The Griggs Fable Ignored: The Far-Reaching Impact of a False Premise

Robert L. Douglas

Jeffrey Douglas

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol33/iss1/4

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor & Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
THE GRIGGS FABLE IGNORED: THE FAR-REACHING IMPACT OF A FALSE PREMISE

Robert L. Douglas* and Jeffrey Douglas**

INTRODUCTION

In the landmark decision of Griggs v. Duke Power Co., the United States Supreme Court expanded the scope of employment discrimination law under Title VII of the Civil Rights Act of 1964 (Civil Rights Act) by adopting, authorizing, and endorsing disparate impact as an independent cause of action in addition to the preexisting disparate treatment theory of discrimination. In the critical paragraph in the opinion of the Court, Chief Justice Burger used the fable of The Fox and the Stork as an analogy to explain the Court’s expanded definition of employment discrimination. For over forty years, many legal scholars...

* Robert L. Douglas is a full-time labor arbitrator and labor and employment mediator. He graduated with a B.S. from the New York State School of Industrial and Labor Relations at Cornell University, a J.D. from the Hofstra University School of Law, and an LL.M. in Labor Law from the New York University School of Law. He is a Member of the National Academy of Arbitrators and a Member of the New York and District of Columbia Bars.

** Jeffrey Douglas is an attorney in the Labor and Employment Practice Group at Meltzer, Lippe, Goldstein & Breitstone, LLP in New York. He graduated with a B.S. from the New York State School of Industrial and Labor Relations at Cornell University, and a J.D. from the Fordham University School of Law where he received the Addison M. Metcalf Labor Law Prize. He is a Member of the New York and New Jersey Bars.


3. Griggs, 401 U.S. at 431 (“Congress has now provided that tests or criteria for employment...
have analyzed and criticized the Court’s then activist role in creating disparate impact, however, not a single scholar has recognized the importance of examining the Court’s manipulative and incorrect interpretation of the pivotal fable. The Chief Justice’s cunning use of the fable enabled the Court to create the legal fiction of disparate impact under the Civil Rights Act. In the context of the undetected false premise of Griggs, Congress codified the disparate impact theory in the Civil Rights Act of 1991—twenty years after the Griggs decision.

Part I of this article analyzes the adoption of disparate impact in Griggs v. Duke Power Co. and the Supreme Court’s interpretation of section 703(h) of the Civil Rights Act. Part II examines the fable of The Fox and the Stork to demonstrate the Supreme Court’s misuse of the fable, which reveals the Court’s activist approach to interpreting Title VII of the Civil Rights Act. Part III addresses the present effects of the Supreme Court’s decision in Griggs.

I. THE CREATION OF DISPARATE IMPACT


In Griggs v. Duke Power Co., the Supreme Court interpreted section 703(h) of the Civil Rights Act to prohibit employers from using professionally prepared examinations that had the effect of 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.


5. See Griggs, 401 U.S. at 431.


7. Id. § 2000e-2(h). Section 2000e-2(h) is also referred to as section 703(h) of the Civil Rights Act of 1964.

8. The use of professionally prepared examinations played a significant role in the Congressional debates pertaining to Title VII of the Civil Rights Act of 1964. See Michael Rothschild & Gregory J. Werden, Title VII and the Use of Employment Tests: An Illustration of the Limits of the Judicial Process, 11 J. LEGAL STUD. 261, 261, 266-67 (1982). During the legislative debates that focused on Title VII of the Civil Rights Act of 1964, several lawmakers expressed concerns that section 703(a) of the Civil Rights Act of 1964, see 42 U.S.C. § 2000-e-2(a), would prevent employers from utilizing professionally prepared examinations as requisites for hiring and promoting employees. See Rothschild & Werden, supra. The lawmakers’ fear stemmed from a decision by the Illinois Fair Employment Practices Commission in Myart v. Motorola, Inc., see
discriminating against members of a protected class regardless of the employer’s intent even though section 703(h) used the word “intent” twice.\(^9\) The Supreme Court’s holding established disparate impact as a cognizable cause of action under Title VII.\(^10\) Prior to the Court’s holding in Griggs, plaintiffs could only sue pursuant to the disparate treatment theory of discrimination, which required the plaintiff to demonstrate an employer’s intent to engage in discriminatory activity.\(^11\)

The key issue in Griggs involved whether Duke Power Company, the respondent-employer, could legally require employees to perform satisfactorily on two professionally prepared examinations before the
employees could qualify for employment in specific departments within the company. The petitioner-employees, a class of African-American workers, sued Duke Power Company by claiming that the use of the professionally prepared examinations had the present effect of continuing acknowledged past discrimination in violation of Title VII.

B. The District Court's Narrow Analysis

The United States District Court for the Middle District of North Carolina dismissed the petitioner-employees’ claim and found that the Duke Power Company had lacked the requisite intent to discriminate against the African-American employees. The district court observed that since the effective date of the Civil Rights Act of 1964, the Duke Power Company had applied the testing requirement “fairly and equally” to black and to white employees. The district court interpreted Title VII to apply to present actions and not as a remedy for the present effects of past discrimination.

The district court also concluded that the requirement of a high school degree and satisfactory scores on two professionally prepared examinations had served the employer’s interest of having an educated workforce. According to the court:


16. Id. at 247. The Civil Rights Act of 1964 took effect on July 2, 1965. On the same date, Duke Power Company instituted its testing requirement. Id. at 245.

17. Id. at 248.

18. Id. The district court distinguished the facts in Griggs from the restrictions utilized by the employer in Quarles v. Philip Morris, Inc. Id. at 249; see also Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). In Quarles, the employer, Philip Morris, Inc., merely relaxed its race based restriction. Id. However in Griggs, the employer, Duke Power Company, created an educational requirement and eliminated its previously acknowledged system of racial discrimination. Id.

19. Id. at 250.
The Act does not deny an employer the right to determine the qualities, skills, and abilities required of his employees. But the Act does restrict the employer to the use of tests which are professionally developed to indicate the existence of the desired qualities and which do not discriminate on the basis of race...  

District Court Judge Eugene Gordon analyzed the plaintiff's claims under a disparate treatment theory of discrimination. In analyzing the facts of the case, Judge Gordon looked to Duke Power Company's intent for implementing the high school and testing requirements. Because Duke Power Company had applied the high school and testing requirements fairly to black and white employees, after the effective date of the Civil Rights Act, for the purpose of improving the quality of its workforce, the district court found that Duke Power Company had not violated the Civil Rights Act. In commenting on the subject, Professor Michael Gold observed that Judge Gordon "rejected the heart and soul of [disparate] impact, for he held the diploma and testing requirements were lawful because they were intended to serve a legitimate purpose and were administered fairly." In Judge Gordon's analysis, "discrimination depended on the reasons for, not the effects of, an employer's act." 

20. *Id.* The district court disagreed with the Equal Employment Opportunity Commission's Guidelines on employment testing which stated that, 

The Commission accordingly interprets "professionally developed ability test" 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. *Id.* The district court rejected the EEOC's interpretation of section 703(h) by noting that "[n]owhere does the Act require that employers may utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs." *Id.* The district court, unlike the EEOC and eventually the Supreme Court, accurately recognized that Congress did not require that professionally prepared examinations test qualities relevant to the performance of a particular job. *Id.* 

The district court strengthened its interpretation of section 703(h) by stating, "[a] test which measures the level of general intelligence, but is unrelated to the job to be performed is just as reasonably a prerequisite to hiring or promotion as is a high school diploma." *Id.* "Rather [the general intelligence tests] are intended to indicate whether the employee has the general intelligence and overall mechanical comprehension of the average high school graduate, regardless of race..." *Id.*

21. Gold, supra note 2, at 469.
22. *Id.*
23. *See id.*
24. *Id.* at 470-71.
25. *Id.* at 471.
C. The Court of Appeals' Groundbreaking Analysis

On appeal, the Court of Appeals for the Fourth Circuit found that the district court had erred by refusing to acknowledge that the Civil Rights Act prevented employers from instituting testing requirements that had the effect of continuing past discrimination. The court analyzed when each of the plaintiffs had applied for employment with the Duke Power Company and how the Duke Power Company's first racial and then educational requirements had affected the present employment status of each employee. For the purpose of understanding the origin of the disparate impact concept, only the Fourth Circuit Court of Appeals' analysis of the effect of the testing policy will be examined in depth.

Circuit Judge Herbert Boreman, writing for the court, determined that "while it is true that the Act was intended to have prospective application only, relief may be granted to remedy present and continuing effects of past discrimination." The Fourth Circuit based its interpretation of the Act on Quarles v. Philip Morris, Inc., which the United States District Court for the Eastern District of Virginia had decided in 1968. The Quarles court held that "Congress did not intend to freeze an entire generation of [African-American] employees into...

27. See id. at 1230-31.
28. See id. at 1230-35. The court first examined the situation of the six plaintiffs who had begun employment with Duke Power Company before the implementation of the high school diploma policy in 1955. See id. at 1230. The court reasoned that the six African-American employees who began employment prior to the implementation of the 1955 high school diploma policy had remained frozen in the labor department at the same time that the whites hired prior to the high school diploma requirement had held jobs in the higher paying departments. Id. at 1231. Similarly, the court held that the test requirements as a means for transfer or promotion had discriminated against these six employees. Id. The court reasoned that if the company had implemented the test policy as a substitute for the high school diploma requirement and the high school diploma requirement had led to discrimination, then the tests had the effect of discriminating against the six plaintiffs who had begun employment prior to 1955. Id. The court ruled that the six plaintiffs hired prior to 1955 would be exempt from the test requirements and would be entitled to relief. Id.

The second group of employees consisted of those individuals who did not have a high school education but had begun employment after the implementation of the 1955 requirement. Id. Four of the plaintiffs belonged to this group. Id. The court determined that these plaintiffs did not qualify for relief. Id. For these four employees, the court decided that the high school diploma requirement and the tests for transfer or promotion did not perpetuate the effects of past discrimination. Id. at 1231-32.

29. Id. at 1230.
30. Id.
discriminatory patterns that existed before the act." Furthermore, the Fourth Circuit noted that the Fifth Circuit had approved the Quarles court's interpretation of the Act in *Local 189, United Papermakers v. United States.* As a consequence, the Court of Appeals for the Fifth Circuit declared that a seniority system that continued past discrimination had violated the Act.

While the Court of Appeals for the Fourth Circuit recognized that the Act may provide relief to members of a protected class who suffer the continuing effects of past discrimination, the court still applied a disparate treatment analysis of discrimination. The court examined the intent of Duke Power Company to determine if the employer had engaged in discriminatory activity. Judge Boreman concluded that in section 703(h) Congress had intended to protect general intelligence and ability tests as long as an employer applied the test in a fair manner. Judge Boreman’s analysis sought to discern the intent of the employer for using the general intelligence and ability examination as a requirement for promotion. The court concluded that the Duke Power Company had a legitimate motive to increase the educational capacity of its workforce and had applied the policy in a good faith manner.

In a dissenting opinion to the Fourth Circuit Court of Appeals’ opinion, Circuit Judge Simon Sobeloff applied a disparate impact analysis to the *Griggs* case, which provided the basis for the Supreme Court’s subsequent analysis. Judge Sobeloff focused on the language of section 703(a) of the Civil Rights Act of 1964. He reasoned:

---

32. *Id.*; *Local 189, United Papermakers v. United States*, 416 F.2d 980, 995 (5th Cir. 1969).
34. *Griggs*, 420 F.2d at 1230, 1232.
35. *Id.* at 1232.
36. *Id.* at 1234-35.
38. *Id.*
40. *Griggs*, 420 F.2d at 1238 (Sobeloff, J., dissenting). Section 703(a) of the Civil Rights Act of 1964 states:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
The statute is unambiguous. Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that "objective" or "neutral" standards that favor whites but do not serve business needs are indubitably unlawful employment practices. The critical inquiry is business necessity and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end.41

Under Judge Sobeloff's interpretation of the Act, a policy that has the effect of discriminating against African-Americans must have a legitimate purpose regardless of the employer's intent for instituting the policy.42

D. The Supreme Court's Analysis

The United States Supreme Court granted a writ of certiorari to examine whether Title VII of the Civil Rights Act of 1964 prohibited an employer from using a high school diploma and satisfactory scores on two professionally developed tests as requirements for promotion or transfer under three conditions; when

(a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify [African-Americans] at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.43

The addition of these three criteria to be examined along with the initial issue as set forth in the decisions of the district court and the court of appeals provided the factual predicate for the Court's disparate impact analysis of the issues in Griggs.44

The Court concluded that the high school diploma and the professionally prepared aptitude tests failed to measure potential job performance in any of the departments.45 The Court reached this conclusion even after the decisions of the district court and the majority for the court of appeals clearly had demonstrated that the Tower

41. Griggs, 420 F.2d at 1238 (Sobeloff, J., dissenting).
42. Id. at 1246.
43. Griggs, 401 U.S. at 426.
44. See id. at 424-29.
45. See id. at 433.
Amendment,\textsuperscript{46} in the form of section 703(h), did not require that professionally prepared tests must directly relate to the job in question.\textsuperscript{47} The Court explained that the Clark-Case Memorandum indicated that an employer may use a bona fide examination to elevate the quality of the workforce.\textsuperscript{48} The Court decided that the Act required that tests directly relate to business necessity.\textsuperscript{49} The Court described the overarching purpose of Title VII as a tool 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.”\textsuperscript{50} The Court continued, “[u]nder 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.”\textsuperscript{51} This analysis by the Court paralleled the reasoning in the dissenting opinion of the Fourth Circuit Court of Appeals.\textsuperscript{52}

At the crucial, decisive, and pivotal point in its opinion, the Supreme Court reasoned:

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 [African-Americans] cannot be shown to be related to job performance, the practice is prohibited.\textsuperscript{53}

\textsuperscript{46} See Rothschild & Werden, supra note 8, at 268-69 (discussing the legislative history of section 703(h)).


\textsuperscript{48} See Gold, supra note 2, at 487. Senators Case of New Jersey and Clark of Pennsylvania were the co-managers of the Act in the Senate. \textit{Id.} The two Senators issued a memorandum explaining that “the proposed Title VII ‘expressly protects the employer’s right to insist that any prospective applicant . . . must meet the applicable job qualifications.’” \textit{Id.} (quoting Griggs, 401 U.S. at 434).

\textsuperscript{49} Griggs, 401 U.S. at 431.

\textsuperscript{50} \textit{Id.} at 429-30.

\textsuperscript{51} \textit{Id.} at 430.

\textsuperscript{52} See Griggs, 420 F.2d at 1247 (Sobeloff, J., dissenting).

\textsuperscript{53} Griggs, 401 U.S. at 431.
This critical paragraph enabled the Court to justify the creation of the disparate impact interpretation of discrimination. The Court utilized the fable of *The Fox and the Stork* as the linchpin to affirm the new concept of disparate impact. The Court relied on the fable’s logic to conclude that job qualification tools must provide for all members of society, regardless of their race, color, sex, national origin, or religion, to have an equal opportunity to qualify for a job. The Court held that the results of the high school diploma and professionally prepared aptitude tests had an “adverse impact” on African-Americans because, although Duke Power Company did not intend to prohibit African-Americans from obtaining jobs in the non-labor departments, the requirements actually led to African-Americans not receiving jobs in the non-labor departments.

In analyzing the disparate impact concept prior to its codification, Professor Mack A. Player explained:

A uniform rule or practice utilized with no motive to benefit or harm members of protected classes, and which does not perpetuate any past intentional segregation along proscribed lines, can violate Title VII. A neutral rule that results in different individuals being treated differently is an act of “Discrimination.” It is “discrimination” “because of” race, color, religion, sex, or national origin if the rule has an adverse impact on members of those classes and cannot be justified in terms of the

---

54. In subsequent cases, the Supreme Court established a burden shifting procedure to prove a case of disparate impact. See MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 356 (Student ed. 1988). To demonstrate disparate impact, the “[p]laintiff carries the initial burden of proving that a particular device or system adversely affects employment opportunities of a defined protected class when compared to the effect that device has upon the opportunities of other classes.” *Id.* Today, the plaintiff can demonstrate disparate impact by statistically demonstrating that the employer hires members of protected class at a rate of less than eighty percent of non-protected classes. *Id.* at 359-60. If the plaintiff can demonstrate disparate impact, “the burden shifts to the defendant to establish to the satisfaction of the trial court that use of the device is a ‘business necessity.’” *Id.* at 356.

“‘Business necessity’ has evolved to include two separate elements. A *prima facie* demonstration of ‘business necessity’ is established by defendant proving that a ‘manifest relationship’ exists between the device being challenged and bona fide and significant business purposes.” *Id.* If the defendant can prove a “business necessity” the burden of proof shifts back to the plaintiff, who can then attempt to demonstrate that alternative methods of action exist for the defendant that will work just as well without discriminating. *Id.* The burden then shifts to the defendant to prove “business necessity.” *Id.*

55. See Griggs, 401 U.S. at 431.

56. See id.

57. *Id.* at 427, 432.
practice being a "business necessity." 58

As explained by the Court in Griggs, intent does not constitute an element in disparate impact discrimination. 59 The Court found that the purpose of Title VII of the Civil Rights Act of 1964 involved preventing the end result of discrimination regardless of the motivation of the employer. 60 As a consequence, disparate impact differs significantly from the more traditional concept of disparate treatment, which requires a plaintiff to prove the intent of the defendant. 61

In the over forty years since the Supreme Court issued the decision in Griggs, many academics have elaborately, exhaustively, and painstakingly analyzed the case and its impact on employment discrimination law. 62 However, in that time not a single commentator

58. PLAYER, supra note 54, at 227.
60. Id.
62. Professor Michael Gold, based on a detailed analysis, concluded that Congress did not intend to include disparate impact theory in Title VII. Gold, supra note 2, at 466. Professor Gold argued that Congress, through the text of Title VII and the legislative debates, proscribed only intentional discrimination—in other words, the disparate treatment theory of discrimination. Id. at 492. Professor Gold concluded that Judge Sobeloff's dissent and the Supreme Court's decision interpreted Title VII well beyond Congress's intent. See id. at 475, 477-79, 478 n.169.

In response to Judge Sobeloff's reasoning that "[o]vert bias, when prohibited, has oftentimes been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before." Griggs v. Duke Power Co., 420 F.2d 1225, 1238 (4th Cir. 1970) (Sobeloff, J., dissenting). Professor Gold responded, "[a]n employer who attempts to evade the Act by choosing tests that favor whites is engaged in disparate treatment, which is illegal regardless of whether adverse impact is illegal." Gold, supra note 2, at 476 n.166. Professor Gold suggested that Judge Sobeloff essentially applied a new concept to situations that could be interpreted within the meaning of the discrimination intended by Congress. See id. at 475.

Professor Gold also cited Section 706(g) to prove that Congress meant to interpret discrimination as intentional discrimination. Id. at 492-93. Section 706(g) of Title VII of the Civil Rights Act of 1964 states,

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be), responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this
HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL

has examined the use of the fable of The Fox and the Stork and its role in the creation of disparate impact. While many scholars have gone to great lengths to verify that the Court broadly interpreted Title VII to justify disparate impact as a form of discrimination, none have discovered, evaluated, or recognized the decisive use of the fable to create the disparate impact option for plaintiffs.

II. THE GRIGGS FABLE IGNORED

In the critical paragraph in Griggs in which the Court declared its acceptance of disparate impact as a form of discrimination, Chief Justice Burger referred to the fable of The Fox and the Stork. Chief Justice Burger’s somewhat subtle use of the fable The Fox and the Stork may appear accurate on its face; however, a deeper analysis definitively reveals that intent actually plays a crucial role in the fable as well as in employment discrimination law.


Professor Gold stated, "[i]ntent is part of the statute, and ‘intentionally’ was added to section 706(g) so the courts would not forget it." Gold, supra note 2, at 492. Professor Gold quoted Senator Hubert H. Humphrey’s reasoning:

Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only discrimination because of race, color, religion, sex, or national origin it would seem already to require intent, and, thus the proposed change does not involve any substantial change in the title. The expressed requirement of intent is designed to make it wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders. It simply means the respondent must have intended to discriminate.

Id. (quoting 110 CONG. REC. 12,723-24 (1964)).

Thus, Professor Gold argued that had Congress intended for the courts to interpret discrimination using the disparate impact concept, the lawmakers would have explicitly articulated such an approach. Gold, supra note 2, at 492. Instead, Congress went to great lengths by specifically inserting the word "intent" in section 706(g), to ensure that the courts would only use a disparate treatment definition of discrimination. Id. at 492-93.

63. See, e.g., Gold, supra note 2; Rothschild & Werden, supra note 8; Selmi, supra note 4.
64. See, e.g., Gold, supra note 2; Rothschild & Werden, supra note 8; Selmi, supra note 4.
66. Without reference to the fable of The Fox and the Stork, the critical paragraph in the Griggs decision would read as follows:

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account . . . . 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 [African-Americans] cannot be shown to be related to job
A. A Brief History of Fables

The prominent fable scholar Christos A. Zafiropoulos defined a fable as a "brief and simple fictitious story with a constant structure, generally with animal protagonists ... which gives an exemplary and popular message on practical ethics and which comments, usually in a cautionary way, on the course of action to be followed or avoided in a particular situation." Authors and storytellers typically employ fables to relay specific moral or life lessons to their readers or listeners.

Scholars of fables credit many of the earliest fables to the Greek slave Aesop. Aesop’s fables, as well as many anonymous fables, contain several distinct literary characteristics. They usually consist of a fictitious plot, a single action or a brief series of actions, actions of specific characters, and delivery of a principle or message. The standard characteristics of Aesop’s fables reflect a basic construct that facilitates the uniform analysis of the fables to reveal the message of each fable.

In modern times, scholars have worked to find similarities among fables to create classification systems based on motifs, messages, and performance, the practice is prohibited.

*Id.* (omitting the Court’s reference to the fable).

67. CHRISTOS A. ZAFIROPOULOS, ETHICS IN AESOP’S FABLES: THE AUGUSTANA COLLECTION 1 (2001). Zafiropoulos’s definition builds on the description of the Greek scholar Theon, who stated that the fable is a “fictitious narration that portrays reality.” *Id.*


Tradition says that around 620 B.C., Aesop was born a slave in one of the ancient city-states in Asia Minor, on the Greek island of Samos, or in Ethiopia or another locale. A man named Xanthus owned him first, and then ladmon; because of Aesop’s marvelous wit and capacious intellect, ladmon gave him his freedom. According to Plutarch, Aesop served as a shrewd and capable emissary to the wealthy Croesus, king of Lydia, who employed the fabulist in his court, where he dined with philosophers and from which he traveled on ambassadorial missions. The brilliant storyteller reportedly journeyed throughout Greece, doing business for Croesus and delighting the citizens of many cities with his fables.

*Id.* at v.


70. *See id.*

71. The fable as a literary entity evolved over time with notable changes throughout its long history. The original use of fables occurred during the Archaic and Classical Periods. ZAFIROPOULOS, supra note 67, at 12. During these periods, storytellers utilized fables to deliver societal messages. *Id.* at 13. By the time of the Imperial Age and Late Antiquity, the fable became an independent literary form. *See id.* In modern times, scholars such as Ben Edwin Perry have thoroughly analyzed the collection of Greek fables to reveal layers of meaning in each fable. *See id.*
In standardizing the analysis of fables, scholars observe the actions and qualities of certain animals and interpret them on a human scale. The animals used in a particular fable do not appear at random; they represent specific character traits that the fabulist intends to criticize or to evaluate. For example, the fox, a key character in the Griggs fable, represents a cunning character.

In addition to the specific animals selected by fabulists, recurring literary devices and literary themes play an important role in understanding and examining the potential meanings about individual fables. According to scholar Francisco Rodríguez Adrados, "there is a series of literary elements of the animalistic type (similes, comparison, oracles, animal aetiologies, animal proverbs, etc.) that are very closely related to the fable and are, on occasions, from even earlier." Fables reflect carefully constructed literary elements that create room for profound analysis and interpretation that may be susceptible to faulty interpretations of the moral or primary principle being expressed.

Like other literary devices, such as similes or comparisons, fables reveal certain aspects of human nature and the values of a particular culture. In Ancient Greek society, competition played a dominant role in all aspects of life. The concept of competition or, in fable literature,
the *agon*, appears frequently.80 A prominent aspect of many fables involves confrontation between the characters.81 In many competitive instances, the weaker of the two animals outwits the stronger animal, which causes the stronger animal to weep.82

Reciprocity constitutes the fundamental feature of *The Fox and the Stork* fable.83 Professor Zafiropoulos defined reciprocity in fables as a “voluntary exchange of goods and services between two or more parties. In essence, it poses the following demands to the ethical agent: to help those who helped him, to harm those who harmed him[,] and not to injure those who helped him.”84

Two types of reciprocity exist: positive reciprocity and negative reciprocity.85 The concept of negative reciprocity applies to the *Griggs* fable.86 One form of negative reciprocity involves hostile reciprocity, which applies in *The Fox and the Stork* fable.87 In instances of hostile reciprocity, the characters engage “in the promotion of self-interest at the expense of the other party; it breaches the mutuality of the relationship because the agent takes something and gives nothing in return.”88 Hostile reciprocity relies on the concept of *lex talionis*, or “the repayment of the harm by harm often of identical value.”89 As a core consequence, the essential element of hostile reciprocity focuses on the intent of the parties to deliberately inflict a hardship or unpleasant act on the other party.90 As revealed by an accurate literary analysis of *The Fox and the Stork*, the failure of the Court to recognize the basic concept of hostile reciprocity in the fable led to an inaccurate use of the fable and created a misunderstanding of the role of intent in the creation of

81. 1 ADRADOS, supra note 71, at 186.
82. *Id.*
84. ZAFIROPOULOS, supra note 67, at 81.
85. *Id.*
86. *See id.*
87. *See id.*
88. *Id.* at 82.
89. *Id.* at 82; *see also* Lex talionis, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The law of retaliation, under which punishment should be in kind—an eye for an eye, a tooth for a tooth, and so on—but no more.”).
90. *See* ZAFIROPOULOS, supra note 67, at 114-17.
disparate impact.  

B. The Fox and the Stork

The fable of *The Fox and the Stork* referred to by the Supreme Court in *Griggs* represents one version of the Perry type 426 fable and the AT type 60 fable. The most typical version of this fable specifies:

A Fox invited a Stork to dinner, at which the only fare provided was a large flat dish of soup. The Fox lapped it up with great relish, but the Stork with her long bill tried in vain to partake of the savoury broth. Her evident distress caused the sly Fox much amusement. But not long after the Stork invited him in turn, and set before him a pitcher with a long and narrow neck, into which she could get her bill with ease. Thus, while she enjoyed her dinner, the Fox sat by hungry and helpless, for it was impossible for him to reach the tempting contents of the vessel.

Another version of this fable type replaces the stork with a crane and states:

The fox invited the crane (the stork in Ph.) to eat and served him a broth or a soup, which he poured onto marble, so that the stork could not drink it. But he in turn invited the fox and served him in a bottle with a narrow neck, from which he too could not drink. Closing

---

91. See infra Part III A-B (discussing the far-reaching impact of the Court’s misapplication of *The Fox and the Stork*).


93. AESOP, AESOP’S FABLES 23 (V.S. Vernon trans., 1916) [hereinafter AESOP’S FABLES]. Phaedrus, a former slave from the first century A.D., established the earliest set of Latin versions of the Greek fables.

94. “Ph.” refers to the fabulist Phaedrus, who told the version of the fable as “[a]n agon of the two animals, in two acts, with the stork (or crane) triumphing: the fox serves soup on a plate that is not very deep, the bird in a bottle with a narrow neck.” 2 Francisco Rodriguez ADRADOS, HISTORY OF THE GRAECO-LATIN FABLE 144 (Leslie A. Ray trans., 2000). Phaedrus was a fabulist who:

[U]se[d] fables to make a hidden satire of the world that surrounds him, in the court of Tiberius; in his prologue to the third book, Phaedrus attributes the invention of the fable to the desire to express himself freely under tyranny and he presents himself as a continuer—and victim—of this practice.... With partly traditional material and traditional themes, Phaedrus virulently attacks the vices of the society of his time: greed, hypocrisy, taking advantage of the weak, etc.

statement by the stork: we must draw the consequences of what we do.\textsuperscript{95} Although many versions of The Fox and the Stork, or in some instances The Fox and the Crane, exist, the general sequence of events and the outcome remain the same: The fox invites the bird for a meal; the fox intentionally serves the meal in a shallow dish to prevent the bird from consuming the meal; the bird reciprocates by inviting the fox for a meal; the bird intentionally serves the meal in a tall, slender vessel; and the fox cannot consume the meal.\textsuperscript{96} The final message of either iteration of the tale expresses the moral “one bad turn deserves another.”\textsuperscript{97}

Professor Francisco Rodriguez Adrados described the sequence of events in The Fox and the Stork as an exchange with “two agones of action with the result inverted: punishment of the wicked fox . . . .”\textsuperscript{98} The key aspect of each animal’s actions involves the deliberateness and malicious intent of each animal to prevent the other from consuming the meal; while the fox’s initial intentional act represents the malicious nature of the cunning fox, the stork’s intentional act represents justice and punishment for the deliberate act of the fox.\textsuperscript{99}

In The Fox and the Stork, the fox, as a cunning animal, deliberately planned to serve dinner in a shallow bowl to prevent the stork from consuming the meal.\textsuperscript{100} In the end, the stork actually outwitted the fox by intentionally reciprocating the fox’s malicious action to ensure that the fox would suffer the same embarrassment that the stork had suffered.\textsuperscript{101} This interaction and negative reciprocity to transform the fox into the victim of his own cunning behavior represents a common

\begin{itemize}
\item \textsuperscript{95} 3 ADRADOS, supra note 92, at 387.
\item \textsuperscript{96} See, e.g., id.; AESOP’S FABLES, supra note 93, at 23.
\item \textsuperscript{97} Aesop, supra note 83.
\item \textsuperscript{98} 3 ADRADOS, supra note 92, at 387.
\item \textsuperscript{99} In fables, the fox generally represents a cunning individual, whose behavior epitomizes the conduct of an actor who would deliberately serve a meal in a shallow vessel to an animal with a long, narrow beak. See 1 ADRADOS, supra note 71, at 158, 353. The clever, cunning behavior of the fox can be observed in several other classic Greek fables in which he “takes on a subordinate position in relation to strong [animals], yet he is boastful and cowardly . . . .” Id. at 353. While clever enough to take a subordinate role to stronger animals such as the lion, the fox’s character represents a selfish quality that takes pleasure in the suffering of others. See id. In other cultures, the role of the fox may be replaced by the snake, which, from the earliest times, represented negative character attributes, such as deceitfulness. Id. at 159-60. In many instances in fables, the cunning animal, such as the fox, reveals his plan prematurely allowing for the intended victim to punish the cunning animal. See ZAFIROPOULOS, supra note 67, at 161-62.
\item \textsuperscript{100} See, e.g., 3 ADRADOS, supra note 92, at 387; AESOP’S FABLES, supra note 93, at 23.
\item \textsuperscript{101} Id.
\end{itemize}
punishment for the cunning animal in fables.\textsuperscript{102}

The stork in this fable represents justice. The stork recognized the deliberate act of the fox and the fox’s intent to embarrass the stork.\textsuperscript{103} The key element in the action of the stork involves the use of \textit{lex talionis} to punish the fox.\textsuperscript{104} In the realm of fables, the appropriate punishment for inappropriate behavior requires the initial wrongdoer to suffer in the manner he had intended his victim to suffer.\textsuperscript{105}

The actions of the fox and the stork at first glance may appear quite innocent; however, a more thorough literary analysis reveals that every action contains a clear intent on the part of the actors. As demonstrated by examining the concept of negative reciprocity, the qualities of the fox and the stork, as well as several versions of the fable of \textit{The Fox and the Stork}, the actual intent of the parties constitutes a crucial, fundamental, and pivotal feature of the fable.\textsuperscript{106}

III. THE FAR-REACHING IMPACT OF THE FALSE PREMISE

After analyzing the history of \textit{Griggs}, the origin of disparate impact, and the true meaning of \textit{The Fox and the Stork} fable, the evidence demonstrates that the Court either misunderstood the fable or improperly manipulated the true meaning of the fable to bolster the disparate impact concept of discrimination.\textsuperscript{107} Like disparate impact, which may appear to be a neutral act on the surface but after peeling away many layers may reveal an intentionally discriminatory act, the same analysis must be applied to the Court’s use of the fable. While on the superficial surface, Chief Justice Burger’s interpretation of the fable may appear to be an accurate reading of the fable, in reality he omitted the crucial point: that the fable deals exclusively with intent!\textsuperscript{108} Quite strikingly, the Court succeeded in justifying a newly announced, non-intentional form of discrimination by using as its critical foundation a fable whose essence involves the explicit intent of the two characters.\textsuperscript{109}

\textsuperscript{102} 3 ADRADOS, \textit{supra} note 92, at 387; see also ZAFIROPOULOS, \textit{supra} note 67, at 81-82.
\textsuperscript{103} 3 ADRADOS, \textit{supra} note 92, at 387.
\textsuperscript{104} See ZAFIROPOULOS, \textit{supra} note 67, at 82.
\textsuperscript{105} See id.
\textsuperscript{106} See, \textit{e.g.}, 3 ADRADOS, \textit{supra} note 92, at 387-88 (depicting various examples of the fox’s mischievous nature throughout several fables including \textit{The Fox and the Stork}).
\textsuperscript{107} See \textit{Griggs} v. Duke Power Co., 401 U.S. 424, 431 (1971) (comparing actions of parties with the fable of \textit{The Fox and the Stork} without considering the character of either creature). \textit{But cf.} Selmi, \textit{supra} note 4, at 722 (discussing whether disparate impact should have been implemented).
\textsuperscript{108} See \textit{Griggs}, 401 U.S. at 431; see also 3 ADRADOS, \textit{supra} note 92, at 387-88.
\textsuperscript{109} See 3 ADRADOS, \textit{supra} note 92, at 387-88.
And for over forty years, no one has exposed this error.\textsuperscript{110} By writing with the sweeping authority that the Supreme Court commands, the Court successfully created and concealed an artificial distinction within the definition of discrimination as specified in Title VII.\textsuperscript{111} Whereas the Act proscribed one form of discrimination in which an employer intentionally attempts to prevent a protected class from having the same opportunities as the majority, the ruling of the Supreme Court in \textit{Griggs} created a cause of action that Congress originally had not intended to make.\textsuperscript{112} Just as the Court created a distinction not found in Title VII about the nature of discrimination, the context in which the Court interpreted the fable represents an inaccurate distinction. By only using the vessel from the fable to define discrimination, the Court omitted the key aspect of the fable: the intentional actions of the characters.\textsuperscript{113} By stating that the vessel must be one from which all members of society can eat, the Court ironically failed to truly relay the most important message of the fable: intentional inhospitality reciprocated.\textsuperscript{114} In this regard, the Court artificially manipulated the fable to use only the part of the fable that justified the Court’s goal to create the disparate impact theory.\textsuperscript{115}

The district court, the majority of the Court of Appeals for the Fourth Circuit, and the commentary of Professor Michael Gold reveal that Congress never intended to create a disparate impact definition of discrimination.\textsuperscript{116} Not only does the Act specifically include the word “intent” in section 706(g),\textsuperscript{117} the congressional record includes several forceful examples of Congress’s view of discrimination.\textsuperscript{118} The Tower

\textsuperscript{110} See, e.g., Gold, supra note 2, at 478-80.


\textsuperscript{112} Gold, supra note 2, at 492.

\textsuperscript{113} \textit{Griggs}, 401 U.S. at 431; \textit{Aesop}, supra note 83.

\textsuperscript{114} Compare \textit{Griggs}, 401 U.S. at 431 (“the vessel in which the milk is proffered [must] be one all seekers can use”), with \textit{ZAFIROPOULOS}, supra note 67, at 82 (explaining the importance of \textit{lex talionis} in the fable), and \textit{Aesop}, supra note 83 (illustrating that the stork’s response that “each bad turn deserves another” evinces inhospitality reciprocated).

\textsuperscript{115} In \textit{Griggs}, the Court’s analogy to the vessel and the employee skills tests omits the fable’s central theme of \textit{lex talionis} and inhospitality reciprocated in order to conclude that Congress intended a disparate impact definition of discrimination. \textit{Griggs}, 401 U.S. at 431.


\textsuperscript{117} 42 U.S.C. § 2000e-5(g) (2012) (“If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice... the court may enjoin the respondent from engaging in such unlawful employment practice...”).

\textsuperscript{118} See Rothschild & Werden, supra note 8, at 267.
Amendment, the Clark-Case Memo, as well as the comments made by several lawmakers on the floor of Congress reveal that Congress only foresaw and meant to eliminate intentional discrimination in the workplace at the time of the passage of the Civil Rights Act of 1964. Even after the district court and the majority of the Court of Appeals for the Fourth Circuit accurately demonstrated Congress' intent for the meaning of discrimination, the United States Supreme Court decided to reach beyond congressional intent to create a new form of discrimination, namely, disparate impact. In this case, however, the Court failed to adequately justify its new creation because it improperly interpreted the fable, which it used as the foundation for the creation of the concept of disparate impact.

A. Disparate Impact's Negative Effect on Disparate Treatment Claims

The Court’s failure to properly justify the creation of disparate impact has had long lasting effects on employment discrimination law. As seen in the statistical evidence presented by Professor Selmi, disparate impact actually may have hurt members of protected groups by reducing the value and the ease of proving disparate treatment. The concept of disparate impact has arguably functioned to limit the number of successful claims of disparate treatment. Professor Selmi suggests that the Court’s sanction of disparate impact as a cause of action under Title VII effectively constrained and limited the development of the disparate treatment theory of

119. See id. at 268 (discussing the legislative history of § 703(h)).
120. See supra note 116 and accompanying text.
121. See Griggs, 401 U.S. at 430, 432.
122. See id. at 431; see also Aesop, supra note 83.
123. See Selmi, supra note 4, at 706-07.
124. Id. at 705. Professor Michael Selmi considered whether the concept and implementation of disparate impact theory has actually benefited members of protected classes. Id. He perceived that the concept of disparate impact has undermined the value of disparate treatment theory. Id. Professor Selmi claims that, “Outside of the original context in which the theory arose, namely written employment tests, the disparate impact theory has produced no substantial social change and there is no reason to think that extending the theory to other contexts would have produced meaningful reform.” Id. Professor Selmi continued,

The disparate impact theory has often been justified based on the difficulty of proving intentional discrimination, particularly in cases where evidence of overt bias or animus is lacking. Yet, there was no reason to believe that courts would be more willing to see discrimination through the lens of disparate impact theory when they were unable to do so even through the far more common mix of circumstantial evidence of intentional discrimination.

Id. at 706.
Professor Selmi hypothesizes that in the absence of the disparate impact cause of action, disparate treatment would have developed into a broad cause of action encompassing many of the claims that are now brought under the disparate impact theory.

Professor Selmi demonstrated with statistical evidence that plaintiffs generally have failed to win suits claiming disparate impact. Of 130 appellate cases analyzed by Professor Selmi, the plaintiffs prevailed in only 19.2% of the claims. Furthermore, several of these cases also succeeded under a disparate treatment interpretation of discrimination. This analysis reveals that the disparate impact theory of discrimination has not fulfilled its potential of eradicating the present effects of past discrimination. At the same time, the concept has reduced the potential value of the disparate treatment theory of discrimination.

B. Codification of Disparate Impact in the Civil Rights Act of 1991

In 1991, Congress amended the Civil Rights Act of 1964 and codified the judicially created disparate impact theory of employment discrimination. Congress codified the disparate impact theory of discrimination to nullify the Supreme Court’s decision in Wards Cove Packing Co., Inc., v. Atonio. In Wards Cove Packing Co., Inc., the Supreme Court had determined that the proper analysis for demonstrating prima facie cases of disparate impact involved comparing “the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market.” Congress reacted to the Supreme Court’s decision to modify the mechanism for calculating disparate impact by codifying the Griggs method for determining if a disparate impact existed.

While Congress codified the method for demonstrating disparate impact, it also specifically added the concept of disparate impact in the

125. Id. at 706-07.
126. Id.
127. Id. at 738-39.
128. Id. at 738.
129. See id. at 742.
133. Perry, supra note 131, at 525 & n.14; see also 42 U.S.C. § 2000e-2(k).
section addressing unlawful employment practices.\textsuperscript{134} The fact that Congress added disparate impact as a separate unlawful employment practice in the amendments reveals by implication that the 88th Congress did not intend for disparate impact to be included in the definition of discrimination in the Civil Rights Act of 1964.

After the Supreme Court’s decision in \textit{Griggs}, disparate impact became a fundamental element of employment discrimination law.\textsuperscript{135} The Court extended the foundation in \textit{Griggs} in subsequent cases by creating the standards for demonstrating disparate impact.\textsuperscript{136} By the time Congress codified disparate impact in the Civil Rights Act of 1991, disparate impact had existed as a recognized form of discrimination for twenty years.\textsuperscript{137} Although many scholars demonstrated that the Supreme Court inappropriately created disparate impact, perhaps if scholars, jurists, or lawmakers had discovered the erroneous use of \textit{The Fox and the Stork} fable, Congress would have questioned in greater depth the disparate impact theory.\textsuperscript{138}

C. The Ongoing Tension Between Disparate Treatment and Disparate Impact

The interplay between disparate treatment and disparate impact arose in \textit{Ricci v. DeStefano}.\textsuperscript{139} In \textit{Ricci}, the Court determined that the City of New Haven’s decision to refuse to implement the results of a professionally prepared examination due to the fear of a potential disparate impact lawsuit from African-American firefighters constituted disparate treatment against the White and Hispanic firefighters, who had sued the City.\textsuperscript{140} This case represented a fundamental paradigm shift by

\begin{footnotesize}
\bibitem{135} See \textit{PLAYER}, supra note 54, at 356.
\bibitem{136} See \textit{Washington v. Davis}, 426 U.S. 229 (1976). In \textit{Washington v. Davis}, the Supreme Court analyzed a disparate impact claim brought under the Equal Protection Clause of the 14th Amendment. \textit{Id.} at 238-39. The Court concluded that disparate impact without a showing of intent did not violate the Equal Protection Clause of the 14th Amendment. \textit{Id.} at 239. The Court acknowledged two distinct standards in \textit{Washington}. \textit{Id.} at 238-39. Under a Title VII claim, a showing of disparate impact, without intent, sufficed to demonstrate a violation of the Civil Rights Act. \textit{Id.} However, to prove an Equal Protection violation the plaintiff must reveal some level of intent in addition to the disparate impact. \textit{Id.} at 239.
\bibitem{137} See \textit{Perry}, supra note 131, at 525.
\bibitem{138} See \textit{Griggs v. Duke Power Co.}, 401 U.S. 424, 431 (1971); \textit{Selmi}, supra note 4, at 722 (discussing how there was little discussion regarding whether intent was a required element of proof for disparate impact cases).
\bibitem{140} See \textit{id.} at 579.
\end{footnotesize}
the Court about the interaction between disparate treatment and disparate impact discrimination. In instances when disparate treatment and disparate impact conflict, the Court specified that the defendant must justify engaging in disparate treatment by a strong basis in evidence to demonstrate the likelihood of a potential disparate impact lawsuit. The Court determined that the defendant lacked a strong basis in evidence to prove that the professionally prepared examination results had a disparate impact on African-American applicants. "[A] 'strong basis in evidence' means an employer finding of potential disparate impact liability, as opposed to a mere prima facie case." The Court's decision in Ricci refocused the priority of disparate treatment claims over disparate impact claims unless the defendant satisfies the strong basis in evidence standard.

The Ricci case reveals the inevitable tension that an employer faces by using a professionally prepared examination that yields potentially disparate results. On the one hand, an employer using a professionally prepared examination must establish that the examination is demonstrably job related. On the other hand, an employer faces a legal dilemma if the results of the professionally prepared examination have a disparate impact on a protected class of test-takers. The employer can either implement the results of the examination and face a disparate impact claim or the employer can intentionally reject the results of the examination, which precludes promotions for the test takers who had passed the examination.

The tension addressed in Ricci reveals another unforeseen consequence of the Court's decision in Griggs. The Griggs decision shifted the legal focus from the explicitly-enacted theory of disparate treatment to the originally judicially created theory of disparate impact. As demonstrated by Professor Selmi, there is an inaccurate perception that disparate impact is easier to prove (by using statistical

141. See id. at 584.
143. Ricci, 557 U.S. at 586.
144. Corrada, supra note 142, at 255.
145. Ricci, 557 U.S. at 592.
146. Id. at 592-93.
147. Id. at 578.
148. Id. at 578-79.
149. See id.
150. See id. at 578.
151. See id. at 577-78.
evidence) than disparate treatment (which requires the demonstration of intent).\textsuperscript{152} From a practical standpoint, plaintiffs are more likely to argue disparate impact to prove discrimination claims, rather than disparate treatment, because of the perception that disparate impact is easier to prove.\textsuperscript{153} Disparate impact requires statistical evidence to show that a professionally prepared examination yielded disparate results for a protected class.\textsuperscript{154} Disparate treatment requires proof of intent, or the use of circumstantial evidence, which may be difficult to uncover.\textsuperscript{155} Prior to \textit{Ricci}, employers lacked legislative or judicial guidance for dealing with a potential conflict between disparate treatment and disparate impact.\textsuperscript{156}

The tension between disparate treatment and disparate impact recently reached reasonable accommodation cases.\textsuperscript{157} The EEOC Compliance Manual on Religious Discrimination explicitly provides that "[a] religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally. An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion."\textsuperscript{158}

In \textit{EEOC v. Abercrombie \\& Fitch}, the U.S. Supreme Court clarified how to analyze reasonable accommodation cases in the context of the statutorily provided unlawful employment practices.\textsuperscript{159} Samantha Elauf, a Muslim woman who wore a headscarf, applied for a job at the retail establishment Abercrombie \\& Fitch (Abercrombie).\textsuperscript{160} Abercrombie denied her employment because her headwear violated Abercrombie's "Look Policy."\textsuperscript{161} Factual disputes existed concerning whether Abercrombie knew or suspected that Ms. Elauf had worn the headscarf as part of her religious observance.\textsuperscript{162} The EEOC, on behalf of Ms.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{152} See Selmi, supra note 4, at 734, 738-39, 742, 768, 776-80.
\item \textsuperscript{153} See id. (illustrating the effect that different burdens have on plaintiffs' claims).
\item \textsuperscript{154} See id. at 780.
\item \textsuperscript{155} See \textit{Ricci}, 557 U.S. at 577.
\item \textsuperscript{156} See id. at 580 (stating that the task of the Court is to provide guidance to employers where no rule exists in order to reconcile the conflict between the disparate treatment and disparate impact).
\item \textsuperscript{157} See, e.g., EEOC v. Abercrombie \\& Fitch Stores, Inc., 135 S. Ct. 2028 (2015).
\item \textsuperscript{158} EEOC COMPLIANCE MANUAL, No. 915.003, DIRECTIVES TRANSMITTAL: § 12-IV REASONABLE ACCOMMODATION (2008).
\item \textsuperscript{159} See \textit{Abercrombie}, 135 S. Ct. at 2033.
\item \textsuperscript{160} Id. at 2031.
\item \textsuperscript{161} Id.
\end{itemize}
\end{footnotesize}
Elauf, initiated an action that alleged Abercrombie’s practices were “intentional and designed to deprive Samantha Elauf of equal employment opportunities and otherwise adversely affect her status as an employee.” The EEOC’s complaint failed to identify the theory of discrimination Abercrombie allegedly had violated by including the word “intentional” and the phrase “adversely affected” to implicate both the disparate treatment theory and the disparate impact theory.

The U.S. Supreme Court held that Abercrombie had violated Title VII by denying Ms. Elauf a job because her religion was a “motivating factor” in Abercrombie’s decision to deny her the job. Justice Scalia, writing for the Court, recounted that disparate treatment and disparate impact “are the only causes of action under Title VII.” The Court then clarified that religious accommodation claims must be brought under a disparate treatment analysis. The Court’s holding therefore rejected the EEOC’s guidance that religious accommodation claims are distinct from disparate treatment claims.

In an opinion concurring in part and dissenting in part, Justice Thomas agreed that only two unlawful employment practices exist, but challenged the majority’s assessment that religious accommodation cases must be analyzed under a disparate treatment theory. Justice Thomas accurately observed that disparate impact: “[c]onceived by this Court in Griggs v. Duke Power Co. ... provides that a ‘facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer’s subjective intent to discriminate that is required in a disparate-treatment case.’” Justice Thomas would have held that Abercrombie’s action did not constitute disparate treatment because Abercrombie had applied its neutral policy even though the

164. Id.
165. See Abercrombie, 135 S. Ct. at 2032.
166. Id. Justice Scalia further reasoned that: Abercrombie’s argument that a neutral policy cannot constitute “intentional discrimination” may make sense in other contexts. But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not “to fail or refuse to hire or discharge any individual ... because of such individual’s religious observance and practice.”
168. Abercrombie, 135 S. Ct. at 2037 (Thomas, J., concurring in part, dissenting in part).
169. Id. (citing Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53 (2003)).
effect fell "more harshly on those who wear headscarves as an aspect of their faith."

Justice Thomas noted that "cases arising out of the application of a neutral policy absent religious accommodations have traditionally been understood to involve only disparate-impact liability."

As yet another perpetuation of the original confusion created by \textit{Griggs}, the ramifications of categorizing certain religious accommodation cases under the disparate treatment theory or the disparate impact theory have a significant impact on the damages available for recovery by prevailing employees. 42 U.S.C. § 1981a(a)(1) permits courts to award compensatory damages and punitive damages to complaining parties who suffer intentional unlawful employment practices. However, 42 U.S.C. § 1981a(a)(1) specifically excludes complaining parties who experience disparate impact from recovering compensatory damages and punitive damages. Employees who prevail under the disparate impact theory only may recover equitable relief that includes reinstatement, backpay, and attorneys' fees. This ongoing tension between the application of disparate treatment theory and the disparate impact theory ultimately causes significant practical and quantifiable distinctions that affect potential recoveries for prevailing employees.

D. \textit{Griggs' Impact on European Union Non-Discrimination Law}

Not only has the \textit{Griggs} decision forever changed U.S. employment discrimination law, but \textit{Griggs} has also played a significant role in shaping the European Court of Justice's analysis of non-discrimination laws. While the United States was enacting civil rights legislation to protect a number of different classes from employment discrimination, the European Union and its member countries were enacting sex discrimination laws. Unlike the United States, Europe in the 1960s and 1970s had a fairly homogeneous population. Therefore, its early...
non-discrimination laws were enacted in the context of equal pay laws for men and women.\textsuperscript{178}

In the 1970s, the Labour Government in the United Kingdom enacted equal pay laws and sex discrimination laws.\textsuperscript{179} In the process of enacting the Sex Discrimination Act of 1975, British Home Secretary, Roy Jenkins, visited the United States.\textsuperscript{180} While visiting the United States, Home Secretary Jenkins discovered the then recent decision in \textit{Griggs v. Duke Power Company}.\textsuperscript{181} Upon returning to the U.K., Jenkins brought with him the concept of disparate impact, which was included in the Sex Discrimination Act of 1975 as a form of indirect discrimination.\textsuperscript{182}

In the mid 1970s and 1980s, the European Court of Justice expressly adopted the \textit{Griggs} analysis of disparate impact, calling it “indirect discrimination.”\textsuperscript{183} The European Court of Justice, like the U.S. Supreme Court, adopted the theory of indirect discrimination

\begin{enumerate}
\item \textsuperscript{178} Tobler, \textit{supra} note 175, at 23.
\item \textsuperscript{179} See Simon Forshaw & Marcus Pilgerstorfer, \textit{Direct and Indirect Discrimination: Is There Something in Between?}, 37 INDUSTR. L. J. 347, 350 (2008).
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} See Tobler, \textit{supra} note 175, at 23-24.
\end{enumerate}
without an explicit European Union legislative mandate.\(^\text{184}\) Indirect discrimination existed as a form of protection in the context of equal pay.\(^\text{185}\) The European Court of Justice expanded the theory of indirect discrimination in the 1970s and 1980s in cases such as *J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd.*\(^\text{186}\) and *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz.*\(^\text{187}\)

In the 1990s and 2000s, the Council of the European Union issued legislative directives that codified the concept of indirect discrimination in the context of nationality, religion or belief, disability, age, and many other protected classes.\(^\text{188}\) In 2000, the Council of the European Union enacted Directive 2000/78/EC, which created a "general framework for equal treatment in employment and occupation."\(^\text{189}\) Council Directive 2000/78/EC provided a uniform definition for indirect discrimination, which had been created through the European Court of Justice's adoption of *Griggs* and subsequent EC Directives that codified indirect discrimination in directives dealing with specific types of discrimination.\(^\text{190}\) As a consequence, the false premise of *Griggs* has not only shaped U.S. employment discrimination law, but also has affected the non-discrimination laws of all European Union member countries.\(^\text{191}\)

---


186. Case 96/80, Jenkins v. Kingsgate Ltd., 1981 E.C.R. 911. In *Jenkins*, the Court found that the fact that work paid at time rates was remunerated at an hourly rate which varied according to the number of hours worked did not expressly violate equal pay laws. *Id.* at 917. However, the Court further held that if the difference in pay was really a mechanism to indirectly reduce the pay of part-time workers, which tended to be women, the policy would violate the equal pay law. *Id.*

187. Case 170/84, Bilka-Kaufhaus GmbH v. Weber von Hartz, 1986 E.C.R. 1607. In *Bilka-Kaufhaus*, the European Court of Justice held that an employer could not prevent part-time workers from participating in pension programs. *Id.* at 1627. The Court reasoned that women are more likely to be part-time workers than men, and therefore preventing women from participating in pension programs would have a disparate impact on women. *Id.* The Court also held that access to pension programs constituted pay under European Union law. *See* *id.* Therefore, the indirect result of women not having access to pension programs constituted indirect discrimination under the equal pay principle. *See* *id.*

188. *See* Tobler, *supra* note 175, at 5.

189. *Id.* at 8 n.4.


Although the fable may appear to represent just a minute detail in the decision of the Court in Griggs, the effects of the failure of the Court to properly interpret and understand the true meaning of The Fox and the Stork has had a lasting impact on employment discrimination law.\textsuperscript{192} The Court’s use of the fable, which involved intentional inhospitality reciprocated as the underpinning for the creation of disparate impact, and the Court’s failure to understand the fable as a lesson based solely on intent revealed the Court’s determined desire to lend validity to the concept of disparate impact.\textsuperscript{193} Unfortunately, since 1971, scholars, judges, and legislators have failed to recognize the Court’s serious interpretational blunder and have ignored the fact that the Court extended its reach beyond the legislative history, which revealed the original congressional intent to limit Title VII to intentional discrimination.\textsuperscript{194}

In recent years, scholars have focused on multi-disciplinary studies that incorporate facets from different fields.\textsuperscript{195} In the decision of the Court in Griggs, the Court unexpectedly incorporated a literary fable into its legal analysis.\textsuperscript{196} The Court’s improper use of the fable represents a genuine problem when experts in one field of study attempt to incorporate aspects of a different field of study in which they do not have the necessary training, expertise, and understanding.\textsuperscript{197} While multi-disciplinary studies and analyses represent an important development in academic studies, accuracy and intellectual honesty must be maintained. The Court’s inaccurate use of the fable violates the trust that our Constitution and our society place in the elevated stature and the standards of excellence of the United States Supreme Court.

Additionally, over the course of the past forty-five years, many scholars have written articles and analyses about Griggs and disparate

\textsuperscript{192} Selmi, supra note 4, at 703 (“The Griggs decision has been universally hailed as the most important development in employment discrimination law.”).
\textsuperscript{194} See Griggs, 401 U.S. at 432; see also Selmi, supra note 4, at 748.
\textsuperscript{195} See Definition of Multidisciplinary, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/english/multidisciplinary (last visited Nov. 1, 2015) (“several academic disciplines or professional specializations in an approach to a topic or problem.”).
\textsuperscript{196} See Griggs, 401 U.S. at 431.
impact, but to date all have ignored the role that the fable played in the Court’s approval of the concept of disparate impact. The Court’s misuse of the true meaning of the fable to support the disparate impact concept either represents the true goal of the Burger Court or constitutes an extreme example of the deficient drafting of a judicial decision. If judges or scholars had noticed the manipulated interpretation of the fable at an earlier time, the amendments to the Civil Rights Act in 1991 may have developed in a different manner.

A broader point to consider based on the Court’s failure to properly interpret the fable involves the checks and balances concept. Why did this misinterpretation of the fable go unnoticed for so long? Many scholars have cited the creation of disparate impact as one of the most important developments in employment discrimination law, yet not one scholar has analyzed in sufficient depth the fable through which the Court justified the creation of disparate impact. Scholars and members of the government must hold the Court accountable for making intentional or inadvertent mistakes like this in the future, especially in situations that have such a lasting impact on the field of law, in the United States and abroad.

198. See supra note 4 and accompanying text.
199. See supra Part III, notes 107-22.
200. See Selmi, supra note 4, at 701.