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The Courts' Response to the Reagan Civil Rights Agenda

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The Reagan Administration came to Washington, D.C. committed to reintroducing traditional theories of civil rights enforcement. The thesis of this Essay is that the Administration's efforts concerning the enforcement of civil rights were not successful. Of course, only time will tell whether civil rights jurisprudence will be altered because of forces set in motion by the Administration and changes in the makeup of the judiciary.

Using the *United States v. Carolene Products Co.*[1] decision as the point of departure for a consideration of twentieth-century civil rights doctrine, it is apparent that the original goal of the Supreme Court's civil rights policy was to prevent governments from engaging in intentionally discriminatory practices designed to harm politically defenseless racial, ethnic, or religious minorities. This traditional vision of civil rights enforcement shaped the Supreme Court's decision in *Brown v. Board of Education*,[2] which struck down separate but equal segregated public education, as well as other decisions made by the Supreme Court during the mid-1950s[3] which held various other segregative practices unconstitutional. For the most part, Congress had this traditional vision of civil rights enforcement in mind when it enacted the early modern civil rights statutes, including the Equal Pay Act,[4] the Civil Rights Act of 1964,[5] and the Fair Housing Act of 1968.[6]

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1. 304 U.S. 144 (1938); *see* Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

2. 347 U.S. 483 (1954).

3. *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf courses).

4. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1982)).

5. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h-6 (1982)).

6. Fair Housing Act of 1968, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3631 (1982)).

These modern statutes extended nondiscrimination requirements to previously unaffected private entities and reinforced constitutional strictures against public actors in the areas of employment, public accommodations, housing, and education. The courts construed these statutes initially to reach only intentionally discriminatory practices.[7] A literal reading of the equal protection clause of the fourteenth amendment and these modern civil rights statutes supported this construction, because the "person" and the "individual" seemed to be the focus of these statutory prohibitions against discrimination.[8] Furthermore, the primary goal of civil rights enforcement during this period—remedying blatant, unsophisticated practices designed to deny ethnic minorities (particularly blacks) and women equal access to a variety of public and private opportunities—was consistent with an approach focusing on intentional discrimination.[9]

Beginning in the mid-1960s, however, two major changes in civil rights enforcement theory occurred. The first change related to the issue of intent. Until then, illegal or unconstitutional discrimination generally was thought to require an intent by the violator to discriminate against the victim on racial or other impermissible grounds.[10] The 1965 Voting Rights Act[11] introduced a new theory of liability: Discriminatory effect, without any proof of discriminatory intent, could render certain electoral practices illegal.

The Voting Rights Act created a mechanism that required jurisdictions covered by its provisions to obtain "preclearance," or prior approval, from the United States Department of Justice before making any changes in the practices affecting voting which were in force at the time that the Act went into effect.[12] Under this provision, the Attorney General must deny approval when the proposed change has either the

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7. *See, e.g.*, Griggs v. Duke Power Co., 292 F. Supp. 243, 251 (M.D.N.C. 1968), *aff'd in part, rev'd in part*, 420 F.2d 1225 (4th Cir. 1970), *rev'd in part*, 401 U.S. 424 (1971).

8. The fourteenth amendment provides, in part, that "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1. Section 703 (a) of Title VII provides in relevant part: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, set, or national origin." 42 U.S.C. § 2000e-2(a) (1982).

9. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding the constitutionality of the 1964 Civil Rights Act's prohibition against racial segregation or discrimination in places of public accommodation).

10. *See, e.g., Griggs*, 292 F. Supp. at 251.

11. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

12. *See* Voting Rights Act of 1965, § 5, Pub. L. No. 94-73 (codified as amended at 42 U.S.C. § 1973(b) (1982)). Alternatively, the jurisdiction desiring preclearance may seek approval from a special three-judge court in the United States District Court for the District of Columbia.

purpose *or effect* of discriminating on the basis of race. In other words, the submitting jurisdiction has to establish both that its proposed change is not designed to disadvantage racial or ethnic minorities, and that the consequences of the change will not create such a disadvantage.[13]

This new approach to civil rights enforcement was introduced in order to "shift the advantage of time and inertia from the perpetrators of the evil to its victims."[14] Earlier federal voting rights laws looked to judicial enforcement by the Justice Department in order to attack discriminatory voting practices. After each victory in court, however, the prohibited practice quickly was replaced by another, perhaps equally illegal, practice that eventually would prompt another federal lawsuit.[15] The Act's emphasis on preventing discriminatory effects reflected the changing view of the nature of discrimination; namely, that discrimination flows not only from individuals but also from certain institutional arrangements which, whatever the motive for their establishment, disadvantage racial minority group members and women.

This insight into the institutionalized character of discrimination undoubtedly informed the Supreme Court's 1971 decision in *Griggs v. Duke Power Co.*[16] There, the Court held that Title VII of the 1964 Civil Rights Act prohibited not only employment practices that intentionally denied job opportunities on the basis of race or other characteristics, but also those employment practices that had a "disparate" or disproportionate impact on racial minorities or women. Employment practices having a disparate impact would be tolerated only if employers could show that the practice was "job related" or justified by "business necessity." Relying on *Griggs*, courts have struck down a variety of objective employment requirements on the ground that they have a disparate impact and are not shown to be "job related." Examples of prohibited objective employment criteria include cutoff scores on aptitude tests, minimum height and weight requirements, and the absence of an arrest record.[17]

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13. For a description of how the preclearance process operates, see City of Rome v. United States, 446 U.S. 156 (1980).

14. South Carolina v. Katzenbach, 383 U.S. 301, 327-28 (1966) (upholding the constitutionality of the Voting Rights Act).

15. *Voting Rights: Hearings on S. 1564, to Enforce the 15th Amendment to the Constitution of the U.S. Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 13-14 (1965) (testimony of Nicholas Katzenbach, Attorney General).

16. 401 U.S. 424 (1971); *see id.* at 431.

17. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (aptitude tests); *see also* Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements); Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970) (arrest record), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972).

The "disparate impact" test articulated in *Griggs* also has been applied in federal court cases involving other civil rights statutes. In particular, the courts have approved the disparate impact test in the context of the Fair Housing Act[18] and Title VI of the Civil Rights Act of 1964.[19] Like Title VII, but unlike the 1965 Voting Rights Act, these statutes do not speak explicitly to the question of whether discriminatory effects are included in the statutory prohibitions. Courts have justified their interpretations that practices having discriminatory effects are prohibited by reference to their duty to read civil rights statutes liberally.[20]

Griggs, however, did more than uncouple modern civil rights statutes from the previous emphasis on discriminatory intent. *Griggs* also moved the focus of employment discrimination prohibitions from the individual victims to racial or ethnic groups or women as a whole.[21] This shift can be illustrated by the following example. Suppose that a black man applies for a job which requires some college education. If a college education is a required employment criterion and the black applicant is rejected on that basis, his chances of establishing that he was the victim of intentional discrimination are weak. However, if the black man and a number of other blacks without any college training apply and all are rejected, they may have a claim of disparate impact. In order to establish a prima facie case of disparate impact, the black plaintiffs must show that blacks are rejected disproportionately for failing to meet the educational criterion. Under *Griggs*, however, the employer may defend the educational criterion by establishing that a college education correlates significantly with satisfactory performance on the job. If the employer cannot make this required showing, he has violated Title VII and may be required to offer jobs to members of the plaintiff class.

The second major change in civil rights enforcement beginning in the late 1960s related to the nature of remedies for discriminatory practices. Just as the courts and administrative agencies, whether applying

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18. Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

19. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). In *Guardians* a plurality of the Court agreed that the disparate impact standard, even if not authorized by the letter of Title VI of the Civil Rights Act of 1964 itself, could be adopted as the applicable test where it had been incorporated in federal agency regulations.

20. *See, e.g.*, *Arlington Heights*, 558 F.2d at 1289 (citing Griffin v. Breckenridge, 403 U.S. 88, 97 (1971)).

21. *See generally* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 89-90 (1972) (arguing that the Supreme Court's holding covers not only incumbent employees but also minority applicants for employment).

the Constitution or civil rights statutes, historically focused on intentional violations of antidiscrimination principles, the remedies employed to rectify violations were equally straightforward. The person found guilty of discriminating on the basis of an impermissible criterion was enjoined from discriminating in the future and those persons denied opportunities because of the violator's discrimination were allowed to attend the all-white school, to work at the all-white factory, or to cast a ballot.[22] Similar remedies were fashioned for victims of other kinds of discrimination. These remedies were characterized by their relative simplicity and by the absence of any reliance on racial or other criteria.

These remedies, however, failed to dismantle entrenched patterns of segregation and exclusion effectively. Granting black children the right to attend previously all-white schools or a black job applicant the right to work at a once segregated plant did not necessarily produce desegregated school systems or integrated workplaces. Recognizing the ineffectiveness of these traditional remedies, courts and administrative agencies began to order remedies, particularly in school desegregation, employment, and voting cases, that relied explicitly on racial or other group characteristics. For example, student assignment plans designed to achieve racial proportions in each school that approximated systemwide ratios were formulated,[23] and employers found liable under Title VII were required to meet goals and timetables for employing and promoting racial minorities and women.[24] Additionally, redistricting in voting rights cases sought to eliminate the racial consequences of various configurations.[25] Voluntary affirmative action plans in higher education, employment, and public contracting also used methods that specifically considered race and sex criteria. Challenges to these explicit uses of race and sex criteria generally have failed.[26] Courts and administrative agencies essentially looked beyond the text of the Constitution and modern civil rights statutes and held that such arrangements were justified by the underlying purposes of those provisions. They argued

22. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958) (school desegregation); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968) (employment).

23. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

24. *See* Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974).

25. *See* United Jewish Orgs. of Williamsburgh v. Carey, 430 U.S. 144 (1977).

26. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980) (public contracting); United Steel Workers of Am. v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (higher education). Although the Supreme Court struck down the race-conscious admissions plan at issue in *Bakke*, challenges to the use of race as an admissions criterion in subsequent cases have been unsuccessful. *See* Days, *Minority Access to Higher Education in the Post-*Bakke *Era*, 55 U. COLO. L. REV. 491, 495-99 (1984).

that both constitutional and statutory strictures against discrimination originally were designed to address the plight of blacks. Consequently, the explicit use of race in fashioning a remedy to ameliorate the plight of blacks could not be reasonably viewed as raising any problems of discrimination.[27]

The Reagan Administration encountered this world of civil rights enforcement, recognized and promoted by several prior Presidential administrations, and was determined to change it profoundly. Administration officials believed that a legally wrong and politically wrongheaded shift had occurred in civil rights enforcement in the late 1960s and the early 1970s and that this transformation required immediate correction.[28]

Harking back to earlier theories of discrimination, the Administration sought to refocus civil rights enforcement on blatant, intentional violations of federal civil rights laws or the Constitution. Standing alone, this shift in policy is not particularly noteworthy. Certainly, no one who is committed to civil rights enforcement can quarrel with a vigorous federal assault on intentional forms of discrimination. For Reagan Administration officials, however, this shift in policy had a corollary: Enforcement of civil rights laws utilizing concepts of "discriminatory effect" or "disparate impact" should be de-emphasized.[29] This de-emphasis was necessary, in their view, because these concepts were at war with the fundamental aim of the civil rights laws—the punishment of bad actors. Consequently, the Administration focused its efforts on returning the law to punishing those actors who intentionally discriminated.

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27. *See Weber*, 443 U.S. at 204-08 (construing Title VII of the Civil Rights Act of 1964 to allow a race-conscious training program despite the apparent conflict hetween that reading and language in the statute suggesting the contrary).

28. For a full discussion of the Reagan Administration's position on civil rights, see Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984). For an exchange between Mr. William Bradford Reynolds, Assistant Attorney General for Civil Rights under President Reagan, and Professor Joel Selig, a former Civil Rights Division lawyer under Presidents Nixon, Carter, and Reagan, over the shift in enforcement policies under the Reagan Administration, see: Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785; Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. ILL. L. REV. 1001; and Selig, *The Reagan Justice Department and Civil Rights, Professor Selig Responds to Assistant Attorney General Reynolds*, 1987 U. ILL. L. REV. 431.

29. *See* United States v. City of Birmingham, 538 F. Supp. 819 (E.D. Mich. 1982). In the *Birmingham* case, the Reagan Administration, as the court's opinion notes, shifted from reliance upon a disparate impact theory argued by the Carter Justice Department to dependence solely upon an intent theory. *Id.* at 827 n.9. For a full discussion of the Carter Administration's use of the disparate impact theory in fair housing cases, see Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement*, 17 U.C. DAVIS L. REV. 445 (1984).

The Administration's view of appropriate remedies for civil rights violations also embraced early civil rights doctrine. In short, the Administration advocated that race or sex criteria should never be used for remedial purposes.[30] Administration officials often remarked that the purpose of *Brown* was to rid our society of race-consciousness, leaving each person to be judged based only on his merits without reference to skin color or sex. The Constitution, according to this view, was meant to be color-blind.[31] Consequently, school desegregation plans that required assignment of students were an anathema to these officials. The Administration's position was that the constitutional mandate was satisfied once school boards were precluded from barring any child from admission to a school because of race.[32] Similarly, affirmative action plans that involved the setting of hiring or promotion goals, timetables, or quotas, whether mandatory or voluntary, could not be squared with the Administration's understanding of the Constitution or of Title VII.[33] The Administration believed that only people who were "actual victims of discrimination" should be provided any remedy under the Constitution or Title VII.[34] Under this view, when a person has been discriminated against based upon race or other impermissible grounds, that person should be given adequate legal or equitable redress because of the injury experienced. However, a remedy that benefits not only the person who has been discriminated against, but also other members of the group to which the victim of discrimination belongs, is inappropriate.

Although I disagree with these views, the Reagan Administration's positions cannot be dismissed as inherently trivial. Putting to one side the explicit invitation of the 1965 Voting Rights Act to preclude electoral changes that are discriminatory either by design or in effect, the Supreme Court's adoption in *Griggs* of the "disparate impact" test for certain Title VII claims[35] and the use of this test by lower courts in enforcing other civil rights statutes were not unambignous. The statutes could be read, in light of their complex legislative histories, to address only intentional discrimination. Similarly, certain provisions of Title

30. *See* Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995 (1984).

31. *See generally* Days, *Holding the Line*, 20 CREIGHTON L. REV. 1 (1986).

32. *See* Days, *supra* note 28, at 319-30.

33. *See* Reynolds, *supra* note 30, at 998.

34. Reynolds, *Justice Department Policies on Equal Employment Opportunity and Affirmative Action*, 35 N.Y.U. CONF. ON LAB. 443, 444-45, 452 (1983).

35. *E.g.*, Bernhardt, Griggs v. Duke Power Co.: *The Implications for Private and Public Employers*, 50 TEX. L. REV. 901 (1972); Wilson, *A Second Look at* Griggs v. Duke Power Company: *Ruminations on Job Testing Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972).

VII could be interpreted plausibly to preclude race-conscious employment plans, whether mandatory or voluntary.[36] Finally, the open-textured character of the equal protection clause could be interpreted to exclude race-conscious remedies for nonvictims from its purview.[37]

The Reagan Administration pursued its agenda with a single-mindedness that perhaps was unequaled by any of its recent predecessors.[38] For example, although school desegregation doctrine affords plaintiffs the benefit of certain evidentiary presumptions in establishing discriminatory intent, the Reagan Justice Department eschewed any reliance on these presumptions.[39] However, the Administration's early attempts to curtail busing for purposes of mandatory or voluntary school desegregation were resisted. In one case the Administration, in a switch from the position taken by the Carter Justice Department in the lower courts, argued in the Supreme Court that voluntary busing plans adopted by several Washington State cities were unconstitutional. The Court ruled against this argument.[40] A similar setback occurred when school districts, after being approached by the Administration to alter their busing plans, rejected the offer when they learned that the revised plan would be significantly more segregative.[41] Thereafter, with one notable

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36. *See Weber*, 443 U.S. at 219 (Rehnquist, J., dissenting).

37. For example, the Supreme Court has stated that "the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." Shelly v. Kraemer, 334 U.S. 1, 22 (1948).

38. The Franklin Roosevelt Administration has been considered perhaps the most active twentieth-century administration in its attempt to change the law. However, the Justice Department's role was very limited. Its involvement was largely in attempting programmatic changes in policy. The history of Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), provides just such an example. The administrative agencies pushed the case in the courts. The Justice Department, by contrast, was extremely hesitant to litigate cases that challenged existing precedent. *See* P. IRONS, THE NEW DEAL LAWYERS 86 (1982).

39. For example, Keyes v. School District No. 1, Denver, 413 U.S. 189 (1973), held that racially based actions in part of a school district may affect the whole school district. Yet Assistant Attorney General Reynolds expressly stated that he would not use the *Keyes* presumption in determining which litigation to undertake. Instead, he would "define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of State officials." *School Desegregation: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 618 (1981) (statement of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division).

40. *See* Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982). For further discussion of the *Seattle* case and the ethical issues presented by the Administration's action, see Note, *Ethical Considerations for the Justice Department when It Switches Sides During Litigation*, 7 U. PUGET SOUND L. REV. 405 (1984). *See also In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1501 (11th Cir. 1987) (affirming the trial court's determination that the Justice Department was collaterally estopped from attacking a consent decree entered into by a prior administration).

41. Following the Administration's unsuccessful attempt to bring about a more segregative desegregation plan in Davis v. East Baton Rouge Parish School Board, 498 F. Supp. 580 (M.D. La. 1980), the Justice Department continued to press for alternative approaches to busing. *See* De-

exception,[42] the Administration's approach in dealing with school districts previously charged as being segregated was to work out consent decrees that entailed no mandatory busing.[43]

In the area of housing, the Administration's docket resembled the agenda developed by prior administrations during the ten years since the Fair Housing Act had been passed. Basically, lawsuits were filed against landlords and homeowners for refusing to rent or sell to interested persons based on impermissible grounds, relying on a theory of intentional discrimination.[44] Despite extensive precedent in the lower federal courts upholding an "effects" standard of proof, the Administration did not pursue these claims in litigation.[45] Instead, the Administration argued that the effects test was not authorized by the Fair Housing Act.[46]

Major amendments to the Fair Housing Act were passed by Congress in September 1988.[47] None of the changes, however, addressed the question of whether the Act required proof of discriminatory intent. Nevertheless, in his signing statement President Reagan argued that

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partment of Justice, Press Release (February 18, 1983). Assistant Attorney General Reynolds stated that other options were "voluntary student transfer programs, magnet schools, enhanced curriculum requirements, faculty incentives, in-service training, training programs for teachers and administrators, school closings in systems with excess capacity and new construction in systems that are over-crowded, and modest adjustments in attendance zones." *Court-ordered School Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1647, S. 1743, and S. 1760 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 582, 592-93 (1981) (statement of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division).

42. *See* United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988). *Yonkers*, a suit filed by the Carter Administration, but prosecuted by the Reagan Justice Department, alleged both intentional school and housing segregation.

43. For example, in 1982 the Department of Education concluded that the Bakersfield, California School District was in violation of Title VI of the 1964 Civil Rights Act. The Justice Department worked out a consent decree approving a voluntary magnet school as an alternative to busing. *See* N. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 40-41 (1988).

44. *See, e.g.*, 1986 ATT'Y GEN. ANN. REP. 129-30; 1985 ATT'Y GEN. ANN. REP. 167; 1984 ATT'Y GEN. ANN. REP. 149; 1983 ATT'Y GEN. ANN. REP. 136.

45. When the Reagan Administration took office, a clear majority of the Courts of Appeals addressing the issue endorsed the discriminatory effect theory. *See, e.g.*, Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach, 493 F.2d 799, 808-09 (5th Cir. 1974).

46. *See* Brief for the United States as Amicus Curiae at 12-18, Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276 (1988) (No. 87-1961). *Huntington*, a case that the Administration urged the Supreme Court to accept for review to press this point, was recently affirmed on other grounds. Town of Huntington v. Huntington Branch, NAACP, 109 S. Ct. 276, *aff'g* 844 F.2d 926 (2d Cir. 1988).

47. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (amending 42 U.S.C. §§ 3602, 3604-3608, 3610-3614, 3617, 3619, 3631 (1982)).

the Act, as amended, required proof of discriminatory intent.[48]

Housing was not the only area in which the Reagan Administration attempted to ensure that only intentional discrimination would be illegal under federal law. In 1980 the Supreme Court held that a provision of the Voting Rights Act of 1965, distinct from those provisions having to do with preclearance, required proof of discriminatory intent.[49] Congress ultimately responded, despite Administration opposition, by enacting an amendment to the Act that incorporated essentially an "effects" standard.[50] Undaunted, the Administration urged the Supreme Court to adopt a reading of the provision that would have limited the reach of the new effects approach substantially.[51] This move prompted the filing with the Court of a rather unusual amicus brief, signed by the major Senate and House sponsors of the amendment, which challenged the Justice Department's reading of the statute.[52] The Administration's interpretation was rejected by the Court.[53]

The Administration's efforts to restrict the application of the *Griggs* disparate impact test in Title VII employment discrimination cases also have been unsuccessful. While not unambignous given the complexity of the opinion, I read the Administration's position in the

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48. In his signing statement, President Reagan stated:

> At the same time, I want to emphasize that this hill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that title 8 violations may be established by a showing of disparate impact or discriminatory effects of a practice that is taken without discriminatory intent. Title 8 speaks only to intentional discrimination.

Remarks on Signing the Fair Housing Amendments Act of 1988, 24 WEEKLY COMP. PRES. DOC. 1140, 1141 (Sept. 13, 1988).

49. *See* City of Mobile v. Bolden, 446 U.S. 55 (1980).

50. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1973, 1973aa (1982)). Section 2(a) of the Act reads in pertinent part as follows:

> No voting qualification or prerequisite to voting or standard, practice, or procedure sball be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of tbe right of any citizen of the United States to vote on account of race or color. . . .

Id. sec. 3, § 2(a), 96 Stat. at 134 (codified as amended at 42 U.S.C. § 1973(a) (1982)) (emphasis added); *see* Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715 (1983).

51. Brief for the United States as Amicus Curiae Supporting Appellants at 6-19, Thornburg v. Gingles, 478 U.S. 30 (1986) (No. 83-1968). *Thornburg* was the first case to reach the Supreme Court under the amended Act.

52. Motion for Leave to File and Brief of Senators Dennis DeConcini, Robert J. Dole, Charles E. Grassley, Edward M. Kennedy, Charles McC. Mathias, Jr., and Howard M. Metzenbaum, and Representatives Don Edwards, Hamilton Fish, Jr., Peter W. Rodino, Jr., and F. James Sensenbrenner as Amici Curiae in Support of Appellees, Thornburg v. Gingles, 478 U.S. 30 (1986) (No. 83-1968).

53. *See Thornburg*, 478 U.S. at 77-79.

1982 case of *Connecticut v. Teal*[54] as an effort to shift the focus from whether an employment practice has a disparate impact to whether the overall hiring process reflects a lack of discriminatory intent.[55] In addition, I read the Court's decision as an outright rejection of the Administration's proposed shift.[56] Additionally, the Supreme Court last term apparently rejected the Administration's argument that the *Griggs* test should not be extended to cover subjective hiring or promotion systems that have a disparate impact.[57] Until that ruling, lower courts had been in conflict over whether the *Griggs* disparate impact test was limited to situations in which objective screening devices disproportionately excluded minority or female candidates.[58] The exact contours of this ruling will have to be shaped in later decisions.[59] At this writing, however, it appears that *Griggs* has been extended rather than curtailed.

Given its concern for a color-blind Constitution and for bars under Title VII to race-conscious programs, the Reagan Administration devoted extensive time, energy, and resources to challenging affirmative action plans. In evaluating how successful the Administration was in its opposition to affirmative action plans, seven Supreme Court decisions are relevant. Six of these cases were decided during President Reagan's tenure.[60] The seventh case, in which the Reagan Justice Department was involved heavily, was decided only three days after the Bush Administration took office.[61]

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54. 457 U.S. 440 (1982).

55. In *Teal*, the Reagan Administration argued that Title VII was not violated by an employer whose overall "bottom line" employment practices did not have a disparate impact even when a component of its personnel process, such as a standardized aptitude test, did disproportionately screen out racial minorities or women. *Id.* at 451-55, 453 n.12. Implicit in the Administration's position was that the employer's bottom line negated any suggestion of discriminatory intent and that, therefore, the overall objective of Title VII was fully achieved. *See id.*

56. The *Teal* Court held that Title VII is violated when disparate impact is shown in one aspect of the employment process despite an end result with no disparate impact. In fairness to the Reagan Administration's position in this case, the Court was badly split over the issue and was criticized by commentators generally committed to the retention in most instances of the *Griggs* disparate impact test. *See, e.g.*, Blumrosen, *The Group Interest Concept, Employment Discrimination and Legislative Intent: The Fallacy of* Connecticut v. Teal, 20 HARV. J. ON LEGIS. 99 (1983); Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983).

57. *See* Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988).

58. *See, e.g.*, Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc), *cert. granted in part*, 108 S. Ct. 2896 (1988); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir., 1984), *cert. denied*, 471 U.S. 1115 (1985).

59. The Supreme Court has granted certiorari to consider this question. *See Wards Cove Packing Co.*, 108 S. Ct. 2896.

60. *See* Johnson v. Transportation Agency, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984).

61. *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

The first of these decisions involved efforts by lower federal courts to protect the jobs of black fire fighters, recently hired pursuant to a consent decree, who were facing layoffs.[62] The Supreme Court struck down this scheme on the ground that the lower courts' modification of the consent decree violated the seniority rights of white workers who were scheduled to be laid off instead of more junior blacks.[63] Extracting language from this opinion which appeared to support its view that Title VII prohibited the granting of any remedies to nonvictims, the Administration notified over fifty jurisdictions that their consent decrees were illegal. Its subsequent attempts to have these decrees, which had been entered into with earlier administrations, declared illegal were rejected by every Court of Appeals in the country. The only cases in which the Justice Department prevailed involved overrides of seniority systems.[64]

Nevertheless, the Administration brought its argument about nonvictims to the Supreme Court. However, in an opinion that upheld a remedial race-conscious plan, seven Justices, one of whom was in dissent on the merits, rejected the Administration's position.[65] In another case decided the same day, the Court upheld a consent decree that contained race-conscious provisions, despite the Administration's opposition.[66] While the Court subsequently struck down as unconstitutional a voluntary affirmative action plan that required proportional layoffs of white and minority teachers irrespective of seniority,[67] the Court did not reject the use of race as a criterion in voluntary affirmative action plans. Rather, the Court set out the requirements that such a plan would have to satisfy in order to survive constitutional scrutiny.[68] In addition, the Court upheld as constitutional one-for-one promotions of black and white state troopers as a remedy for long-standing employ-

62. *See Stotts*, 467 U.S. 561.

63. *Id.* at 572-83.

64. *See* N. AMAKER, *supra* note 43, at 126; Goldberg, *Waiting for* Wygant*: Affirmative Action in the Aftermath of* Stotts, 1985 PROC. N.Y.U. 38th ANN. NAT'L CONF. ON LAB. 19-1, §§ 19.04-.05.

65. *Sheet Metal Workers'*, 478 U.S. 421. Justices Brennan, Marshall, Blackmun, and Stevens held that the legislative history does not indicate that Congress intended that affirmative relief under § 706(g) of Title VII benefit only the identified victims of past discrimination. *Id.* at 444-79 (Brennan, J., plurality). Justice Powell, in a concurring opinion, agreed that § 706(g) does not limit a court to granting relief only to actual victims of discrimination. *Id.* at 483 (Powell, J., concurring). Justice O'Connor was concerned that the Court appeared to disregard dicta in *Stotts* that embodied a policy against such nonvictim remedies. *Id.* at 489-90 (O'Connor, J., concurring in part, dissenting in part). She stated, however, that these remedies may be available if they are truly necessary. *Id.* at 496. Justice White dissented on the merits, but agreed tbat § 706(g) does not bar relief for nonvictims. *Id.* at 499 (White, J., dissenting).

66. *City of Cleveland*, 478 U.S. 501.

67. *Wygant*, 476 U.S. 267.

68. *Id.* at 274-84.

ment discrimination.[69]

The Reagan Administration also sought to overturn a 1979 decision that upheld a voluntary race-conscious hiring and promotion program as consistent with Title VII.[70] Despite the Administration's efforts to achieve this result, the 1979 decision was reaffirmed and expanded in a 1987 opinion in which six members of the Court rejected the Administration's position.[71] One of the concurring Justices, however, voted with the majority largely on grounds of stare decisis.[72]

The most recent affirmative action decision by the Supreme Court, rendered on January 23, 1989, held unconstitutional a minority set-aside program that ensured minority business enterprises a fixed percentage of public works or procurement contracts.[73] The Court asserted that the plan was constitutionally infirm because it did not appear to be based on any evidence of discrimination against minority businesses in the jurisdiction and, even if it was, the plan was not tailored narrowly to respond to that discrimination.[74] The Reagan Administration had argued for this result. Minority set-aside programs, however, were not prohibited entirely.[75] Given the fragmented nature of the decision, the only clear statement which comes from the opinion is that for the first time five Justices voted in favor of strict scrutiny as the standard of review for race-conscious programs.[76]

Thus, the Administration's position has been vindicated in only three of the last seven affirmative action cases. Admittedly, in those three cases, as well as in at least one of the cases that, on the merits, went against the Administration's position,[77] the Court did articulate tighter standards governing race-conscious plans than had existed previously. But on the Administration's core challenges, namely the issues of general race-conscious remedies and the treatment of nonvictims

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69. *Paradise*, 480 U.S. 149.

70. *See* Taylor, *Civil Rights Division Head Will Seek Supreme Court Ban on Affirmative Action*, Wall St. J., Dec. 8, 1981, at 4, col. 2.

71. *Johnson*, 480 U.S. 616.

72. *Id.* at 644 (Stevens, J., concurring).

73. See City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

74. *Id.* at 723-29.

75. In fact, four of the Justices who voted to strike down the Richmond set-aside, Justices O'Connor, Rehnquist, White, and Kennedy, suggested that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." *Id.* at 729 (O'Conner, J., plurality). Since Justices Marshall, Brennan, and Blackmun voted to uphold the set-aside, there appears to be a majority on the Court for the proposition that nonvictims may be benefited. *See id.* at 754-55 n.12 (Marshall, J., dissenting).

76. *See id.* at 720-21; *id.* at 735 (Scalia, J., concurring).

77. *See Sheet Metal Workers*, 478 U.S. 421. In *Sheet Metal Workers*, the Court established that remedies that benefit nonvictims should be used only to remedy "persistent or egregious discrimination, or when necessary to dissipate the lingering effects of pervasive discrimination." *Id.* at 445 (Brennan, J., plurality); *see also Paradise*, 480 U.S. 149.

particularly, the Court remained unpersuaded.

What conclusions can be drawn from these recent affirmative action decisions? I assert that these decisions reflect significant judicial resistance to an Administration bent on making dramatic changes in civil rights doctrines. Even if lower court judges or Justices of the Supreme Court found the Administration's arguments politically attractive in specific cases, I believe that the lack of solid legal or factual support for the Administration's position in some instances, and the pull of stare decisis, particularly in statutory cases, caused them to rule against the Administration's arguments.

As I suggested at the outset of this Essay, given the recent changes in the Court's composition and the likelihood that new appointments soon will be made, the Reagan civil rights agenda finally may receive a favorable hearing.[78] Judging the situation at this juncture, however, few fundamental changes in civil rights enforcement occurred during the eight years of the Reagan Administration.

78. I suggested an explanation for the Reagan Justice Department's persistence in the face of defeat in an earlier article:

> The answer, I think, is that they do not expect to win in the law courts in the near future. Rather, they hope to win in the court of public opinion and to transform the national debate in a way that will have consequences inside and outside of the courts with respect to civil rights policy long after they have left office.

Days, *supra* note 31, at 7.