

# The Constitutionalization of Disparate Impact—Court-Centered and Popular Pathways: A Comment on Owen Fiss’s Brennan Lecture

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Introduction.....	2001
I. Disparate Impact’s Constitutionalization: Fiss’s Court-Centered Account .....	2005
II. Disparate Impact’s Constitutionalization: A Dialogic and Democratic Account .....	2006
A. The Intent Requirement Shifts Civil Rights Remedies from Courts to Politics.....	2007
B. (Re)reading Davis as Authorizing Disparate Impact.....	2008
C. The Court Retreats, Congress Leads, and the Court Follows .....	2009
D. National Acceptance of Disparate Impact Standards—Especially in Nonracial Contexts.....	2011
E. Democratic Debate Informs the Court.....	2012
F. Conflicts over Disparate Impact in the Executive Branch Today .....	2015
III. Constitutionalization: Court-Centered and Popular Pathways .....	2019
Conclusion .....	2022

## INTRODUCTION

At Yale Law School, I had the great fortune of studying with Owen Fiss, who provided a riveting introduction to constitutional law. He encouraged me to

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\* Nicholas deB. Katzenbach Professor of Law, Yale University. This Comment responds to the Brennan Center’s 2017–2018 Thomas M. Jorde Symposium lecture delivered at the University of Chicago Law School by Professor Owen Fiss. For comments on the draft, I thank Joseph Fishkin, Cary Franklin, Linda Greenhouse, Aziz Huq, and Robert Post. For excellent research assistance, I thank Dylan Cowit, as well as Rachel Frank, Harrison Stark, and Alisa Tiwari.

go into teaching at a time when there were scarcely any women on the faculty at Yale.<sup>1</sup> His work on antisubordination—the group-disadvantaging principle<sup>2</sup>—orients much of my work on inequality.

But it was my fortune to learn from Fiss, not in the 1960s or 1970s, but in the 1980s, when Presidents Nixon and Reagan had filled the Supreme Court with Justices who did not share Fiss’s core convictions. Fiss venerated the work of the Warren Court and spoke of an America committed to civil rights change.<sup>3</sup> He studied law during the years<sup>4</sup> when the Warren Court required states to provide the indigent counsel in criminal cases and upheld the public accommodations provisions of the 1964 Civil Rights Act;<sup>5</sup> he graduated in the era of Freedom Summer<sup>6</sup> and the passage of the 1965 Voting Rights Act.<sup>7</sup> By contrast, when I was in law school, the civil rights cause encountered one setback after another: opponents of the Equal Rights Amendment (ERA) blocked its ratification,<sup>8</sup> while

1. When I entered Yale Law School in the fall of 1982, there was only one tenured female professor on the faculty. *See Bulletin of Yale University: Yale Law School*, 1982–83, YALE L. SCH., Aug. 20, 1982, at 7–9 (listing Lea Brilmayer and Barbara Dale Underwood as the only tenured female professors on the faculty, and noting that Underwood was on a leave of absence for the 1982–83 academic term); *see also* Robert Harding, *Barbara Underwood Named Acting NY Attorney General After Schneiderman Resigns*, AUBURNPUB.COM (May 9, 2018), [https://auburnpub.com/blogs/eye\\_on\\_ny/barbara-underwood-named-acting-ny-attorney-general-after-schneiderman-resigns/article\\_db73b4b6-52c2-11e8-8a83-93c29c30992b.html](https://auburnpub.com/blogs/eye_on_ny/barbara-underwood-named-acting-ny-attorney-general-after-schneiderman-resigns/article_db73b4b6-52c2-11e8-8a83-93c29c30992b.html) [https://perma.cc/XZF7-2N59] (reporting that Underwood taught at Yale Law School from 1972 to 1982). For a glimpse of gender dynamics at Yale Law School in this era, see OWEN FISS, *PILLARS OF JUSTICE: LAWYERS AND THE LIBERAL TRADITION* 121–22 (2017) (discussing my role as Fiss’s research assistant and recalling classroom debates in Fiss’s first course on sex equality law during the mid-1980s in which Fiss and Marty Lederman were the only men in the room); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1310 (1988) (interviewing twenty women in the class of 1987 who participated in a first-year women’s group organized to address women’s silence in the classroom).

2. *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157–58 (1976) (arguing that state action violates the Equal Protection Clause when it “aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group”).

3. This vision orients his recent book *PILLARS OF JUSTICE*. *See supra* note 1.

4. *See Owen M. Fiss*, YALE L. SCH., <https://law.yale.edu/owen-m-fiss> [https://perma.cc/J2M6-ZXK2] (last visited Oct. 26, 2018) (noting that Fiss graduated from Harvard with an LL.B. in 1964 and then began clerking for then-Judge Thurgood Marshall on the Second Circuit).

5. *See Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6. “Freedom Summer was a highly publicized campaign in the Deep South to register blacks to vote during the summer of 1964.” *Freedom Summer*, CONGRESS RACIAL EQUALITY, <http://www.congressofracialequality.org/freedom-summer.html> [https://perma.cc/9YJT-F4CC] (last visited Oct. 26, 2018).

7. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.)

8. I graduated from law school in 1986. On the conflict over the ERA, *see* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006) (illustrating how equal protection doctrine prohibiting sex discrimination was forged in conflict over the ERA); *see also id.* at 1378, 1390, 1398–99 (discussing ratification votes). On contemporary efforts to ratify the ERA, *see* PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 2018 SUPPLEMENT 8-1-4 (2018); and Robinson

the Rehnquist Court denied protection to gays in the midst of the AIDS crisis,<sup>9</sup> limited school desegregation remedies,<sup>10</sup> and restricted review of race discrimination challenges to the death penalty in the midst of a war on crime.<sup>11</sup>

Different formative experiences of civil rights conflict appear to have shaped the ways Fiss and I understand constitutional law, including the constitutionalization of disparate impact. By constitutionalization, I refer to processes of constitutional change—the dynamics through which understandings about the constitutional status of disparate impact law have evolved in history.

The story Fiss offers about the constitutional status of disparate impact is oriented around the Supreme Court. It is a story about constitutional law, not constitutional politics. My perspective is different. Having come of age watching Americans struggle over the civil rights decisions of the Court and ultimately over membership of the institution itself, I am skeptical of Fiss's court-centered account of constitutional change. I contrast his juricentric account of constitutional change with a dialogic account—an account in which courts interact with institutions of representative government and the people themselves in interpreting the Constitution. The juricentric model is dominant in Fiss's lecture, and the dialogic model latent.

Given my formative experiences in the law and my writings in democratic constitutionalism,<sup>12</sup> I believe that democratic conflict over disparate impact is a significant feature of its constitutionalization—a feature, not a bug. In this Comment, I show how, over the decades, popular struggle over civil rights law has guided the growth of disparate impact law. The aim here and throughout my

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Woodward-Burns, *The Equal Rights Amendment is One State from Ratification. Now What?*, WASH. POST (June 20, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/20/the-equal-rights-amendment-is-one-state-from-ratification-now-what/?utm\\_term=.a8a8a3aaa585](https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/20/the-equal-rights-amendment-is-one-state-from-ratification-now-what/?utm_term=.a8a8a3aaa585) [<https://perma.cc/5FYE-W2Q9>].

9. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). For the historical context surrounding *Bowers*, see BREST ET AL., *supra* note 8, at 9.141–43.

10. See Stuart Taylor Jr., *Justices Deny Appeals in Norfolk Busing Case and on a Libel Suit*, N.Y. TIMES (June 17, 1986), <https://www.nytimes.com/1986/06/17/us/justices-deny-appeals-in-norfolk-busing-case-and-on-a-libel-suit.html> [<https://perma.cc/E384-PPHW>] (reporting that the Court declined to review an appeal challenging dissolution of a court-ordered busing plan in a case supported by the Reagan Justice Department “as a model for localities that want to end court-ordered busing”).

11. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). For the historical context surrounding *McCleskey*, see Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp—and Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018).

12. See Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728 (2017) [hereinafter Siegel, *Community in Conflict*]; Siegel, *supra* note 8; see also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) [hereinafter Post & Siegel, *Roe Rage*]; Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000) [hereinafter Post & Siegel, *Equal Protection by Law*].

work is not to displace the Court, but rather to understand its authority dialogically, in relationship with other democratic actors.<sup>13</sup>

To illustrate the important role that democratic actors have played in disparate impact's constitutionalization, I sample conflict over disparate impact standards across all three branches of the federal government since the 1970s, from the Burger Court to the Roberts Court, in Congress, and in the Reagan, Obama, and Trump administrations. The history of democratic conflict over disparate impact standards includes episodes of popular resistance to civil rights law. Looking back at these conflicts is now especially instructive as these chapters of our civil rights history call into question some of our core assumptions about the relative commitment of courts and legislatures to protect minorities. They remind us that on numerous occasions, Congress has proven more willing than the Court to protect minority rights.<sup>14</sup> Examining the continuing opposition to the use of disparate impact standards to combat race discrimination (as distinct from discrimination on the basis of religion or disability) suggests that constitutionalization of disparate impact could take forms that Fiss does not anticipate. Fiss argues that a Court in the coming decades could interpret the Equal Protection Clause to require judges to review the racially disparate impact of state action.<sup>15</sup> The history I consider suggests that constitutionalization might instead take the form of a Court interpreting the Equal Protection Clause to prohibit or limit federal laws mandating such review—a prospect that grows with the shifting composition of the Court.<sup>16</sup>

This Comment makes the case for a dialogic understanding of our constitutional law primarily on grounds of descriptive accuracy. Situating the Court's work in dialogue with democratic actors supplies a better understanding of how our law has evolved and is likely to evolve in the coming decades. But I close by offering a brief, normative account that suggests why conflict strengthens our constitutional law. When properly constrained, constitutional conflict can give democratic authority and direction to constitutional law.<sup>17</sup>

The Comment proceeds in three parts. Parts I and II contrast the court-centered account of constitutionalization in Fiss's lecture with an alternative history that foregrounds the interaction of the Court with the representative branches of government and popular movements, and shows how popular conflict over disparate impact has played a role in its constitutionalization. Part III concludes by suggesting that the dialogic account offers not only a more descriptively accurate account of our history, but makes visible important features of our constitutional tradition that help anchor its democratic legitimacy.

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13. See Siegel, *Community in Conflict*, *supra* note 12 (exploring the Court's authority under conditions of backlash); Post & Siegel, *Roe Rage*, *supra* note 12 (same).

14. See *infra* Part II.

15. See Owen M. Fiss, *The Accumulation of Disadvantages*, 106 CALIF. L. REV. 1973–76 (2018).

16. See *infra* Part II.

17. See *infra* Part III.

## I.

## DISPARATE IMPACT'S CONSTITUTIONALIZATION: FISS'S COURT-CENTERED ACCOUNT

Today, we know that, as a matter of black letter law, the Constitution allows state action with racially disparate impact, so long as it is not motivated by a discriminatory purpose.<sup>18</sup> Impact may be evidence of purpose but it is not a violation of the Constitution in its own right.<sup>19</sup> The Court's 1971 decision in *Griggs v. Duke Power Co.*,<sup>20</sup> striking down a practice with racially disparate impact not justified by a business necessity, was a statutory decision interpreting Title VII of the 1964 Civil Rights Act<sup>21</sup>—not a constitutional decision—even if many courts in the 1970s initially interpreted the decision as applying to the Equal Protection Clause.<sup>22</sup> *Washington v. Davis* rejected that reading of *Griggs* in 1976.<sup>23</sup>

In his lecture, Fiss describes *Griggs* as an expression of constitutional commitments from which the Court retreated in part, but to which it may yet one day fully recommit. He offers a constitutional reading of *Griggs*: the opinion expresses a “theory of cumulative responsibility—which condemns any institution, regardless of its own past actions, from engaging in a practice that aggravates, perpetuates, or merely carries over a disadvantage Blacks had received at the hands of some other institution acting at some other time in some other domain,”<sup>24</sup> whether during slavery or segregation. This obligation arises not because a firm has played a part in building the racial caste system that subordinates blacks. Instead it arises “simply because we live together and are members of the same polity, must do what we can to honor the values of the Constitution and to make good on its promise to transform America into a community of equals.”<sup>25</sup>

Acknowledging that “as a purely technical matter, *Griggs* had been brought under Title VII of the Civil Rights Act of 1964,” Fiss recounts a variety of reasons why the opinion “had a constitutional quality.”<sup>26</sup> This view was shared by many in the legal profession who understood the *Griggs* principle as “governing both statute and Constitution” from the time of *Griggs* to the Court's decision in *Davis* in 1976.<sup>27</sup> But as Fiss recounts, in the early 1970s, Americans elected two Republican Presidents who appointed Justices to the Supreme Court

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18. *Washington v. Davis*, 426 U.S. 229, 239–42 (1976).

19. *Id.* at 241.

20. 401 U.S. 424 (1971).

21. Civil Rights Act of 1964, 42 U.S.C. § 2000 (2012).

22. See Reva B. Siegel, *The Supreme Court 2012 Term Foreword: Equality Divided*, 127 HARV. L. REV. 1, 14 (2013).

23. 426 U.S. at 251–52.

24. Fiss, *supra* note 15, at 1946.

25. *Id.* at 1949.

26. *Id.* at 1950–51.

27. *Id.* at 1951.

“who were less committed—maybe some were even opposed—to the reform that *Brown* promised,”<sup>28</sup> and effectively ended the Second Reconstruction. These Justices—the majority in *Washington v. Davis*—“drew a bold distinction between constitution and statute, and downgraded the *Griggs* principle to a statutory rule.”<sup>29</sup>

The Supreme Court may have denied *Griggs* roots in the Constitution, but on Fiss’s account, it is the Court and not Congress that over the decades has sustained the *Griggs* principle as an aspirant for (re)constitutionalization. In developing this account, Fiss devotes considerable attention to the opinions of Justice Kennedy that interpret provisions of federal employment discrimination law in *Ricci*<sup>30</sup> and federal housing discrimination law in *Inclusive Communities*.<sup>31</sup>

Until the very closing pages of his lecture, Fiss offers what might be termed a juricentric account of *Griggs*’s constitutionalization. Courts interact with representative government and the mobilized public in Fiss’s account of struggles over the *Griggs* principle, but it is predominantly the Court that speaks for the nation. And when the Court speaks, it is on the assumption that the Court has, or can command, the nation’s assent. On this account, the participation of the representative branches of government is largely irrelevant to the story.<sup>32</sup> It is only as the lecture winds to a close that Fiss tells us that it may take a new mass mobilization and a Third Reconstruction for the Supreme Court to interpret the Equal Protection Clause through the *Griggs* principle and require government to avoid taking action with unjustified racially disparate impact.<sup>33</sup> Here, and in fleeting moments throughout Fiss’s lecture, we catch a glimpse of the role that politics may play in determining whether and where there is constitutional authority for disparate impact standards.

## II.

### DISPARATE IMPACT’S CONSTITUTIONALIZATION: A DIALOGIC AND DEMOCRATIC ACCOUNT

In what follows I offer an account of disparate impact’s constitutionalization that, I believe, is closer to our actual constitutional history and has a rich democratic logic not visible in Fiss’s telling. My account

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28. *Id.* at 1950.

29. *Id.*

30. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

31. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015); see Fiss, *supra* note 15, at 1958–59.

32. See Fiss, *supra* note 15, at 1953 (observing that Congress “refused to assume responsibility for the disparate impact doctrine and instead insisted upon treating it as a judicial creation”); and 1961 (“From the perspective of *Ricci* and *Inclusive Communities*, the requirement for legislative endorsement of the disparate impact test has taken on a formal, almost ritualistic, character. The Court used it in those cases as an ideological fig leaf, allowing constitutional rulings to be presented as exercises in statutory interpretation.”).

33. See *id.* at 1973.

foregrounds the participation of the representative branches of government and popular conflict over constitutional meaning in ways Fiss's does not. As I understand our history, the constitutional status of disparate impact has evolved as Americans have struggled over civil rights change. I am no less interested in the Court than Fiss; but I understand the Court to be one of many important players in the story of disparate impact's constitutionalization, and for many decades now, arguably *not* the most prominent.

The evolving constitutional status of the disparate impact principle owes in no small measure to long-running democratic debate about discrimination standards in civil rights law. In this brief Comment, I cannot do more than sample some prominent points of this history, enough to suggest how democratic debate has informed the Court's judgment and the nation's.

In this Part, I identify some aspects of the historical record that are either minimized or entirely omitted in Fiss's account—and then briefly consider their normative significance in a different, and more democratically informed account of disparate impact's constitutionalization.

#### A. *The Intent Requirement Shifts Civil Rights Remedies from Courts to Politics*

I begin with a point that Fiss only quietly acknowledges. It was explosive public protest over desegregation that led the Court to retreat from the *Griggs* rule.<sup>34</sup> As desegregation cases moved beyond the South in the late 1960s and early 1970s, there was fierce public debate about the proper reach of court desegregation orders.<sup>35</sup> In 1970, in a speech against busing, President Nixon called upon federal courts to restrict equal protection liability to cases where there was discriminatory intent. “In determining whether school authorities are responsible for existing racial separation—and thus whether they are constitutionally required to remedy it—the intent of their action in locating schools, drawing zones, etc., is a crucial factor,” Nixon urged.<sup>36</sup> The intent principle was designed to minimize the responsibility of school authorities for school segregation.

President Nixon sought to embody the intent principle in law: the four Justices he appointed voted with the majority in *Washington v. Davis* to require plaintiffs seeking to establish an equal protection violation to prove discriminatory purpose, and then voted in *Feeney* to make discriminatory

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34. *Cf. id.* at 1955.

35. *See, e.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974); *Keyes v. Sch. Dist. No. 1, Denver*, 413 U.S. 189 (1973); *see also* Siegel, *supra* note 22, at 16 n.73 (reviewing literature on social protest directed at desegregation of schools, especially busing).

36. Richard Nixon, *Statement About Desegregation of Elementary and Secondary Schools*, AM. PRESIDENCY PROJECT (Mar. 24, 1970), <http://www.presidency.ucsb.edu/ws/index.php?pid=2923> [<https://perma.cc/W5FK-CCSV>].

purpose exceedingly hard for plaintiffs to prove.<sup>37</sup> Yes, judges can interpret the intent principle to provide civil rights plaintiffs access to the courts, as Justice Brennan demonstrated in *Keyes*<sup>38</sup> and Justice Stevens showed in *Davis* itself.<sup>39</sup> But the Justices Nixon appointed self-consciously interpreted the intent principle to deny civil rights plaintiffs access to the courts and to shift debate over civil rights remedies from courts to politics.<sup>40</sup>

### B. (Re)reading *Davis* as Authorizing Disparate Impact

*Davis* is properly understood as part of the Burger Court's effort to shift civil rights remedies from courts to politics. Even so, *Davis* did *not* simply deconstitutionalize disparate impact law. Fiss reports that *Davis* "den[ie]d the constitutional status of the *Griggs* principle."<sup>41</sup> This is correct in the sense that the Court ruled that *Griggs* was not a proper interpretation of the judicially enforceable provisions of the Equal Protection Clause. Yet this common reading of *Davis* overlooks a crucial aspect of the Court's decision.

In *Davis*, the Court itself declined to enforce disparate impact standards but, as it did so, the Court encouraged legislators to decide where disparate impact standards should be enforced. The Court's opinion in *Davis* concludes: "[I]n our view, extension of the [disparate impact] rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription."<sup>42</sup> By concluding its opinion on these terms, the Court was holding (1) that the judicially enforceable Constitution did not require state actors to avoid taking action with unjustified

37. President Nixon nominated Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist to the Court. MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 4–5 (2016). All four voted with the majorities in *Davis* and *Feeney*. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).

38. *Keyes*, 413 U.S. at 189, 207–08 (“[A] finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to the remainder. . . . [A] finding of intentionally segregative school board actions in a meaningful part of a school system . . . establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.”).

39. *Davis*, 426 U.S. at 253 (Stevens, J., concurring) (“Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.”); see also Siegel, *supra* note 22, at 16–17 (“*Davis* left open multiple evidentiary pathways to proving purpose. The Court did not repudiate appellate decisions that looked to a policy’s foreseeable impact for evidence of the government’s purpose; indeed, Justice Stevens made a point to emphasize this approach in his concurring opinion in *Davis*.”). For commentators illustrating that liberal expressions of the intent principle are possible, see, for example, Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012); Siegel, *supra* note 22.

40. See Siegel, *supra* note 22, at 17–23 (“The aim of the Burger Court’s discriminatory purpose decisions was to limit dramatically the power of federal courts to intervene in democratic decisionmaking . . . . The Burger Court repeatedly explained that it was for representative government, and not the federal courts, to guide the nation beyond the legacies of segregation.”).

41. See Fiss, *supra* note 15, at 1951.

42. *Davis*, 426 U.S. at 248; see also Siegel, *supra* note 22, at 21.



racially disparate impact, but (2) that the Constitution permitted legislators to impose disparate impact liability; and (3) the Court was inviting actors in representative government to enact civil rights laws imposing disparate impact standards in the appropriate domains.<sup>43</sup>

In short, in *Davis* the Burger Court gave constitutional authorization to disparate impact law, and did so on terms that stimulated long-running public debate about the proper place of disparate impact standards in American life.

### C. *The Court Retreats, Congress Leads, and the Court Follows*

As a consequence, the 1980s were a flashpoint for disparate impact law. In the years after *Davis*, the Burger Court twice retreated from disparate impact standards in interpreting major civil rights legislation. Congress, however, after fierce public debate, responded by legislatively codifying disparate impact standards.

In the 1980s, the Court applied its new discriminatory purpose standard to Section 2 of the Voting Rights Act<sup>44</sup> in *City of Mobile v. Bolden*.<sup>45</sup> In Congress, civil rights advocates moved to amend Section 2 to reflect the “‘result’ or ‘effect’ test” of prior case law,<sup>46</sup> and prevailed over critics who “attacked an effects standard as imposing ‘proportional representation,’ ‘racial balance and racial quotas,’ and conferring ‘racial entitlements’—a term borrowed from the affirmative action debates.”<sup>47</sup> In 1988, Congress also amended the Fair Housing Act (“FHA”),<sup>48</sup> retaining language that had spurred disparate impact claims in the federal courts of appeals.<sup>49</sup>

In voting rights and in all else, the Reagan Justice Department opposed Congress’s efforts to entrench disparate impact standards, and published a

43. Siegel, *supra* note 22, at 21.

44. 52 U.S.C. § 10301 (2012).

45. 446 U.S. 55, 60–62 (1980) (holding that Section 2 of the Voting Rights Act “was intended to have an effect no different from that of the Fifteenth Amendment itself,” which the Court noted is violated only when “motivated by a discriminatory purpose”).

46. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(a), 96 Stat. 131 (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .” (emphasis added)); see also S. REP. NO. 97-417, at 27, 39 (1982) (arguing that the amendment to Section 2 was “necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendment rights,” and that “Section 2 of the Fifteenth Amendment grant[s] Congress broad power to enact appropriate legislation to enforce the rights protected” by the Fifteenth Amendment).

47. Siegel, *supra* note 22, at 24–25 (footnotes omitted). For the history of the amendment to Section 2, see generally Frank R. Parker, *The “Results” Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715 (1983).

48. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

49. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2519–20 (2015). See generally Keith Aoki, *Fair Housing Amendments Act of 1988*, 24 HARV. C.R.-C.L. L. REV. 249, 257–62 (1989).

broadside attack on the use of disparate impact standards in civil rights law.<sup>50</sup> By the decade's end, with the help of the three Justices President Reagan appointed to the Supreme Court, the Court weakened the disparate impact standard in federal employment discrimination law in its 1989 decision, *Wards Cove Packing Co. v Atonio*.<sup>51</sup>

*Again*, as with the Voting Rights Act, Congress fought the Court. Congress sought legislatively to restore disparate impact standards in federal employment discrimination law, and a fierce, several-year battle ensued in Congress and across the nation. *Again*, opponents of disparate impact denounced the civil rights restoration act as a "quota bill."<sup>52</sup> And after President Bush's initial veto, the bill's supporters *again* prevailed when Congress enacted the Civil Rights Act of 1991, which codified the disparate impact framework in law.<sup>53</sup>

If during the 1960s, Congress famously partnered with the Court in enforcing civil rights law,<sup>54</sup> during the 1980s, Congress led and pushed a recalcitrant Court into preserving and affirming disparate impact law. For

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50. See 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). See generally Siegel, *supra* note 22, at 23–29 (describing how the Reagan-era Office of Legal Policy issued reports, such as the 1987 report on disparate impact that "endorsed intent standards and attacked effects standards in antidiscrimination legislation" and urged "that judicial appointments are crucial to *restrict* civil rights law").

51. 490 U.S. 642 (1989). President Reagan made four successful nominations to the Court: elevating William Rehnquist to Chief Justice and adding Justices O'Connor, Scalia, and Kennedy. See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 141, 185, 188–89 (2005). All four voted with the majority in *Wards Cove*. 490 U.S. at 642. In a 1988 report published by the Office of Legal Policy (OLP) called *The Constitution in the Year 2000*, the Reagan-era OLP identified preserving *Washington v. Davis* and upholding the constitutional requirement of discriminatory purpose as crucial issues in judicial nominations that went to "the very heart of how our society will define 'civil rights' and 'discrimination' in the future." OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION 44–50 (1988).

52. Robin Stryker et al., *Political Culture Wars 1990s Style: The Drum Beat of Quotas in Media Framing of the Civil Rights Act of 1991*, in 17 THE FUTURE OF AFFIRMATIVE ACTION: RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 33, 49 (Kevin T. Leicht ed., 1999).

53. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 171 (1991); see also H.R. REP. NO. 102-40, at 2 (1991) (noting that the Civil Rights Act of 1991 "overrule[d] key aspects of . . . *Wards Cove*" by "restor[ing] the *Griggs* requirement" that had "place[d] on employers the burden of proving that employment practices with a 'disparate impact' . . . were required by business necessity"). See generally Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1 (1993) (noting that, as part of a final compromise with the executive branch to pass the bill after President Bush's initial veto, Congress tinkered with the burdens of proof for the disparate impact standard); Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save US? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1100 (1993) (arguing it is "clear that . . . the prohibition of discriminatory effects in the Civil Rights Act of 1991" is "a valid exercise of Congress's section 5 power").

54. See e.g., Post & Siegel, *Equal Protection by Law*, *supra* note 12, at 516–17 (discussing the enforcement of *Brown* through Title VI).

decades now, where disparate impact standards are concerned, representative government has often led and courts followed.<sup>55</sup>

*D. National Acceptance of Disparate Impact Standards—Especially in Nonracial Contexts*

Over the decades, Congress has incorporated effects standards and accommodation requirements into a large body of civil rights legislation governing discrimination on the basis of sex, disability, and religion, as well as race.<sup>56</sup> Conservatives are much more willing to accept accommodation requirements as bona fide nondiscrimination requirements in contexts that are not explicitly racial. To take a recent example, pregnant worker fairness acts requiring the reasonable accommodation of pregnant employees have passed in many states by lopsided majorities.<sup>57</sup> Both the Americans with Disabilities Act

55. See, e.g., Charles F. Abernathy, *Legal Realism and the Failure of the “Effects” Test for Discrimination*, 94 GEO. L.J. 267 (2006).

56. Sex and religion are included as protected categories under federal employment discrimination law. 42 U.S.C. § 2000e-2 (2012). Employers must reasonably accommodate the religious practices of employees. Religion is also covered by the Religious Freedom Restoration Act. 42 U.S.C. §§ 2000bb–2000bb-4 (2012). The Americans with Disabilities Act requires reasonable accommodation of Americans with disabilities. 42 U.S.C. § 12101 (2012). There are also disparate impact provisions in statutes such as the Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2012), and the No Child Left Behind Act of 2001, Pub. L. No. 107-110 (codified as amended in scattered sections of 15 U.S.C., 20 U.S.C., 42 U.S.C., and 47 U.S.C.). See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 496 n.15 (2003). In addition, “nearly every federal agency . . . has adopted implementing regulations under Title VI that prohibit not only intentional discrimination but also ‘disparate impact,’” including the Department of Justice (DOJ), Department of Education (DOE), Environmental Protection Agency, Department of Agriculture, Department of Energy, Department of Transportation, and Department of Housing and Urban Development. Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1156–57 & n.8 (2000).

57. Twenty-three states, the District of Columbia, and five cities have enacted pregnant worker fairness acts. See *Pregnant Workers Fairness*, A BETTER BALANCE, <https://www.abetterbalance.org/our-campaigns/pregnant-workers-fairness> [<https://perma.cc/VQ8L-WFQU>] (last visited Oct. 26, 2018); see also Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 WM. & MARY L. REV. 971, 976 & n.14 (2018). Many of those bills passed with lopsided majorities—some unanimously. E.g., H.R. 212, 147th Gen. Assemb., 2d Reg. Sess. (Del. 2013) (noting that the Delaware bill passed the Senate by a vote of 21-0 and the House by a vote of 41-0); H.R. 1463, 64th Leg. Assemb. (N.D. 2015) (noting that the North Dakota bill passed the House on second reading by a vote of 93-0 and the Senate on second reading by a vote of 45-1); THE COMMONWEALTH OF MASS., AN ACT ESTABLISHING THE MASSACHUSETTS PREGNANT WORKERS FAIRNESS ACT, <https://malegislature.gov/Bills/190/H3680/BillHistory> [<https://perma.cc/9S53-5TQQ>] (last visited Oct. 26, 2018) (noting that the Massachusetts bill passed the House by a vote of 150-0 and the Senate by a vote of 38-0); Antidiscrimination and Workplace Accommodations Revisions, S.B. 59, Gen. Sess. (Utah 2016), Utah St. Legislature, <https://le.utah.gov/~2016/bills/sbillenr/SB0059.pdf> [<https://perma.cc/ZH82-TKZ4>] (last visited Oct. 26, 2018) (noting that the Utah bill passed the Senate on third reading by a vote of 18-9 and the House on third reading by a vote of 59-15, and that the Senate concurred with a final House amendment by a vote of 23-2).

(ADA)<sup>58</sup> and the Religious Freedom Restoration Act (RFRA) passed with overwhelming bipartisan support.<sup>59</sup> Many who supported RFRA invoked concerns about protecting religious minorities and drew on effects and disparate impact standards in advocating passage of the Act.<sup>60</sup> Today, conservatives seek exemptions from laws of general application to accommodate the religious beliefs of Christians and call refusal to provide such accommodations “discrimination.”<sup>61</sup>

### E. Democratic Debate Informs the Court

The decades of debating, enacting, and enforcing civil rights laws with effects and accommodation standards has informed the Court’s judgment. In 2003, when Richard Primus first raised the possibility that the Equal Protection Clause might prohibit disparate impact standards,<sup>62</sup> the nation had been

58. Larry E. Craig, *The Americans with Disabilities Act: Prologue, Promise, Product, and Performance*, 35 IDAHO L. REV. 205, 210 (1999) (noting that the ADA passed the Senate by a vote of 76-8 and the House by a vote of 403-20).

59. See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2527 n.46 (2015) (noting that RFRA passed “by voice vote in the House” before “pass[ing] the Senate 97-3”).

60. See Thomas Scott-Railton, Note, *A Legal Sanctuary: How the Religious Freedom Restoration Act (RFRA) Could Protect Sanctuary Churches*, 128 YALE L.J. (forthcoming 2018) (on file with author).

61. Mississippi’s Religious Freedom Restoration Act characterizes as “discrimination” government’s failure to exempt practices based on particular religious beliefs from laws of general application. H.R. 1523, Reg. Sess. (Miss. 2016); see also News Release, All. Defending Freedom, Mississippi’s Popular Religious Liberty Law Protects Fundamental Freedoms, Should Stand Despite Federal Judge’s Ruling (July 1, 2016), <https://www.adflegal.org/detailspages/press-release-details/mississippi-s-popular-religious-liberty-law-protects-fundamental-freedoms-should-stand-despite-federal-judge-s-ruling> [<https://perma.cc/EW2S-WWSY>] (stating that Mississippi House Bill 1523 aimed to “ensure[] that the government does not discriminate against churches and other organizations . . . for following their deeply held beliefs”). For a similar usage of the word “discrimination,” see Press Release, U.S. Dep’t of Health & Human Servs., HHS Announces New Conscience and Religious Freedom Division (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html> [<https://perma.cc/47CK-VB26>] (“No one should be forced to choose between helping sick people and living by one’s deepest moral or religious convictions, and the new division will help guarantee that victims of unlawful discrimination find justice.”). An interview with Roger Severino, the Director of the HHS Office for Civil Rights in charge of the new Division of Conscience and Religious Freedom, emphasizes that accommodating religious beliefs is a discrimination claim like any other. See *Roger Severino Discusses the HHS Division of Conscience and Religious Freedom*, NAT’L PUB. RADIO (Jan. 18, 2018), <https://www.npr.org/2018/01/18/578956922/rep-vicky-hartzler-on-why-she-supports-the-hhs-division-of-conscience-and-religi> [<https://perma.cc/2SAL-TV7V>]:

There is no contradiction between respecting conscience and protecting against discrimination against people of faith and conscience and respecting all of the other civil rights. They’re all civil rights. This is a package of civil rights. They come together. It’s about freedom for everybody. And my office enforces civil rights laws regarding sex, discrimination, age, disability, race, national origin and the whole spectrum. And they will be fully enforced.

62. A 2003 article in the *Harvard Law Review* claimed to be the “first serious consideration” of whether statutory disparate impact liability might violate the Equal Protection Clause. Primus, *supra* note 56, at 497.

enforcing civil rights laws with disparate impact standards for over thirty years. It was this experience that informed the Court's judgment when Justice Kennedy, writing for the Court in 2009, chose to avoid an equal protection objection to the enforcement of Title VII disparate impact law in *Ricci v. DeStefano*,<sup>63</sup> at that time, only Justice Scalia embraced Primus's suggestion and warned of "the war between disparate impact and equal protection [that] will be waged sooner or later."<sup>64</sup> In 2015, Justice Kennedy, writing for the Court in *Inclusive Communities*, again deflected constitutional challenges to disparate impact.<sup>65</sup> Yet subtly in *Ricci*, and much more openly in *Inclusive Communities*, Justice Kennedy did begin to speak of equal protection limits on disparate impact law.<sup>66</sup>

In *Inclusive Communities*, Justice Kennedy interpreted the FHA to authorize disparate impact claims that would enable plaintiffs to challenge hidden intentional, unconscious, and structural forms of discrimination.<sup>67</sup> Describing the different kinds of bias that disparate impact can remedy, Justice Kennedy drew on the nation's experience enforcing the great civil rights statutes of the Second Reconstruction. At the same time, Justice Kennedy drew on conflict over these statutes, introducing constitutional limitations into the *Inclusive Communities* opinion that were not in *Griggs*, *Davis*, or *Wards Cove*—nor likely within the imagination of the Justices who joined those opinions.

To recall, it was only after President Reagan added Justices O'Connor, Scalia, and Kennedy to the Supreme Court that a majority first voted to impose equal protection limitations on voluntary affirmative action programs in 1989.<sup>68</sup>

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63. 557 U.S. 557 (2009). For an analysis of the constitutional conflict in *Ricci*, see Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2015). Justice Kennedy's opinion for the majority claimed to avoid the constitutional question and decide the case on statutory grounds. 557 U.S. at 593. "Yet even as the Court professed to 'avoid' the constitutional question, its decision under Title VII suggested that New Haven's enforcement of disparate impact might raise equal protection concerns." Siegel, *supra* at 666 (discussing how Justice Kennedy's reformulation of the Title VII standard that governs in certain disparate impact cases is now informed by constitutional considerations).

64. 557 U.S. at 594–95 (Scalia, J., concurring) (citing Primus, *supra* note 56, at 497).

65. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015). Constitutional challenges to disparate impact were raised in the briefing. See Siegel, *supra* note 63, at 668 n.85. Writing for the Court, Justice Kennedy ruled that the FHA prohibits practices with disparate impact. 135 S. Ct. at 2525.

66. For discussion of *Ricci*, see Siegel, *supra* note 63. For discussion of *Inclusive Communities*, see *infra* note 74 and accompanying text.

67. *Inclusive Cmty.*, 135 S. Ct. at 2512 (observing that disparate impact liability allows plaintiffs to challenge decision-makers who reason from "unconscious prejudices and disguised animus"); *id.* at 2521–22 (observing that disparate impact liability allows plaintiffs to employ criteria that arbitrarily entrench prior unjust distributions, for example, "zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification"). For sources asserting that disparate impact law redresses hidden intentional, unconscious, and structural forms of discrimination, see Siegel, *supra* note 63, at 657–59 & nn.17–23.

68. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); see also Siegel, *supra* note 22, at 29. See generally Siegel, *supra* note 22, at 30 (citations omitted):

From the standpoint of doctrine, the Justices argued, they were applying long-established principles, and so changed "nothing" in applying strict scrutiny to affirmative action.

The Court's decision in *Wards Cove*—making it much more difficult for plaintiffs to prove disparate impact claims in Title VII cases—was decided that same year, with Justice Kennedy in the majority.<sup>69</sup> In *Wards Cove*, there was no hint whatsoever that the Equal Protection Clause limited disparate impact law<sup>70</sup>—nor was there in all the ensuing months of allegations that Congress's efforts to restore prior law amounted to a “quota bill.”<sup>71</sup> (An op-ed in the *Wall Street Journal* assailed the new law as a “quota bill” but called unconstitutional only the provision “depriving third parties of the right to challenge consent decrees.”<sup>72</sup>)

It took until 2015 for Justice Kennedy to say that the elements of the plaintiff's burden of proof for which he long ago voted in *Wards Cove*<sup>73</sup> had constitutional significance: “serious constitutional questions,” he cautioned, “might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity.”<sup>74</sup> Here and elsewhere in *Inclusive Communities*, Justice Kennedy warned that the Court might yet invoke the Constitution to restrict how representative government enforces civil rights remedies and impose equal protection limitations on disparate impact of the kind the Court has imposed on affirmative action.

In *Inclusive Communities*, we can see the influence of each side of the disparate impact debate. The Court's decision recognizing the disparate impact claim under the FHA codified decades of civil rights advocacy; the Court's threat

From the standpoint of history, of course, the Justices President Reagan added to the Court were forging a new body of equal protection law. The Justices President Reagan appointed engaged in responsive or “evolving” interpretation, reasoning about the meaning of civil rights precedent and principle from the standpoint of concerns shared by the Reagan Administration and constituencies it sought to represent.

69. 490 U.S. 642 (1989).

70. *Id.* at 650 (discussing disparate impact solely as a “theory of liability” under Title VII, without referring to the Constitution or any constitutional limitations).

71. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1322–23 & nn.135–36 (2011). See generally Govan, *supra* note 53 (recounting the legislative history of the Civil Rights Act of 1991).

72. See L. Gordon Crovitz, *Rule of Law: Bush's Quota Bill: (Dubious) Politics Trumps Legal Principle*, WALL ST. J., Oct. 30, 1991, at A17.

73. 490 U.S. at 659–60.

74. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015). For example, Justice Kennedy, writing for the majority, observed:

[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that “[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact” and thus protects defendants from being held liable for racial disparities they did not create. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653, 109 S. Ct. 2115, 104 L.Ed.2d 733 (1989), superseded by statute on other grounds, 42 U.S.C. § 2000e–2(k). Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and “would almost inexorably lead” governmental or private entities to use “numerical quotas,” and serious constitutional questions then could arise. 490 U.S., at 653, 109 S. Ct. 2115.

*Id.* at 2523 (citations omitted).

of new constitutional limits on disparate impact voiced decades-old conservative animosity to racial disparate impact claims—now powered by conservative appetite to use courts to achieve conservative ends.<sup>75</sup>

#### F. Conflicts over Disparate Impact in the Executive Branch Today

Struggles over disparate impact law have continued to unfold, not only in Congress and on the Court but also in the executive branch. For example, the Obama administration invoked disparate impact enforcement authority under Title VI of the 1964 Civil Rights Act,<sup>76</sup> employing disparate impact—notably, in both the education and criminal law context—as a tool to disrupt the so-called “school to prison pipeline”<sup>77</sup> and in support of police reform in Baltimore and Newark.<sup>78</sup> The Obama administration also responded to the Court’s decision in

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75. On judicial intervention in matters of affirmative action during an era in which conservatives advocated judicial restraint, see Siegel, *supra* note 22, at 31. On conservative advocacy of “judicial engagement,” even while continuing attacks on liberal judicial activists, see Linda Greenhouse, *Actively Engaged*, N.Y. TIMES (Oct. 19, 2011), <https://opinionator.blogs.nytimes.com/2011/10/19/engagement-as-the-new-activism> [<https://perma.cc/B4WR-HPU3>].

76. See Memorandum from Loretta King, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Federal Agency Civil Rights Directors and General Counsels 3 (July 1, 2009), [https://www.energy.gov/sites/prod/files/ED2/civil\\_rights/documents/DOJ\\_Memo.pdf](https://www.energy.gov/sites/prod/files/ED2/civil_rights/documents/DOJ_Memo.pdf) [<https://perma.cc/EF7G-RNCY>] (writing to federal agencies “on the occasion of the 45th anniversary of the passage of Title VI” to “urge [them] to remember that the federal agencies serve an especially critical role in enforcing the Title VI disparate impact regulations”); Memorandum from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Federal Agency Civil Rights Directors (Aug. 19, 2010), [https://www.justice.gov/sites/default/files/crt/legacy/2011/01/21/titlevi\\_memo\\_tp.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/01/21/titlevi_memo_tp.pdf) [<https://perma.cc/99RX-6EEL>] (following up on Loretta King’s memo by explaining the Department of Justice’s efforts under Title VI and describing Title VI as the “‘sleeping giant’ of civil rights law”).

77. Catherine E. Lhamon & Jocelyn Samuels, *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*, DEP’T OF EDUC. & DEP’T OF JUST. (Jan. 8, 2014), <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201401-title-vi.html> [[perma.cc/LY88-PDG9](https://perma.cc/LY88-PDG9)]. Catherine Lhamon, the former Assistant Secretary for Civil Rights at the DOE and one of the signatories of the Dear Colleague Letter, has stated that the letter’s goal was to “make sure that students actually can attend school in a nondiscriminatory environment without racial prejudice and implicit bias[,] . . . rather than being pushed out.” 74 *Interview: Catherine Lhamon Takes on Trump with Probe into Cutbacks on Student Civil Rights*, 74 MILLION (June 27, 2017), <https://www.the74million.org/article/74-interview-catherine-lhamon-takes-on-trump-with-probe-into-cutbacks-on-student-civil-rights> [<https://perma.cc/53HC-C522>].

78. Invoking its authority from disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012), and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789(c) (2012), the Civil Rights Division of the Department of Justice has repeatedly investigated local police departments to assess whether there was a pattern or practice of discriminatory policing. In reports detailing the outcomes of these investigations, the Division on occasion relied heavily on disparate impact evidence in its findings on discrimination. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 72–73 (2016), <https://www.justice.gov/opa/file/883366/download> [<https://perma.cc/N2Q8-UER5>]; CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE & U.S. ATTORNEY’S OFFICE, DIST. OF N.J., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 16–17 (2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark\\_findings\\_7-22-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf) [<https://perma.cc/SJR9-2Z8T>].

*Inclusive Communities* by adopting an important new regulation<sup>79</sup> implementing the “affirmatively . . . further fair housing” provisions of the FHA that required jurisdictions receiving Housing and Urban Development block grants to assess whether their housing policies have racially disparate impacts.<sup>80</sup>

Not surprisingly, the Trump administration is now working to undo the disparate impact regulations of the Obama administration.<sup>81</sup> For instance, upon President Trump’s nomination, Kenneth Marcus was confirmed as Assistant Secretary for Civil Rights at the Department of Education (DOE).<sup>82</sup> Marcus is in print questioning the constitutionality of disparate impact.<sup>83</sup> Conservatives have also challenged DOE’s authority to enforce disparate impact standards in student discipline.<sup>84</sup> DOE is closing school discipline investigations,<sup>85</sup> and, after the

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79. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271 (July 16, 2016) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903). The rule requires recipients of HUD funds to engage in a race-conscious planning process to promote integration. *Id.*

80. 42 U.S.C. § 3608 (2012).

81. See, e.g., Gail L. Heriot, It’s Time for the Executive Branch to Conduct a “Disparate Impact Inventory,” Remarks at the Federalist Society’s Sixth Annual Executive Branch Review (Apr. 17, 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3179766](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3179766) [<https://perma.cc/56CE-DTEK>] (proposing that, “for each statute, regulation, or policy that is being interpreted to impose liability for disparate impact, [the executive branch] needs to get a handle on why it is thought that it would pass strict scrutiny”).

82. Valerie Strauss, *Divided Senate Confirms Controversial Figure to Head Education Department Office for Civil Rights*, WASH. POST (June 7, 2018), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/06/07/divided-senate-confirms-controversial-figure-to-head-education-departments-office-for-civil-rights> [<https://perma.cc/2DND-MUY4>].

83. Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection, 2008–2009* CATO SUP. CT. REV. 53, 83 (2009) (arguing that disparate impact law is “incompatib[le] . . . with equal protection”).

84. See, e.g., Gail L. Heriot & Alison Somin, *The Department of Education’s Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 TEX. REV. L. & POL. (forthcoming), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3104221](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104221) [<https://perma.cc/2H46-R95Q>] (arguing that “aggregate racial disparities in discipline . . . are the result of differences in behavior” rather than racial discrimination); see also Gail L. Heriot, *The Trump Administration Should Conduct a “Disparate Impact Inventory,”* REASON (July 9, 2018, 8:49 AM), <https://reason.com/volokh/2018/07/09/the-trump-administration-should-conduct> [<https://perma.cc/X5TK-TRL4>] (arguing that “disparate impact liability discriminates against whites”). Others are pushing for the administration to rescind the Obama-era Dear Colleague Letter about the school-to-prison pipeline, claiming that disparate impact liability is unconstitutional. See, e.g., Hans Bader, *Civil Rights Experts Issue Report on Unjustified Federal Meddling in Education*, COMPETITIVE ENTERPRISE INST. (Sept. 15, 2017), <https://cei.org/blog/civil-rights-experts-issue-report-unjustified-federal-meddling-education> [<https://perma.cc/BZC8-T5S3>] (calling the “demands” of the Dear Colleague Letter “unconstitutional and a violation of Title VI’s ban on racial quotas”); Roger Clegg & Hans A. von Spakovsky, *Withdraw the Obama Administration’s ‘Dear Colleague’ Letter on School Discipline*, NAT’L REV. (June 15, 2018), <https://www.nationalreview.com/corner/dear-colleague-letter-obama-administration-withdraw> [<https://perma.cc/4L93-HKXH>] (arguing that “the 2014 letter coerced many school systems into adopting illegal racial quotas”).

85. See Annie Waldman, *Shutdown of Texas Schools Probe Shows Trump Administration Pullback on Civil Rights*, PROPUBLICA (Apr. 23, 2018), <https://www.propublica.org/article/shutdown-of-bryan-texas-schools-probe-shows-trump-administration-pullback-on-civil-rights> [<https://perma.cc/Z5F3-TUAB>].



Parkland shooting, the Trump administration appointed a commission to examine the “repeal of the Obama administration’s ‘Rethink School Discipline’ policies.”<sup>86</sup>

Similar initiatives designed to suspend enforcement or eliminate disparate impact standards are appearing in other departments. Under President Trump, the Justice Department has begun dismantling consent decrees that correct violations of constitutional and federal law in local police departments.<sup>87</sup> At the same time, the Trump administration has delayed the implementation of the Affirmatively Furthering Fair Housing Rule until after 2020, and Congress has prohibited the use of federal money for the Rule’s enforcement.<sup>88</sup> In these and

86. Erica L. Green, *Trump Finds Unlikely Culprit in School Shootings: Obama Discipline Policies*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/us/politics/trump-school-shootings-obama-discipline-policies.html> [<https://perma.cc/QL2J-TGFD>].

87. On March 31, 2017, Attorney General Jeff Sessions initiated a sweeping review of all “existing or contemplated consent decrees” that aim to correct violations of the Constitution and federal law in local police departments. Memorandum from Attorney General Jeff Sessions to Heads of Department Components and United States Attorneys on Supporting Federal, State, Local and Tribal Law Enforcement, U.S. Dep’t of Justice (Mar. 31, 2017), <https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html> [<https://perma.cc/W6AK-FAFE>]. The review, which examines whether these agreements comply with new principles from the Trump administration, including that “the misdeeds of individual bad actors should not impugn” police officers’ efforts “in keeping American communities safe,” *id.*, has been recognized as a retreat from the Department’s previous commitment to using consent decrees in addressing unjust policing. *See, e.g.*, Sari Horowitz, Mark Berman & Wesley Lowery, *Sessions Orders Justice Department to Review All Police Reform Agreements*, CHI. TRIBUNE (Apr. 3, 2017), <https://www.chicagotribune.com/news/nationworld/ct-justice-department-police-reform-review-20170403-story.html> [<https://perma.cc/W6PR-SX4K>]; Sheryl Gay Stolberg & Eric Lichtblau, *Sweeping Federal Review Could Affect Consent Decrees Nationwide*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/us/justice-department-jeff-sessions-baltimore-police.html> [<https://perma.cc/S2GQ-KMUN>]. Shortly thereafter, Sessions attempted to suspend an agreement to reform unlawful practices within the Baltimore Police Department. While a federal judge refused to delay the Baltimore consent decree, *see* Peter Hermann & Sari Horowitz, *Federal Judge Approves Baltimore Police Consent Decree*, WASH. POST (Apr. 7, 2017), [https://www.washingtonpost.com/local/public-safety/federal-judge-approves-baltimore-police-consent-decree/2017/04/07/acda85f4-1ba9-11e7-9887\\_1a5314b56a08\\_story.html](https://www.washingtonpost.com/local/public-safety/federal-judge-approves-baltimore-police-consent-decree/2017/04/07/acda85f4-1ba9-11e7-9887_1a5314b56a08_story.html) [<https://perma.cc/LR6Z-GXPY>], the Justice Department appears to have stalled negotiations on an agreement to address unlawful practices in the Chicago Police Department. *See* Editorial, *Illinois Fills in for the Missing-in-Action Justice Department*, WASH. POST (Sept. 2, 2017), [https://www.washingtonpost.com/opinions/illinois-fills-in-for-the-missing-in-action-justice-department/2017/09/02/c8e16484-8e90-11e7-84c0-02cc069f2c37\\_story.html](https://www.washingtonpost.com/opinions/illinois-fills-in-for-the-missing-in-action-justice-department/2017/09/02/c8e16484-8e90-11e7-84c0-02cc069f2c37_story.html) [<https://perma.cc/8JRH-XBEF>].

88. *See* Emily Badger & John Elgion, *Trump Administration Postpones an Obama Fair-Housing Rule*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/upshot/trump-delays-hud-fair-housing-obama-rule.html> [<https://perma.cc/L36K-WFLD>] (“The Department of Housing and Urban Development . . . says it will suspend until 2020 the requirement that communities analyze their housing segregation and submit plans to reverse it, as a condition of receiving billions of federal dollars in block grants and housing aid.”); Glenn Thrush, *Under Ben Carson, HUD Scales Back Fair Housing Enforcement*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html> [<https://perma.cc/4MBB-PB33>] (noting that HUD is “freezing enforcement actions against local governments and businesses” and “sidelining officials who have aggressively pursued civil rights cases”); *see also* Tracy Jan, *Federal Judge Dismisses Lawsuit Accusing HUD Secretary Ben Carson of Dismantling Obama-Era Fair Housing Law*, WASH. POST (Aug. 18, 2018), <https://www.washingtonpost.com/business/2018/08/18/federal-judge-dismisses-lawsuit->

other areas, constitutional critics of disparate impact in the Trump administration are working to dismantle the disparate impact policies of the Obama administration.<sup>89</sup>

As these developments illustrate, the reconstitutionalization of disparate impact could take a very different path than the one Fiss imagines.<sup>90</sup> The Trump administration now has the opportunity to replace Justice Kennedy on the Court.<sup>91</sup> Rather than interpreting the Equal Protection Clause to require the government to avoid taking actions with an unjustified racially disparate impact, a new Court could well interpret the Equal Protection Clause to prohibit or constrain the government from acting to mitigate the racially disparate impact of its actions.<sup>92</sup>

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accusing-hud-secretary-ben-carson-dismantling-obama-era-fair-housing-law [https://perma.cc/PAJ4-7ZX3] (dismissing suit alleging that HUD had dismantled the Affirmatively Furthering Fair Housing Rule when it withdrew a tool for assessing compliance). HUD is also encouraging criticism of the disparate impact regulation at issue in *Inclusive Communities*. See Press Release, U.S. Dep't of Hous. & Urban Dev., HUD To Seek Public Comment on 'Disparate Impact' Regulation (May 10, 2018), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_18\\_035](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_035) [https://perma.cc/23ZW-TLCX].

89. "[T]he Trump administration may be rethinking" disparate impact liability on a variety of issues, as well as limiting its use of race-conscious policymaking. Roger Clegg, *'Disparate Impact' in the News*, NAT'L REV. (Nov. 29, 2017), <https://www.nationalreview.com/corner/d disparate-impact-news> [https://perma.cc/HE4A-P2TR]. Cf. Roger Clegg, *It's Time to Strike Down the Disparate-Impact Doctrine*, WALL ST. J. (Apr. 11, 2018), <https://www.wsj.com/articles/its-time-to-strike-down-the-disparate-impact-doctrine-1523484279> [https://perma.cc/8YNP-9VZ6]. For instance, the DOJ has "opened an investigation into the use of race in Harvard University's admissions practices," suggesting a desire to return to more color-blind policies and practices. See Melissa Korn & Nicole Hong, *Harvard Faces DOJ Probe Over Affirmative-Action Policies*, WALL ST. J. (Nov. 21, 2017), <https://www.wsj.com/articles/harvard-faces-doj-probe-over-affirmative-action-policies-1511260380> [https://perma.cc/JNN8-8F2N]. The administration has also issued an advance notice of proposed rulemaking, seeking comment on whether HUD's 2013 disparate impact rule should be altered in light of *Inclusive Communities*. Reconsideration of HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 83 Fed. Reg. 28,560 (June 20, 2018) (to be codified at 24 C.F.R. pt. 100). And the administration may also be questioning the use of disparate impact liability in environmental law. See Roger Clegg, *Environmental Justice and the Trump Administration*, NAT'L REV. (Mar. 10, 2017), <https://www.nationalreview.com/corner/epa-environmental-justice-trump-administration> [https://perma.cc/M3SW-TDK3] (calling the application of disparate impact theory to environmental law "bizarre" and citing the "good news that the Trump administration has announced that it wants to close the Environmental Protection Agency's Office of Environmental Justice").

At a Federalist Society meeting in the spring of 2018, Gail Heriot, a member of the US Commission of Civil Rights, called for a "Disparate Impact Inventory" across the agencies of the executive branch, as an initial stage of bringing constitutional and statutory challenges to prevailing federal policies. Heriot, *supra* note 81.

90. See Fiss, *supra* note 15, at 1973 (imagining a new mass mobilization and a Third Reconstruction in which the Supreme Court might interpret the Equal Protection Clause through the *Griggs* principle and require government to avoid taking action with unjustified racially disparate impact).

91. See Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html> [https://perma.cc/2HFC-A6A8].

92. As I have described, the Trump administration has already begun to roll back disparate impact regulations. See *supra* notes 81–89 and accompanying text. With new members nominated by President Trump, the Supreme Court may also begin to restrict the ambit of disparate impact claims.

## III.

## CONSTITUTIONALIZATION: COURT-CENTERED AND POPULAR PATHWAYS

So what difference does it make to tell disparate impact's story focusing on these decades of political conflict? What is at stake in the choice between juricentric and dialogic accounts of disparate impact's constitutionalization?

Simply put: the choice between juricentric and dialogic accounts of constitutionalization matters descriptively and prescriptively. We got from *Griggs* to the present understanding of disparate impact law through popular struggle, and it will take popular struggle to get us from here to anywhere else—and, *even where minority rights are concerned*, that is a good thing. Democratic conflict plays a central role in the evolution of our constitutional law, and our law is stronger—and in important respects, better—for it.

As I observed some time ago in my Brennan lecture on the fight over the ERA<sup>93</sup> and again in a recent study of the same-sex marriage conflict, “constitutional conflict produces important social goods”:

Conflict constrained by the role-based interactions of constitutional culture helps “steer” constitutional development over time; it also

As this Comment goes to press, President Trump has nominated Judge Brett Kavanaugh to replace Justice Kennedy on the Court. See Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump's Pick for Supreme Court*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court.html> [<https://perma.cc/V93X-2DCZ>].

If confirmed, Judge Kavanaugh is expected to help move the Court to the right on racial issues. In 1999, Kavanaugh wrote a Supreme Court amicus brief with Robert Bork and Roger Clegg for the Center for Equal Opportunity, an organization committed to a “colorblind society” and opposed to race-conscious policies like affirmative action or disparate impact. Brief of Amici Curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom in Support of Petitioner at \*16–17, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818); see Center for Equal Opportunity, *Mission Statement*, <http://www.ceousa.org/about-ceo/mission> [<https://perma.cc/GCE5-BLD9>]. The brief argued that the government can take race into consideration only when “there is an imminent threat to life or limb (as in a prison race riot)” or to “remed[y] discrimination that was committed both *within that jurisdiction*, and *within the industry or field* in which the classification is imposed.” Brief of Amici Curiae, *supra*.

Clegg recently stated that “he expects Kavanaugh to be ‘more conservative than Justice Kennedy in general on a variety of issues.’” Delano R. Franklin et al., *Kavanaugh's Nomination May Jeopardize Affirmative Action, Experts Say*, HARV. CRIMSON (July 13, 2018), <https://www.thecrimson.com/article/2018/7/14/kavanaugh-affirmative-action> [<https://perma.cc/PY2L-VDUB>]. And civil rights organizations are concerned about Judge Kavanaugh's record. See Ari Berman, *Does Brett Kavanaugh Spell the End of Voting Rights?*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/opinion/sunday/voting-rights-voter-id-kavanaugh.html> [<https://perma.cc/8TRN-G45V>] (arguing that the 1950–60s “era of strong civil rights enforcement is over. With Judge Kavanaugh on the bench, this will be the most extreme court on civil rights issues since the days of Jim Crow”); Eugene Scott, *Civil Rights Organizations Are Worried About Brett Kavanaugh's Potential Impact on Racial Issues*, WASH. POST (July 11, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/07/11/civil-rights-organizations-are-worried-about-brett-kavanaughs-potential-impact-on-racial-issues> [<https://perma.cc/RB4J-4Q84>].

93. Siegel, *supra* note 8, at 1323 (“Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding—a dynamic that guides officials interpreting the open-textured language of the Constitution's rights guarantees.”).

promotes the “attachment” to the Constitution of those who may be deeply estranged from official pronouncements of the law.<sup>94</sup>

In my work with Robert Post, we show that backlash can have “constructive effects”: through conflict, the American constitutional order coordinates its potentially competing commitments to democracy and to the rule of law.<sup>95</sup>

When constrained by role understandings of constitutional culture, *constitutional conflict gives democratic authority and direction to constitutional law*. Citizens like Fiss who disagree with the law need not submit in estrangement. Instead, those who dispute the Court’s decisions can mobilize and endeavor to shape the law.

Of course, we look to courts to play a special role in safeguarding minority rights, and popular mobilization can threaten courts’ ability to act—as the anniversary of *Cooper v. Aaron*<sup>96</sup> reminds us. But as *Cooper* illustrates, courts assert their authority through conflict, not merely consensus. We can see this dynamic at work on the path to marriage equality; backlash preceded—and greeted—the Court’s decision in *Obergefell*.<sup>97</sup>

We commonly trace the authority of constitutional law to consent—often the fiction of constructive consent—and view conflict as a threat.<sup>98</sup> This commonsense view dramatically underestimates the role that conflict plays in sustaining the authority of our constitutional law. As I have elsewhere observed, “[t]heorists of free speech, procedural justice, federalism, and the rule of law emphasize that outlets for voicing and acting on dissent play a crucial role in maintaining the authority of law.”<sup>99</sup> Yet only a few scholars in constitutional theory—many of them at Yale—recognize the integrative role of constitutional conflict.<sup>100</sup>

The history of disparate impact law demonstrates the role of conflict in helping “steer” development of our law and in sustaining the “attachment” of those potentially estranged from it. As the story I recounted opened, opponents of civil rights law had succeeded in electing presidents who appointed Justices hostile to disparate impact and affirmative action law. Left to the Burger, Rehnquist, and Roberts Courts, the *Griggs* principle of disparate impact law

94. Siegel, *Community in Conflict*, *supra* note 12, at 1755 (footnote omitted).

95. Post & Siegel, *Roe Rage*, *supra* note 12, at 374–75.

96. 358 U.S. 1 (1958) (holding that state officials must obey the Court’s constitutional rulings, after Arkansas officials refused to abide by the Court’s ruling in *Brown v. Board of Education* to begin desegregating the state’s public schools).

97. I explore the role of courts in vindicating minority rights in a world of movement conflict in Siegel, *Community in Conflict*, *supra* note 12.

98. See Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755 (2011); Siegel, *Community in Conflict*, *supra* note 12.

99. Siegel, *Community in Conflict*, *supra* note 12, at 1755.

100. See *id.* at 1755–58 nn.129, 131 & 136 (citing scholars in constitutional law and allied fields of law whose work recognizes the integrative role of conflict, including Robert Burt, Heather Gerken, Robert Post, Judith Resnik, Cristina Rodriguez, Louis Seidman, Reva Siegel, Glen Staszewski, and Tom Tyler).

would have died, even as disparate impact (or “indirect effect”) standards descending from *Griggs* flourished in constitutional orders around the world.<sup>101</sup> But, spurred by civil rights advocates and constituents, Congress and various Democratic administrations fought back, and entrenched disparate impact standards in civil rights laws. Today, opponents will tolerate disparate impact standards as measures to police discriminatory purpose<sup>102</sup>—the ground on which the standards would be sustained as a valid exercise of Congress’s power to enforce the Equal Protection Clause.<sup>103</sup> And conservatives enthusiastically embrace disparate impact or accommodation standards (for example, protecting religious conscience) so long as the standards are not designed expressly to redress race discrimination.<sup>104</sup>

This long-running struggle between supporters and opponents of disparate impact standards—unfolding in the courts, Congress, and the executive branch and in matters concerning discrimination on the basis of race, sex, disability and religion—diverges significantly from the ideal conditions specified by Fiss’s theory, which imagines disparate impact as a constitutional remedy for wrongs to blacks that federal courts would impose during a “Third Reconstruction.”<sup>105</sup> In our history, a rather different cluster of legal and political understandings has ensured the survival and spread of disparate impact standards decades after opponents in the Nixon and Reagan administrations plotted disparate impact’s demise.<sup>106</sup> Civil rights advocates defended, entrenched, and expanded disparate impact remedies as they found support. During the Obama administration, the Department of Justice and DOE’s Office of Civil Rights were beginning to enforce impact standards to redress race discrimination in new domains—for

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101. See Julie Suk, *Disparate Impact Abroad*, in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50, at 283 (Ellen D. Katz & Samuel R. Bagenstos eds., 2016); see also FOUNDATIONS OF INDIRECT DISCRIMINATION LAW (Hugh Collins & Tarunabh Khaitan eds., 2018).

102. See, e.g., *Ricci v. Destefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (“It might be possible to defend the law by framing it simply as an evidentiary tool to identify genuine, intentional discrimination—to ‘smoke out,’ as it were, disparate treatment.”); *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (“If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive.” (citing *Washington v. Davis*, 426 U.S. 229 (1976))).

103. See, e.g., *Okruhlik v. Univ. of Ark. ex rel. May*, 255 F.3d 615 (8th Cir. 2001) (noting that, because discrimination with “a discriminatory impact” had “the same effect as intentional discrimination, Congress enacted in response a ‘prophylactic’ ban on disparate impact discrimination”); *In re Emp’t Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1321 (11th Cir. 1999) (rejecting the argument that “the disparate impact provisions of Title VII” cannot be “sustained under Congress’ Fourteenth Amendment enforcement power,” because “disparate impact analysis was designed as a ‘prophylactic’ measure to get at ‘[d]iscrimination [that] could actually exist under the guise of compliance with [Title VII]’” (alterations in original) (citations omitted)).

104. See *supra* note 61 and accompanying text; see also E. Christian Brugger, *Whose Conscience? What Protections? Conscience Provisions in Healthcare and Elsewhere*, WITHERSPOON INST.: PUB. DISCOURSE (May 30, 2018), <http://www.thepublicdiscourse.com/2018/05/21432> [https://perma.cc/9VRG-N9S8] (arguing that “[l]egislation protecting citizens from being forced to cooperate in the LGBT culture *must be passed by this Congress*”).

105. See *supra* Part I.

106. See *supra* notes 36–40, 50–51 and accompanying text.

example, in education and, in the wake of Ferguson, Baltimore, and the Black Lives Matter movement, in law enforcement.<sup>107</sup> But, the Trump administration is now dismantling this law, and much more.<sup>108</sup>

#### CONCLUSION

In the coming decade, will we see a new administration entrench disparate impact standards or unravel disparate impact standards in our law? Working with Congress, will this new administration appoint a Court that interprets the Equal Protection Clause to mandate, or to ban, disparate impact standards in civil rights law?

I am confident that this is a question of *constitutional democracy*, even if questions of democracy seem to me more uncertain today than they ever have in my lifetime.<sup>109</sup> Constitutional law can diverge from justice because it is *our* law, not merely *the* law imposed from on high.<sup>110</sup>

The history I have surveyed suggests that it is not always the Court that has vindicated disparate impact standards; and that disparate impact standards can survive in democratic debate. There is much to guide us here.

It is an important time to remember that there are eras when it is the institutions of representative government—and not the Court—that vindicate minority rights. This same history also suggests that disparate impact can survive in democratic debate (and, possibly, even in a hostile Court), if disparate impact is not defended solely as a measure of *racial* justice, but also serves as a standard of inclusion that other Americans might claim.<sup>111</sup>

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107. See *supra* notes 76–78 and accompanying text.

108. See *supra* notes 82–89 and accompanying text.

109. See Alexander Burns & Michael D. Shear, *Democratic Party Alleges Trump-Russia Conspiracy in New LawsUIT*, N.Y. TIMES (Apr. 20, 2018), <https://www.nytimes.com/2018/04/20/us/politics/dnc-russia-trump-lawsuit.html> [<https://perma.cc/XCW2-PQVH>]; Ross Douthat, *Trump and Russia: One Mystery, Three Theories*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/opinion/trump-putin-russia-theories.html> [<https://perma.cc/7FEC-WAJL>].

110. See Post & Siegel, *Roe Rage*, *supra* note 12.

111. See *supra* notes 56–61 and accompanying text (discussing conservative support for disparate impact and accommodation standards, especially in the area of religion); Danieli Evans, *Socioeconomic Status Discrimination*, 104 VA. L. REV. (forthcoming Nov. 2018) (proposing that discrimination statutes cover socioeconomic status).