85]

*Watson* was a hollow victory for plaintiffs, however, because the plurality[86] opinion constituted a harbinger for the deleterious *Wards Cove* decision. The plurality "warned that the extension of the disparate impact theory had the potential of undermining an employer's freedom to make legitimate business decisions."[87] The plurality alleged that broadening the disparate impact doctrine to subjective employment decisions may "increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment."[88] Because of this risk, the plurality stated that the current burden-shifting framework should be modified to "serve as adequate safeguards" to prevent the risk.[89]

According to the plurality, a plaintiff must provide statistical evidence showing that a specific practice had a disparate impact on a protected class to present a prima facie case of disparate impact.[90] Once a plaintiff presents a prima facie case, the burden of *production*—not the burden of persuasion—shifts to the employer to provide legitimate business reasons for the employment practice.[91] After that, the burden shifts back to the plaintiff to assert that there is a less discriminatory alternative employment practice that can accomplish the employer's legitimate business goals.[92]

The detrimental part of the plurality opinion for the disparate impact doctrine lay within the proposed burden-shifting framework presented by the Court. "[T]he Court departed from past disparate impact cases by affirming that the ultimate burden of proof remain[ed], at all times, with the plaintiff."[93] Under this framework,

85. Merrill D. Feldstein, Watson v. Fort Worth Bank and Trust: *Reallocating the Burdens of Proof in Employment Discrimination Litigation*, 38 AM. U. L. REV. 919, 923 (1989).

86. The plurality opinion comprised Parts II-C and II-D of the opinion. Justice O'Connor wrote the plurality opinion and was joined by Justices Rehnquist, White, and Scalia. *See Watson*, 487 U.S. at 982.

87. Feldstein, *supra* note 85, at 940.

88. *Watson*, 487 U.S. at 993.

89. *Id.*

90. Feldstein, *supra* note 85, at 941.

91. *Id.* at 941–42.

92. *Id.*

93. *Id.*

the employer never had the burden of persuasion, but merely a burden of production.[94]

Importantly, the burden-shifting framework conceived in *Watson* would become outcome-determinative for plaintiffs. The heavier burden of persuasion required the employer "to prove to the fact finder the truth or existence of those facts for which the party has the burden."[95] The lighter burden of production merely required the employer to "produce evidence" that may or may not be convincing.[96] When the burden of production shifted to the employer to provide a legitimate business reason, the employer only needed to produce a reason of some sort; by contrast, the burden of persuasion required the employer to prove the *truth* of the reason offered.[97] Accordingly, "although allocation of the burdens of production and persuasion [was] nominally procedural, it ha[d] significant, substantive impact" because "[t]he allocation of the burdens between the parties [could] change the outcome of the case."[98] *Watson* foreshadowed the heightened burden plaintiffs now face after *Wards Cove*.

### *B. The Purported Death Knell of* Griggs*:* Wards Cove Packing Co. v. Atonio

The disparate impact doctrine sustained a severe blow just one year after the *Watson* decision in 1989 in the form of the *Wards Cove Packing Co. v. Atonio* decision.[99] Because there was no majority opinion regarding the reallocation of the burden-shifting requirements, the *Watson* decision created confusion about the evidentiary burdens for a disparate-impact case. *Wards Cove*, decided by the Court's right-wing majority, severely weakened the disparate impact doctrine as originally set out in *Griggs* by adopting the new evidentiary approach outlined in *Watson*.[100]

94. *Id.*

95. Candace S. Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove*: Semantics as Substance*, 39 AM. U. L. REV. 615, 620 (1990).

96. *Id.*

97. *Id.*

98. *Id.* at 621.

99. *See* 490 U.S. 642 (1989).

100. *Compare id.* at 656–60 (adopting the burden-shifting framework from *Watson* that embraced a lighter burden of production, rather than persuasion), *with* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (placing a heavier burden

Under *Wards Cove*, the Court required the plaintiff to identify a specific employment practice causing the disparate impact.[101] Once the plaintiff establishes a prima facie case of discrimination, the burden of *production* rather than *persuasion* shifts to the employer to articulate a "legitimate business reason" for the practice.[102] Ultimately, the plaintiff must rebut the employer's legitimate business reason by showing that an alternative practice would meet the employer's business reason as well as reduce the disparate impact caused by the business practice being challenged.[103]

The majority opinion emphasized that requiring an employer to meet a higher burden than what *Wards Cove* created "would result in a host of evils."[104] The majority also expressed concern that a higher burden for employers would essentially compel the adoption of affirmative action.[105] One employment law professor and commentator explained this concern: "[A]s the defendant's burden of proof becomes heavier, affirmative action becomes less and less a voluntary option and more and more a mandatory requirement. It becomes the only realistic way of avoiding liability under the theory of disparate impact."[106]

The majority's rationale, the proverbial "parade of horribles," does not turn on rigorous legal analysis or a full and fair consideration of the factual reality across the nation. Instead, the

of persuasion on employers and stating that Congress placed the burden on the employer to show that a practice has a manifest relationship to the employment in question).

101. *Wards Cove*, 490 U.S. at 657 ("As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack."); *see also* Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," a Codification of* Griggs*, a Partial Return to* Wards Cove*, or All of the Above?*, 43 CASE WESTERN RES. L. REV. 287, 303 (1993).

102. Browne, *supra* note 101, at 303.

103. *Id.*

104. *Wards Cove*, 490 U.S. at 659.

105. *See id.* at 652 ("[A]ny employer who had a segment of his work force that was—for some reason—racially imbalanced, could 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. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof . . . .")

106. GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW 90 (3d ed. 2010).

decision to change the evidentiary standard reflects a political and economic judgment that employers and other defendants should not be subjected to undue burden and legal exposure. Essentially—and somewhat arbitrarily—the majority concluded that ensuring true equality of opportunity is simply not important enough. Two strong dissents to *Wards Cove* demonstrate this point by criticizing the majority's analysis, or lack thereof.

First, Justice John Paul Stevens observed that the majority's reliance on the *Watson* plurality opinion, which commentators have criticized because it "relied on no authority whatsoever for its proposition,"[107] was "most disturbing."[108] Justice Stevens emphasized that the divided *Wards Cove* opinion departed completely from the Court's unanimous decision in *Griggs* to prohibit neutral employment practices with discriminatory effects.[109]

In a separate and more pointed dissent, Justice Harry Blackmun focused on the stark change in the judicial decision-making process used by the majority. Legal commentators have noted that while the Court "once gave credence to the notion that employment inequalities were, at least in part, the product of previous racist employment practices" and "once took seriously its own charge to eradicate the effects of past discrimination,"[110] the majority's opinion did not. For instance, Justice Blackmun questioned "whether the majority still believ[ed] that race discrimination—or, more accurately, race discrimination against nonwhites—[was] a problem in our society, or even remember[ed] that it ever was."[111] According to legal commentators, Justice Blackmun concluded that the majority chose to "overlook racism" and failed "to examine the history of segregation at the cannery in *Wards Cove*."[112]

Not surprisingly, *Wards Cove* had a drastic effect on the effort to remedy discriminatory employment practices. For instance, Tyree Scott, a prominent workers' rights activist, explained in plain language the substantial adverse impact that *Wards Cove* and the

107. Amos N. Jones & D. Alexander Ewing, *The Ghost of* Wards Cove*: The Supreme Court, the Bush Administration, and the Ideology Undermining Title VII*, 21 HARV. BLACKLETTER L.J. 163, 169 (2005).

108. *Wards Cove*, 490 U.S. at 672 (Stevens, J., dissenting).

109. *Id.* at 665–66.

110. Jones & Ewing, *supra* note 107, at 171.

111. *Wards Cove,* 490 U.S at 662 (Blackmun, J., dissenting).

112. Jones & Ewing, *supra* note 107, at 170.

new burden-shifting framework had on civil rights enforcement across the nation:

> The burden was on the employees to prove harm. You could allege a prima facie case of discrimination on the basis of statistics. And then once you did that, it was on the boss to prove that he wasn't [discriminating]. So it was very easy, you know, to start this cause of action, to go into court . . . . [W]e had more than two dozen lawsuits filed in six or seven cities . . . . And so when the law was good we were winning . . . . The *Wards Cove* case . . . was really the death throe to the '64 Civil Rights Act in terms of employment.[113]

In short, *Wards Cove* represented the culmination of judicial extremism, which sought to eliminate the disparate impact doctrine in furtherance of business interests. *Wards Cove* effectively rolled back the gains in civil rights achieved through progressive application of the disparate impact doctrine in the 1960s and 1970s. The courts' subsequent and increasingly regressive approach has thwarted application of the doctrine to areas beyond employment discrimination. For example, the Supreme Court's holding in *Alexander v. Sandoval*[114] has meant that "discrimination claims can no longer be pursued under a disparate impact theory in cases filed under Title VI, which applies to discrimination claims regarding federally funded programs."[115]

### *C. The Congressional Backlash Against* Wards Cove*: The Civil Rights Act of 1991*

In a telling display of the legislative intent behind Title VII, Congress responded to the *Wards Cove* decision with the Civil Rights Act of 1991.[116] Congress viewed the *Wards Cove* decision as

113. Lovell, McCann & Taylor, *supra* note 48, at 61 (quoting Tyree Scott, a workers' rights activist).

114. 532 U.S. 275 (2001).

115. Justin D. Cummins, *The De Facto Death of Disparate Impact in Most Age Discrimination Cases*, CUMMINS & CUMMINS, LLP (Oct. 29, 2012), https://www.cummins-law.com/blog/2012/10/the-defacto-death-of-disparate-impact-in-most-age-discrimination-cases/.

116. The stated purposes of the amendment were: "(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (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*,

undercutting the employment rights Congress sought to protect when enacting Title VII. The Civil Rights Act of 1991 marked the first time Congress expressly codified the disparate impact doctrine.[117] However, although the Civil Rights Act of 1991 is often heralded as codifying *Griggs*, it only partially returned the disparate impact doctrine to its state pre-*Wards Cove*.

Congress, through the Civil Rights Act of 1991, clarified its intent by "correcting" the Supreme Court's decision in *Wards Cove* in several respects. Clarifying the law in several ways, the Act:

(1) Upheld the *Wards Cove* decision that plaintiffs must identify a specific employment practice creating the disparate impact, but provided an exception where if the plaintiff could "demonstrate to the court that the elements of a respondent's decisionmaking process [were] not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice;"[118]

(2) Required a higher burden of persuasion for an employer trying to prove that a disparate impact was the result of a "business necessity;"[119]

(3) Defined "business necessity" as being "job related for the position in question and consistent with business necessity,"[120] which narrowed judicial discretion to define "business necessity"; and

(4) Changed the *Wards Cove* requirement that the plaintiff establish the presence of a less-discriminatory alternative[121]

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 (42 U.S.C. § 2000e *et seq.*); and, (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (2012)).

117. Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1, 14–15 (2010).

118. 42 U.S.C. § 2000e-2(k)(1)(B)(i).

119. *See* The Harvard Law Review Ass'n, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 913 (1993) ("[T]he defendant-friendly 'legitimate business goals' language in *Wards Cove*, as well as the broad conception of 'the job in question' applied in that case . . . ought not be imported into the definition of 'business necessity' under the Act.").

120. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

121. *Wards Cove*, 490 U.S. at 661.

by requiring the alternative to be "equally" effective as the challenged practice.[122]

These changes did not usher in an era of more litigation.[123] A likely explanation is that the Civil Rights Act of 1991 allowed for compensatory and punitive damages in Title VII claims, "but only for claims of intentional discrimination."[124] With only equitable remedies available for disparate-impact claims, bringing a case remained cost-prohibitive for many plaintiffs because of the challenging burden-shifting framework from *Wards Cove* and the minimal monetary incentive for plaintiffs' attorneys to pursue disparate-impact claims.[125] Without either a private attorney general provision, providing sufficient capacity for plaintiffs' attorneys to bring suit, or the availability of punitive damages to compel accountability, the Act did not provide a viable means of enforcement.

Despite often being hailed as an affirmation of *Griggs*, the reality remains that many elements of *Wards Cove* have remained intact after passage of the Civil Rights Act of 1991. As a result, "it is not at all clear that the disparate-impact provisions of the 1991 Act have delivered their promised victory."[126] Notwithstanding the monetary issue of remedies, plaintiffs bringing disparate impact claims post–Civil Rights Act of 1991 must identify a specific employment practice in order to establish a prima facie disparate-impact case.[127] This new requirement has proven fatal to many claims. In *Clark v. Eagle Food Centers*, for example, an employee alleged that her employer's promotion practices had a disparate impact on women and had statistical evidence to support a

122. 42 U.S.C. § 2000e-2(k)(1)(A)(ii). This change allowed the employee to rebut the employer's showing of business necessity and job relatedness by showing that (1) an alternative practice exists that produces less of a disparate impact and (2) the employer refuses to adopt that alternative employment practice. *See* Browne, *supra* note 101, at 371–72.

123. *See* Melissa Hart, *From* Wards Cove *to* Ricci*: Struggling Against the "Built-in Headwinds" of a Skeptical Court*, 46 WAKE FOREST L. REV. 261, 271 (2011) ("[T]here was no surge in the number of disparate impact suits filed after 1991.").

124. *Id.*

125. *Id.* However, it has also been suggested that the reduction in disparate-impact cases after 1991 is because the disparate impact doctrine was effective in fulfilling its purpose of "encourag[ing] employers to develop internal practices that did not have a disparate impact on protected classes." *Id.*

126. *Id.* at 261.

127. *Id.* at 267.

disparate-impact claim, but the court still dismissed the plaintiff's claim because she could not isolate to the court's satisfaction the specific practice creating the disparate impact.[128]

### *D. The Manufactured Tension Between the Disparate Impact and Disparate Treatment Theories of Liability*

#### *1. Pitting the Disparate Impact Theory Against the Disparate Treatment Theory:* Ricci v. DeStefano

The regressive attack on the disparate impact doctrine reached new heights in 2009 when the Supreme Court decided *Ricci v. DeStefano*.[129] This case most clearly exemplifies the judicial activism of the Court's right-wing majority. Although *Ricci* concerned disparate treatment, the majority reached beyond to decide questions about the constitutionality of the disparate impact doctrine.[130] Indeed, the majority used *Ricci* to exploit the supposed tension between the disparate impact and disparate treatment theories as a rationale for further attacking the disparate impact doctrine.[131]

The facts of *Ricci* involved a promotion examination in the City of New Haven.[132] The results of the examination showed a disparate impact on candidates of color.[133] The City decided not to use the results of the promotion examination to avoid Title VII liability under the disparate impact doctrine.[134] The Supreme Court held,

128. Clark v. Eagle Food Ctrs., Inc., No. 95-3459, 1997 WL 6145, at *1 (8th Cir. Jan. 9, 1997) ("Clark did not identify a specific employment practice that caused this statistical disparity; rather, she simply restated her disparate treatment allegations that Eagle pursued intentionally discriminatory policies against women in training and promotion opportunities.").

129. 557 U.S. 557 (2009).

130. *Id.* at 584.

131. *Id.* at 558 ("The question, therefore, is whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination."). Interpreting these doctrines in opposition to each other is troubling for the future of the disparate impact doctrine because it circumvents the purpose and policy behind Title VII and the disparate impact doctrine by dissuading employers from taking necessary preventative measures to eradicate systemic discrimination and makes it impossible for the disparate impact doctrine to operate as it was intended.

132. *Id.* at 557.

133. *Id.* at 562.

134. *Id.*

however, that the City of New Haven intentionally discriminated against the white firefighters when it decided not to use the results of the promotion examination, given the disparate impact of using those results.[135] In its analysis, the majority considered whether the City met its burden in proving that preventing disparate impact on candidates of color was an adequate defense for "intentional discrimination."[136]

To determine whether the City met its burden, the Court first had to decide what evidentiary standard applied. The majority relied on *Wygant v. Jackson Board of Education*[137] and applied *Wygant*'s "strong-basis-in-evidence-standard."[138] The *Ricci* court held that the City did *not* have a strong basis in evidence to conclude that the promotional examination was ineffective or, furthermore, to abandon the test scores in avoidance of disparate-impact liability.[139]

The majority held that a prima facie showing of a statistical disparity was *not* enough to demonstrate the City would be liable for disparate impact.[140] It determined that "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[141] The majority emphasized that the City could only be liable for disparate impact if (1) the City could not show that its examinations were job-related and consistent with a business necessity, or (2) the City could not overcome less-discriminatory alternatives available to the City to meet its objective.[142] Because the City did not meet this threshold,

135. *Id.* at 563.
136. *Id.* at 579.
137. 476 U.S. 267 (1986).
138. *Id.* at 277–78 ("The trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program. But unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination.").
139. Ricci v. DeStefano, 557 U.S. 557, 593 (2009).
140. *Id.* at 587.
141. *Id.* at 585.
142. *Id.* at 587.

the majority held that preventing disparate-impact liability in this case did not defeat the disparate-treatment claims.

In a concurring opinion, Justice Scalia signaled the imminent escalation of the attack on the disparate impact doctrine. Justice Scalia declared as follows: "The Court's resolution of these cases makes it unnecessary to resolve these matters today. But the war between disparate impact and equal protection will be waged sooner or later."[143]

### 2. *The Problem of Implicit Bias and Unconscious Discrimination After* Ricci

As overt discrimination has become less prevalent in the workplace, the spotlight on unconscious discrimination or implicit bias, "characterized by a subconscious decisionmaking process based on intuition and a lack of an overt intent to discriminate," has become more prominent.[144] What social scientists have deemed "implicit bias" has drawn great attention to how people look at discrimination in modern times.[145] "Implicit biases are defined as the subconscious attitudes, feelings, and stereotypes that an individual may possess toward a given social group,"[146] which are "assimilated through interactions with others and an individual's culture, and are picked up throughout an individual's lifetime."[147] However, "most individuals are entirely unaware that they possess any implicit biases."[148]

Implicit bias is a growing concern in the employment context in particular. The "workplace has shifted away from the rigid and linear systems of the past, which has enhanced the impact of implicit biases on the employment decisionmaking process."[149] Moreover, modern workplaces tend to require individuals to "make quick decisions that are largely based on intuition" and require employers to "rely on subjective characteristics to evaluate their employees."[150] Where much discretion is given to an employer, an

143. *Id.* at 595–96.
144. *Id.*
145. Christopher Cerullo, *Everyone's a Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127, 127 (2013).
146. *Id.* at 138.
147. *Id.*
148. *Id.*
149. *Id.* at 139.
150. *Id.* at 140.

employee becomes more vulnerable to the deleterious effect of implicit bias, which may lead to unconscious discrimination.[151] Although such discrimination may be unintentional, the result would be effectively the same as explicitly intentional discrimination.[152] In other words, implicit bias can lead to a disparate impact.

In this context, the question becomes whether an employer can acknowledge implicit bias and remedy systemically discriminatory practices without disparate treatment—that is, without engaging in intentional discrimination. The majority in *Ricci* created a false choice between rectifying institutional discrimination and avoiding disparate treatment.[153] In truth, the purported victims of supposed disparate treatment are beneficiaries of systemic discrimination in their favor, so the disparate impact doctrine acts as a corrective mechanism to make the playing field more level for everyone. Application of the disparate impact doctrine, then, remedies rather than perpetuates discrimination.

In sum, a systemic approach that considers outcomes of policies and practices—regardless of how well-intentioned the policies and practices may be—is necessary to achieve the equality of opportunity that the legislative branch has recognized to be axiomatic. "Congress . . . cast the [employment and civil rights] plaintiff in the role of a 'private attorney general,' vindicating a *policy 'of the highest priority.*'"[154] Similarly, the Minnesota Human Rights Act declares that "discrimination threatens the rights and privileges of the inhabitants of this state and *menaces the institutions and foundations of democracy*."[155] In light of the institutional nature of discrimination and the reality of implicit bias in decision-making, the disparate impact doctrine remains essential to eradicating discrimination based on a protected class as both Congress and the Supreme Court have previously mandated.

151. *Id.* at 158.

152. *Id.*

153. *Cf.* Ricci v. DeStefano, 557 U.S. 557, 629 (2009) (Ginsburg, J., dissenting).

154. N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980) (emphasis added) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416–17 (1978)).

155. MINN. STAT. § 363A.02, subdiv. 1(b) (2016) (emphasis added).

### *E. The Core Impediments to Class Action Certification of Disparate-Impact Claims*

#### *1. The Practical Nexus Between Disparate-Impact Claims and Class Actions*

Class actions facilitate more robust enforcement activity regarding systemic violations because they enable plaintiffs to pool resources and shared experience in prosecuting civil rights claims.[156] Because class actions allow the financial burden of attorney's fees and litigation costs to be divided amongst a larger number of claimants, it is "economically possible to assert [claims]."[157] As a result, class actions work to "eliminate power imbalances" that exist between individual plaintiffs and large corporate defendants.[158]

In addition to equalizing the differences in resources between parties, class actions help to equalize the comparative power in litigation because an individual plaintiff may have substantial "emotional apprehension" and "fear of retaliation by an employer" if proceeding by himself or herself.[159] In other words, class actions operate to provide strength in numbers, which helps to "motivate and inspire confidence in individual class members."[160]

Because discrimination takes its toll on a particular group based on a particular characteristic, it makes sense that group-based litigation strategies should be used. Indeed, by its very nature, "[e]vidence of disproportionate impact inevitably is evidence that an entire class has suffered from a violation of Title VII."[161] Furthermore, the word "discrimination" connotes group-based action; specifically, it can be described as "the practice of

156. 97 AM. JUR. PROOF OF FACTS 3D 81 *Litigating an Employment Discrimination Class Action* § 5 (2007).

157. *Id.*

158. Katie Melnick, *In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticisms*, 22 ST. JOHN'S J. LEGAL COMMENT 755, 790 (2008).

159. Sherry E. Clegg, *Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(a)(2) in* Wal-Mart v. Dukes, 44 TEX. TECH. L. REV. 1087, 1094 (2012).

160. *Id.* at 1095.

161. George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 712–13 (1980).

unfairly treating a person or group of people differently from other people or groups of people."[162]

Courts have also pointed to the practical nexus between disparate impact and class actions pre- and post-*Griggs*. In 1960—before *Griggs*—the Seventh Circuit held in *Bowe v. Colgate-Palmolive Co.* that a "suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, i.e. race, sex, religion or national origin."[163] Moreover, in 1982—after *Griggs*—the United States Supreme Court reasoned that it "[could not] disagree with the proposition underlying the across-the-board rule—that racial discrimination is by definition class discrimination."[164]

Consequently, employment discrimination cases pursued via the disparate impact doctrine are generally class actions,[165] and they are most successful as such.[166] While individuals can pursue disparate-impact claims, they are often unsuccessful.[167] These claims are difficult for individual plaintiffs because of the "evidentiary rigors of a disparate-impact claim, consisting of aggregate statistics showing that an employer's facially neutral practice had a disproportionately adverse impact on a protected group."[168] Producing necessary statistics is a lengthy process requiring "extensive discovery and expert testimony, which individual plaintiffs commonly fail to do."[169]

162. *Discrimination,* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/discrimination (last visited Sept. 22, 2016) (defining discrimination as "the practice of unfairly treating a person or group of people differently from other people or groups of people").

163. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

164. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982).

165. James S. Bryan, *Shifting the Burdens in Disparate Impact Cases:* Wards Cove Packing v. Atonio, 6 LAB. LAW. 233, 235 (1990).

166. *See* Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L. J. 433, 443 (2012).

167. *Id.*

168. *Id.*

169. *Id.* at 444.

### 2. *The Culmination of the Ideologically Driven Attack on the Disparate Impact Doctrine and Class Actions:* Wal-Mart Stores, Inc. v. Dukes

Despite the practical nexus between disparate-impact claims and class action claims, the recent decision in *Wal-Mart Stores, Inc. v. Dukes*, a massive class action involving over 1.5 million plaintiffs, created new hurdles for those seeking to eradicate discrimination.[170] Under Federal Rule of Civil Procedure 23, plaintiffs must satisfy four prerequisites before a class may be certified[171]: "numerosity, commonality, typicality and adequacy."[172] The issue in *Wal-Mart* involved the commonality requirement.[173] Prior to *Wal-Mart,* the commonality requirement had "been seen as relatively easy to satisfy" and required simply that "each member of the class assert claims that share[d] legal or factual issues with one another."[174]

In *Wal-Mart,* however, the majority required a heightened commonality standard. Under *Wal-Mart*, members of a class have to "suffer[] the same injury," not just "a violation of the same provision of law."[175] To support this heightened standard, the majority argued that Wal-Mart's policy of delegating pay and promotion decisions to local manager discretion based on subjective factors was not sufficient to meet the commonality requirement under Rule 23.[176] The majority declared that "the mere claim by employees of the same company that they have Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once."[177] Instead, the majority held the following:

170. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

171. *See* FED. R. CIV. P. 23(a) ("Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.").

172. Tippett, *supra* note 166, at 444.

173. *See Wal-Mart*, 564 U.S. at 349 ("The crux of this case is commonality.").

174. A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 443 (2013).

175. *Wal-Mart*, 564 U.S. at 350.

176. *See id.* at 352.

177. *Id.* at 350.

> [The plaintiffs' claims] must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.[178]

Not surprisingly, under this onerous new standard, the majority found that the plaintiffs in *Wal-Mart* failed to show they had sufficient commonality to certify a class.[179] Otherwise stated, *Wal-Mart* "raise[d] the bar for plaintiffs seeking to certify large class actions involving disparately situated individuals and provide[d] class-action defendants with a variety of tools to defeat such efforts."[180]

The majority opinion in *Wal-Mart* represents yet another setback for the disparate impact doctrine, in particular, and civil rights enforcement, in general. The disparate impact doctrine, especially when used in the prosecution of class actions, is potentially one of the most powerful means of challenging corporate power that perpetuates—and even profits from—discrimination-induced inequality. In particular, class-based discovery and the fee-shifting mechanism under civil rights statutes collectively enable the proverbial David to have a chance at prevailing over the proverbial Goliath. *Wal-Mart* undermines the ability of future litigants to use collective action to challenge discriminatory practices for protected classes in this manner.

178. *Id.*

179. *Id.* at 359.

180. Grace E. Speights & Paul C. Evans, Wal-Mart v. Dukes*: Supreme Court Announces Stricter Class-Certification Standards*, WESTLAW J. EXPERT SCI. EVIDENCE, Dec. 20, 2011, at 12, 2011 WL 6367678, at *1; *see Wal-Mart*, 564 U.S. at 360 (holding unanimously that claims for monetary relief may not be certified as a class action under Rule 23(b)(2)); *see also* Speights & Evans, *supra*, at *3 ("This ruling has widespread implications for class actions because Rule 23(b)(3) requires plaintiffs to prove that common questions predominate over individual ones and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Given the court's cynicism regarding the use of discretionary decision making as grounds for the less-stringent commonality standard, this burden should be extremely difficult for plaintiffs' attorneys to meet in employment class actions without significantly altering the types of class actions they bring.").

*Wal-Mart*, like *Wards Cove*, reflects political and economic judgments—shaped primarily by the ideologically-driven Federalist Society—regarding what is "best," rather than a principled analysis of how to apply the compelling public policy codified by the governing civil rights statutes. In other words, the majority in *Wal-Mart* placed corporate interests before the public interest—prioritizing the preservation of company profits over fulfilment of the constitutional promise of equality for all.[181]

### *F. The Obvious Consequence of a Regressive Application of the Disparate Impact Doctrine: Continued Disparities Based on a Protected Class*

Beginning in the 1980s, largely ideologically-driven courts began to distort the disparate impact doctrine adopted in *Griggs*. Recent applications of the disparate impact doctrine deviated radically from *Griggs*, which sought to establish a viable claim for "practices that are fair in form, but discriminatory in operation."[182] Whereas the Supreme Court in *Albemarle* operationalized the doctrine by placing a greater burden of proof on the defendant,

181. *Wal-Mart* espouses the same prioritization of corporate interests over the public interest illustrated by *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Both *Citizens United* and the follow-up *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), collectively stand for the proposition that corporations and billionaires should be allowed to inject as much money into the electoral process as they want because that somehow constitutes "free speech" and promotes democracy. The practical reality, of course, is that the speech of corporations and billionaires drowns out the speech of regular people. The de facto quid pro quo of massive campaign contributions for policy changes undermines democracy.

Although many declare that the United States is a democracy, a recent empirical study by Princeton economists determined that our form of government is actually most like an oligarchy. *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POL. 564, 577 (2014) ("Americans do enjoy many features central to democratic governance, such as regular elections, freedom of speech and association, and a widespread (if still contested) franchise. But we believe that if policymaking is dominated by powerful business organizations and a small number of affluent Americans, then America's claims to being a democratic society are seriously threatened."). An oligarchy is characterized by a "small group of people" or interests that control a country. *Oligarchy*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/oligarchy (last visited Sept. 22, 2016).

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

rather than on the plaintiff,[183] the Court, channeling the Federalist Society agenda, has since perverted the doctrine's purpose of eliminating discrimination against protected classes, whether the discrimination was intentional or not.

Just as *Wards Cove*, *Ricci*, and *Wal-Mart* have seriously limited the power of disparate-impact claims under Title VII, the Supreme Court has used other decisions to restrict or even eliminate disparate-impact claims under other civil rights statutes. *Sandoval*, discussed above, actually nullified the disparate impact doctrine under Title VI regarding federally funded programs.[184] The Supreme Court limited disparate impact's viability under the Age Discrimination in Employment Act ("ADEA") in a 2005 decision, *Smith v. City of Jackson*.[185]

In *Smith*, the Court recognized disparate impact as a cognizable claim under the ADEA.[186] In doing so, the Court recognized similarities between the ADEA and Title VII. The Court noted that the *Griggs* court "interpreted the identical text at issue"[187] in *Smith* and, thus, "[t]he language and circumstances surrounding the passage of both Acts indicated that they should be interpreted similarly."[188]

Nonetheless, the majority in *Smith* departed from *Griggs* by applying a diluted version of the disparate impact doctrine for ADEA claims.[189] In *Griggs*, the Court held that a practice resulting in

183. *See* BELTON, *supra* note 22, at 196–97.

184. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

185. *See* 544 U.S. 228, 243 (2005).

186. *See id.* at 239. The ADEA was passed in 1967 and its intended purposes were "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (2012).

187. *Smith*, 544 U.S. at 236.

188. Debra Burke, *ADEA Disparate Impact Discrimination: A Pyrrhic Victory?*, 9 U.C. DAVIS BUS. L.J. 47, 57 (2008).

189. It is worth noting that the Court revisited its *Smith* holding in *Meacham v. Knolls Atomic Power Laboratory* in 2008. *See* 554 U.S. 84, 95 (2008). The *Smith* case left it unclear whether the burden for showing an RFOA (reasonable factor other than age) rested with the employee or the employer. *See Smith*, 544 U.S. at 228. The *Meacham* Court held "an employer facing a disparate-impact claim and planning to defend on the basis of RFOA must not only produce evidence raising the defense, but also persuade the factfinder of its merit." 554 U.S. at 87; *see* Burke, *supra* note 188, at 75. Despite doing so, "the Court recognized that the difference in the burden of proof applied to the facts may not translate into a difference in

a disparate impact violates the law unless the employer can show the practice is related to job performance. *Griggs* emphasized that "[t]he touchstone is business necessity."[190] The majority in *Smith* held, however, that the employer can rebut the prima facie case of disparate impact for older workers "if it can establish that the policy is based upon a reasonable factor other than age—a rather undemanding burden."[191] The majority also concluded that the RFOA (reasonable factor other than age) showing only requires the employer to "meet a reasonableness test; there is no inquiry concerning whether there is a better way to achieve a goal," which is "an inquiry required under business necessity."[192] The result for plaintiffs is "a difficult, if not impossible, burden of proof,"[193] because they have to prove that the "employer's proffered rationalization of the allegedly discriminatory practice or policy is unreasonable, either in the prima facie case or in rebuttal to an affirmative defense."[194] In effect, *Smith* allows employers to "promulgate whatever policy they choose, providing it makes some degree of sense, notwithstanding its impact on protected employees," and represents another example of how the Court has skewed disparate impact doctrine analysis.[195] Rather than seeking to prevent discrimination against protected classes, regressive application of the doctrine protects business interests and props up the powerful at the expense of equal opportunity and the public interest.

The seemingly abstract issues about burdens of proof have concrete consequences. Statistics reflect ongoing and intensifying disparities in the context of the anemic application of the disparate impact doctrine.[196] A recent study found that it would take 228 years to close the wealth gap between African American and white

the result." Burke, *supra* note 188, at 76.

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

191. Burke, *supra* note 188, at 59–60.

192. Ann Marie Tracey & Norma Skoog, *Is Business Judgment a Catch-22 for ADEA Plaintiffs? The Impact of* Smith v. City of Jackson *on Future ADEA Employment Litigation,* 33 DAYTON L. REV. 231, 255 (2008).

193. Burke, *supra* note 188, at 69–70.

194. *Id.* at 70.

195. *Id.* at 82.

196. *See, e.g.*, Kate Davidson, *It Would Take 228 Years for Black Families to Amass Wealth of White Families, Analysis Says*, WALL ST. J. (Aug. 9, 2016, 7:12 AM), http://blogs.wsj.com/economics/2016/08/09/it-would-take-228-years-for-black-families-to-amass-wealth-of-white-families-analysis-says/.

families.[197] Also, by way of example, "only 24 percent of CEOs in the US were women and they earned 74.5 percent as much as male CEOs."[198] The statistics illustrate that disparities reach far beyond employment access and into educational access,[199] heath care access,[200] access to quality and affordable housing,[201] and financial access for economic security.[202]

The widespread presence of these disparities within a large number of systems of opportunity demonstrates the pervasiveness of unconscious and institutionalized discrimination, which requires a systematic approach to fully remedy past and ongoing harm. The disparate treatment theory, which relies on the evidence of overt discrimination to prove explicit intent, is not an effective tool for addressing the persistent and intensifying disparities experienced by members of protected classes.

197. *Id.*

198. *Gender Inequality and Women in the U.S. Labor Force*, INT'L LABOUR ORG., http://www.ilo.org/washington/areas/gender-equality-in-the-workplace/WCMS_159496/lang–en/index.htm (last visited Oct. 15, 2016) (describing the ongoing presence of gender pay gaps and disparities in the number of women in leadership positions in corporations).

199. Saeed Ahmed, *Racial Disparities Persist in U.S. Schools, Study Finds*, CNN (June 27, 2016), http://www.cnn.com/2016/06/07/health/schools-disparity-education-study/ (indicating ongoing racial disparities in education).

200. AGENCY FOR HEALTHCARE RES. & QUALITY, U.S. DEP'T HEALTH & HUMAN SERVS., 2014 NATIONAL HEALTHCARE QUALITY & DISPARITIES REPORT 2 (May 2015), https://www.ahrq.gov/sites/default/files/wysiwyg/research/findings/nhqrdr/nhqdr14/2014nhqdr.pdf (indicating research suggests disparities in healthcare access).

201. Gregory D. Squires & Charis E. Kubrin, *Privileged Places: Race, Opportunity and Uneven Development in Urban America*, SHELTERFORCE ONLINE (Fall 2006), http://nhi.org/online/issues/147/privilegedplaces.html ("Seventy percent of white families own their homes; approximately half of black families do so. For blacks, home equity accounts for two-thirds of their assets compared with two-fifths for whites. A study of the 100 largest metropolitan areas found that black homeowners received 18 percent less value for their investments in their homes than white homeowners.").

202. For example, "[i]n the Milwaukee metropolitan area, while African-Americans represent 16% of the population they only received 4% of mortgage loans. Similarly, African-Americans make up 18% of the population in the St. Louis metropolitan area but only had 4% of all home loans made there." Jacob Passy, *Racial Disparities Seen in Loan Data for Three MSAs: Report*, NAT'L MORTGAGE NEWS (July 20, 2016), http://www.nationalmortgagenews.com/news/origination/racial-disparities-seen-in-loan-data-for-three-msas-report-1082644-1.html.

Recent movements, such as Occupy Wall Street and Black Lives Matter, demonstrate an increasing recognition that the system needs to be changed because it disadvantages members of protected classes as a matter of course, if not by design. "Occupy's fundamental message—that the financial and political systems is rigged in favor of the 1%—has gained ground over the past five years."[203] Likewise, the Black Lives Matter movement has raised awareness about discriminatory legal systems.[204] Robust enforcement of civil rights statutes via a meaningful and progressive application of the disparate impact doctrine is crucial to avert the potential political, social, and economic repercussions that evidently will flow from refusal to change the status quo in furtherance of equalizing opportunity.

## V. ENVISIONING A MORE MEANINGFUL APPLICATION OF THE DISPARATE IMPACT DOCTRINE

Although much of the jurisprudence concerning the disparate impact doctrine has developed under Title VII to address workplace discrimination, the doctrine has also been used under Title VIII to address housing discrimination.[205] In 2015, the Supreme Court revisited the disparate impact doctrine under Title VIII in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[206] in a manner that offers hope for the future.

### A. *The Explicit Recognition of the Need to Remedy "Unconscious Prejudice":* Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.

Against the trend of applying the disparate impact doctrine in a regressive way, the Supreme Court embraced an expansive interpretation of the doctrine in *Inclusive Communities*. Specifically, the Court recognized that disparate impact is a cognizable claim

203. Ben Geier, *The Occupy Movement Comes of Age*, FORTUNE (May 24, 2016), http://fortune.com/2016/05/24/the-occupy-movement-comes-of-age/.

204. *See, e.g.*, Robert King, *Black Lives Matter Holds White House Protest*, WASH. EXAMINER (July 8, 2016), http://www.washingtonexaminer.com/black-lives-matter-holds-white-house-protest/article/2596042 (discussing legal discrimination).

205. *See, e.g.*, United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).

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

under Title VIII, the Fair Housing Act ("FHA").[207] In doing so, the Court analyzed Title VII and the ADEA, the two anti-discrimination statutes that preceded the FHA.[208] The Court decided that the logic of *Griggs* and *Smith* provided "strong support for the conclusion that the FHA [supports] disparate-impact claims."[209] This conclusion, paired with statutory analysis of the results-oriented policies of the FHA, prompted the Court formally to adopt the disparate impact doctrine under the FHA.[210]

Importantly, the language of the Court's decision in *Inclusive Communities* suggests a shift in how the Court views the disparate impact doctrine. The author of the decision, Justice Anthony Kennedy, concluded by writing that the Court "acknowledges the Fair Housing Act's continuing role in moving the nation toward a more integrated society."[211] Justice Kennedy's language further embraced the insight and reasoning of *Griggs* when he wrote the following vital words: "Recognition of disparate-impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[212] Given the Court's acknowledgement of "unconscious prejudices" leading to disparate impacts,[213] *Inclusive Communities* marks a crucial return to a progressive application of the disparate impact doctrine.

207. *See id.* at 2525.

208. *See id.* at 2516–18.

209. *Id.* at 2518.

210. *See* Justin D. Cummins, *Fair Housing Protections Remain Robust*, CUMMINS & CUMMINS, LLP (July 2, 2015), https://www.cummins-law.com/blog/2015/07/fair-housing-protections-remain-robust/ (Congress "enacted the Fair Housing Act pursuant to the Thirteenth Amendment to the Constitution, which abolished slavery," and its passage sought to achieve a more integrated society that departed from the segregation of housing, which "means the segregation of schools and other institutions . . . all of which [are] vestige[s] of slavery according to Congress.").

211. *Inclusive Cmtys.*, 135 S. Ct. at 2525–26.

212. *Id.* at 2511–12.

213. *Id.*

### *B. The Mandate for a Systematic Approach to Remedy Continuing Disparities: A Return to a Progressive Application of the Disparate Impact Doctrine*

For the disparate impact doctrine to be meaningful and for the nation to have any chance of truly eliminating discrimination, courts should do the following to restore analytical integrity to the legal regime: (1) re-impose a burden of persuasion, rather than merely a burden of production, on defendants before they can shift the evidentiary burden back to plaintiffs in disparate-impact cases; (2) make explicit the fee-shifting mechanism that enables plaintiffs' counsel to serve as private attorneys general in disparate-impact claims; (3) certify class actions in disparate-impact cases; and (4) reject defendants' efforts to pit disparate impact against disparate treatment theories of liability.

In addition to restoring vitality to the disparate impact doctrine that existed in the 1960s and 1970s, the courts should draw upon more recent insights to make the doctrine as relevant and effective as possible in the twenty-first century. In particular, courts would do well to consider evidence of both disproportionate advantage and disproportionate disadvantage as proof of a disparate-impact claim.[214] In other words, and given the subtle forms that discrimination often takes now, courts need to look at both sides of the equation for evidence of a civil rights violation. Reframing the disparate impact doctrine to provide not only a remedy for subordination, but also a remedy for privilege, "would empower courts to identify and remedy . . . more discrimination because . . . discrimination can manifest itself as either privilege or subordination, not just subordination."[215] To exemplify this idea, consider the following: "[I]f whites receive benefits—jobs, promotions, contracts, housing opportunities, or loans—to an extent substantially exceeding their numbers within the pool of prospective recipients or applicants, people of color would have the evidentiary basis for a cause of action."[216]

214. *See* Justin D. Cummins, *Refashioning the Disparate Treatment and Disparate Impact Doctrines in Theory and in Practice*, 41 HOW. L.J. 455, 477 (1998) ("Not only does anti-discrimination law fail to remedy adequately racial subordination, it also completely ignores . . . privilege, all in the quest to preserve formal equality. Consequently, anti-discrimination law, as dictated by the current disparate treatment and disparate impact doctrines, preserves the . . . status quo.").

215. *Id.* at 476.

216. *Id.* at 472–73.

## VI. CONCLUSION

Unfortunately, challenging discriminatory practices under a disparate treatment theory of liability has not even come close to eliminating discrimination in the United States. In the employment arena and elsewhere, courts effectively enabled companies and other defendants to explain away discriminatory practices by alleging that there was no intent to discriminate,[217] even as the disparities based on a protected class widened.[218]

Fortunately, the Supreme Court adopted the disparate impact doctrine to hold businesses and other defendants accountable for facially neutral practices that privilege one group of employees at the expense of members of a protected class.[219] A progressive application of the disparate impact doctrine yielded highly positive results around the country until the 1980s, when political change empowered right-wing legal activists and judges to impose a regressive application of the doctrine.[220] Since then, the disparities based on protected classes have increased substantially and unsurprisingly.[221]

The growing awareness of implicit bias offers great promise, even as the efforts to dismantle the disparate impact doctrine have continued. During its last term, the Supreme Court expressly acknowledged the existence of, and the need to remedy, unconscious discrimination in the context of emphasizing the disparate impact doctrine's value.[222] At a more practical level, the enhanced understanding of implicit bias has prompted corporate leaders, such as Facebook, Coca-Cola, and Google, and government agencies, such as the Central Intelligence Agency, to provide implicit bias trainings while addressing unconscious discrimination within their institutions.[223]

These important developments signal the return to a progressive application of the disparate impact doctrine. To that

217. *See supra* Section IV.B.
218. *See supra* Section IV.F.
219. *See supra* Section II.B.
220. *See supra* Part III.
221. *See supra* Section IV.F.
222. *See supra* Section V.A.
223. *See* Valentina Zarya, *I Failed This Test on Racism and Sexism—and So Will You*, FORTUNE (Nov. 10, 2015), http://fortune.com/2015/11/10/test-racism-sexism-unconscious-bias/ (discussing the increasing organizational use of unconscious bias training as a response to implicit bias).

end, courts should follow the recommendations set forth above in Section V.B. In so doing, the judiciary can help fulfill the constitutional promise of equal opportunity for all. Such an approach will not only promote the rule of law, it will also help to "form a more perfect Union."[224]

224. U.S. CONST. pmbl.