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STRANGERS IN PARADISE: *GRIGGS V. DUKE POWER CO.* AND THE CONCEPT OF EMPLOYMENT DISCRIMINATION

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For good thoughts (though God accept them) yet towards men are little better than good dreams, except they be put in act; and that cannot be done without power and place, as the vantage and commanding ground.—Sir Francis Bacon†

I. PROLOGUE: THE OCCASION FOR A DECISION

IN March 1966, the Equal Employment Opportunity Commission (EEOC) negotiated an extensive agreement with the Newport News Shipyard to eliminate employment discrimination.[1] The outcome of these negotiations—which were conducted by the Office of Conciliations which I then headed—was the first major achievement for the EEOC under title VII[2] of the Civil Rights Act of 1964.[3] Following that episode, Ken Holbert, Deputy Chief of Conciliations, and I decided to try to negotiate a model conciliation agreement on the subject of discriminatory employment testing. We knew that many companies had introduced tests in the 1950's and early 1960's

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† *Of Great Place*, in FRANCIS BACON'S ESSAYS 31-32 (Everyman's Library ed. 1906).

1. *See generally* A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 328-407 (1971).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970), prohibits discrimination in employment on grounds of race, color, religion, sex, and national origin. It creates the Equal Employment Opportunity Commission which is authorized to receive charges of discrimination, to investigate such charges, and where it has reasonable cause to believe a charge is true, to attempt to eliminate the alleged discriminatory employment practice by informal conciliation and persuasion. If conciliation fails, the charging party is entitled to sue in federal district court. The process is described in M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 61-102 (1966).

The Commission established an Office of Conciliations. From its creation until April 1967, I served as Chief of that Office. Mr. Holbert was my deputy at the time. He later served as Acting Director of Compliance and Acting General Counsel. The work of the Office is described in A. BLUMROSEN, *supra* note 1, at 51-101.

In March 1972, Congress amended title VII to enable the EEOC to sue private employers if conciliation failed. The Commission was also given jurisdiction over state and local government employment. Also, Congress designed the procedure so that the EEOC could not prevent an individual from suing. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

3. Pub. L. No. 88-352, 78 Stat. 241.

when they could no longer legally restrict opportunities of blacks and other minority workers and that the tests had proved to be major barriers to minority advancement. We therefore sought to negotiate a solution that would induce industry either to stop using these tests, or, at the least, to modify their use so that they did not have a discriminatory effect.

Our attempt failed completely. We chose as the springboard for obtaining the model settlement a finding of the Commission that there was reasonable cause to believe a paper company in Louisiana had violated title VII,[4] because the finding had mentioned the use of tests. However, when we attempted to negotiate on the testing issue, company officials pointed out that the reasonable-cause finding had merely alluded to the issue of employment tests. They maintained that their tests for general ability were important in enabling them to secure generally competent workers and that by using these tests, the company had developed a capable work force. They would not give up the tests unless compelled to do so. And we could not persuade the officials that title VII required the abandonment of these devices.

As we flew back to Washington, we reflected on the setback we had just received. We concluded that further conciliation efforts concerning testing would be useless unless the Commission published a clear official statement delineating what the law required. Without such official support, efforts at persuasion would fail because of the employer's intense interest in retaining his testing programs. We therefore decided to press within the EEOC for the adoption of guidelines that would resolve the legal questions concerning discriminatory testing. We encouraged discussions within the Offices of Research and Compliance and the involvement of outside specialists in the testing field, and sought the opinion of the EEOC's General Counsel. The Commissioners and staff acted on our urging. As a result, the Commission issued its guidelines on employment testing on August 24, 1966.[5]

4. Before the EEOC can begin conciliation proceedings, it must find that there is reasonable cause to believe a charge of discrimination is true. 42 U.S.C. § 2000e-5(a) (1970), *as amended,* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 104. The evolution of this procedure is described in A. BLUMROSEN, *supra* note 1, at 43-47.

5. The original guidelines were issued in a printed pamphlet. A brief excerpt appears at 35 U.S.L.W. 2137 (EEOC announcement, Aug. 24, 1966). A more detailed version of the guidelines was published on August 1, 1970, in the Federal Register. 35 Fed. Reg. 12333 (codified at 29 C.F.R. §§ 1607.1-.14 (1972)). The original guidelines were developed in the Office of Research and Reports under the general supervision of its then director, Charles Markhem, and the direct supervision of its then Chief of Technical Studies, Phyllis Wallace.

The guidelines represented the EEOC's interpretation of section 703(h)[6] of title VII, which permits the use of a "professionally developed" ability test so long as that test is not "designed, intended or used" to discriminate. They rejected the position that the use of *any* test developed by a professional in the field of institutional or industrial testing was protected under title VII and thus laid to rest one of the arguments presented by employers in conciliation conferences.[7] The guidelines also interpreted the phrase "professionally developed" to refer to tests measuring an employee's ability to perform the specific job or class of jobs for which he has applied, and thereby rejected the argument that an employer could test for "general ability or promotability."[8] The remainder of the guidelines constituted a Commission endorsement of contemporary psychological testing standards developed by professional associations.

For those of us involved in title VII's administration, the guidelines provided the basis for a determination that certain testing practices were illegal. On this authority, our Office resumed efforts at conciliation. The case of the paper company in Louisiana was reexamined by the Commission under the guidelines and a revised reasonable-cause finding issued. This opinion was among the first published by the Commission and was later cited by the Supreme Court.[9] Many other cases were processed under the guidelines. In some, attempts at conciliation were successful. When negotiations failed or were not undertaken because of the huge backlog of work at the Commission, suits were frequently brought in federal court under title VII, often with the litigation conducted by attorneys of the NAACP or the Legal Defense and Education Fund, Inc.

One such case was *Griggs v. Duke Power Co.*[10] It reached the

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6. 42 U.S.C. § 2000e-2(h) (1970).

7. The opening paragraph of the 1966 guidelines reads:

> Title VII of the Civil Rights Act of 1964 provides that an employer may give and act upon the results of "any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate because of race. . ." (Sec. 703(h)). The language of the statute and its legislative history make it clear that tests may not be used as a device to exclude prospective employees on the basis of race. The Commission accordingly interprets "professionally developed ability tests" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

8. *See* note 7 *supra*.

9. Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971). The Commission's opinion, with the parties' names deleted, appears in CCH EMPL. PRAC. GUIDE ¶ 17,304.53 (EEOC Dec. 2, 1966) and is reprinted in Appendix A *infra*.

10. 401 U.S. 424 (1971).

Supreme Court and provided the first occasion for the high court to determine the nature and scope of the prohibition on racial discrimination in employment under the Civil Rights Act of 1964.[11] Although issued without fanfare, *Griggs* is in the tradition of the great cases of constitutional and tort law which announce and apply fundamental legal principles to the resolution of basic and difficult problems of human relationships. The decision has poured decisive content into a previously vacuous conception of human rights. It shapes the statutory concept of "discrimination" in light of the social and economic facts of our society. The decision restricts employers from translating the social and economic subjugation of minorities into a denial of employment opportunity, and makes practical a prompt and effective nationwide assault by both administrative agencies and the courts on patterns of discrimination.[12]

The assumption underlying *Griggs* is that the Civil Rights Act of 1964 protects the interests of minority groups and their members in securing and improving employment opportunities. *Griggs* views discrimination not only as an isolated act by an aberrant individual wrongdoer that affects only an individual complainant, but also as the operation of industrial-relations systems that adversely affect minority group members. Title VII law thus focuses on the harm to both the group and the individual.

Griggs redefines discrimination in terms of consequence rather than motive, effect rather than purpose. This definition is new to the field of employment discrimination, in which a subjective test had previously been used. The Court applied this new definition to invalidate hiring standards based upon education and testing, and in the process gave strong legal sanction to the EEOC's statutory interpretations.

Significantly, the *Griggs* opinion was written by Chief Justice Burger, and concurred in by seven of his brethren (Justice Brennan

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11. The first case reaching the Supreme Court dealing with substantive rights under title VII was Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), in which a company rule against hiring women with preschool-age children was challenged. The Court held implicitly that sex did not have to be the sole cause of deprivation of female employment opportunities for a practice to be discriminatory. It was enough that men with preschool-age children were hired. However, the Court left open the possibility that the employment practice was a bona fide occupational qualification under the Act.

The only other Supreme Court decision on the merits, Love v. Pullman Co., 404 U.S. 522 (1972), upheld an EEOC administrative procedure concerning federal-state relations in the processing of cases under title VII. The Court made it clear that a technical reading of title VII's procedural provisions was inappropriate.

12. In March 1972, approximately one year after *Griggs*, Congress amended title VII and strengthened the powers of the Commission and the rights of the complainant. *See* note 2 *supra*.

absented himself from the case). The case was decided during a time in which the Supreme Court appeared to be shifting toward a cautious approach to constitutional issues.[13] Yet, it is a sensitive, liberal interpretation of title VII. It has the imprimatur of permanence and may become a symbol of the Burger Court's concern for equal opportunity. Although the Court may take a more cautious approach to constitutional rights of minorities,[14] *Griggs* makes clear that sympathetic interpretation of *statutory* rights is the order of the day. This dichotomy accords with the notion that the legislature rather than the courts should be the prime policy maker in this field. The recognition of legislative suzerainty in this area should be, in the long run, desirable. At this point in our history, many important civil rights have received statutory recognition from Congress.[15] It is more important, today, that we be concerned about the broad and practical implementation of these rights than about their constitutional foundation. A judge may feel more comfortable in rendering a liberal interpretation of a statute than in interpreting the Constitution since a decision based on the Constitution is less easily revised.

II. Equal-Opportunity Day for Black Workers in the South

In *Griggs*, the Supreme Court dealt with an archetype of the subordination of black workers in the South. This pattern, explored in cases[16] and by commentators,[17] involved a broad range of industrial-

13. *Compare* Dandridge v. Williams, 397 U.S. 471 (1970), *with* Shapiro v. Thompson, 394 U.S. 618 (1969).

14. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Palmer v. Thompson, 403 U.S. 217 (1971).

15. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a to 2000h-6 (1970)), recognized the right to be free from discrimination in places of public accommodation, from segregation in public facilities, from discrimination in federally assisted programs, and from discrimination in employment. The right to be free from discrimination in voting was strengthened by the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, *as amended*, 42 U.S.C. §§ 1973-73p (1970). Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3602-19 (1970)), established the right to be free from discrimination in housing.

16. *E.g.*, United States v. Jacksonville Terminal Co., 451 F.2d 218 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Hicks v. Crown Zellerbach Corp., 310 F. Supp. 536 (E.D. La. 1970); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

17. *E.g.*, A. Blumrosen, *supra* note 1, at 159-217; R. Marshall, The Negro and Organized Labor (1965); Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598 (1969); Gould, *Employment, Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 How. L.J. 1 (1967); Rosen, *The Law and Racial Discrimination in Employment*, 53 Calif. L. Rev. 729 (1965).

relations devices and understandings that defined the "place" of black workers.

In enacting the 1964 Civil Rights Act, Congress provided a one-year delay in the effective date[18] to give labor and management an opportunity to comply voluntarily with the Act's provisions, and to allow the EEOC and the Department of Justice to "tool up" for the enforcement of the Act. Neither of these events occurred. During this one-year moratorium, southern industry engaged in a flurry of activity that sometimes involved genuine changes in industrial-relations systems, but more often produced only a "cosmetic change"; many employers adopted seemingly neutral personnel policies, which, in fact, perpetuated the subordinate position of black workers.[19] Tests and educational requirements were adopted extensively in the early 1960's to achieve this result. The tests could be justified as "sound" personnel practices and would also permit an employer to continue the subordination of minorities.

Before 1965 at the Duke Power Company, blacks were assigned only to the labor department to perform janitorial and low-level maintenance work throughout the Dan River Steam Station. All jobs in other departments were reserved for whites.[20] The economic bite of the discrimination was clear. The top rate of pay in the "black" department was $1.55 per hour, which was fourteen cents below the bottom rate in the white departments and nowhere near the white departments' top rates, which ranged from $3.18 to $3.65 per hour.[21] The company did not have formal criteria for employment when this system of segregation was first implemented, but in 1955 it started to require a high school diploma for employment in the white departments, ostensibly to upgrade the quality and flexibility of the work force.[22] Blacks with high school diplomas were, after 1955, still employed only in the labor department.[23]

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18. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716(a), 78 Stat. 266.

19. Seniority systems were revised in some instances to permit minority workers to enter all-white jobs, with lower seniority than those white workers already employed, in accordance with the principle of Whitfield v. Steelworkers Local 2708, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959). (For a discussion of *Whitfield*, see text accompanying notes 111-13 *infra*.) Other seniority systems which had been fair on their face but which operated with an understanding that minority workers could not rise above a certain level of jobs, were reformed to reduce the formal opportunities for minorities.

20. Griggs v. Duke Power Co., 292 F. Supp. 243, 247 (M.D.N.C. 1968), *modified*, 420 F.2d 1225 (4th Cir. 1970), *revd.*, 401 U.S. 424 (1971).

21. Griggs v. Duke Power Co., 420 F.2d 1225, 1228 (4th Cir. 1970), *revd.*, 401 U.S. 424 (1971).

22. 420 F.2d at 1228-29.

23. 292 F. Supp. at 247.

Duke Power responded to title VII's enactment by revising its hiring and transfer standards in 1965. A simple test was imposed for entry into the black (labor) department.[24] For initial employment in the previously all-white departments, the passage of two standard industrial tests—the Wonderlic and the Bennett—was superimposed upon the high school diploma requirement.[25] For transfer of incumbents between departments, the company at first required a high school diploma.[26] This requirement kept the black workers without diplomas from crossing into the white departments, but it also prevented some white workers in the least desirable white units from transferring into other white departments. They protested, and the company then provided that the passage of the two tests, Bennett and Wonderlic, would be sufficient to transfer between departments.[27] Workers in the white departments without high school diplomas were not required to take any tests to retain their jobs or to be promoted within their departments.

When the company had completed its response to title VII in 1965, three classes of blacks could be discerned:

1. Blacks possessing high school diplomas who were in the labor department by virtue of the racial assignment. They had not transferred to previously white units prior to the filing of the complaint with the EEOC.[28]
2. Blacks hired into the labor department before July 2, 1965, who did not have high school diplomas. They had to pass the two tests to transfer into the white departments, whether they were hired before or after the high school diploma requirement was implemented in 1955.
3. Black applicants for new employment after July 2, 1965. To obtain employment in what was previously the black department, they had to pass a simple test. To be employed in a formerly white department, they had to have earned a high school diploma and to pass the two tests. The same standards were applied to white applicants for employment.

As a class action,[29] the *Griggs* litigation involved those black workers who had achieved formal education but had found that it

24. 292 F. Supp. at 245.

25. 292 F. Supp. at 245-46.

26. 292 F. Supp. at 246.

27. 292 F. Supp. at 246.

28. Of the fourteen blacks employed at the Dan River Station, three had high school diplomas. One of them was transferred from the labor department after charges had been filed with the EEOC but before suit was brought in district court. 401 U.S. at 427 n.2; 420 F.2d at 1229. The other two blacks were promoted during the pendency of the suit. 420 F.2d at 1229.

29. 292 F. Supp. at 244.

did not help them obtain better jobs, those who did not have as much formal schooling and were locked into the black department, and those black workers in the labor market who had a lower level of formal education and who scored lower on tests than white workers in the labor market. These facts and interests shaped the issues of the case which, in turn, illuminated the fundamental legal question under title VII: how is discrimination defined?

III. What Is Discrimination?

During the twenty-year period preceding 1965, a time in which some legal effort to eradicate or control racial discrimination in employment had been made, there was little opportunity for the courts or legal scholars to work out carefully a legal definition of discrimination.[30] The term had not acquired a fixed meaning in the context of employment opportunities, a result in part attributable to the failure of civil rights agencies to adopt a definite law enforcement approach in administering federal and state fair-employment-practice laws and regulations.[31] The state civil rights agencies tended to concentrate their efforts on achieving "voluntary compliance," which meant that they did not take many cases through the administrative-hearing procedures.[32] By 1962, the civil rights agencies in the twelve states that established such bodies during the 1940's and 1950's had brought, together, only sixty-two cases to public hearing.[33] Since the state courts would pass on the legal questions concerning discrimination under the state statutes only after the agency process was completed, the nonlitigation approach adopted by the state civil rights agencies meant that courts rarely had to deal with discrimination problems. The few state court opinions that did face up to the issue provided little aid in resolving the problem of defining discrimination. It is not too helpful to be told that discrimination can be practiced by "methods subtle or elusive,"[34] if we are not told of its contours.

The legislators have responded to the tragic social and economic plight of minorities through the enactment of civil rights legislation.

30. M. Sovern, *supra* note 2, at 42-43:

> [W]hether an employer has discriminated is a subtle factual question made especially difficult by uncertainties in the very meaning of discrimination, a term the statutes do not define. . . . The statutes are quite general and litigation has been so infrequent that the courts have had little occasion to supply guidance.

31. *See generally* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 Harv. L. Rev. 526 (1961).

32. A. Blumrosen, *supra* note 1, at 14.

33. S. Rep. No. 867, 88th Cong., 2d Sess. 7 (1964).

34. Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954).

They sought to provide a legal solution to a complex social problem and uniformly left many problems, including the definitional problems, to the agencies that must enforce these laws and to the courts that must pass upon the validity of these agencies' policies and actions.

At the risk of some simplification, we can identify in the law and literature three concepts concerning the nature of discrimination in employment opportunities. In the order of their emergence, they are as follows:

Concept of Discrimination	Interest Protected and Type of Conduct Proscribed	Common Law Parallel
1. Discrimination consists of acts causing economic harm to an individual that are motivated by personal antipathy to the group of which that individual is a member. Proof of discrimination requires evidence of acts, motive (a mens rea), and harm.	Individual economic interest of complainant. Protected against deliberate denials of employment opportunities based on racial prejudice.	Cases involving malice or willful and wanton misconduct. Mens rea in criminal law.
2. Discrimination consists of causing economic harm to an individual by treating members of his minority group in a different and less favorable manner than similarly situated members of the majority group. Proof involves evidence of differential treatment and harm. Defense of justification available.	Recognition of the individual's interest in securing the same treatment as whites. "Unequal treatment" which may be evidence of racial animus.	Negligence cases in which reasonable man standard has not been adhered to by defendant. Also, constitutional cases involving equal protection, particularly the jury cases.
3. Discrimination consists of conduct that has an adverse effect on minority group members as compared to majority group members. Defense of justification for compelling reasons of business necessity is recognized.	Group interest in seeing that its members are not harmed in employment because of discrimination elsewhere in the society. Individual interest in economic opportunities. Protected against all types of conduct where the injury is foreseeable. Covers all industrial-relations systems because their consequences are foreseeable.	Res ipsa loquitur. Interference with advantageous relations. Strict liability.

Initially, the dominant if not exclusive definition of discrimination was based upon the evil-motive, mens rea, or state-of-mind test.[35]

35. *See, e.g.*, Bonfield, *The Substance of American Fair Employment Practice*

Under this test, it was necessary to establish that respondent was motivated by dislike or hatred of the group to which complainant belonged. This concept produced a series of almost insuperable difficulties, as individual cases became bogged down in the vagaries of fact-finding. The potential law enforcement thrust of the statute was lost in the search for circumstantial evidence that would reveal the employer's state of mind. This subjective focus contributed to the acceptance of the view that education of employers on the legal implications of employment discrimination rather than law enforcement was the proper procedure to follow in eliminating discrimination. This emphasis on voluntary compliance contributed substantially to the ineffectiveness of the state agencies.[36]

Civil rights advocates realized in the 1950's that the state agencies were floundering, and therefore attempted to push legislatures into enacting procedural changes that they thought would free agencies from the bog of individual case-handling. They sought for the agencies the power to initiate "pattern-centered proceedings," which could be commenced on the basis of the agency's analysis of a general situation rather than on the basis of individual complaints.[37] This campaign was frequently successful as far as securing legislation was concerned, but success stopped in the legislative hallway; it did not carry into the administrator's office. Civil rights advocates to this day have not realized the importance of continuing political pressures with respect to both the budget and the top staff appointments of civil rights agencies. This deficiency is *not* found in the political activities of either labor or management.

In addition to this deficiency, the administrators lacked a legal concept that would enable them to discover a pattern of discrimination. How does one find a "pattern" of individual, evilly motivated acts that cause economic harm to individual minority group members? The procedural change permitting pattern investigations did not have, as a corollary, a substantive change in the concept of discrimination.[38] It therefore proved to be of little use.

It did, however, force the evolution of a second and closely related concept of discrimination. State agencies began to apply the

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Legislation I: Employers, 61 NW. U. L. REV. 907, 955-56 (1967); Note, *An American Dilemma—Proof of Discrimination*, 17 U. CHI. L. REV. 107, 109 (1949).

36. *See generally* A. BLUMROSEN, *supra* note 1, at 3-50; M. SOVERN, *supra* note 2, at 19-60.

37. *See generally* M. SOVERN, *supra* note 2, at 31-46.

38. Blumrosen, *Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study*, 19 RUTGERS L. REV. 189, 234-37 (1965), discusses the substantive implications of a government-initiated proceeding in which no individual has filed a complaint.

"equal protection" concept of discrimination.[39] This test might be viewed simply as a method of proving the evil motive required under the earlier concept of discrimination. Even so, the equal-treatment test became recognized as a distinct method for discerning discrimination[40] and continued to provide a method for discerning discrimination as late as 1965. Professor Sovern expressed the prevailing view when, shortly after the 1964 Civil Rights Act was enacted, he suggested that discrimination required a purpose or motive to harm an individual because of his race, which purpose could be inferred from certain conduct, mainly that denying equal treatment to minorities.[41]

The fundamental question which permeated the activity of the EEOC in its formative days under title VII and which has since consumed much of the energy of lawyers and judges in cases brought under title VII has concerned the concept of discrimination. Respondents have pressed to confine title VII within the mold of the older definitions, while the EEOC, the Departments of Justice and Labor, and plaintiffs' counsel in individual cases have sought to establish, in the crucible of administration and litigation, an additional dimension to the concept.

This effort was, without doubt, crucial. The traditional definitions of discrimination permitted the employer to translate the unfair treatment of minorities in other segments of society into a limitation on employment opportunities. For example, a much higher proportion of minority group members than of whites are arrested.[42] Therefore, a policy that prohibits employment of persons with arrest records will exclude a higher proportion of minorities, and thus the administration of the criminal law may restrict employment opportunities of minorities.[43] Similarly, if, as in *Griggs*, the employer requires a high school diploma and minorities have a smaller propor-

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39. The equal protection concept had been articulated as early as 1947. Note, *The New York State Commission Against Discrimination: A New Technique for an Old Problem*, 56 YALE L.J. 837, 849 (1947), discussing the then new New York statute, stated: "[I]t insures only that the same standards be applied to all employees and applicants."

40. For an application by a state commission of the equal protection standard, see Lefkowitz v. Farrell, 9 RACE REL. L. REP. 393 (N.Y. Commn. Human Rights 1964), *discussed in* M. SOVERN, *supra* note 2, at 179-203.

41. M. SOVERN, *supra* note 2, at 70-73. Professor Sovern thought that employment tests were legal under title VII even if not job-related. However, he thought the EEOC should try to persuade employers to use requirements more suited to the individual job. *Id.* at 73. *See also* note 54 *infra*.

42. Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970).

43. The practice of automatically disqualifying applicants with several arrests (but no convictions) when not compelled by business necessity was held unlawful in Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970).

tion of high school graduates for reasons rooted in their subordination, the diploma requirement spreads the effects of discrimination in education into the employment field. If an employer locates in a white suburban area and selects his employees from residents of the area, the pattern of housing opportunities will have a similar limiting effect on employment opportunities; or if an employer with an all-white work force only selects employees referred by his present employees, patterns of social segregation will determine the racial composition of his work force.

These practices were not condemned by either of the traditional definitions of discrimination. An employer could impose such requirements without an intent to exclude minorities, for each of the requirements could be justified on grounds of business convenience. That is to say, the employer might not want to take risks associated with persons having arrest records, or have workers without the general education or the perseverance evidenced by a high school diploma, or risk the increased tardiness that may be associated with an employee's living far from the plant, or have a possibly inharmonious social situation occur in the plant as a result of an integrated work force. In making these decisions, the employer would not be violating the evil-motive concept of discrimination. In addition, the employer could impose these requirements "equally" on white and black alike, and, as a result, not violate the equal-treatment concept of discrimination either.

The older concepts of discrimination thus permitted the employer to insulate his employment practices from the social and economic problems that had arisen in society as a consequence of the pervasive pattern of discrimination and subordination of minorities. Employers simply did not have to address themselves to this problem. Hence, under these older concepts, minorities remained at the bottom of seniority lists and at the top of the unemployment statistics. Meanwhile, the industrial-relations system went on its way, leaving the subordinated position of minorities unchanged. Prior to title VII and *Griggs*, employment was not a meaningful avenue of escape from subordination.

Under the pressures of day-to-day decision-making by administrative agencies, with the aid of the private and government attorneys who brought the first litigation under title VII,[44] with some academic

44. EEOC findings of reasonable cause to believe that a violation of title VII had occurred were based on the new objective definition. The EEOC Office of State and Community Affairs under the direction of Peter Robertson encouraged state agencies to adopt objective standards in dealing with the problem of fair recruitment.

assistance[45] and through the initial judicial decisions,[46] the third concept of discrimination was born. It sought to relate the law of discrimination more closely to the social problems that had generated the enactment of the Civil Rights Act of 1964. Under this concept discrimination was measured in terms of the adverse consequences inflicted upon minorities, no matter how achieved. Discrimination became conduct rather than a state of mind—conduct that was illegal unless justifiable under the narrow corridor provided by title VII.[47]

This third concept of discrimination drew heavily on the conceptual framework provided by the law of torts for a legally sound analysis that would make the Civil Rights Act of 1964 viable. The seniority and testing cases in the South, and the recruitment and hiring problems in the North, provided the occasion for the application of this concept. It emerged from a matrix of legal, jurisprudential, and sociological ideas.

These ideas are not described here in order to analyze their implications. Rather, they have operated as forces on the minds of those who shaped the law. They represent ways of thought that possess a long jurisprudential history and are embedded in the attitudes of lawyers. Once a concept is grasped, it is often applied without conscious awareness of or reference to its genesis. This predisposition is of fundamental importance in understanding the actions taken by administrators, advocates, and judges.

One significant idea arose from legal concepts permeating the law of tort. The intentional infliction of harm is generally actionable in tort law unless justified. Intention, however, is a legal construct that can connote a range of mental states, from a desire to reach a given result, to the likelihood that a given result will flow from a given action.[48] In the federal statutory context, for example, the concept that the foreseeable results will be viewed as intended

45. The clearest discussion of the necessity for a shift to the objective discrimination is Cooper & Sobel, *supra* note 17. Their concern was generated in part by their participation as counsel in several title VII cases. I articulated the same conclusion in my works *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969), and *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 *id.* 465 (1968).

46. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970); Hicks v. Crown Zellerbach Corp., 310 F. Supp. 537 (E.D. La. 1970); Clark v. American Marine Corp., 297 F. Supp. 1305 (E.D. La. 1969); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

47. For a discussion of the narrow corridor afforded by business necessity, see pt. V *infra*.

48. W. PROSSER, THE LAW OF TORTS § 8 (4th ed. 1971).

is well understood.[49] The concept of interference with advantageous relations, such as contractual relations, is a special case of intentional tort theory.[50] It was devised to deal with the type of interests in economic activity that are similar to those protected under title VII.[51] Basic notions concerning what is intentional interference with an advantageous relation may have contributed to the rise of this third concept of discrimination.

A second idea is that of legal protection for group interests. Discrimination of the type prohibited by title VII is a class- or group-oriented phenomenon that challenges the status of every member of the class.[52] Thus the group has an interest in the status of each of its members. The recognition of this group interest takes on both substantive and procedural implications. Substantively, discrimination is established by showing that acts of discrimination have been taken against the class to which plaintiff belongs. Procedurally, plaintiff initiates a class action suit. Jurisprudentially, this area affords an advanced example of the recognition given to the concept of group interest, which was illuminated by Professor Cowan more than a decade ago.[53]

A third idea focuses on systems as subjects for legal regulation. This concept has had a full development in labor relations and labor law. The industrial-relations system involves the allocation, functions, conditions, and compensation of employees in large-scale enterprise. It has as one primary purpose the *reduction* of the areas of individual discretion among managers and supervisors. For example, specific hiring procedures may prevent the local manager from hiring his friends and assure distant top management of some quality control over employees. A seniority system, likewise, stops the foreman from playing favorites with promotions by requiring

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49. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967); NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-28 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17, 45-46 (1954).

50. 1 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 6.5-.13 (1956); W. PROSSER, *supra* note 48, §§ 129-30.

51. Compare Jersey Printing Co. v. Cassidy, 63 N.J. Eq. 759, 765, 53 A. 230, 232 (1902):

> A large part of what is most valuable in modern life seems to depend more or less directly upon "probable expectancies." When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these "probable expectancies" are bound to increase. It would seem inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these "probable expectancies."

52. "Discrimination by its very nature is directed against an entire class . . . ." Jackson v. Concord Co., 54 N.J. 113, 125, 253 A.2d 793, 799 (1969).

53. Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958).

him to give the job to the most senior man who possesses the qualifications for the position. All such systems leave room for individual judgment of managers, but the hiring procedures themselves dictate the initial parameters within which this judgment may be made. Thus the personnel director will never have the chance to discriminate against a black youngster who never heard of the vacancy in the first place, or whose score on the Wonderlic test knocked him out of consideration for the job without an interview. Similarly, the black steel worker seeking a promotion will not be rejected by the foreman because of race, for that opening will be filled, instead, through the operation of the seniority system by the most senior man in the line of progression—who will probably be white.[54]

Finally, the principle of liberal construction of the statute is relevant. Title VII of the Civil Rights Act of 1964 was aimed at "all aspects of discrimination,"[55] even though the Senate Committee that issued the report using these words may not have known exactly what they meant. Title VII was intended as a serious response to a major social problem, and, for this reason, the Equal Employment Opportunity Commission since 1965 has attempted to make the statute effective in dealing with the social problem by giving it the broadest possible construction. While doubters might have faltered and not pressed issues to judicial decision, the Commission, during its first years, moved in relation to the need. The issuance of the guidelines and the development of the concept of written reasonable-cause decisions[56] provided a body of law that has crystallized the concept that discrimination should be defined in terms of consequence.[57]

54. For an illuminating discussion of this aspect of seniority systems, see United States v. Jacksonville Terminal Co., 451 F.2d 418, 448-55 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). *See also* S. REP. No. 92-415, 92d Cong., 1st Sess. 5 (1971):

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially "human" problem, and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

55. S. REP. No. 867, 88th Cong., 2d Sess. 10 (1964).

56. One of the first written decisions finding reasonable cause to believe the Act was violated is reprinted in Appendix A *infra*.

57. The United States Chamber of Commerce in a brief submitted as amicus curiae in *Griggs* argued that this deliberate effort to extend the statute's scope was reason not to give deference to the guidelines. (This argument is reproduced in Appendix B *infra*.) In rejecting this argument, the Supreme Court used the standard principle of

The principle of liberal construction requires an anchor, which for title VII purposes lies in section 703(a)(2).[58] This provision makes it unlawful for an employer to "adversely affect" an individual's employment status because of race, color, religion, sex, or national origin. The "adversely affect" language has an obscure genesis. It was not part of the original New York fair employment law,[59] and thus presents a technically new point of departure for purposes of statutory interpretation. It suggests that a court's focus of attention should be more on the consequences of actions than on the actor's state of mind.

With these four notions setting the legal background, government attorneys from the EEOC and Departments of Labor and Justice pressed for acceptance of this third definition of discrimination. Gaining acceptance of this definition also became an integral part of the litigation efforts of the NAACP and the Legal Defense and Education Fund, Inc. Without the devoted and intelligent effort of the many attorneys representing minorities and women, the legal evolution that we are experiencing in this field could not have taken place. The Supreme Court early recognized the importance of the role of private counsel in civil rights litigation. It held that the private litigant who brings suit under the 1964 Civil Rights Act acts as a "private attorney general" by furthering the public interest; thus, if he prevails, the litigant is ordinarily entitled to have his attorney fees paid by the defendant.[60] This position of the Court has enhanced enforcement of the 1964 Act. *Griggs*, for example, was litigated by the Legal Defense and Education Fund, Inc., a group whose attorneys have forced the fundamental legal issue of discrimination to be sharply litigated and clearly decided.

The lower federal courts quickly grasped and applied this third concept of discrimination. Their opinions reveal a sense of understanding of the consequences that flow from employment discrimination and a determination to provide an effective remedy for this problem.[61]

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deference to the expertise of an administrative agency. *See* text accompanying note 161 *infra*.

58. 42 U.S.C. § 2000e-2(a)(2) (1970).

59. In 1945, New York enacted a law, [1945] N.Y. Sess. Laws., ch. 118, §§ 1-3 (codified at N.Y. EXEC. LAW §§ 290-301 (McKinney 1972)), which was the model for other state enactments. M. SOVERN, *supra* note 2, at 19.

60. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), so held in interpreting a section of title II of the Act, 42 U.S.C. § 2000a-3(b) (1970). Title VII contains a provision on attorneys' fees that is worded similarly. 42 U.S.C. § 2000e-5(k) (1970). For an application of title VII's provision, see Lea v. Cone Mill Corp., 438 F.2d 86 (4th Cir. 1971).

61. *See* cases cited in note 46 *supra*.

Thus, an understanding of social need, the jurisprudential conception of protection for group interest, legal doctrines borrowed from tort law, a statutory foundation, and the availability of counsel all contributed to the building of a body of law adequate to ameliorate employment discrimination. These laid the foundation for the full articulation of the third concept of discrimination by the Supreme Court. The elements of this concept had been generated and tested in the interstices of administrative and judicial experience. In the common law tradition, this new theory of discrimination was suitable for promulgation as the law of the land. It came without the fanfare of *Brown*,[62] but without the bitter reaction also.[63]

IV. The Evolution of the Concept of Discrimination in Griggs

One of Duke Power's black employees who had a high school diploma was promoted after a complaint was filed with the EEOC but before suit was instituted.[64] This may be taken as the extent of "voluntary compliance" under informal legal pressure. After the filing of suit under title VII in the United States District Court for the Middle District of North Carolina, the two other black employees with high school diplomas were promoted.[65] This action must have been taken on advice of counsel who knew what was needed to protect the interests of the company in the litigation. After all, the only explanation for these men being in the black department after July 2, 1965, once vacancies had arisen, was their race. Refusal to transfer or promote them would have perpetuated the deliberate racial assignment. Under the evil-motive test, these acts constituted discrimination.

Duke Power's counsel had correctly anticipated the view of the district court. The district court applied the evil-motive concept of discrimination to the entire case. The court looked for acts taking place *after* July 2, 1965, that were motivated by racial animus such as the pre-July 2 act of placing black workers in the labor department because that is where blacks "belonged."[66] Since the black high school graduates had been promoted, the court found no discrimina-

62. Brown v. Board of Educ., 347 U.S. 483 (1954).

63. Compare Bacon, *Of Innovations*, in Francis Bacon's Essays 74 (Everyman's Library ed. 1906):

> It were good therefore that men in their innovations would follow the example of time itself, which indeed innovateth greatly, but quietly and by degrees scarce to be perceived: for otherwise, whatsoever is new is unlooked for; and ever it mends some, and pairs other: and he that is holpen takes it for a fortune, and thanks the time; and he that is hurt, for a wrong, and imputeth it to the author.

64. *See* note 28 *supra*.

65. *Id.*

66. Griggs v. Duke Power Co., 292 F. Supp. 243, 247-51 (1968).

tion at all.[67] The hiring and testing procedures appeared to the court as rational management techniques for securing the best-qualified employees.[68] Plaintiff's argument that these procedures had to be job-related was dismissed because such a requirement was not, in itself, a part of the statute.[69] Plaintiff also argued that the EEOC guidelines required employment tests to be job-related; but since plaintiff never established discrimination, the requirement that the test be job-related was, in the court's view, simply an abstract recommendation of a federal agency, which the district court felt free to ignore.[70]

Unlike the district court, the Court of Appeals for the Fourth Circuit applied the second concept of discrimination. Regardless of evil motive, the court held that the company's different treatment of similarly situated black and white employees constituted discrimination.[71] White employees hired before 1955 who had earned no high school diploma had been able during the years to transfer and be promoted into higher paying positions. Black employees had been confined to the labor department. To treat the black employees equally, it was now necessary to permit those hired before 1955 to transfer and be promoted without regard to the high school standard or the testing requirement. Otherwise, the unequal treatment of black and white employees from the pre-1955 period would be perpetuated. The court, therefore, concluded that treatment must not be equalized and that the group of black employees in question must be allowed to transfer and be promoted without any more strenuous conditions than those placed upon similarly situated white employees; that is, those hired before 1955.

This was the "equal treatment" concept, and, in applying it, the court of appeals indicated, as have other courts,[72] that it would remedy the effects of past discrimination. Yet, the only discrimination identified by the equal-treatment test was that involving the racial assignment of blacks to the labor department before 1955. Blacks without high school diplomas who were hired into the labor department *after 1955* were not denied equal treatment because there were no "similarly situated" white employees. All white employees hired after 1955 had high school educations. Since all the black em-

67. 292 F. Supp. at 251.

68. 292 F. Supp. at 248, 250.

69. *See* 292 F. Supp. at 250.

70. 292 F. Supp. at 250.

71. Griggs v. Duke Power Co., 420 F.2d 1225, 1230-31 (1970).

72. *See, e.g.*, Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

ployees with high school diplomas had been promoted, the equal-treatment concept did not help the *Griggs* plaintiffs. In addition, there was no evil-motive discrimination practiced against them after 1965.

Before the Fourth Circuit, plaintiffs again tried to strengthen their case by relying on the Commission guidelines which required tests to be job-related.[73] But the court of appeals majority was unimpressed. Since no discrimination had been found,[74] the EEOC's requirement that tests be job-related appeared to the court as being aimed not at discrimination, but instead at a concern by the EEOC that tests in general be fair. To the majority, the EEOC's position seemed too close to one (concerning testing) that had been rejected by the Congress.[75] Thus, the court concluded that the job-related requirement was beyond the power of the EEOC.

The sole dissenter on the Fourth Circuit, Judge Sobeloff, formulated a definition of discrimination that foreshadowed the unanimous opinion by the Supreme Court in *Griggs*. Relying on the now-famous language of Judge Butzer in *Quarles v. Phillip Morris, Inc.*,[76] that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act,"[77] Judge Sobeloff suggested that any practices having this effect are discriminatory.[78] In light of this judgment, his review of the job-relatedness requirement of the EEOC led him to give deference to the agency charged with administering the Act.[79] Moreover, his dissent makes clear his motivation for accepting the third concept of discrimination. In his words, the issue presented by *Griggs* was "whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric."[80] He concluded:

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73. 420 F.2d at 1231.

74. 420 F.2d at 1232-33.

75. 420 F.2d at 1233-35.

The testing provision had been written into title VII as a result of the decision in 1964 of the Illinois Fair Employment Practices Commission in Myart v. Motorola, Inc., No. 636-27, reprinted in 110 CONG. REC. 5662 (1964), *modified sub nom.* Motorola, Inc. v. FEPC, 58 L.R.R.M. 2573 (Ill. Cir. Ct. 1965), *revd.*, 34 Ill. 2d 266, 215 N.E.2d 286 (1966). Many interpreted this decision as banning any test which adversely affected blacks without regard to business need. *See generally* Cooper & Sobel, *supra* note 17, at 1649-54; Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 707-10 (1968).

76. 279 F. Supp. 505 (E.D. Va. 1968).

77. 420 F.2d at 1247, *quoting* 279 F. Supp. at 516.

78. 420 F.2d at 1247-48.

79. 420 F.2d at 1239-44.

80. 420 F.2d at 1237-38.

> This case deals with no mere abstract legal question. It confronts us with one of the most vexing problems touching racial justice and tests the integrity and credibility of the legislative and judicial process. We should approach our task of enforcing Title VII with full realization of what is at stake.[81]

The Supreme Court took Judge Sobeloff's point seriously. Chief Justice Burger, recognizing that the case was one of first impression, proceeded to define discrimination as follows:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.
>
> The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes. . . . This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools . . . . Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
>
> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demon-

81. 420 F.2d at 1248. *See also* Hicks v. Crown Zellerbach Corp., 310 F. Supp. 536 (E.D. La. 1970).

strable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the over-all quality of the work force.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used. The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case the Company has made no such showing.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." . . . We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the under-educated employees through the Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the common sense proposition that they are not to become masters of reality.[82]

All of the concepts we have discussed come into play in the Supreme Court's opinion: the objective of achieving equality and the necessity that such equality be real; the need to eliminate barriers

82. 401 U.S. at 429-33.

unless justified by business necessity and the consequences of failing to meet the business necessity test; the rejection of the evil-motive test and the shift of the burden of proof to the employer once it is found that the consequences of the employer's conduct adversely affect minorities.

The importance of this new concept of discrimination was underscored by the roles in the opinion of the job-relatedness concept, the EEOC guidelines, and the testing provision of title VII. All were viewed quite differently than in the lower courts. There, these factors were considered as part of *plaintiff's* case of *discrimination.* In the Supreme Court's opinion, they were viewed as part of *defendant's* case of *justification* because a prima facie case of discrimination was established without reliance on these factors.

The Supreme Court found discrimination because the diploma and test requirements screened out a higher proportion of minorities than of whites. These facts alone established the prima facie case of discrimination, and there was no need for plaintiffs to rely on the testing guidelines. Having made this finding of discrimination, the Court viewed the testing issue as a matter for the defense. Defendant argued that it was privileged under title VII's testing proviso to use tests for "general ability" that were "professionally developed" without demonstrating any relation to the work in question.[83] This was one of the arguments that Holbert and I had been unable to overcome back in 1966, before the issuance of the guidelines. Defendant also argued in the Supreme Court that the guidelines went beyond the bounds permitted by the statute.[84] The Court, having concluded that discrimination was bounded by the justification of business necessity, viewed the EEOC guidelines as spelling out the details of business necessity in testing situations, and upheld the Commission's interpretation of title VII.[85]

At this point, a review of the effect of the legal process on the situation at Duke Power Company is in order. The statute's passage, without the invocation of any formal procedures, led to a change in the entry level and transfer standards, but no black workers were hired, promoted, or transferred into the more desirable departments or positions. Once the EEOC complaint had been filed, the company upgraded one black worker who had a high school diploma. After the district court proceedings had been commenced, the remaining two black workers with high school diplomas were promoted. The dis-

83. Brief for Respondent at 46-52, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

84. *Id.* at 52.

85. 401 U.S. at 433-34.

trict court therefore concluded that its concept of discrimination (evil-motive) had not been proven.

The court of appeals ordered priority for promotion and transfer of the six black workers who had been hired before 1955. That much was required by its equal-treatment concept of discrimination. The Supreme Court decision extended that priority to all of the remaining black employees, and struck down the high school and test requirements as applied to minority applicants. This reflects the reach of the statute under the Supreme Court's concept of discrimination. It involves a more extensive re-examination of both the conditions of incumbent blacks and the hiring standards than the other two concepts would require.

V. The Scope of the Business Necessity Defense

The legal issues concerning testing have been exhaustively analyzed elsewhere.[86] The nature of the discussion and controversy surrounding testing is shaped by the underlying concept of discrimination. The testing proviso of title VII, as Chief Justice Burger pointed out by the use of italics, has a self-limiting feature, for professionally developed ability tests can be relied upon for personnel decisions only if they are not "designed, intended or *used* to discriminate."[87] Since discrimination is to be measured by effect and since the tests as applied to minorities do have the proscribed effect, the testing proviso appears inapplicable in its own terms.[88]

The EEOC interpretation of the testing proviso was designed to deal *inter alia* with the employer defense that tests measuring "general abilities and aptitudes" that are not related to the particular job or group of jobs for which the minority applicant is being considered may be used, even after title VII's enactment. *Griggs*, however, by upholding the EEOC's conclusion that tests must bear a more intimate relation to the necessities of the work than that provided under the rubric of "general abilities and aptitudes," adequately disposed

86. *E.g.*, A. Blumrosen, *supra* note 1, at 255-69; Bernhardt, *Griggs v. Duke Power Co.: The Implications for Private and Public Employers*, 50 Texas L. Rev. 901 (1972); Cooper & Sobel, *supra* note 17; 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); Note, *supra* note 75.

87. 401 U.S. at 433, *quoting* 42 U.S.C. § 2000e-2(h) (1970).

88. This "self-limiting" feature is a characteristic of the several provisions that were adopted as part of the compromise that led to the passage of the 1964 Act. *See* 42 U.S.C. 2000e-2(h), (j) (1970). The opponents of the legislation would propose an amendment which the supporters would find objectionable. The supporters would then add qualifying language which would make the provision inoperative if discrimination was found. *See generally* A. Blumrosen, *supra* note 1, at 182-85 (seniority), 251-52 (quotas), 265-66 (testing).

of this argument. This argument by the employer that a standard of business convenience should govern was too close to the proposition that wrongdoers should be permitted to establish their own standards of conduct, an argument long rejected by the common law of negligence.[89] It is now clear that the standards of necessity under title VII are to be *judicially* established, after a careful scrutiny of the situation, so that conduct having an adverse effect on minorities will not be permitted simply because it would be more convenient for the employer. Often, it was business convenience that created the practices that proved harmful to minorities in the first place. It would be a meaningless gesture to characterize such practices as discrimination and then to permit them to be continued under the business necessity privilege. To implement the concept that discrimination consists of conduct adversely affecting minorities, it is essential for courts to fashion a narrow and carefully limited test of business necessity. This is precisely what adoption of the EEOC guidelines accomplished.

The language and the legislative history of section 703(e)[90] supports this approach. That section permits conduct otherwise prohibited "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." On its face, section 703(e) does not extend the occupational qualification privilege to permit racial discrimination, and the legislative reports make clear that the omission of the word "race" from this provision was done purposefully. The bill as reported by the House Judiciary Committee did not include race as a possible bona fide occupational qualification,[91] and Congressman Williams' attempt to amend the bill on the House floor to include race was defeated.[92]

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89. "Even an entire industry, by adopting such careless methods to save time, effort or money, cannot be permitted to set its own uncontrolled standard." W. PROSSER, *supra* note 48, § 33, at 167, *citing* Shafer v. H.B. Thomas Co., 53 N.J. Super. 19, 146 A.2d 483 (1958).

A. BLUMROSEN, *supra* note 1, at 181-82 discusses the same concept in connection with discrimination in seniority systems.

90. 42 U.S.C. § 2000e-2(e) (1970).

91. H.R. 7152, 88th Cong., 1st Sess. § 704(e) (1964). The Committee's report stated that the bona fide occupational qualification "provides for a very limited exception to the provisions of the title. Notwithstanding any other provisions, it shall not be an unlawful employment practice for an employer to employ persons of a particular religion or national origin in those rare situations where religion or national origin is a bona fide occupational qualification." H.R. REP. No. 914, 88th Cong., 1st Sess. 27 (1963), in U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMN., LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2027 (1968) [hereinafter LEGISLATIVE HISTORY].

92. 110 CONG. REC. 2550 (1964), in LEGISLATIVE HISTORY, *supra* note 91, at 3191-92.

In the Senate, Senator McClellan tried the same approach.[93] He explained that his proposal would permit racial considerations in employment

> when the employer believes, on the basis of substantial evidence, that the hiring of such an individual of a particular race . . . would be more beneficial to the normal operations of his particular business or to its good will than the hiring of an individual of another particular race . . . .
>
> . . . The present provisions of the bill constitute an infringement on personal liberty, denying to the employer the right to exercise his judgment in his own business affairs as to whom he might employ to help him carry on his business and whom he might employ to make the business more prosperous.[94]

Senator Case, a proponent of the 1964 Act, responded:

> The issue is clearly drawn by this amendment. The Senator from Arkansas does not believe in the FEPC title of the bill and would eliminate them, in effect, by the provisions of his amendment. I think there is no question about that.
>
> We who believe in fair employment practices and the intervention of the Federal Government in this field . . . must resist the amendment of the Senator from Arkansas with all our power, because it would destroy the bill.[95]

Senator McClellan's proposed amendment was defeated, 30 to 61.[96] While the fears of opponents are not necessarily to be read into the statute if they lose, it is clear that the precise issue, whether managerial prerogatives and business convenience would be subordinated to the need to eliminate racial discrimination, was confronted and rejected by both houses of Congress. It is therefore simply not a defense under title VII for an employer to argue that conduct that constitutes racial discrimination, as defined in *Griggs*, is justified as reasonably necessary to the normal operations of his business.

This analysis supports the narrow scope of justification adopted in *Griggs* and resolves the "policy questions" that the academic literature seeks to keep alive.[97] Congressional judgment on this matter, of course, is conclusive.

In cases decided since *Griggs*, the courts have proceeded along the path of limited justification. In *Robinson v. Lorrilard Corp.*,[98] Judge Sobeloff, writing for a now unanimous court, held:

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93. 110 CONG. REC. 13825 (1964), in LEGISLATIVE HISTORY, *supra* note 91, at 3183.

94. 110 CONG. REC. 13825 (1964), in LEGISLATIVE HISTORY, *supra* note 91, at 3183.

95. 110 CONG. REC. 13826 (1964), in LEGISLATIVE HISTORY, *supra* note 91, at 3184.

96. 110 CONG. REC. 13826 (1964), in LEGISLATIVE HISTORY, *supra* note 91, at 3185.

97. *See, e.g.*, Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

98. 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[99]

Judge Sobeloff's view was carried one step further in *Johnson v. Pike Corp. of America*,[100] which held that a company rule providing for discharge in the event of successive wage garnishments was invalid because of its discriminatory effect on minority employees. On the justification issue, the company arguments concerning time and expense involved in garnishment procedures were rejected; the court considered these to be a price that Congress indicated must be paid to end discrimination.[101] The argument that the worker would become less productive if he were under garnishment was dismissed as speculative.[102] The court concluded, "The ability of the individual effectively and efficiently to carry out his assigned duties is, therefore, the only justification recognized by the law."[103]

The question of justification can be analyzed in this way when dealing with formal company policies relating to testing, education, arrests, or garnishments. It can also be applied with respect to recruitment and seniority systems that exclude minorities, and even to corporate decisions such as plant location. But the vast bulk of personnel decisions that determine a worker's future are made within a much more fluid framework. Initial-employment, promotion, discharge, and discipline decisions also take place under rubrics such as "best qualified" or "just cause." How *these* decisions will be viewed by the courts under title VII when the employer's personnel system discriminates within the meaning of *Griggs* is a much more difficult problem.

The internal tension within the *Griggs* decision will provide the fighting ground for the next round of cases. As *Griggs* holds, dis-

99. 444 F.2d at 798. *See also* United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) (management convenience and business necessity not synonymous); United States v. Bethlehem Steel Corp., 446 U.S. 652 (2d Cir. 1971).

100. 332 F. Supp. 490 (C.D. Cal. 1971).

101. 332 F. Supp. at 495-96.

102. 332 F. Supp. at 495.

103. 332 F. Supp. at 496.

crimination is conduct which has an adverse effect on minority employees as a class. Yet, at the same time, the Court stated that the law does not provide "that any person be hired simply because . . . he is a member of a minority group. . . . Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins."[104] These statements from *Griggs* raise the all-important question of the relationship between a finding of class discrimination and the granting of relief to individual members of that class in a particular case. The possibilities for confession and avoidance in this situation are substantial. A respondent may, because of the strength of the "consequences" rule, admit that he has discriminated and then argue that the complainant or other individual members of the minority group should not benefit from remedies that would correct the discrimination. Presumably, the argument will present "good reasons" based on normal industrial criteria of performance and discipline for denying employment opportunity to the particular individual. For example, the respondent will contend that the majority group person was "better qualified" than a rejected minority group person who has the basic qualifications to do the work. Indeed, this contention has already been raised successfully in one state administrative proceeding. The Maryland Commission of Human Relations found discriminatory practices in recruitment, but refused to apply that finding to benefit an individual complainant.[105]

In *Jacksonville Terminal*,[106] the Fifth Circuit considered the

104. Griggs v. Duke Power Co., 401 U.S. at 431, 436.

105. Jones v. American Totalisator Co., FEP 70-796 (Md. Commn. Human Relations 1971), copy of decision on file with the *Michigan Law Review*. The respondent was found to have used a discriminatory recruitment and hiring system that relied on word-of-mouth referrels and walk-ins at a plant in a white geographic area with an almost all-white work force. The company was ordered to use a nondiscriminatory method of recruitment. However, the Commission gave no relief to the complainant on the ground that no discrimination was proved in the failure to hire him. Several whites were also passed over, when a friend of a supervisor was given the job. Since both complainant and the other whites had more experience than the white who got the job, the Commission concluded there was no racial discrimination. Thus, the Commission switched from the adverse-effects test that it had used to judge the recruitment system and instead used an equal-treatment test when considering the complainant's case. This failure to follow the adverse-effects test in the individual case could, if followed by other decisions, render a finding of discrimination in the recruitment and hiring system a bare abstraction, with no "bite" into actual employment practices.

But compare Mabin v. Lear Siegler, Inc., 4 Fair Empl. Prac. Cas. 679 (W.D. Mich. 1971), *affd. per curiam*, 457 F.2d 806 (6th Cir. 1972). The court held that statistical evidence that suggested discrimination in recruiting was relevant in resolving credibility issues concerning alleged discrimination in a denial of a request for transfer from a qualified black applicant. The court's link between recruiting and transferring was that the company employed the same processes in handling both activities.

106. United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

proof-of-discrimination question in two situations: first, with respect to restrictions on promotion and transfer opportunities of incumbent minority employees; and second, in the context of initial employment. The court rejected the company's desire to *promote* the "most qualified" employee[107] because this policy would have perpetuated the effects of past minority subordination. It held that the company could not refuse to *promote* an otherwise eligible minority employee if he had "sufficient" ability to do the job.[108] The employer was prohibited from applying a "best qualified" standard. However, the court permitted the company to use a "best qualified" standard in connection with *newly hired* employees even though the result was to perpetuate a pattern of white hiring.[109]

This latter holding may represent a departure from the *Griggs* principle. In requiring that the government prove that black applicants for employment had qualifications equal or superior to white applicants,[110] the court appeared to apply the equal-treatment concept of discrimination, rather than the adverse-effect concept. However, the case is not clear on this point since the government failed to prove that minority applicants possessed any level of qualifications to do the work or that minority qualifications were more limited than the white applicants' as a result of a discriminatory hiring system. Because of this failure of proof, the court did not squarely face the issue of whether an employer who has discriminated against minority group members, either through an assignment or seniority system or through recruitment and hiring practices, may reject a *qualified* minority applicant because his white applicants are "better qualified."

The decision does highlight the importance of establishing a link between discriminatory practices that have harmed a class of minorities and the claims of individual minority applicants that they have been improperly denied employment opportunities. If this connection cannot be established, then the *Griggs* principle may be limited to protection of incumbent employees only and will not work for the benefit of applicants for employment who are members of the group which was discriminated against.

If the *Griggs* principle, as applied by a "private attorney general," yields no remedy when qualified minority applicants appear for employment by an employer who has discriminated, title VII will be

107. 451 F.2d at 448-55.
108. 451 F.2d at 458-60.
109. 451 F.2d at 443-48.
110. 451 F.2d at 446.

of limited effectiveness. Failure to provide meaningful relief was the reason why the *Whitfield*[111] case put an end to efforts to enforce the doctrine of the *Steele* case,[112] which stated that a union has a duty to represent minority employees fairly. *Whitfield* upheld a collective bargaining agreement requiring that senior black employees take a cut in pay and a loss of job security, and assume junior positions in previously white departments in order to transfer to such departments. This made the *Steele* doctrine a dead letter.[113]

How then can an individual complainant obtain the benefit of a finding of discrimination against the class to which he belongs? There are two possible approaches to this problem. First, and at the least, a finding of class discrimination should create a presumption that complainant individually suffered an adverse effect from that discrimination. A prima facie case would be based either on the inference that the discriminatory system had in fact adversely affected plaintiff or on the grounds of respondents' doubtful credibility because of their discriminatory practices. Either form of reasoning must be rooted in a rational connection between the class discrimination and the harm to plaintiff. The burden of persuasion would then shift to the defendant who must demonstrate that the adverse action was based on business necessity, was carefully tailored to the precise peculiarities of the immediate situation, and did not involve any residual elements of the operation of a discriminatory system.[114] In *Green v. McDonnell Douglas Corp.*,[115] the Eighth Circuit moved toward this position. There, the court stated,

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied a job, we think he presents a *prima facie* case of racial discrimination and that the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job.[116]

What is left open by the court, of course, are the questions whether McDonnell Douglas would have prevailed if it had established that

111. Whitfield v. Steelworkers, Local 2708, 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959).

112. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

113. The Fifth Circuit has explicitly rejected *Whitfield's* reasoning in title VII cases. Taylor v. ARMCO Steel Corp., 429 F.2d 498 (1970).

114. Compare the approach taken in Mabin v. Lear Siegler, Inc., 4 Fair Empl. Prac. Cas. 679 (W.D. Mich. 1971), *affd. per curiam*, 457 F.2d 806 (6th Cir. 1972) (discussed in note 105 *supra*).

115. 4 Fair Empl. Prac. Cas. 577 (March 30, 1972), *cert. granted*, 41 U.S.L.W. 3312 (U.S., Dec. 5, 1972).

116. 4 Fair Empl. Prac. Cas. at 583.

another applicant was "better qualified" and what standards must be met to prove better qualification. At any rate, *Green* does impose the burden of proving the best-qualified defense upon the employer. This shift itself may achieve substantial results for minorities, particularly in light of the analysis in the Fifth Circuit's recent decision in *Rowe v. General Motors Corp.*,[117] which rejected the use of subjective standards for promotion in face of a statistical demonstration that minorities were excluded from supervisory positions. The court evidently felt that after a showing by the plaintiff of class discrimination and of some qualification for the job, the "best-qualified" defense is available, but the employer has the burden of proving it, and his credibility will be viewed cautiously.[118]

Thus, as the law stands at present, if the minority person is refused employment by an employer who has used a discriminatory recruitment system, the employer may defend on the grounds that the minority person lacks the capacity to perform the work. If the employer wishes to argue that he preferred to have a better-qualified employee, at the least he must bear the burden of proof and show that the employee hired was better qualified by objective standards to do the job. This conclusion is consistent with the point made in *Griggs* that less-qualified applicants need not be favored[119] and with *Jacksonville Terminal's* reasoning. Yet, it also leaves the employer with the burden cast upon him by the adverse-effects test of *Griggs*.

An alternative line of analysis would conclude that the "hire the best qualified" argument is simply not available while the effects of discrimination persist and while minority applicants have the basic qualifications necessary to do the work. This was the approach taken in *Jacksonville Terminal* with respect to incumbents and in the Newport News conciliation effort with respect to promotions to supervisory positions.[120] Such an analysis appears at odds with the language quoted from *Griggs* against favoring less-qualified minority applicants. This language can be construed as applicable to situations in which there has not been a finding of discrimination or the effects of past discrimination have been eliminated. It can be argued

117. 457 F.2d 348 (1972).

118. *See* 457 F.2d at 358-59. This reasoning was explicitly adopted in Cooper v. Allen, 4 Fair Empl. Prac. Cas. 1219 (5th Cir., Aug. 29, 1972), brought under 42 U.S.C. § 1981 (1970), which held that once it has been determined that a minority applicant was denied employment by virtue of a standard illegal under *Griggs*, that applicant is entitled to back pay unless the employer can demonstrate that the person employed was the most qualified.

119. *See* text accompanying note 104 *supra*.

120. A copy of the Newport News agreement can be found in A. BLUMROSEN, *supra* note 1, at 367-77.

that only when the headwinds against minorities have dissipated may the employer resort to the best-qualified principle to reject a qualified minority applicant.

It is important to preserve the principle of qualifications for reasons to be discussed below;[121] yet it is also important, as *Griggs* itself notes, not to allow the qualifications concept to be used to perpetuate patterns of discrimination. Either of the analyses suggested here will accomplish both objectives.

VI. Some Implications of the Decision

The generating principles in *Griggs*—that discrimination is defined by adverse consequences to minorities as a group and that the right to be free from such discrimination runs to the benefit of members of the group unless the respondent can justify his actions—have ramifications in several directions.

A. *Class Actions*

The right to bring a class action to express the group interest of minorities is woven so intimately into the *Griggs* opinion[122] that one might think such a right is set forth in title VII. Except for those provisions that authorize EEOC Commissioners to file charges of discrimination and authorize the Attorney General to sue if there is injury to a group,[123] the statute is silent on the issue. Yet, in creating a federal cause of action, Congress necessarily invoked the broad body of federal procedural law incident to federal jurisdiction, which, of course, would include class actions in this type of case.[124] The 1972 amendments to title VII implicitly accept the concept of class actions by permitting charges to be filed with the EEOC "by or on behalf of" aggrieved parties.[125]

The district court, at the close of the *Griggs* trial, held that the class covered by the judgment included "those Negroes presently employed, and who subsequently may be employed, at the Dan River Steam Station and all Negroes who may hereafter seek employment at the station."[126] This finding was not further reviewed, since both

121. Pt. VIII *infra*.

122. "Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act . . . ." 401 U.S. at 426.

123. 42 U.S.C. §§ 2000e-5(a),-6(a) (1970), *as amended*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 4-5, 86 Stat. 104.

124. Fed. R. Civ. P. 23.

125. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 104.

126. 292 F. Supp. at 244.

the court of appeals and the Supreme Court dealt explicitly with only the plight of the employed black persons. Nevertheless, the Supreme Court's holding implicitly covers not only the incumbent employees who were the immediate focus of the actions, but all minority applicants for employment as well. *Griggs*, therefore, suggests that title VII class actions aimed at practices that promote discrimination against incumbent minorities may also reach practices that adversely affect minority applicants for employment.

B. *"Northern-Style" Discrimination*

"Northern-style" discrimination, to which I have given considerable attention elsewhere,[127] involves the combination of the southern pattern of assigning minorities to lower-paying positions with the northern pattern of total minority exclusion from many employment situations.[128] This result is accomplished through the use of recruitment systems in which the segregated nature of social and housing patterns influences the color of the work force. In these systems, the mechanism for notifying potential employees about job openings is frequently word-of-mouth referral by friends and relatives who are apt to be of the same color. The legal problem here involves the scope of the duty of fair recruitment. What says *Griggs* on this question?

The decision speaks to cases in which "barriers . . . have operated in the past to favor an identifiable group of white employees over other employees."[129] The situation before the Court involved the classic southern pattern in which whites were given preferences over black employees with more seniority because of race. However, the rationale of the case reaches all actions by employers having an adverse effect on minority employment opportunity, even though no history of overt discrimination may exist. Evidence of past overt discrimination in a title VII case can serve at least two purposes: It may prove that the employer had a discriminatory intent at some point in time, and it may show that the present plight of employees is the consequence of actions based upon that discriminatory intent. Now that the consequence test of discrimination has replaced the intent test, these reasons for evidence of past discrimination are no longer important. It is sufficient to show that employment practices restrict

127. A. BLUMROSEN, *supra* note 1, at 218-70. For an example of northern-style discrimination (practiced, ironically, in Arkansas), see Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

128. *See, e.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

129. 401 U.S. at 430.

minority employment opportunities as compared to those open to the majority. Thus, the rationale of *Griggs* reaches situations in which there has never been a history of overt discrimination and supports the duty of fair recruitment and, I think also, the duty to plan for equal employment opportunities in connection with plant location and other matters.[130]

C. *The Use of Statistics in Making a Prima Facie Case*

Statistics may be used to demonstrate the existence of an adverse effect, or "built-in headwind,"[131] against minorities, and may thus force the defendant to justify those policies which contributed to his poor minority employment record. The issue in these cases is when do statistics shift the burden of going forward to the defendant? Frequently, the "real grounds" for finding liability are adduced from evidence given by the employer's own witnesses. These "real grounds" are often legal constructs, created after the evidence is in. The plaintiff may guess at what defendant did wrong and attack these actions as discriminatory. His proof consists of statistics showing a failure to hire or promote minority persons plus identification of the acts and practices by defendant that may have produced the statistics. Full disclosure of the operations of defendant may be forthcoming only during defendant's testimony, and consequently this evidence will become available only if the court requires defendant to present this proof; otherwise, defendant will prevail on a motion for a directed verdict after plaintiff has finished presenting his case. If the entire picture is presented before the court, however, the operative factors that produced the prima facie discrimination statistics may be identified and the defendant's claims of justification with respect to each element in the situation evaluated. The use of statistics may thus be well suited to securing a full judicial scrutiny of defendant's employment practices—a scrutiny necessary if title VII is to be effective.

The relation between the statistics and the practices of defendant is one of probability. Thus, in *Griggs*, the proof that the high school diploma was a "headwind" against minorities was provided by statistics demonstrating the general educational level in North Carolina, while the proof that the Wonderlic test excluded minorities was

130. *See* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (suit alleging discrimination in police recruitment, brought under 42 U.S.C. §§ 1981, 1983 (1970)). *See generally* A. BLUMROSEN, *supra* note 1, at 218-70; Blumrosen, *The Duty To Plan for Fair Employment: Plant Location in White Suburbia*, 25 RUTGERS L. REV. 383 (1971).

131. 401 U.S. at 432.

found in the EEOC's reasonable-cause finding in the Louisiana paper company case.[132]

The Court did not require proof that the Duke Power Company had in fact turned down three times as many black applicants as whites or that blacks had failed the Wonderlic test at the Duke Power plant nine times as frequently as whites. Such proof may not have existed at all, or if it did exist, may have involved such small numbers of persons as to be insignificant. The Court utilized evidence of the effect of the diploma and test requirements based on probability and experience *in other places.*

If the Court had required proof of an adverse effect of the test or diploma requirements in the particular case, the principle of the *Griggs* case could only be applied to the specific hiring practice or procedure which barred minority opportunity. Thus, a discriminatory-recruitment case might yield a finding of discrimination only with respect to initial recruiting procedures, but not with respect to hiring qualification standards that had not been tested by minority applicants because they had never applied for employment or had been rebuffed at the front gate, and thus never reached the testing table.

This approach would produce the ultimate frustration of piecemeal litigation concerning the employer's hiring process, and would require successive litigation over each stage in the hiring and employment process. This result would stultify the implementation of title VII. It was carefully avoided by the Supreme Court.

There are at least two types of statistical evidence available to plaintiff that will force defendant to justify his activities: (1) proof that particular employment standards will exclude a higher proportion of minorities than of the majority group, and (2) proof that the composition of defendant's labor force is itself reflective of restrictive or exclusionary practices. *Griggs*, with its challenge to diplomas and tests that reflect the inferior position of minorities in society, serves as an illustration of statistical proof under the first heading. Under the second heading falls statistical evidence showing the employment patterns of defendant; where this evidence shows restriction or exclusion, the defendant also must come forward with explanation and justification. With respect to this type of proof, the courts have expressed some reservations regarding the use of statistics in proving discrimination.[133] I believe the courts are wisely avoiding a rigid

132. 401 U.S. at 430 n.6.

133. *See, e.g.*, United States v. Bethlehem Steel Corp., 312 F. Supp. 977, 992 (W.D.N.Y. 1970), *aff'd.*, 446 F.2d 652 (2d Cir. 1971).

stance. The cases coming before them now are cases of gross disparity which clearly indicate that the defendant has not dealt fairly with minorities. But at some point the courts may begin to insist on further proof of discrimination by plaintiff and may not want this option foreclosed by overly general statements.[134]

D. *Statistics and Remedy*

Once discrimination is found, the remedy must destroy the adverse effect on minorities as rapidly as possible, while leaving a degree of flexibility in the implementation of the corrective measures. In the case of discriminatory failures to recruit and hire, the courts have properly required defendants to use a numerical standard for hiring minorities. This numerical standard might require that one of two, or one of three, future new employees be members of the class previously subjected to discrimination.

Carter v. Gallagher[135] is the most important precedent on the matter of numerical standards. There, the court flatly rejected a "hire minority workers exclusively" proposal as unduly interfering with other interests, but, after further consideration, the court did hold that a one-in-three minority-hiring ratio would be acceptable.[136]

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134. *See* Pennsylvania v O'Neill, 4 Fair Empl. Prac. Cas. 1286 (3d Cir. Sept. 14, 1972). *See also* the discussion in pt. VII *infra*.

135. 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972) (suit brought under 42 U.S.C. § 1981 (1970), but title VII remedies offered a "practical guide").

136. 452 F.2d at 330-31. This Article is not the place for an extended discussion of constitutional questions concerning numerical standards or other specific remedies for discrimination that will provide meaningful employment opportunities for minorities. Some elementary comments are in order:

1. The optimum remedy is one that does *not* pit worker against worker, but rather gives minorities or women opportunities that do not detract from those of the majority. This concept of a nonzero sum game is not always possible in the struggle for scarce jobs.

2. There is no constitutional right on the part of the "most qualified" person to a job or promotion in private employment. We have never constitutionalized rights to employment opportunities. *See* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). Except when restricted by statute or contract, an employer remains free to hire or promote for good reason, bad reason, or no reason at all. Public employers, on the other hand, may function under a more vigorous standard judicially imposed by the fifth and fourteenth amendments. But this standard requires only that the public employer not be arbitrary or use invidious classifications. The public employer has a wide range of optional employment policies under this standard and is not required to hire the most qualified. *See* Contractors Assn. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

3. The white male majority has no legitimate expectation that patterns or practices that adversely affected minorities or women will continue to benefit them.

4. In imposing a remedy under a statute such as title VII, the courts are free to shape such relief in a manner that will correct the injustice suffered by plaintiff and the appropriate class, abolish the illegal practice, and assure that it will not recur. They may not impose sanctions that are "punitive." *Cf.* Carpenters Local 60 v. NLRB,

While somewhat reminiscent of the conversation concerning price and principle between George Bernard Shaw and the lady, the *Carter* case does, I think, point the way through the maze of "quota" and "preferential treatment" talk. It suggests: (1) The use of numerical standards to increase minority hiring is an appropriate remedy for discrimination. (2) Those standards must have a degree of flexibility—the court will not order all vacancies saved for minorities. (3) The order will only operate until the defendant demonstrates that his system is acting fairly;[137] at that point the chancellor's foot will be lifted from the defendant's neck.

All of these propositions are compatible with a larger vision of how the courts can, in a manner consistent with judicial traditions and in concert with other institutions of government, destroy the pattern of discrimination in employment. This point will be discussed further below.[138]

VII. "Power" of the EEOC

A scholar who was finishing a book on employment discrimination when title VII was passed characterized the EEOC as a "poor enfeebled thing."[139] Professor Sovern was reacting, along with many

365 U.S. 651 (1961). This, rather than the Constitution, is the appropriate legal framework for discussion of the problem. It is obvious that the majority must stand aside while discrimination is being remedied in situations of scarcity where there is no other alternative. This result poses no constitutional question. The issue of "how far aside" the majority must stand is closely related to the issue of how quickly will the discrimination be remedied. That question is for the judiciary, which must interpret the scope and reach of title VII. In this framework *Carter* (one of three), Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) (one of two), Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (one of three), Pennsylvania v. O'Neill, 4 Fair Empl. Prac. Cas. 1286 (3d Cir. Sept. 14, 1972) (one of three is inappropriate if the pool from which minorities are to be drawn is not composed of qualified persons), have already hammered out the formulas to be used in shaping remedies under the statute. The "constitutional talk" in some of these cases is, in my view, a way of discussing wise judicial policy under the statute to end the effect of discriminatory practices as rapidly as possible without "freezing" majority employment opportunities. As long as the courts focus on these issues, there is no constitutional question in affording a meaningful remedy for discrimination against minority group individuals.

The arguments cast in constitutional terms appear to be revisions of the ancient and discredited arguments for "going slow," using "education," and not trying to solve social problems "overnight." We have paid a terrible human price for listening too closely to those arguments. The kernel of wisdom in them has been buried in the rhetoric of the status quo. That status quo is now unacceptable. This is the meaning of *Griggs*. The courts are doing a competent job at the moment of identifying the rate of minority and female advance that they believe will both reduce the "headwinds" and be, at least grudgingly, acceptable to the policy makers and to society. For the judges who hammered out the one-of-three formula in *Carter v. Gallagher*, there could be no constitutional talisman, only the lonely task of judgment.

137. Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429 (8th Cir. 1970).

138. Pt. VIII *infra*.

139. M. Sovern, *supra* note 2, at 205.

other civil rights supporters, to the gutting of the administrative procedure that they believed important to combat employment discrimination. They wished to give the EEOC administrative-hearing and cease-and-desist-order power similar to that possessed by the National Labor Relations Board. This approach was stricken from the original bill in a congressional compromise.[140] Instead, the Commission was given the power to investigate, find reasonable cause, and attempt to conciliate. If it failed, then either the complainant or the Attorney General—but not the Commission—could file suit in federal district court.[141] The Commission was given, in addition, power to investigate, to require reporting and record-keeping, and to adopt procedural rules.[142] It was not given substantive rule-making power.[143]

In the face of these restrictions of its formal powers, the EEOC adopted other approaches that would enable it to be influential in dealing with discriminatory conduct. Two such techniques were approved by the Supreme Court in *Griggs*: the elevation of a finding of reasonable cause into a decision with some value as precedent[144] and the issuance of interpretative guidelines indicating the application of title VII to general classes of situations.[145] As noted above, the power to issue such guidelines does not flow from any clear congressional grant of authority.[146] Yet, as Professor Davis points out, such a power is an attribute of any administrative agency

140. *See* H.R. 405, 88th Cong., 1st Sess. § 9 (1963).

141. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 706-07, 78 Stat. 259, *as amended*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 4-5, 86 Stat. 104.

142. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, §§ 709-10, 713(a) 78 Stat. 262, *as amended*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 6-7, 86 Stat. 107.

143. Section 713(a) of the Act, 42 U.S.C. § 2000e-12(a) (1970), gives the EEOC only procedural rule-making power. The word "procedural" was inserted into the section granting rule-making authority on the motion of Representative Cellar, generally a civil rights supporter. His amendment was adopted with little discussion and was eventually enacted. 110 CONG. REC. 2575 (1964), in LEGISLATIVE HISTORY, *supra* note 91, at 3329. Section 713(b) of the Act, 42 U.S.C. § 2000e-12(b) (1970), which protects individual respondents who act in accordance with advisory opinions given by the Commission, certainly cannot be considered a grant of general rule-making authority. Thus the legislative history of title VII seems to indicate clearly that Congress did not intend to grant the EEOC substantive rule-making power.

144. *See* 401 U.S. at 430 n.6.

145. 401 U.S. at 433-34.

146. *See* note 143 *supra*. *But cf.* Riley v. Bendix Corp., 4 Fair Empl. Prac. Cas. 951 (5th Cir. July 14, 1972), in which the court referred to section 713(a) as authority for the issuance of the guidelines on religious discrimination. The case, however, appears to have turned on the congressional validation of the EEOC's interpretation in the 1972 amendments to title VII, which added section 701(j) defining religious discrimination. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(7), 86 Stat. 103.

that interprets and applies a statute.[147] The power to interpret and apply the statute carries with it the power to announce in advance how the agency intends to perform these tasks. Thus, the Commission drew its authority to issue guidelines from its function of interpreting title VII. But whence came this function?

Under the statute, the Commission is first to investigate a charge that title VII has been violated, and then to determine whether there is reasonable cause to believe that the charge is true. This process requires that the Commission interpret title VII, in a preliminary manner, in light of the facts gathered during its investigation.[148] The authority to issue guidelines ultimately rests on the EEOC's power to determine if there is reasonable cause to believe title VII has been violated. Except for the reasonable-cause provision, it is difficult to find justification in the statute for the guidelines. Perhaps the "technical assistance"[149] or "technical studies"[150] subsections could provide such a basis. However, the testing guidelines mentioned in *Griggs* involved a direct form of statutory interpretation. The Court's conclusion that the guidelines must be followed by the federal district courts endowed them with qualities of law that are not the result of the usual technical studies.

The history of the finding-of-reasonable-cause requirements in fair-employment-practice legislation is interesting. Most of the state statutes existing prior to title VII required a finding of reasonable or probable cause before conciliation efforts could be undertaken.[151] But these provisions were usually ignored. Conciliation efforts were commenced without adequate investigation or without a judgment by an enforcing agency that any "wrong" need be corrected.[152] This technique contributed to weak conciliation settlements. Moreover, when the probable-cause provisions were followed by the state agencies, the finding simply consisted of one-line statements such as

147. *See generally* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

148. Under the intense pressures caused by a backlog of work, the Commission has departed from the statutory procedure in 1970 in quest of "predecision settlements." *See* 29 C.F.R. §§ 1901.19(a)-(c) (1972). There is no evidence that this new procedure has added any efficiency, dispatch, or justice to the work of the Commission.

149. The Commission has power "to furnish to persons subject to [title VII] such technical assistance as they may request to further their compliance with [title VII] or an order issued thereunder." 42 U.S.C. § 2000e-5(f)(3) (1970).

150. The Commission has power "to make such technical studies as are appropriate to effectuate the purposes and policies of [title VII] and to make the results of such studies available to the public." 42 U.S.C. § 2000e-5(f)(5) (1970).

151. *See, e.g.*, CAL. LABOR CODE § 1421 (1971); N.Y. EXEC. LAW § 297 (1972).

152. *See* Blumrosen, *supra* note 38, at 223-24.

"the Commission finds probable cause to believe the statute has been violated."

The state agencies did not consider the reasonable-cause finding as a formal document interpreting the statute in light of the known facts. This approach was developed by the EEOC and has proved to be a genuine innovation.[153] It has spawned hundreds of published decisions and a matrix of law that never existed before the Commission was established. It also provides the logical foundation for the issuance of interpretative guidelines.

However, the question of the weight to be accorded the EEOC guidelines is another matter. Since the authority to issue guidelines is based on the authority to interpret title VII, these guidelines are a fortiori "interpretative" rules within the meaning of the Administrative Procedure Act.[154] As a consequence, no hearing or public participation in the guideline-making process is required.[155] Therefore, in preparation for the testing guidelines, the EEOC Office of Research called together a group of testing experts, to whom Ken Holbert and I explained the nature of the problem of discrimination with which we were confronted, and asked them to prepare a statement. That statement was later reviewed by the General Counsel and his staff, and by the Commissioners before issuance.

The utility of guidelines and bulletins is obvious. Labor relations of large corporations are conducted on a sophisticated basis; labor relations experts, lawyers, personnel officials, union officers, and the like constantly keep up to date on developments in the law and regulations affecting their operation. They read the volumes of loose-leaf material that are issued by regulatory agencies and serve as part of the "law transmission system," which carries into effect the interpretation of statutes and regulations in thousands of industrial-relations situations. Without the benefit of this system, the decision makers in Washington would never be heard or heeded in the plants throughout the country.[156]

The industrial-relations community—labor and management—is accustomed to receiving guidance and information in the form of agency decisions, interpretations, and bulletins. The EEOC at-

153. *See* A. BLUMROSEN, *supra* note 1, at 19-20, 44-46.

154. 5 U.S.C. §§ 551-59, 701-06 (1970).

155. 5 U.S.C. § 553 (1970).

156. For a discussion of the types of problems encountered by the law transmission system when implementing administrative interpretations and guidelines, see Cramton, *Causes and Cures of Administrative Delay*, 58 A.B.A. J. 937 (1972).

tached itself to this tradition by publishing "sanitized versions"[157] of the reasonable-cause findings, and by publishing guidelines on employment testing and other subjects.[158] These guidelines and interpretations enable intelligent responses by the industrial-relations community. The response may demonstrate agreement within the industrial-relations community with respect to the EEOC's interpretation and encourage a change of policy as dictated by the guidelines, or, at the other extreme, guidelines may lead to litigation against the EEOC's decision as in the airlines[159] and the newspaper[160] cases.

The original testing guidelines consisted of one paragraph of legal interpretation (that is the paragraph involved in *Griggs*), while the remainder contained background statements concerning good personnel-testing procedures. In passing on the validity of the Commission's interpretation, the Supreme Court stated in *Griggs*:

> The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . . Since the Act and its legislative history support the Commission's construction, this affords good reason *to treat the guidelines as expressing the will of Congress*. . . .
>
> . . . .
>
> . . . From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703(h) to require that employment tests be job related comports with congressional intent.[161]

The importance of the distinction between those guidelines that should be given "great weight" and those that "express the will of Congress" presumably will not be lost in the federal district courts. The binding effect given the guidelines is one additional indicator of the importance the Court has attached to the policy of eliminating discrimination.

The process used by the Supreme Court in determining the validity of EEOC guidelines involves a search through the legislative history for a clear demonstration that the EEOC interpretation was

157. This means giving descriptions of the facts without giving the names of the parties or revealing what was said or done during conciliation attempts, in conformity with 42 U.S.C. § 2000e-5(a) (1970).

158. 29 C.F.R. §§ 1604.1-.31 (sex), 1605.1 (religion), 1606.1 (national origin), 1607.1-.14 (employee selection procedures) (1972).

159. Air Transp. Assn. of America v. Hernandez, 264 F. Supp. 227 (D.D.C. 1967).

160. American Newspapers Publishers Assn. v. Alexander, 294 F. Supp. 1100 (D.D.C. 1968).

161. 401 U.S. at 433-34, 436 (emphasis added).

not intended. If the matter is ambiguous or if the legislative history supports the interpretation of the EEOC, the *Griggs* analysis requires that the district courts follow the guidelines. This confers great responsibility on the EEOC, a responsibility fully commensurate with the policy of providing equal opportunity and the desirability that the industrial-relations community be given specific guidance.

In light of the shifting meaning of discrimination and the evolving conceptions of equal opportunity, there will be few matters on which the congressional intent will be found to be clearly contrary to a Commission guideline. The congressional discussion never reached the level of detail that is involved in the application of title VII to particular cases. The legal concept of discrimination, which is itself a fundamental notion underlying all of the detailed matters of interpretation, was not seriously addressed by the Congress. It is a jurisprudential conception, derived from the law of tort, and far more suitable for exposition through judicial decision than for careful examination in the political forum.

Congressmen can react to social needs. Their administrative staffs and interest groups can prepare studies, data, and arguments. The Justice Department lawyers can prepare scholarly memoranda for use in the heat of the political debate, and legal and other academicians can review these proposals and recommend changes. Out of these ingredients the legislative product emerges. But the legislation itself is far from the last word. The application of the legislation to specific situations remains. The administrative and judicial processes work between the cup of legislation and the lip of life. The jurisprudential conceptions applied at this point determine the operative effect of the statute.

Two examples pointing in opposite directions will suffice. Judicial hostility to the workman's compensation acts is the classic illustration of how reluctance by judges—in this case reluctance to surrender their control over the course of personal-injury litigation in employment—can neutralize legislative intent.[162] On the other hand, one need only examine the Supreme Court's sympathetic support of the comparative-negligence principle in the Federal Employers' Liability Act[163] cases to find an example at the other extreme. In these cases, the network of negligence doctrines has been cast aside in furtherance of the congressional policy.[164]

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162. *See, e.g.*, Jacquemin v. Turner & Seymour Mfg. Co., 92 Conn. 382, 103 A. 115 (1918); Leckie v. H.P. Foote Lumber Co., 40 S.2d 249 (La. App. 1948).

163. 45 U.S.C. §§ 51-60 (1970).

164. *See, e.g.*, Ringhiser v. Chesapeake & O. Ry., 354 U.S. 901 (1957); Rogers v. Mis-

It is now indisputable that the intention of the federal courts is to afford maximum minority employment opportunity under title VII. Minority employment programs under executive orders have been given judicial support and sanction,[165] and the courts have made clear that, if necessary, constitutional principles will be brought into play to accomplish this goal.[166] Nevertheless, the hope remains in the judiciary that the administrative agencies will be able to do the job.[167] To this end, the courts are arming the "poor enfeebled thing" with the necessary doctrinal tools and are encouraging private litigants to act as "private attorney generals" by liberally granting attorney's fees to the prevailing party.[168] In short, the federal courts are taking the view that the national crisis that gave rise to title VII still exists and that the application of the statute may determine the outcome of that crisis.[169]

VIII. The Limits of Griggs

We can expect criticisms of *Griggs* on a variety of grounds. Those who have developed "theories of fair employment practice laws" may maintain that the decision does violence to their conceptions of the function and purpose of fair-employment laws. For example, Professor Fiss of the University of Chicago has stated,

> The employer's interest in wealth maximization and the rigors of the market place are generally acknowledged in fair employment laws. A fair employment law is a limited corrective strategy and the societal interest in efficiency is a major limitation.[170]

Similarly, the anonymous but influential *Harvard Law Review* has said, "Congress in Title VII attempted to aid minority employment within the constraints of color blindness and non-interference with employer decisions that are based on legitimate business considerations."[171]

souri Pac. R.R., 352 U.S. 500 (1957); Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943).

165. Contractors Assn. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1971). *Cf.* Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert denied*, 402 U.S. 944 (1971).

166. Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).

167. Hadnott v. Laird, 4 Fair Empl. Prac. Cas. 375 (D.C. Cir. Feb. 29, 1972).

168. *See* note 60 *supra.*

169. Compare Vegelahn v. Guntner, 167 Mass. 92, 106, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting):

> The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanimous proof.

170. *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 303 (1971).

171. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1166 (1971).

Both of these formulations are contradicted by the analysis in *Griggs*. Insofar as the language of the statute and its history are concerned, the *Griggs* decision seems correct.[172] Neither wealth maximization, management prerogative, nor color blindness were dominant themes in the congressional decision.[173]

There is another difficulty with what may be called the "Fiss-Harvard" analyses. They assume that legal rules should describe directly and in detail the result that the law seeks to achieve. This is too simple a notion. Legal rules are filtered through the law transmission system.[174] Thousands of men and women must respond to these rules in the exercise of their discretion as lawyers, writers, academics, personnel administrators, management officials, civil rights advocates, union officials, and the like. They must internalize and accept certain propositions from the perspective of their own particular roles within their own structures. It is literally impossible to write a single statement or a single opinion that will be tailored to the situations of all who have contributed to the operation of systems that have restricted minority employment opportunities. To maintain maximum pressure on this network of discriminatory attitudes, actions, and concepts, the law of employment discrimination speaks in broad, principled terms and forces the responses into narrow channels of justification. This maximizes the likelihood that the law will indeed affect the course of conduct concerning minorities.

To meet a massive problem, a massive dose of law is required. Liberal judicial construction and a maximum enforcement effort are also essential. We can count on the conservative forces—political,

172. For an example of how the legislative history will seem at odds with the *Griggs* decision in the absence of the concept of discrimination adopted by the Supreme Court, see Wilson, *supra* note 86, at 852-58.

173. The subordination of managerial prerogative with respect to racial discrimination was precisely what Congress did have in mind. *See* text accompanying notes 90-96 *supra*. The Harvard *Development*, *supra* note 171, is especially unresponsive to the basic congressional judgment that racial discrimination was to be dealt with without any bona fide occupational qualification privilege, while that privilege was available to the other grounds of discrimination. The part of the *Development* dealing with racial discrimination is based on the principle of balancing minority interests within the constraints of color blindness and noninterference with employer decisions. But in its discussion of the bona fide occupational qualifications with regard to sex, the *Development* concludes, "The statute offers no exception based on cost . . . to be borne by employers ordered to cease sex discriminations." *Id.* at 1180. Without disagreeing with its conclusion considering the scope of the bona fide occupational qualification, the *Development* seems prepared to go further in protecting management interests in connection with race discrimination than in connection with sex discrimination. This judgment was squarely rejected in the congressional debates over section 703(e).

174. A formal discussion of this system can be found in Laswell, *Toward Continuing Appraisal of the Impact of Law on Society*, in THE LAW SCHOOL OF TOMORROW 87 (D. Haber & J. Cohen ed. 1968). For suggestions as to its application in this field, see A. BLUMROSEN, *supra* note 1, at 20-23, 155, 213-17.

economic, legal, and social—to protect their vital interests and thus to modify the effect of our legal formulation in the specific life situations. A broad statement of law is necessary to begin to achieve meaningful results.

Obviously, there are risks in this approach. The message of the Court might be taken too literally. There are two responses to this fear. First, the appellate courts will correct overreaction. Yet, even if overreaction is an actual risk, we must ask who should bear the consequences of a court's misperception of its role—the class of minorities who have been the victims of discrimination, or the class of respondents who have created and administered the discriminatory pattern? This inquiry takes us back to the fundamental policy judgment concerning the sweep that the Court should be prepared to give to the statute. If this sweep be broad, one of the risks that may be appropriately placed on the defendants is that involving a mistaken application of the statute. This limited risk can, however, be cured through the appellate stages of litigation. To help minorities clear out the morass of discriminatory patterns present in this nation's economy, Congress appropriately placed the burden of such litigation on the respondent class. This Article has been concerned with the positive scope of the *Griggs* principle because the outer reaches of *Griggs* will determine the extent to which the law will cope with inequality in employment opportunities. Yet, it is also necessary to consider the other side of the coin, the question of *Griggs'* limits. If discrimination is defined by the presence of "built-in headwinds" against minority groups, then the absence of this adverse effect on minorities would force plaintiffs back to the evil-motive and equal-treatment tests of discrimination.

The existence of adverse effect is a question of judgment. There is no mechanical talisman to identify it. Adverse effect exists in many areas at this time because of historical patterns of restrictions upon minority group members and women. In coping with the present, extreme situations, civil rights advocates and some governmental agencies have begun to use "goals, targets, and timetables" to increase minority and female employment opportunities. The "Philadelphia Plan" of the Labor Department, which was created to deal with construction industry discrimination, takes this approach (subject to a "good faith" defense) and has been upheld by the Third Circuit.[175] The application of numerical proportions to recruiting for apprenticeship programs has also been upheld under title VII.[176]

175. Contractors Assn. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

176. United States v. Ironworkers, Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*,

In these circumstances, advocates for a rapid increase in minority or female participation in the labor force argue for proportional representation based on population figures, or for parity in employment opportunities. Racial minorities in central cities argue for a formula based on the central city, rather than the county or region, while advocates for women's rights uniformly rest their equal-opportunity demands on population proportions. The risk in accepting these arguments is obvious. Once a statistical analysis becomes popular, there may be a tendency for various groups to claim "their share" of employment opportunities, for advocates to seize upon proportional representation, and for administrators to think of proportions as ends rather than means.

But such risks do not justify avoidance of the venture, for the human needs are too great. The underlying concern of those who worry about quotas and individual rights should be answered not in a refusal to reform the inequalities in our society, but in a judgment that the reform must succeed so that the interest in flexibility can be reasserted.

The proportional-employment argument must be understood in the context of the near-total exclusion of minority groups and women from many sectors of the labor market. Where an employer or other institution has virtually no female employees in other than minor clerical positions, the argument that fifty per cent of the managers should be females need not be understood as an argument in favor of a world in which women hold fifty per cent of all jobs. Similarly, where a construction union has substantially an all-white membership working in a city with sixty per cent black citizens, the argument for population parity among journeymen electricians must be construed as an argument for a rapid increase in the number of minority electricians. Viewed in these terms, the numerical standards proposed in various plans and programs are not an end in themselves, but rather a means of eliminating the adverse effect of historical discrimination patterns as rapidly as possible. So used, numerical standards are essential as a remedial tool to eliminate patterns of discrimination. Our history demonstrates that milder medicine will not cure the disease, but that numerical standards will work. Less specific standards are brushed aside in the interests of continuity of institutional activity.

Numerical standards are attended to in our society and are capable of enforcement within institutions, and by government upon

404 U.S. 984 (1971); United States v. IBEW, Local 38, 428 F.2d 144 (6th Cir.) *cert. denied*, 400 U.S. 943 (1970); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

institutions. Furthermore, concentration on numerical standards as a remedy for discrimination permits the flexibility essential for our institutions to continue.

The use of numerical standards will allow us to overcome one inevitable dilemma posed by those who wish to reform industrial-relations systems. That is to say, if the remedy consists of using objective standards for qualification of employees, then because of the history of discrimination in other areas of society, many minority persons will be excluded from employment opportunities. The issue then becomes the relevance of these standards, and that calls into play the highly technical issue of validation. Thus, title VII may become a full-employment act for industrial psychologists. Furthermore, many judgments with respect to personnel actions are "net judgments" not fully capable of quantification in all of their dimensions; the subjective aspects of hiring often cannot be quantified. Thus, a rule requiring that judgments be made on objective criterion requires the respondent, ultimately, to "lie up to the headnote." This approach creates a multitude of factual disputes; so we have also in title VII a full-employment act for lawyers.

On the other hand, subjective judgments provide, in fact, a fertile atmosphere for producing attitudes, policies, prejudices, and stereotypes, and consequently they may tend to restrict employment opportunities of minorities and women. Where discrimination exists the use of these subjective judgments should not be allowed, and, as *Jacksonville Terminal* and *Green v. McDonnell Douglas* illustrate, the courts are carefully cutting back on their use.

The dilemma, therefore, is that objective standards may exclude minorities, while subjective standards may permit discrimination against them. One way to resolve this dilemma is to measure employment practices against the basic principle of *Griggs*: If the adverse effect on minorities continues, then discrimination will be deemed to still exist; when the adverse effect is no longer identifiable, discrimination *à la Griggs* is at an end. While the adverse effect is being eliminated, a primary consideration is whether, on the basis of a flexible formula that will allow some deviation from the norm, any particular remedial proposal adequately contributes to an acceptable increase in the number of minorities or females hired. Thus, during the period of adverse effect, all criteria, objective and subjective, are suspect if they do not contribute to the expeditious elimination of the adverse effect.

Once the adverse effect has been dissipated, remedial programs may be modified; but they should retain provisions to assure that the adverse effect does not reassert itself once the hand of govern-

ment is withdrawn.[177] Thus, remedial programs should encourage the industrial-relations system to operate fairly on its own terms and within its own parameters. For example, an employer with an all-white plant who recruits by word-of-mouth referral discriminates because minorities do not have notice and opportunity to apply for employment. The remedy to such a problem should include affirmative recruitment efforts that would lead to rapid increase in minority employment. Once this has been achieved, the same word-of-mouth referral system will operate among minority employees and their friends and associates. The employer will then have a stream of minority applicants. If the hiring practices have been otherwise corrected so that they do not exclude minorities at another point in the procedure, the employment pattern for this employer thereafter should continue to include substantial numbers of minorities.

Another example might be taken from *Rowe v. General Motors*, the case in which the defendant's supervisors were predominantly white males. Since the first-level supervisor is influential in deciding who should be hired, promoted, and made supervisor, the tendency to perpetuate the existing pattern is strong. But once a remedy has been applied so that a substantial number of minority persons or women have become supervisors, they will seek to maintain and promote some of their own into positions of influence and ultimately into positions similar to theirs. The same phenomena that discriminate when the system was controlled by white males will provide an integrative effect, once minorities and women have occupied some of the supervisory positions. At that point, governmental programs should become far less important.

The phrase used by Chief Justice Burger—"built-in headwinds"—captured the sense of futility and frustration that has confronted minorities in their quest for equality. *Griggs* measured that frustration by gross statistics. The high school diploma test screened out three times as many blacks as whites; the Wonderlic test screened out nine times as many blacks.[178] The Court's prohibition of these requirements will serve to alleviate the impact of discrimination on minorities. But when does the sense of injustice fade? When does the adverse effect dissipate? At what point does discrimination end, or, more precisely, at what point along a continuum is it appropriate to reduce restraints on the employer's practices?

A reduction in legal pressure may be appropriate long before the law gives up jurisdiction. The adverse effect will dissipate before

177. *See* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429 (8th Cir. 1970); Davis v. Washington, 4 Fair Empl. Prac. Cas. 1132 (D.D.C. July 31, 1972).

178. 401 U.S. at 430 n.6.

minority groups and women achieve a mathematical proportion of the labor force. *Griggs* does not demand that the work force of each large employer should be a microcosm of the total population or labor force. *Griggs* only requires that the structures responsible for restricting minority opportunity be destroyed. The accomplishment of this objective must be measured by increases in minority or female participation. Therefore, numerical standards are an appropriate tool. But carried to a pseudological conclusion, such standards would structure opportunities on society along lines of race, national origin, and sex. The individualist strain in our traditions stands against that proposition. The moral strength behind the broad definition of discrimination also cuts against a mathematical allocation of job opportunities by group characteristic. Thus, the use of this third concept of discrimination should be decreased, and the range of employer discretion increased, as the crude consequences of minority subordination are eliminated. We will revert back toward evil-motive and equal-treatment concepts of discrimination when the social system operates in a fairer way.

When the adverse effect dissipates is a question of judgment for courts and administrators. As with any such question, there is risk of error. The Fifth Circuit in *Whitfield* committed such an error when it said "angels could do no more" than to establish a "fresh start" for the future, even though this approach would leave blacks behind whites.[179] It corrected this error in a stream of cases in the late 1960's and in effect overruled *Whitfield* in 1970.[180]

There is—and can be—no guarantee that the courts and the administrators will wisely decide whether the adverse effect has been dissipated. The pressure of cases will make them dependent on rules of thumb based on statistics, which may, over time, be incorporated into the law. But we have far to go before this stage is reached.[181] The economic condition of minorities and the continuing lack of employment opportunities suggest that much must be done—and quickly—before serious disagreements over the need to continue such strong remedies will arise. To achieve the prompt reform without creating a rigid system for allocating job opportunities requires

179. 263 F.2d at 551.

180. *See* notes 111-13 *supra* and accompanying text.

181. My own preference is to use relative unemployment figures to measure minority progress. A. BLUMROSEN, *supra* note 1, at 23-27. Earnings among comparable majority and minority groups are also relevant. *Id.* Most of these indicators are complied regularly by the federal government. *See, e.g.*, U.S. Dept. of Labor, Bureau of Labor Statistics, The Social and Economic Status of Negroes in the United States, 1969, BLS Rep. No. 375, at 13-46 (1970).

that our administrators and courts be courageous and wise along both dimensions.

IX. Epilogue—One Consequence of a Decision

By 1971, my life had substantially changed from the days when we sought the issuance of the guidelines. Instead of commuting between Washington and the Deep South, I was commuting between New York and Paris. After one recent trip, I found myself riding to Newark with the industrial-relations director of a large national company. We identified our common professional interests, and he told me how his company and the union with which it bargains had negotiated away certain education and testing requirements for entry into training and apprenticeship programs. Since then, he said, some 150 employees, two thirds of them black, had left the ranks of the unskilled labor force of the company and entered into skilled trades training or apprenticeship programs. Copies of the collective bargaining agreement, both before and after the changes, are included as Appendix C, as a tribute to the influence of title VII and the Commission guidelines, which were upheld in the *Griggs* decision.

X. In the Beginning—An Explanation

The concept of rights of strangers is of ancient lineage, reaching back to *Exodus* and *Leviticus:*

> The stranger that sojourneth with you shall be unto you as the homeborn among you, and thou shall love him as thyself; for ye were strangers in the land of Egypt....
>
> ....
>
> ... Ye shall have one manner of law, as well for the stranger as the homeborn....[182]

Griggs dealt with such rights in an extraordinary setting, as District Judge Gordon noted. He began his opinion as follows:

> Duke Power Company, the defendant in this action, is a corporation engaged in the generation, transmission, and distribution of electric power .... The thirteen named plaintiffs are all Negroes and contend that the defendant has engaged in employment practices prohibited by Title VII of the 1964 Civil Rights Act ... at its Dan River Station located in Draper, North Carolina (recently consolidated with the towns of Leaksville and Spray and named *Eden*) ....[183]

182. *Leviticus* 19:34, 24:22.

183. 292 F. Supp. at 244 (emphasis added).

APPENDIX A

Commission decision applying testing guidelines of August 24, 1966, CCH EMPL. PRAC. GUIDE ¶ 17,304.53 (EEOC Dec. 2, 1966), cited in Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971):

> On August 24, 1966, the Commission adopted Guidelines on Employment Testing Procedures (¶ 16,904). In light of the Guidelines, the Commission concludes that reasonable cause exists to believe that Respondent's testing procedures are in violation of Title VII of the Act.
>
> The following facts are undisputed. Respondent employs approximately 2,465 persons in its Mill and Converter Plants . . . . While Negroes constitute approximately 40% of [the local] population, they constitute 6% of Respondent's work force. Commencing in 1958 Respondent has administered various tests to applicants for employment. From the beginning of 1957 through April 1964 Respondent hired 386 whites and 12 Negroes; of the Converter plant employees hired since then, between April 1964 and November 1965, 75 are white and 4 are Negro.
>
> Most of the jobs at Respondent's plant are in lines of progression, which means that an employee moves up from a lower paying job on the bottom to a higher paying job on the top in accordance with seniority, if able to perform the work. Most of the remaining jobs, which involve less skilled and more menial work, are lower paying "dead end" jobs with no prospect of advancement. Of the white employees in the Converter operation, 797 (82%) are in line of progression jobs while 177 (18%) are in dead end jobs. Of the Negro employees in the Converter operation, 8 (8%) are in line of progression jobs while 89 (92%) are in dead end jobs. In 1964 Respondent commenced administering tests to employees desiring to move from dead end jobs to line of progression to another. Employees who were in line of progression jobs were not required to take the tests to keep their jobs or to be promoted within lines of progression. Since 1964, 94 white employees and 17 Negro employees have taken the transfer tests. Of these, 58 whites (58%) and one Negro (6%) passed. The one Negro who passed was outbid for the job he was seeking by a higher seniority white.
>
> It is significant that until 1963, shortly before the transfer tests were instituted, Respondent maintained segregated jobs and lines of progression, so that Negroes were categorically excluded on the basis of their race from the more skilled and better paying jobs which were reserved for "whites only." While the bars are no longer expressly in terms of race, it is plain that Respondent's testing procedures have had the effect of continuing the restriction on the entrance of Negro employees into "white" line of progression jobs.
>
> We stated in our Guidelines: "If the facts indicate that an employer has discriminated in the past on the basis of race . . . the

use of tests in such circumstances will be scrutinized carefully by the Commission." Accordingly, where, as here, the employer has a history of excluding Negroes from employment opportunities it is incumbent upon the employer to show affirmatively that the tests themselves and the method of their application are non-discriminatory within the meaning of Title VII.

Title VII permits employers to use ability tests which are "professionally developed" and which are not "designed, intended, or used" to discriminate. As we have stated in our Guidelines, to be considered as "professionally developed," not only must the tests in question be devised by a person or firm in the business or profession of developing employment tests, but in addition, the tests must be developed and applied in accordance with the accepted standards of the testing profession. Relevant here are the requirements that the tests used be structured in terms of the skills required on the specific jobs and that the tests be validated for those specific jobs. In other words, before basing personnel actions on test results, it must have been determined that those who pass the tests have a greater chance for success on the particular jobs in question than those who fail. Moreover, where the work force, or potential work force, is multiracial, the tests should be validated accordingly.

In the instant case, all prospective Converter Plant employees are required to pass the Otis Employment Test 1A or 1B. Applicants for jobs "requiring mechanical ability" are also required to pass the Bennett test of Mechanical Comprehension Form AA and PTI Numerical Test A or B. For transfer, employees are required to pass or have passed one or more of the above tests plus the Wonderlic Personnel Tests Form A. The Otis and Wonderlic tests measure "general intelligence," with particular loading on verbal facility; the PTI test measures skill in arithmetic; the Bennett test measures knowledge of physical principles. There is nothing in the voluminous materials submitted by Respondent to indicate that the traits measured by these tests are traits which are necessary for the successful performance of the specific jobs available at Respondent's plant. Nor does it appear that any of the tests have been validated properly in terms of the specific jobs available at Respondent's plant, or in terms of the racial composition of Respondent's work force. In the absence of evidence that the tests are properly validated, Respondent has no rational basis for believing that employees and applicants who pass the tests will make more successful employees than those who fail; conversely, Respondent has no rational basis for believing that employees and applicants who fail the tests would not make successful employees. Respondent's testing procedures, therefore, are not "professionally developed." Accordingly, since Respondent's testing procedures serve to perpetuate the same pattern of racial discrimination which Respondent maintained overtly for many years before it began testing, we conclude that there is reasonable cause to believe that Respondent, thereby, has violated Title VII of the Civil Rights Act of 1964.

APPENDIX B

Extract from the Brief for the Chamber of Commerce of the United States as Amicus Curiae at 7-9 (footnotes omitted), Griggs v. Duke Power Co., 401 U.S. 424 (1971):

> Moreover, in considering the deference to be accorded the Guidelines, it should be recognized that the EEOC has consciously sought to construe Title VII "as broadly as possible in order to maximize the effect of the statute on employment discrimination without going back to Congress for more substantive legislation." In doing so, the Commission, "depart[ed] . . . from previous notions of what discrimination is" and, in taking "its interpretation of Title VII a step further than other agencies have taken their statute," disregarded "intent . . . as crucial to the finding of an unlawful employment practice." In the process of this "creative interpretation" of the law, the legislative history of the Act was regarded only an outer limit, not a guide, apparently based on the premise that the courts "were available to prevent serious error" and might sustain the EEOC's interpretation of Title VII, "partly out of deference to the administrators."

APPENDIX C

Extracts from an agreement between a large manufacturing company and a major industrial union relating to qualifications for participation in apprenticeship programs. The provisions of the 1971-1974 agreement represent a collectively bargained response to the Commission guidelines on testing, which were upheld in *Griggs*.

1968-1971 AGREEMENT	1971-1974 AGREEMENT
Applicants for apprenticeship shall meet the following requirements:	
1. Not less than eighteen nor more than thirty years of age. (Deals with citizenship.)	1. Not less than eighteen nor more than forty years of age. (No provision re citizenship.)
2. High school graduate or equivalent. (In exceptional cases, by mutual local agreement between the parties, this qualification may be waived if the applicant has two or more years of high school.)	2. An applicant who has not successfully completed a minimum of eight years of elementary education or equivalent must demonstrate to the joint plant training committee that he has the potential to learn the particular apprenticeship job for which he has bid.
3. Satisfactorily pass the company's physical examination designed to establish physical ability to work in the trade or craft, including 20/20 normal or corrected vision and color determination test.	3. Applicants shall be physically able to perform the work of the occupation and training program involved. In the determination of ability and physical fitness the company shall use such examinations and evaluation procedures as are related to the physical and training requirements of the particular occupation involved.