[Forthcoming 2026, Pagination Not Final]

TITLE VII'S CLASSIFICATION BAR: § 2(A)(2), DISPARATE IMPACT, AND EEO-1S

Dan Morenoff[*]

ABSTRACT

In 1971, the Supreme Court's *Griggs v. Duke Power Co.* opinion deferred to the Equal Employment Opportunity Commission's assertion that Title VII of the Civil Rights Act of 1964 imposed disparate-impact liability onto employers by barring them from pursuing facially demographically neutral policies, even if both adopted with no intent to discriminate and evenhandedly applied, unless those policies satisfied a "business necessity" defense. In doing so, the Court referenced only one Title VII provision (42 U.S.C. § 2000e-2(a)(2)), in a buried, exposition-less footnote. On June 9, 2026, the Department of Justice's Office of Legal Counsel released an opinion: (a) agreeing with those who have long argued that this reading of Title VII exceeded federal power under the Constitution; and (b) proposing a minimum set of alterations to the Title VII disparate-impact regime necessary to comply with the Constitution's demands. OLC's constitutional analysis is admirable, but does not reconcile § 2(a)(2)'s text with any continued imposition of disparate-impact liability under Title VII. This article explores the text and original understanding of § 2(a)(2), the few judicial precedents purporting to interpret its language, and the available alternative readings of Congress's enactment. In doing so, it specifically analyzes two administrative actions the EEOC has taken applying § 2(a)(2) and recommends how best to reconcile them with each other and with § 2(a)(2)'s demands.

[*] Executive Director of the American Civil Rights Project and Adjunct Fellow at the Manhattan Institute.

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1. Introduction

For more than 50 years, the Equal Employment Opportunity Commission (EEOC) has required every covered employer to annually report through the EEO-1 form the demographic makeup of every job-classification in its workforce.[1] The regulation imposing this requirement has long allowed the agency (and private parties who obtain copies of the submitted reports) to assess whether employers maintain policies that affect different groups of employees or job applicants differently.[2] Litigants use this information to argue that such disparate impacts of even facially neutral, even-handedly administered employment policies, unless shielded by a business-necessity defense, violate Title VII of the Civil Rights Act of 1964 (as amended).

Against that backdrop, on June 9, 2026, the Department of Justice's Office of Legal Counsel (OLC) released an opinion on *The Constitutionality of Disparate-Impact Liability Under Title VII* (OLC Opinion).[3] The OLC Opinion concluded that the Supreme Court's most recent Title VII decision is inconsistent with retaining the current version of independent disparate-impact liability under Title VII.[4] It then proposed a saving construction for disparate-impact doctrine in Title VII, informed by the constitutional constraints necessary for any such regime to be constitutional.[5]

The EEO-1 requirement to maintain and report the demographic classifications of all employees could not be justified on June 8, 2026 and cannot

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1 Requirement for Filing of Report, 37 Fed. Reg. 9219, 9219 (May 6, 1972) (codified at 29 C.F.R. § 1602.7); *see also* Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113, 5113–14 (Feb. 1, 2016).

2 *Id.*; *e.g.*, Alfred W. Blumrosen, *Forty-Five Years Near Broad Street: A Memoir of Rutgers Law School*, 51 RUTGERS L. REV. 777, 828 (1999) ("Another project I undertook for [EEOC Chairman] Eleanor [Holmes Norton] was to design a program to address 'systematic discrimination' that could be identified initially by examining statistics of employer utilization of minorities and women. Employers had filed annual EEO-1 reports of the race, ethnic, and sex composition of their workforces since 1966. The program I designed was upheld by the Supreme Court in 1984, but the Commission never followed through because the Reagan-Bush administrations did not approve of the use of statistical proofs of discrimination." (footnote omitted)).

3 Constitutionality of Disparate-Impact Liability Under Title VII, 50 Op. O.L.C. (June 9, 2026) (slip op. at 1), https://perma.cc/Z3DJ-BZUT [hereinafter 50 Op. O.L.C.].

4 *Id.* at 10–11, 23 (citing Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303 (2025)).

5 *Id.* at 14–18.

be justified after the release of the OLC Opinion. That requirement was and is fundamentally wrong, entirely aside from the constitutional arguments undergirding the OLC Opinion because Title VII does not bar facially neutral, even-handedly applied employment policies that differentially affect different demographic groups. More fundamentally, the EEOC's requirement could not and cannot be justified because Congress—in 1964—barred employers from classifying employees and job applicants in precisely this fashion.[6] Congress has never reversed that legislative judgment.

No agency should ever require its regulated community to do what the statute the agency enforces prohibits. And no saving interpretation offered by even the best-intentioned portion of the Department of Justice could suffice to cure these problems.

2. Background

I've previously written about the flaws and future of *Griggs v. Duke Power Co.*[7] While the reader is encouraged to revisit that analysis in full, a short retelling of its main points sets the stage for this piece. The Supreme Court's *Griggs* opinion read a disparate-impact standard into Title VII,[8] getting the original understanding of the statute catastrophically wrong and adopting an interpretation incompatible with the statutory language, the legislative context of its enactment, and its legislative history.[9] The Senate not only *rejected* the disparate-impact interpretation of Title VII adopted in *Griggs*,[10] it made clear that its codification of language effectuating that rejection *alone* prevented the Senate from killing the entire Civil Rights Act.

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6 42 U.S.C. § 2000e-2(a)(2).

7 401 U.S. 424, 429–36 (1971); Dan Morenoff, *Disparate-Impact Liability: Unfounded, Unconstitutional, & Not Long for This World*, 26 FEDERALIST SOC'Y REV. 193, 196–98 (2025).

8 *Griggs*, 401 U.S. at 431 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

9 Others have also covered this ground more comprehensively. As an example, Gail L. Heriot has a forthcoming book that addresses this and other elements of the story of how American employment law went off the rails and drove unintended, negative social developments. GAIL L. HERIOT, WHY WE WALK ON EGGSHELLS (forthcoming 2026) (on file with author).

10 Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & LIBERTY 1, 11–25 (2020) (detailing the legislative dealmaking essential to passing Title VII).

The Civil Rights Act of 1991 worked certain amendments to Title VII, but it did not alter Title VII's prohibitory language. This means that "[n]o Congress ever passed, no President ever signed, and as a result Title VII never contained (and does not contain now) any language outlawing employment policies bearing disparate impacts across demographic groups or imposing disparate-impact liability on employers for using such policies."[11] Moreover, the Supreme Court's most recent Title VII opinions (coupled with the Court's precedents on precedent) invite litigation revisiting *Griggs* to allow its reversal.[12]

My previous exploration of these topics set to the side one problematic detail. While *Griggs*'s disparate-impact standard has all-but-invariably been applied by the Courts of Appeals to claims asserted under Title VII's main prohibition on employer discrimination,[13] the *Griggs* opinion *itself*—in its only statutory citation (which it buried in a footnote and left unexplained)—claimed to interpret a different, rarely-litigated provision of Title VII (42 U.S.C. § 2000e-2(a)(2)).[14] I then proposed that this other "section's

11 Morenoff, *supra* note 7, at 193.

12 While not reaching all the identical conclusions this piece does, the OLC Opinion agreed that *Ames* was inconsistent with retaining the current version of independent disparate-impact liability under Title VII. *See* 50 Op. O.L.C., *supra* note 3, at 7 n.2.

13 42 U.S.C. § 2000e-2(a)(1); *see also* Morenoff, *supra* note 7, at 196 n.16 (citing Meditz v. City of Newark, 658 F.3d 364, 370 (2d. Cir. 2011) ("Title VII makes it unlawful '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.' 42 U.S.C. § 2000e–2(a)(1). The Supreme Court has long recognized that Title VII plaintiffs can make out a viable employment discrimination claim without alleging or proving discriminatory intent. *See Griggs v. Duke Power*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).")); *cf.* Adams v. Fla. Power Corp., 255 F.3d 1322, 1324 (11th Cir. 2001) ("The language of the ADEA closely parallels that of Title VII. In fact, the sections forbidding discrimination are almost identical. *Compare* 29 U.S.C. § 623 (a)(1) (ADEA) *with* 42 U.S.C. § 2000e-2(a)(1) (Title VII). The Supreme Court has held that Title VII supports a cause of action for employment discrimination based on a disparate impact theory. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971)." (additional citations omitted)).

14 For the decision's sole citation to § 2(a)(2), see *Griggs*, 401 U.S. at 426 n.1. For the conclusion that § 2(a)(2) is "an infrequently litigated provision in Title VII" applying only to classification, segregation, and limitation, see Morenoff, *supra* note 7, at 196 n.16 (citing U.S. Equal Emp. Opportunity Comm'n v. AutoZone, Inc., 860 F.3d 564, 565 (7th Cir. 2017)).

tortured history is overdue for its own telling,"[15] while punting on telling it for the time to focus that piece elsewhere.

This Article offers that bracketed story, from the text and original understanding of § 2(a)(2), to the few judicial precedents purporting to interpret its language, to the available alternatives. To date, only *one* Supreme Court opinion addressing § 2(a)(2) both (i) arose in Title VII litigation and (ii) purported to follow *Griggs* to resolve a disparate-impact claim: *Connecticut v. Teal*.[16] But *Teal* has at least as many flaws as *Griggs* and adds little to its reasoning. What it adds is of perhaps no value. *Almost none* of the other decisions addressing § 2(a)(2)'s meaning resolved Title VII litigation;[17] *all* of the analysis from *all* of those cases arising elsewhere can be no more than dicta (as it turns out, deeply unpersuasive dicta at that). There appears to be *only one other* appellate decision *anywhere* applying § 2(a)(2) to resolve a Title VII case, and it did not involve a disparate-impact claim.[18]

None of this interpretive misadventure is inevitable. There are better alternatives available. The language of § 2(a)(2) affords at least two such preferable interpretations, each of which is far more faithful to Congress's enacted work. Those alternatives have contrasting merits worth considering for their potential ramifications on the future of American employment law.

This Article proceeds in four parts. First, it surveys § 2(a)(2)'s text and the original understanding of that text (as demonstrated by its pre-enactment evolution). Second, it explains why *Griggs* and *Teal* do not supply the missing textual account. Third, it considers the later Title VII and non-Title VII cases interpreting § 2(a)(2). Finally, it proposes better readings of § 2(a)(2) and applies them to the EEOC's EEO-1 regime.

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15 Morenoff, *supra* note 7, at 196 n.16.

16 457 U.S. 440, 440 (1982). One further Supreme Court case involves a Title VII claim and cites § 2(a)(2): *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). However, *Philbrook* was a religious accommodation case, in which the plaintiff challenged a policy disallowing his use of personal-leave days to allow his observance of religious holidays. 479 U.S. at 63–65. The citation to § 2(a)(2) did no more than point at the words "employment opportunities" in the section, before addressing the illegality of the employer's intentional disparate treatment of employees seeking to use generally applicable policies to allow their own religious practice. *Id.* at 63 n.1. It shed no light on what § 2(a)(2) adds to § 2(a)(1)'s prohibition on setting "terms, conditions, or privileges of employment" discriminating because of covered demography. *Id.*

17 See discussion *infra* Section 5.2.

18 *See* discussion *infra* Section 5.1 (discussing in more detail *U.S. Equal Emp. Opportunity Comm'n v. AutoZone, Inc.*, 860 F.3d 564 (7th Cir. 2017)).

3. Congress Acts: The Language and Original Meaning of § 2(a)(2)

3.1. Enacted Legislative Language

Congress passed Title VII as part of the Civil Rights Act in 1964. From its inception, Title VII's prohibitory provision for employers has read:

> **Employer practices** 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.[19]

While almost all Title VII employment litigation unfolds under § 2(a)(1), § 2(a)(2) sits right next to it and must carry its own meaning. The core language of § 2(a)(2) makes "[i]t . . . unlawful . . . for an employer . . . [to] classify . . . employees or applicants for employment in any way which would . . . tend to deprive any individual of employment opportunities . . . because of" their covered demography.[20]

3.2. Original Understanding of the Classification Bar

So what does that mean and what does it add above and beyond the meaning of § 2(a)(1)? A straightforward reading suggests little, if any, ambiguity in these statutory terms. Perhaps it's unsurprising then that Title VII includes no language defining "limit," "segregate," or "classify," much less more concretely explaining what it means to "tend to deprive any individual

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19 42 U.S.C. § 2000e-2(a)(1)–(2). For the original enactment of this language, see Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352 § 703(a), 78 Stat. 241, 255 (1964).

20 42 U.S.C. § 2000e-2 (a)(2).

of employment opportunities or otherwise adversely affect his status as an employee[.]"[21]

Still, given how intensely Title VII was debated, it remains strange precisely how little direct evidence there is of the Civil Rights Act's original interpretive community's understanding of § 2(a)(2) in isolation from § 2(a)(1). Nonetheless, what evidence exists suggests that Title VII's original interpretive community read § 2(a)(2) to have a singular, clear meaning—they understood it to prohibit the employer classification of employees and job applicants by race (or other covered demography), whenever such classification even tended to adversely impact such individuals.

3.2.1. Clear Understanding of Unbifurcated § 2(a) as a Whole: *Not* Disparate-Impact

Not everything here lingers in murk. There is ample evidence that the original interpretive community *did not* understand either subpart of § 2(a), either separately or jointly, to impose or indeed to allow the imposition of disparate-impact liability. Over and over again the most influential members of that community insisted on this, including: (a) those at the Department of Justice Congress most relied on in crafting the bill; (b) the sponsors of the Civil Rights Act; and (c) those specifically responsible for corralling enough support to retain Title VII in the Act.[22] The Senate's confrontation with events in Illinois unfolding contemporaneously with its consideration of the Civil Rights Act interpreting an antecedent state statute (and the Senate's eventual adjustment to the draft text of Title VII to assure nothing similar would unfold under it) is particularly salient.[23]

In 1964, the Senate leadership knew that passing the Civil Rights Act would be a titanic task that it might not be able to pull off. At a minimum, Senate leadership knew that it had no wiggle room to spare. It needed the support of every potentially supportive senator to have a prayer of

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21 *See generally id.* (setting forth the operative language of § 703(a)(2) without defining, *inter alia*, "limit," "segregate," or "classify").

22 *See* Morenoff, *supra* note 7, at 194–95.

23 This history is most succinctly set out in Heriot, *supra* note 10, at 20–25. It is told most comprehensively in Heriot's forthcoming book, see HERIOT, *supra* note 9. The telling of Senate events, below, relies broadly on Heriot's work. *See* discussion *infra* Section 2.2.1.

overcoming the last-ditch opposition of the Senate's segregationist caucus. It could hardly have been more ill-timed then in March 1964 for an Illinois bureaucrat to construe the state's Fair Employment Act to bar Motorola from using an aptitude test under the logic that fewer black applicants passed it than did white applicants.[24] While the terminology did not yet exist, this was disparate-impact theory applied to employment law *avant la lettre*, and it made its appearance as a formal, bureaucratic interpretation of one of the main state statutes on which Title VII had been based.[25]

The firestorm that followed initially appeared to send up in smoke all of President Lyndon B. Johnson and the congressional leadership's work to secure passage. No senator—neither any supporting the Civil Rights Act, nor any opposing it—defended the bureaucrat on policy grounds.[26] No, the Senate instead spent weeks arguing about whether: (a) the bureaucrat was wrong and the proposed bill was already unsusceptible to a parallel misinterpretation; or (b) it didn't matter whether he was wrong because similar mischief could and would be worked on the proposed bill by an equally foolish federal bureaucrat or court.[27]

The Senate was only eventually able to un-throw the parking brake when Senator Everett Dirksen negotiated an amendment that—whether or not redundantly—satisfied all that, with its changes incorporated, no one could possibly find disparate-impact in Title VII's language.[28] For our purposes, the key changes worked by Senator Dirksen's amendment were to: (i) deny the EEOC either enforcement authority or substantive rulemaking authority;[29] and (ii) add repeatedly the word "intentionally" to Title VII. On the latter, he changed § 706(g)(1) of the bill to read: "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 . . . ."[30]

24 Heriot, *supra* note 10, at 14–25; *see also* Griggs v. Duke Power Co., 401 U.S. 424, 434 n.10 (citing Myart v. Motorola Co., No. 63C-127 (Ill. Fair Emp. Comm'n Feb. 27, 1964), *reprinted in* 110 CONG. REC. 5662).

25 *See* discussion *infra* Section 3.2.2.

26 Heriot, *supra* note 10, at 16.

27 *Id.* at 16–18.

28 *E.g.*, Heriot, *supra* note 10, at 19–25.

29 *See* discussion *infra* Section 7.1.

30 Heriot, *supra* note 10, at 19 (citing Civil Rights Act of 1964 §706(g), 78 Stat. 241, at 261 (codified as amended at 42 U.S.C. § 2000e-5(g)(1) (2018) (emphasis added)).

That language made the difference. By persuading the senators on the fence that relief would only be available on a showing of intentional discrimination (i.e., disparate treatment), it allowed them to support Title VII—and with it the rest of the Civil Rights Act. This let the debate shift back into gear and allowed the Senate to pass the law. Oh, and Senator Dirksen's last-mentioned addition is still in Title VII, now codified at 42 U.S.C. § 2000e-5(g)(1).[31]

It's true that none of this history directly addresses the meaning of § 2(a)(2) in isolation. And yet, almost all of the language that became § 2(a)(2) had already been passed by the House of Representatives and sat in the bill the Senate was considering at every stage of this Motorola-triggered debacle. While this history sheds only a negative light and sheds it uniformly across § 2(a)(1) and § 2(a)(2) jointly, it simply could not more clearly demonstrate that the original interpretive community *did not*: (i) read *either* subsection to impose disparate-impact liability onto employers; or (ii) understand those subsections, jointly or severally, to allow either an administrative enforcer of the statute or a court to later read it into the statute.

3.2.2. Direct Originalist Evidence of Proper Reading of § 2(a)(2)

On the other hand, the historical record is remarkably bereft of direct evidence of the original understanding of the specific text in isolation of § 2(a)(2). Formally, what became the Civil Rights Act of 1964 began life as H.R. 7152.[32] On that formal level, H.R. 7152 included from its inception at § 704(a)(2) almost exactly the language that would eventually become § 2(a)(2).[33] Specifically, the original text of § 704(a)(2) made it an "unlawful employment practice for an employer . . . to limit, segregate, or classify his employees 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, or national

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31 *Id.*

32 Senate Vote No. 409 on the Civil Rights Act of 1964, H.R. 7152, 88th Cong. (1964), https://perma.cc/4JE8-YSUA; *see also* H.R. REP. NO. 88-914, at 1487 (1963).

33 H.R. REP. NO. 88-914, at 1487.

origin."[34] That original text differs from the final language only in: (a) lacking any reference to sex, which was added to Title VII's covered demography by the Senate later; and (b) lacking an extension prior to employment to provide the same protection against classification to "applicants for employment[.]"[35]

If we start the tape at that point, it doesn't appear that any member of Congress found this language sufficiently lacking transparency to even justify an explanation of its meaning. The House Judiciary Committee Report's discussion of the provision did no more than restate its language.[36] The related Minority Report never discussed § 704(a)(2) at all.[37] When H.R. 7152 went to the House floor for debate, the Congressional Record reflects *no* congressmen discussing § 704(a)(2) even in passing.[38] Then the House approved the bill.

The Senate wasn't materially different on this score. Its debate that followed was the longest in history.[39] It saw major amendments to Title VII before passage.[40] Despite the length and breadth of that Senate debate, though, *only two* senators *ever* discussed the language of § 2(a)(2) in any

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34 H.R. 7152, 88th Cong. § 704(a)(2) (1963).

35 *Compare id.*, *with* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(2), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(2)).

36 H.R. REP. NO. 88-914, at 1507 ("Section 704(a) describes a number of activities which, if engaged in by employers, will constitute unlawful employment practices. . . . It will also be an unlawful employment practice for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any person of employment opportunities or otherwise adversely affect his status as an employee because of his race, color, religion, or national origin.") (emphasis omitted).

37 H.R. REP. NO. 88-914, at 1542–74.

38 110 CONG. REC. 2574–77 (1964).

39 *See generally* CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985) (chronicling the lengthy Senate debate preceding its enactment).

40 One such amendment saw the removal from Title VII of H.R. 7152's proposed section declaring the policy underlying what followed. *See* Heriot, *supra* note 10, at 20–21 (referring to the same provision as the House's "grandiloquent statement of Title VII's purpose" (quoting 110 CONG. REC. 12811 (1964)). In the House version, that provision was labeled § 701. Due to its removal, the enacted Civil Rights Act includes the language of the original § 704(a)—with the minor alterations discussed herein—at § 703(a).

depth, and they didn't so much interpret that language as complain that it was unclear.[41]

However, events and documents from a bit *earlier* in the 88th Congress shed light on the meaning of what became § 2(a)(2). Several earlier-filed bills from 1963 included provisions largely parallel to H.R. 7152's § 704(a)(2). Congressman John Dingell filed H.R. 24, the first of them, which included provisions that would have declared it:

> (a) . . . an unlawful employment practice for any employer— (1) to refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to his terms, conditions, or privileges of employment, because of such individual's race, religion, color, national origin, or ancestry; [and] (b) . . . for any labor organization to discriminate against any individual or to limit, segregate, or classify its membership in any way which would deprive or tend to deprive such individual of employment opportunities, or would limit his employment

41 The first exceptional senator was John Stennis. *See* 110 CONG. REC. 5809–10 (1964). On March 20, 1964, Senator Stennis both: (a) attacked what-was-then § 704(a) as a whole, *id*. at 5810, for its purported "imprecision and vagueness[;]" and (b) attacked what-was-then § 704(a)(2)'s specific language, *id.* at 5818, for what he perceived as its extraordinary breadth, authorizing "an aggrieved employee" to "bring an action with respect to a matter which allegedly tends 'to adversely affect his status as an employee.'" *Id.* at 5810. This was far too broad an invitation for Senator Stennis, who feared that "[a]lmost any act of any employer that is distasteful to an employee could be construed as tending to adversely affect his status as an employee . . . ." *Id.* at 5818. One day later, Senator Robert Byrd similarly complained that § 704(a)(2)'s language making it "unlawful to limit or to classify employees in any way that might 'tend to deprive' any individual of an employment opportunity because of his race" provided no meaningful guidance to employers on what they could or couldn't actually do, without ever suggesting a potential answer as to what the language should properly be understood to mean. *Id.* at 5877–78. In a thematically similar vein, Senator Sam Ervin remarked exactly once that § 704(a)(2) was a "queer provision" that he "did not understand" until he read the *Motorola* case. *Id.* at 5614. It does not appear that any other senator shared Senators Stennis and Byrd's critiques or responded specifically to them or that any other senator throughout the debate concerning the impact of *Motorola* believed it to be specifically relevant to the meaning of § 704(a)(2). Moreover, when Senator Dirksen's negotiated amendments satisfactorily addressed *Motorola*-based concerns, *supra* Section 2.2.1, they did not alter §2(a)(2)'s language and no senator raised any concerns that this left the problem standing—necessarily, by that point, even Senator Ervin concluded that § 2(a)(2)'s language did not codify *Motorola*'s version of disparate-impact. *See* 110 CONG. REC. 5614–15.

> opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, or would affect adversely his wages, hours, or employment conditions, because of such individual's race, religion, color, national origin, or ancestry.[42]

Congressman Joseph Minish included a similar provision in the same Congress's H.R. 2027.[43]

Each of these predecessor proposals included both: (a) a provision running directly parallel to what would become § 2(a)(1)'s prohibition on disparate treatment by employers (again, with the exception that the predecessor both lacked Title VII's later addition of sex discrimination, plus the additional difference of specifically including a bar on "ancestry" discrimination above and beyond Title VII's bar against national-origin discrimination); and (b) a provision very nearly paralleling what was eventually codified at 42 U.S.C. § 2000e-2(c)(2). Section 2(c)(2) applies effectively the same prohibition to *unions* that § 2(a)(2) applies to *employers*.[44]

These predecessor proposals, in turn, bear more than a striking resemblance to a number of the *state* Fair Employment Practices statutes passed in the immediately preceding years. By 1963, half the states had enacted such statutes,[45] so a good deal of percolation had occurred by the time Congress considered the matter,[46] with patterns emerging among them. Those patterns informed the writing of these predecessor proposals—Congress was not working from a blank slate in crafting Title VII.

Perhaps most notable of the state Fair Employment Practices laws for our purposes was Illinois's, first passed in 1961 and subsequently amended

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42 *Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States: Hearings Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 88th Cong. 7–8 (1963) [hereinafter *Hearings No. 4*].

43 *Id.* at 42, 48.

44 *Compare* 42 U.S.C. § 2000e-2(a)(2) *with* 42 U.S.C. § 2000e-2(c)(2). Indeed, to bring this full circle, the version of H.R. 7152 that went before the House already included almost all of the text of the eventual § 2(c)(2) (with the same differences from the final already described in reference to § 704(a)(2)). H.R. REP. NO. 88-914, at 1479 (1963).

45 John E. Means, *Fair Employment Practices Legislation and Enforcement in the United States*, 93 INT'L LAB. REV. 211, 222 (1966) ("Between 1945 and the passage of the federal Civil Rights Act in 1964, more than 25 states . . . had adopted fair employment practices [statutes] . . . .").

46 H.R. REP. NO. 88-914, at 1632 (1963) (views of Rep. William M. McCulloch).

twice in the summer of 1963. By the end of summer 1963, the Fair Employment Practices Act of Illinois included a provision that declared it "an unfair employment practice":

> (a) For any employer, because of the race, color, religion, national origin, or ancestry of an individual to refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment; or . . .
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> (c) For any labor organization because of the race, color, religion, national origin or ancestry of any person to discriminate against such person, or to limit, segregate or classify its membership with respect to such person, or to limit such person's employment opportunities, such person's selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action which affects adversely such person's status as an employee or as an applicant for employment or as an apprentice, or as an applicant for apprenticeship, or such person's wages, tenure, hours or employment or apprenticeship conditions . . . .[47]

When Congress was writing Title VII, the Illinois statute had provisions almost perfectly paralleling *both* what became § 2(a)(1) and § 2(c)(2). Illinois had: (i) expressly barred *employers* from discriminating because of covered demography in hiring, firing, or in the terms or conditions of employment; and (ii) expressly made it illegal for *unions* to "limit, segregate or classify" individuals "or to limit such person's employment opportunities . . . or otherwise to take, or fail to take, any action which affects adversely such person's status as an employee or as an applicant for employment[.]"[48]

Congressmen Dingell and Minish appear to have lifted and simplified this language into their own bills' provisions.[49] Over the summer of 1963, the Subcommittee No. 5 of the House Judiciary Committee held a series of

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[47] Fair Employment Practices Act, ILL. REV. STAT. ch. 48, §§ 851–67 (repealed in 1980); ILL. FAIR EMP. PRACS. COMM'N, *Fair Employment Practices Act of Illinois*, at 5 (1963) (citing ILL. REV. STAT. ch. 48, § 853.3).

[48] ILL. REV. STAT. ch. 48, § 853.3(a), (c) (1963).

[49] *Hearings No. 4*, *supra* note 42, at 7–8, 42, 48.

hearings on a number of proposed Civil Rights bills, including those of Congressmen Dingell and Minish.[50] When those hearings ended, the subcommittee then "considered the bill in 17 days of executive sessions."[51] The full committee then held another two days of hearings before it "considered the bill in executive session for 7 [more] days."[52] By the time it returned, someone had crafted an amended version of H.R. 7152, which included what we know as Title VII of the eventual Civil Rights Act.

Like Athena emerging from the head of Zeus, the text we know as § 2(a)(2) emerged essentially fully formed from that executive session, with some unknown author(s)—operating in the un-demarcated, liminal space of that session—having both fully adopted Congressman Dingell's language into § 704(c)(2) and then cut-and-pasted it into § 704(a)(2)'s similar constraint on the behavior of *employers*. This derivation suggests a few things about the meaning of § 2(a)(2). First, notice that the source language in the Illinois statute was longer than the final version of § 2(a)(2). The Illinois statute's source language[53] used that greater length to more clearly express a series of five separate constraints:

> (i) Actors (originally unions) can't discriminate because of demography.
>
> (ii) Actors (originally unions) can't limit, segregate, or classify individuals (originally members) because of demography.
>
> (iii) Actors (originally unions) can't limit individuals' (originally members') employment opportunities because of demography.
>
> (iv) Actors (originally unions) can't limit individuals' (originally members') selection for professional development because of demography.
>
> (v) Actors (originally unions) can't otherwise take or fail to take any action which adversely affects an individual employee or applicant's (originally a member's) status, wages, tenure, hours of employment, or apprenticeship conditions because of demography.

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50 *Id.* at 57–60, 63–66.

51 *See* 110 CONG. REC. 6436 (Mar. 26, 1964) (statement of Sen. Thomas J. Dodd).

52 *Id.*

53 ILL. REV. STAT. ch. 48, § 853.3(c) (1963).

Second, notice that Congressman Dingell's version retains *almost all* of the same elements[54] while: (i) shortening the series by moving several elements into subordinate clauses; and (ii) adding precisely *one* new phrase. He still had the first element: a prohibition on discrimination because of demography. He still had the second element: a prohibition on limiting, segregating, or classifying individuals because of demography. He still had something like the third and fifth elements: references to the problem of limited opportunities and to actions adversely affecting employee or applicant status, wages, hours, and conditions. Still, *here*, Congressman Dingell had made alterations.

The third element—the bar on depriving or limiting employment opportunities—is no longer an independent prohibition. In Congressman Dingell's version, it became a subordinate clause functioning to constrain the prohibition on classifications, segregations, or limitations. Now, only those segregations, limitations, or classifications that resulted in lessened opportunities would violate the law. Also, perhaps because of that shift, Congressman Dingell added the phrase "or tend to deprive such individual of employment opportunities[.]"[55] That coupled subordination and addition was Congressman Dingell's most creative, active alteration to the Illinois statute. Between these changes, in place of Illinois's ban on unions denying opportunities, Congressman Dingell proposed barring unions from *classifications of member because of demography* that *tend* toward that result.

Congressman Dingell had done something similar with the fifth, catchall element, covering in the Illinois statute all other actions that adversely affected employees or job applicants because of their covered demography. In Congressman Dingell's version, other actions because of demography causing such adverse effects were no longer illegal.[56] Instead, such other demographically motivated actions had moved into another subordinate clause constraining the prohibition on classifications, segregations, or limitations. In the Dingell bill, that subordinate clause, too, functions as an avenue toward such classifications, segregations, or limitations being illegal.

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[54] The sole exception is the fourth element—a specific prohibition on limiting professional development opportunities based on demography. Presumably, Congressman Dingell cut this as redundant of the third element.

[55] *Hearings No. 4*, *supra* note 42, at 7–8.

[56] *See id.*

Between Congressman Dingell's two subordinate clauses, classifications, segregations, or limitations because of covered demography will now only be illegal if they deny employment opportunities, tend to deny employment opportunities, or have a negative impact on an employee or applicant unrelated to employment opportunities. Meanwhile, under the Dingell bill, federal law *would not* adopt Illinois's prohibition on union actions that *do not* either qualify as discrimination, on the one hand, or as a classification, a segregation, or a limitation of membership, on the other—even if those actions deny employment opportunities, tend to deny employment opportunities, or otherwise adversely affect individuals.

Fourth, notice that the anonymous Judiciary Committee author(s) who shuffled together provisions from the various proposals considered at hearings into the replacement version of H.R. 7152 retained *all* of Congressman Dingell's tweaks to the Illinois statute in crafting § 2(c)(2).[57] And that when they subsequently cut-and-pasted that revised language into § 2(a)(2), they retained all of Congressman Dingell's tweaks there as well. Clearly there were meaningful—if limited—changes between the Illinois statute's source material and the language of H.R. 7152. The final version's duplication of the classification provision as a constraint on employers in addition to on unions qualifies. Beyond that?

The Illinois statute prohibited a union from limiting, segregating, or classifying its members by demography because there was an actual live history of unions limiting their membership to exclude particular races.[58] There

57 *See* discussion *supra* Section 3.2.2.

58 *E.g.*, Rachel Reed, *Organized Labor's Complicated History with Civil Rights: Harvard Law Professor Kenneth Mack Says That Early Unions Often Excluded Black Workers, But That Today's Labor and Social Justice Movements Often 'Dovetail'*, HARV. L. TODAY (Feb. 12, 2025), https://perma.cc/5KKM-AUUQ ("[T]he problem between labor and civil rights was always that labor unions—many, but not all—discriminated against [b]lack workers and excluded them from their organizations. . . . The AFL allowed its constituent unions to discriminate against [b]lack workers. Its leaders often claimed that they didn't endorse discrimination, but the organization kept rejecting civil rights activists' demands to adopt a non-discrimination requirement for unions that desired to become members. . . . Some of the constituent unions in the AFL simply didn't allow [b]lack workers to join their locals. And if you're a union local, you become the exclusive representative for the workers at a particular location, particularly once this practice is authorized by New Deal-era legislation. So, if you're the exclusive representative and you don't allow [b]lack people in your union, then [b]lack people simply can't be employed at that location. There were also unions that didn't explicitly bar Black

was good reason to fear that, if forced to allow in individuals from those races they did not want, unions would react like the Redeemer South had in the 1860s and 1870s,[59] creating tiered, segregated membership for different classes of members defined by race, enjoying radically different rights and benefits. That far, Congressman Dingell's version meant precisely the same thing the Illinois statute had meant, barring the same actors from taking the same actions, even when their classifications would only *tend* to deny opportunities. Still, his transformation of the third and fifth elements into subordinate clauses *expressly removed* any suggestion that actions *other than classifications*, *segregations*, or *limitations because of covered demography* that weren't intentional discrimination but denied opportunities or otherwise negatively impacted employees or applicants would be illegal. Then, the anonymous author or authors transposed that language into § 704(a)(2) as a constraint on employers, without anything suggesting that H.R. 7152's author(s) wanted it or understood it to apply its parallel prohibitions to them any differently than they applied to unions.

That is the meaning of what became § 2(a)(2)'s text in the original context where it arose. *That* is what neither the committee majority nor the committee minority felt any need to clarify further in their reports. It is what no member of either chamber saw as controversial enough to challenge and

members but were very hostile to them. This would be an apt description of many construction unions, for instance, as late as the 1960s and 1970s.").

59 Dan Morenoff, *March 2, 1877: The President Rutherford B. Hayes Electoral Compromise and End of Southern Reconstruction*, CONSTITUTING AM. (2020), https://perma.cc/4ECL-45UH ("Notice how that progression, at each stage, was made necessary by the resistance of some Southerners to what preceded it. Ratification of the Thirteenth Amendment abolishing slavery? Bedford Forrest, a low-ranking Confederate General, responded by reversing Lee's April decision: in December 1865, he founded the Ku Klux Klan (effectively, Confederate forces reborn) to wage the clandestine war against the U.S. government and the former slaves it had freed, which Lee refused to fight. Their efforts (and, after [Andrew] Johnson recognized them as governments, the efforts of the Southern states to recreate slavery under another name) triggered passage of the Civil Rights Act of 1866 and the Fourteenth Amendment. Southern states nonetheless continued to disenfranchise black Americans. So, Congress passed the Fifteenth Amendment to stop them. Each step required the next. . . . [Later, following Hayes's abandonment of reconstruction] the 'Redeemers' promptly completed their 'Redemption' of the South from freely, lawfully elected governments. They rewrote state constitutions, broadly disenfranchised those promised the vote by the Fifteenth Amendment, and established the whole Jim-Crow structure that ignored (really made a mockery of) the Fourteenth Amendment's guaranties.").

what only two senators thought potentially ambiguous enough to even question, each a single time, without ever proposing a related amendment, drawing a response, or returning to the issue.[60]

4. The Supreme Court's Textual Problem

4.1. *Griggs*'s Holding and Missing Statutory Explanation

When events presented the Supreme Court with their first chance to interpret § 2(a)(2), though, that is *not* what the justices read it to mean. In 1971, deferring to the Equal Employment Opportunity Commission's aggressive misinterpretation of Title VII,[61] the Supreme Court announced in *Griggs* that the statute "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation[,]" with "[t]he touchstone [of] business necessity."[62] "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[63]

The Court did not explain where it found these rules in any legislative text. Instead, it divined its newly conjured requirements from the "objective of Congress in the enactment of Title VII as plain from the [unspecified] language of the statute."[64] It managed this trick despite clear contrary legislative history and the fact that in "1971, the terms 'artificial,' 'arbitrary,' 'unnecessary,' 'barriers,' and 'business necessity' appeared nowhere in Title VII."[65]

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60 Again, whatever Senator Ervin's momentary misgivings, he, too, never returned to his suggestion that § 2(a)(2) bore any particular relevance to avoiding the federalization of *Motorola* and no senator ever returned to his contrary reading of its text as a hook for such federalization.

61 Morenoff, *supra* note 7, at 196 (citing Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971) ("The administrative interpretation of the Act by the enforcing agency is entitled to great deference.")). It is worth emphasizing that Chief Justice Burger wrote this language *despite* Senator Dirksen's amendment having explicitly recrafted the Civil Rights Act of 1964 to *prevent* the EEOC from *being* an "enforcing agency"—the statutory text didn't grant the EEOC enforcement authority until Congress's 1972 amendments.

62 *Griggs*, 401 U.S. at 431.

63 *Id.*

64 Morenoff, *supra* note 7, at 196–97 (citing *Griggs*, 401 U.S. at 429) (internal quotation marks omitted).

65 *Id.* at 197.

But this still understates the degree to which the Court discovered disparate-impact liability in Title VII based on nothing other than its own political priors, ether, and vibes. The *Griggs* decision did not engage with any particular legislative text as any modern court would (or, one might argue, as any legitimate court must).[66] True. Look closer. The decision "relegates to a footnote the only language of Title VII it mentions at all."[67] That footnote cited "Section 703(a)(2) of the Civil Rights Act" (now codified as § 2(a)(2)), along with § 703(h) (now codified as § 2(h)), with *no* exposition.[68] Section 2(h) did not then—and does not now—include any prohibition of any kind. That leaves only § 2(a)(2) as a purported grounding for *Griggs*'s rules. But the decision's body-text never referred back to § 2(a)(2) (or to § 703(a)(2), which was the same thing) at all, never offering even the slightest explanation of its relevance.

Griggs provides nothing substantive to justify its rules. *Griggs*'s citation to § 2(a)(2) just sits there on an island, remote and inscrutable, a pronouncement from an oracle announced as revelation after hypothetical receipt from some mouthless stone god.

4.2. *Teal* and the Bottom-Line Problem

The *Teal* case followed *Griggs* by more than a decade, belatedly trying to back-fill the blanks it left behind. It resolved a challenge to a state agency's requirement that individuals pass a written test before obtaining a permanent promotion to supervisor status.[69] When a larger percentage of white employees passed the test than did black employees, failing black employees argued that the agency's use of that test had a racially disparate impact in violation of Title VII.[70] The agency defended the litigation primarily by pointing to the fact that—when it actually made promotions—it employed separate "affirmative action" policies to pick among those who had become

[66] The OLC Opinion rightly castigates the *Griggs* court for its flippant inattention to the language of Title VII. *See* 50 Op. O.L.C., *supra* note 3, at 23. But remarkably, in undertaking to explain the constitutional constraints that must inform any disparate-impact component of Title VII, the OLC also never engages with the text of § 2(a)(1), § 2(a)(2), or § 2(a) as a whole.

[67] Morenoff, *supra* note 7, at 196 n.16 (citing *Griggs*, 401 U.S. at 425 n.1).

[68] *Griggs*, 401 U.S. at 425 n.1.

[69] Connecticut v. Teal, 457 U.S. 440, 442–44 (1982).

[70] *Id.* at 443–44.

eligible by passing the test and, so, wound up promoting a higher percentage of passing black applicants than passing white applicants.[71] The district court considered the entire promotional process as a unit and found that the "bottom line" percentages precluded a finding of disparate impact sufficient to impose liability under *Griggs*.[72]

A 5–4 Supreme Court disagreed, with the majority nominally applying "our construction of [§ 2(a)(2)] in *Griggs* . . . ."[73] Justice Brennan's majority argued that intervening cases required the same construction of § 2(a)(2).[74] It argued that its conclusion that § 2(a)(2) "encompasses respondents' claim is reinforced by the terms of Congress' 1972 extension of the protections of Title VII to state and municipal employees[;]"[75] Justice Brennan supported this contention by pointing toward Congress's 1972 Committee Reports and cherry-picked floor speeches.[76] He then tied this result back to the statutory language, arguing that "[w]hen an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of *opportunity* 'because of . . .'" their covered demography, violating § 2(a)(2).[77] He then concluded with the observation that § 2(a)(2) "prohibits practices that would deprive or tend to deprive '*any individual* of employment opportunities.'"[78]

71 *Id.* at 444–45.
72 *Id.*
73 *Id.* at 446.
74 *Id.* at 447–50 (citing Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568 (1979)).
75 *Id.* at 449.
76 *Id.* at 449–50.
77 *Id.* at 448 (emphasis in original).
78 *Id.* at 453 (emphasis in original). Brennan used the fact that the statute protects "individuals" to side-step the defendant's argument that the entirety of its process—including its "affirmative action" intervention among those passing the test to produce racial balance—precluded a "bottom line" finding of disparate impact. *Id.* at 443–45, 453–56. Even if *Griggs* were sound, the move would make little sense. A better argument would have recognized that the plaintiffs challenged a single procedure as bearing disparate impacts, not the entire process, and would have concluded that intentional discrimination against other employees at Phase II could not inoculate the defendant-employer against liability to those excluded at Phase I through an illegal mechanism.

Every link in this chain of reasoning fails. Begin with the invocation of *Dothard*.[79] *Dothard* involved a disparate-impact claim under Title VII and saw the Court split over four opinions in how to allow it.[80] Justice Stewart's plurality opinion followed *Griggs*, but cited its rules as applications of § 2(a) as a whole (fully quoting both § 2(a)(1) and (2)), not of § 2(a)(2) alone.[81] Both Justices Powell and Stevens fully joined his opinion. A sufficient number of justices joined each of the pair of concurrences to represent a hypothetically governing majority, even while the concurrences materially split both with each other and with Justice Stewart.[82] Justices Marshall and Brennan joined the portion of Justice Stewart's opinion invoking § 2(a) as a whole, without asserting any particular relevance of § 2(a)(2).[83] Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun, on the other hand, did not;[84] only these last three justices invoked specifically § 2(a)(2) as support for their decision.[85] But in *Teal*, Justice Brennan *did not cite* to Justice Rehnquist's *Dothard* concurrence;[86] Justice Brennan did not treat it as the controlling authority. At least as Justice Brennan so construes it in *Teal*, *Dothard*'s authority cannot be read to support a reading of Title VII disparate-impact liability as flowing out of § 2(a)(2) rather than § 2(a)(1) or some unexplained penumbra arising from the totality of § 2(a)'s terms.[87]

The situation is similar, perhaps even clearer, for Brennan's invocations of *McDonnell Douglas*, *Albemarle Paper*, and *Beazer*. *McDonnell Douglas* involved allegations of "racially motivated" disparate treatment in violation of § 2(a)(1); it saw no allegations of facially neutral policies bearing disparate impacts at all.[88] *Albemarle Paper* involved allegations of both intentional discrimination and the use of a facially neutral testing regime bearing disparate impacts across demographics; in resolving them, the Court never

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[79] *Dothard*, 433 U.S. at 321.
[80] *Id.* at 328–32.
[81] *Id.* at 328 n.10.
[82] *Id.* at 336–37; *id.* at 337 (Renquist, J., concurring in the result and concurring in part); *id.* at 340 (Marshall, J., concurring in part and dissenting in part).
[83] *See id.* at 340 (Marshall, J., concurring in part and dissenting in part).
[84] *Id.* at 337 (Rehnquist, J., concurring in the result and concurring in part).
[85] *Id.*
[86] *See generally* Connecticut v. Teal, 457 U.S. 440 (1982) (treating *Dothard*'s plurality, not Justice Rehnquist's concurrence, as part of the Court's disparate-impact precedents).
[87] *Id.* at 446–50.
[88] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 (1973).

invoked § 2(a)(2) even in passing.[89] *Beazer* saw the Court *reject* a disparate-impact claim, without ever referencing § 2(a)(2).[90] Whatever the implications of these cases, they cannot and do not shed any light on the proper reading of the statutory provision they never referenced or relied on to reach their decisions.

Justice Brennan's invocations of the 1972 Amendments are equally specious. Justice Brennan twice draws on those amendments.[91] The relevant portion of those Amendments removed the exemption of governmental employers from Title VII's purview.[92] No portion of those Amendments altered Title VII's prohibitions for covered entities or addressed (even in passing) the propriety of imposing disparate-impact liability on anyone. Given those facts, there's no obvious connection between extending the application of Title VII to governments and the meaning of Title VII for all covered employers.

Still, Justice Brennan asserted in *Teal* that the "legislative history of the 1972 amendments to Title VII . . . is relevant to this case[.]"[93] He reasoned that "the House and Senate Reports cited *Griggs* with approval" and noted that those reports "explicitly stated that in any area not addressed by the amendments, present case law—which as Congress had already recognized included our then recent decision in *Griggs*—was intended to continue to govern."[94] Inescapably, Justice Brennan admitted that *Griggs* and the existence of disparate-impact liability under Title VII were "area[s] not addressed by the amendments[.]"[95] He did so again when he returned to this source—"Congress did not explicitly consider the viability of [disparate-impact liability or the business necessity] defense[.]"[96] Nonetheless, citing the use of the word "opportunity" in the Congressional reports and in floor debates, he concluded that Congress "intended" to impose disparate-impact liability onto government actors by making *Griggs* apply to them, too.[97]

89 Albemarle Paper Co. v. Moody, 422 U.S. 405, 408–12 (1975).
90 N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 583–84 (1979).
91 *Teal*, 457 U.S. at 447 n.8, 449.
92 *Id.* at 449–50.
93 *Id.* at 447 n.8.
94 *Id.*
95 *Id.*
96 *Id.* at 449.
97 *Id.* at 449–50.

These arguments share *Griggs*'s illegitimate reliance on legislative histories (whether or not they present that legislative history as dishonestly as *Griggs* had) and purposivism to transform words that never went through bicameralism and presentment into law overriding the words that actually did.[98] They transformed congressional inaction (*not* overriding the Supreme Court's ruling in *Griggs*) into the codification (without words) of the Supreme Court's case law.

Justice Brennan's argument from text similarly missed the mark. Remember his explanation of how § 2(a)(2) applied:

> When an employer uses a nonjob-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment opportunity "because of . . . race, color, religion, sex, or national origin."[99]

As a first problem, neither the suit before him, nor *Griggs*, involved a finding that the employer *had* "use[d] a[ny] barrier . . . *in order* to" achieve a discriminatory end; this pure rhetorical sleight of hand was irrelevant to both cases.[100] Imagine it weren't. An employer "us[ing] a . . . barrier"—whether job-related or not—"*in order to* deny a minority or woman applicant employment or promotion" would have engaged in intentional discrimination against the applicant that clearly violated § 2(a)(1).[101] That employer could not have avoided § 2(a)(1) liability *whether or not* the barrier employed more generally "has a significant adverse effect on minorities or women[.]"[102] Above and beyond its irrelevance, the argument could justify reading § 2(a)(2) no further (indeed, only *much less far*) than as a duplication of § 2(a)(1).

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98 This, they can never do. *E.g.*, FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd., No. 24–345, slip op. at 14 (U.S. June 11, 2026) (majority opinion) ("Congress expresses itself as a body through the text it enacts; the views of the 42-member House Committee on Interstate and Foreign Commerce and of the 15-member Senate Committee on Banking, Housing, and Urban Affairs are not the law.").

99 *Teal*, 457 U.S. at 448 (emphasis omitted).

100 *Id.* (emphasis added).

101 *Id.* (emphasis added).

102 *Id.*

Finally, Justice Brennan's conclusion fails to reflect the statute. He contends that § 2(a)(2) "prohibits practices that would deprive or tend to deprive '*any individual* of employment opportunities.'"[103] But § 2(a)(2) didn't bar undifferentiated "practices" that denied opportunities because of covered demography. It made it illegal "to limit, segregate, or classify" individuals in ways that tended to deny opportunities "because of" covered demography. As in *Griggs*, Brennan's *Teal* opinion simply skips the logical necessity of explaining how the facially neutral, evenhandedly applied tests at issue "limit[ed], segregate[d], or classif[ied]" anyone at all, much less how it did so "because of" their covered demography.[104]

5. Section 2(a)(2) in the Courts After Teal

5.1. § 2(a)(2) in the Appellate Courts

U.S. Equal Emp. Opportunity Comm'n v. AutoZone, Inc. is the most prominent other case applying § 2(a)(2) to resolve a Title VII claim.[105] It repeatedly calls § 2(a)(2) "an infrequently litigated provision in Title VII[.]"[106] Both these statements may undersell the matter—I have been unable to identify *any other* appellate case, *anywhere*, *ever*, applying § 2(a)(2) to resolve *any* Title VII litigation.[107]

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103 *Id.* at 453–54 (emphasis in original).

104 *Id.* at 448–50.

105 860 F.3d 564, 564 (7th Cir. 2017).

106 *Id.* at 565; *see also id.* at 568 ("Though not often litigated, the terms of subsection (a)(2) are straightforward enough[.]").

107 The closest any other majority decision comes would be *Ricci v. DeStefano*. 557 U.S. 557 (2009). There, the majority explained that Title VII "did not include an express prohibition on policies or practices that produce a disparate impact" before noting that *Griggs* "interpreted the Act to prohibit, in some cases, employers' facially neutral practices that, in fact, are 'discriminatory in operation.'" *Id.* at 577–78. *Ricci* then repeated the conventional wisdom that "the Civil Rights Act of 1991 . . . included [in § 2(k)] a provision codifying the prohibition on disparate-impact discrimination[,]" *id.* at 578, although a close reading of the 1991 Act shows otherwise. Morenoff, *supra* note 7, at 203–05. *Ricci* then struggled to balance the requirements of § 2(a)(1) with the burden allocation of § 2(k). But the *Ricci* majority never construed § 2(a)(2) to impose disparate-impact liability; only the *Ricci* dissent made that argument. *Ricci*, 557 U.S. at 621 n.2 (Ginsburg, J., dissenting). To the extent relevant, the OLC Opinion tries to thread this needle by referring to the 1991 Act as having "acquiesced" to *Griggs*, even while admitting that "Congress [only] overrode [one] specific aspect of *Wards Cove*, *see* 42 U.S.C. § 2000e-2(k)"—specifically, its burden allocation—while it

And *AutoZone* was *not* a disparate-impact case. In *AutoZone*, an employer maintained shops in both Chicago's predominantly black South Side and its predominantly hispanic West Side.[108] The EEOC maintained that the employer transferred a black employee from a location on the predominantly hispanic West Side to one in the predominantly black South Side, in order to "keep [the former] predominantly Hispanic and . . . get the sales back up to where they're supposed to be at."[109] According to the EEOC, this meant that the employer had classified and segregated employees because of race in violation of § 2(a)(2).[110]

Even while recognizing that § 2(a)(2) is "not often litigated," the Court of Appeals found its terms "straightforward enough: Employers may not 'limit, segregate, or classify' their employees by race (or another listed characteristic) 'in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect' his employment."[111] The Court of Appeals read this "straightforward" language to make "it unlawful to segregate employees by race even if that action has only a *tendency* to deprive a person of employment opportunities. In that sense subsection (a)(2) *does* cast a wider net than subsection (a)(1), which speaks more concretely in terms of actions that 'discriminate against any individual.'"[112] The court nonetheless ruled against the EEOC under the theory—since rejected by the Supreme Court in *Muldrow v. City of St. Louis*—that Title VII makes litigable only "materially adverse employment action[s]" and a transfer between locations without a reduction in pay or demotion was not materially adverse.[113]

"left the specific-causation requirement in place[.]" 50 Op. O.L.C., *supra* note 3, at 6–7. One might add that the 1991 Civil Rights Act also left the prohibitory language of Title VII (including § 2(a)(2)) in place, without any alteration.

108 *AutoZone*, 860 F.3d at 566; *see also* Opening Brief of the Equal Employment Opportunity Commission as Appellant at 6–7, 12–15, U.S. Equal Emp. Opportunity Comm'n v. AutoZone, Inc., 860 F.3d 564 (7th Cir. 2017) (No. 15-3201).

109 *AutoZone*, 860 F.3d at 567 (internal quotation marks omitted).

110 *Id.* at 567–68.

111 *Id.* at 568.

112 *Id.* at 569 (emphasis in original).

113 *Id.*; *see also* Muldrow v. City of St. Louis, 601 U.S. 346, 354–56 (2024).

Other than dissents,[114] it appears the *only* directly on-point appellate decisions across the federal system are *Griggs*, *Teal*, and *AutoZone*, with the only modern case taking a starkly different view of the statute than the two prior, poorly reasoned Supreme Court authorities.[115]

5.2. Analogous Disparate-Impact Cases Under Other Statutes

This is not to say that the Supreme Court has said *nothing* else about § 2(a)(2)'s meaning. It has in dicta from major cases construing other federal nondiscrimination statutes. The two most important such cases (both in their own right and for the depth of their analysis of § 2(a)(2)) are *Smith v. City of Jackson*[116] and *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*[117]

5.2.1. *Smith* and the Age Discrimination in Employment Act

Smith forced the Supreme Court to decide for the first time "whether the 'disparate-impact' theory of recovery announced in *Griggs* . . . is cognizable under the ADEA."[118] The district court and Fifth Circuit Court of Appeals had answered "no" and dismissed the asserted disparate-impact claims.[119] But the justices disagreed, importing disparate-impact analysis into the

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114 A number of *dissenting* opinions have purported to interpret and apply § 2(a)(2) to Title VII litigation. These include dissents from: (a) *Ricci v. DeStefano*, 557 U.S. 557, 608 (2009) (Ginsburg, J., dissenting); (b) *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 219–55 (1977) (Rehnquist, J., dissenting) (adopting a reading far more like that in *AutoZone* than that in *Griggs*); (c) *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 88 n.4 (1982) (Brennan, J., dissenting); and (d) *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 561 (1977) (Marshall, J., dissenting). *See also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 378 (1977) (Marshall, J., concurring in part and dissenting in part) (citing § 2(a)(2) in portion of opinion dissenting from majority's reading of § 2(h)'s protection of seniority systems as a safe harbor shielding employer from disparate-impact liability).

115 I have not included the cases referencing § 2(a)(2) in passing or for no more than its usage of the word "opportunity" in what would otherwise be garden variety § 2(a)(1) cases.

116 544 U.S. 228, 228 (2005) (plurality opinion).

117 576 U.S. 519, 519 (2015).

118 *Smith*, 544 U.S. at 230.

119 *Id.* at 231.

ADEA through a fractured 4–1–3 division (with Chief Justice Rehnquist not participating), even while affirming the dismissal.[120]

The case's facts were simple.[121] Jackson, Mississippi increased the compensation of its municipal employees. Concerned that—even as increased—Jackson was paying new police less than the regional average, the city then adjusted its raise plan to extend "proportionately greater raises" to employees in their first five years of service than to those with greater seniority.[122] An older group of police officers sued, claiming that because a larger portion of officers over 40 had more than five years of seniority, the plan had a disparate-impact on older police in violation of the ADEA.[123]

> The ADEA's statutory language at issue was familiar, making it: unlawful for an employer "to limit, segregate, or classify his employees 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 age . . . ." Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in [§ 2(a)(2)].[124]

However, while passing it in 1967, Congress had altered the ADEA's formula slightly from the Title VII model, adding "language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age[.]"[125]

Notably, both Justice Stevens's plurality and Justice O'Connor's concurrence—each joined by multiple justices—engaged in the kinds of effort to parse Congress's enacted language so notably absent from *Griggs* and *Teal*. Equally notably, and more importantly, neither decision's analysis controls—

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120 *Id.* at 230; *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 247 (O'Connor, J., concurring in the judgment).

121 *Id.* at 230–31 (plurality opinion).

122 *Id.* at 231.

123 *Id.*

124 *Id.* at 233 (citations omitted). The ADEA also includes—at § 4(a)(1)—a provision precisely as parallel to § 2(a)(1).

125 *Id.* (citing ADEA § 4(f)(1), the "Reasonable Factor Other Than Age" provision).

the far shorter concurrence of Justice Scalia, alone, emerges as *Smith*'s binding precedent.[126]

For Justice Stevens's plurality (joined by three colleagues), fresh statutory analysis was secondary, if present. Primarily, Justice Stevens would have held that, given the parallel language of the ADEA and Title VII, "*Griggs* is . . . a precedent of compelling importance."[127] Still, he would have gone further, arguing that the statutes' shared language—specifically, their inclusion of the phrase "otherwise adversely affect his status as an employee"—"focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer."[128] The plurality then read the Reasonable Factor Other Than Age provision as further proof that this reading was proper, asserting that "[i]n most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place."[129]

Justice O'Connor (supported by Justices Kennedy and Thomas) completely rejected this analysis.[130] Satisfyingly, her opinion accurately reflected that "nothing in the Court's decision in *Griggs* itself provides any reason to extend its holding to the ADEA. As the plurality tacitly acknowledges, the decision in *Griggs* was not based on any analysis of Title VII's actual language. Rather, the *ratio decidendi* was the statute's perceived *purpose*[.]"[131] Justice O'Connor then explained—without directly criticizing *Griggs*—how the "ADEA's text, legislative history, and purposes together make clear that Congress did not intend the statute to authorize [disparate-impact] claims."[132]

She began by flagging that Congress's passage of the ADEA four years *before* the announcement of *Griggs* made it impossible for Congress to have chosen this language to adopt *Griggs*' interpretation of § 2(a)(2).[133] The opinion continued to note that while the "employer actions targeted by paragraph (a)(1)—*i.e.*, refusing to hire, discharging, or discriminating against—

126 *Id.* at 243 (Scalia, J., concurring in part and concurring in the judgment).
127 *Id.* at 234 (plurality opinion).
128 *Id.* at 236.
129 *Id.* at 238.
130 *Id.* at 247–68 (O'Connor, J., concurring in the judgment).
131 *Id.* at 261–62 (citations omitted).
132 *Id.* at 248.
133 *Id.* at 260.

are *inherently harmful* to the targeted individual[,]" the "actions referred to in paragraph (a)(2), on the other hand—*i.e.*, limiting, segregating, or classifying—are *facially neutral*."[134] It read the next statutory language to therefore limit the reach of the section: "(a)(2) includes additional language which clarifies that, to give rise to liability, the employer's action must actually injure someone: The decision to limit, segregate, or classify employees must 'deprive or tend to deprive [an] individual of employment opportunities or otherwise adversely affect his status as an employee.'"[135]

Justice O'Connor specifically countered Justice Stevens's reading of § (a)(2) as "prohibit[ing] employer actions that adversely affect [an individual's] status as an employe[e]" with "because of . . . age refer[ing] to the *cause of the adverse effect* rather than the *motive for the employer's action*."[136] Justice O'Connor argued that the structure of the sentence (and the parallel structure of § (a)(1)) prohibited this reading.[137] She marched through the legislative history of the ADEA, both generally noting that "I find it telling that the legislative history is devoid of any discussion of disparate impact claims or the complicated issues such claims raise in the ADEA context[,]"[138] and more specifically demonstrating that the statute arose from a Labor Department report both proposing the eventually enacted language to address "arbitrary discrimination, *i.e.*, disparate treatment" and "recommend[ing] that the other two types of 'discrimination'—both involving factors or practices having a disparate impact on older workers—be addressed through noncoercive measures[.]"[139]

There are major problems with Justice O'Connor's reading, to which we'll return. For now, though, we must consider the final and controlling opinion.[140] Justice Scalia alone concurred with the plurality in the

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134 *Id.* at 249 (emphasis in original).
135 *Id.*
136 *Id.* at 250 (emphasis in original) (cleaned up).
137 *Id.*
138 *Id.* at 258.
139 *Id.* at 256–58 (cleaned up).
140 Justice Scalia supplied the decisive vote for recognizing ADEA disparate-impact claims, on the narrower grounds discussed, below. *Id.* at 243–44 (Scalia, J., concurring in part and concurring in the judgment). On that issue, the rest of the Court split 4–3. *Id.* at 228–29 (plurality opinion). Had Justice Scalia joined O'Connor on that matter, rather than joining the plurality in recognizing the availability of disparate-impact claims, it would have produced a 4–4 split that left the lower court ruling undisturbed

judgment.[141] Rejecting *all* of the plurality's relevant analysis,[142] Justice Scalia took a very different tack. He began with the ADEA's authorization for the EEOC "to issue 'such rules and regulations as it may consider necessary or appropriate for carrying out' the ADEA."[143] Noting that the EEOC had "promulgated, after notice-and-comment rulemaking" a regulation asserting that the ADEA imposed disparate-impact liability and the business-necessity defense, Justice Scalia deferred to the agency as a matter of administrative law.[144]

This alignment makes the actual holding of *Smith* surprisingly narrow and completely untethered from the statutory construction offered by either Justice Stevens or Justice O'Connor. Justice Scalia deferred to the EEOC's reading of the ADEA *only* because Congress gave it substantive rulemaking authority to enforce the ADEA. Notably, as discussed below, this cannot be said of Title VII. Whatever else Justice Scalia's controlling opinion in *Smith* does, it *does not* follow *Griggs* or offer any support for its alleged propriety as an interpretation of Title VII.

5.2.2. *Inclusive Communities Project* and the Fair Housing Act

A decade later, *Inclusive Communities Project* brought another late-'60s nondiscrimination statute before the Court for a first-time determination of whether it imposed disparate-impact liability onto a regulated

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and the ADEA covering only disparate treatment. This makes Scalia's decision the narrowest result-determinative decision. At minimum, *Smith* does not make the plurality's textual analysis binding in Title VII litigation.

141 *Id.* at 243 (Scalia, J., concurring in part and concurring in the judgment).

142 Justice Scalia joined parts I, II, and IV of the plurality opinion. Part I described the factual background. *Id.* at 231–32 (plurality opinion). Part II provided both the legislative history of the ADEA and the language of the provision at issue. *Id.* at 232–33. Part IV construed the differences between the ADEA and Title VII, as amended in 1991, before applying *Wards Cove*'s burden allocation to the case. *Id.* at 240–43. *All* of the plurality's discussion construing § (a)(2) falls in Part III, which Justice Scalia pointedly chose *not* to join. *Id.* at 243 (Scalia, J., concurring in part and concurring in the judgment).

143 *Id.* at 243.

144 *Id.* at 243, 248.

community.[145] This time, the statute was the Fair Housing Act (FHA), enacted by Congress in the immediate aftermath of the 1968 Washington riots triggered by Reverend Martin Luther King, Jr.'s assassination.[146]

Writing for a bare majority, Justice Kennedy purported to follow *Griggs* and the *Smith* plurality in concluding that the FHA *did* impose disparate-impact liability.[147] First, Kennedy reiterated the substance of *Griggs* and of the *Smith* plurality, noting specifically the parallel language of Title VII and the ADEA.[148] He then turned to the FHA's language outlawing a decision "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of" covered demography.[149] Even while admitting that "Congress did not reiterate Title VII's exact language in the FHA,"[150] Justice Kennedy contended that "the phrase 'otherwise make unavailable' is of central importance" and interpreted it to "refer[] to the consequences of an action rather than the actor's intent."[151]

Justice Kennedy buttressed his argument by reference to the 1988 amendments to the FHA.[152] Although the Supreme Court had never done so, Justice Kennedy noted that "all nine Courts of Appeals to have addressed the question" before 1988 "had concluded the Fair Housing Act encompassed disparate-impact claims."[153] "Congress'[s] decision in 1988 to amend the FHA while still adhering to the operative language . . . is convincing support for the conclusion that Congress accepted and ratified the unanimous

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145 Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 527–28 (2015).

146 *Id.* at 529–30; *see also* Stephen J. Pollack, Acting Assistant Att'y Gen. of C.R. Div., 1968 and the Beginnings of Federal Enforcement of Fair Housing1 (Feb. 1, 2000), https://perma.cc/2L2T-3U27 (noting the passage of the Fair Housing Act in the aftermath of Dr. Martin Luther King, Jr.'s assassination amid nationwide riots).

147 *Inclusive Cmtys. Project*, 576 U.S. at 532–39. Justice Thomas took Justice Kennedy to task for adopting the reasoning of the *Smith* plurality in *Inclusive Communities Project*, despite having joined with Justices Thomas and O'Connor in rejecting that reasoning in *Smith*. *Id.* at 556 (Thomas, J., dissenting). Justice Kennedy did not explain his change of heart.

148 *Id.* at 532–35 (majority opinion).

149 *Id.* at 533 (citing 42 U.S.C. § 3604(a)).

150 *Id.* at 533.

151 *Id.* at 534.

152 *Id.* at 535–39.

153 *Id.* at 535.

holdings of the Courts of Appeals finding disparate-impact liability."[154] Primarily, this advanced an endorsement-through-inaction theory. However, Justice Kennedy went further, flagging that in 1988, Congress added three specific "exemptions from liability that" he believed "assume the existence of disparate-impact claims."[155]

Justices Alito and Thomas each authored dissents. No other justice signed onto Justice Thomas's opinion,[156] but Chief Justice Roberts, along with Justices Scalia and Thomas, joined Justice Alito's.[157] Justice Thomas's dissent reached further, admitting forthrightly that "the foundation on which the Court builds its latest disparate-impact regime—*Griggs* . . . —is made of sand."[158] Justice Thomas would "drop the pretense that *Griggs*'s interpretation of Title VII was legitimate."[159] He quoted *Ricci*'s observation that Title VII "did not include an express prohibition on policies or practices that produce a disparate impact" before adding that "[i]t did not include an implicit one either."[160]

Justice Thomas repeated the Court's oft-rehearsed interpretation of "because of" in § 2(a)(1) as focusing exclusively on disparate treatment. He observed that the "only difference between [§ 2(a)(1)] and [§ 2(a)(2)] is the type of employment decisions they address."[161]

Justice Thomas marched through the history of Title VII's disparate-impact regime with the specificity one would expect from a former Chairman of the EEOC.[162] He proceeded to demolish the factual assumptions underlying disparate-impact theory as contrary to sociological fact.[163] As he had in supporting Justice O'Connor's analysis from *Smith*, Justice Thomas again argued that, when Title VII did not actually include any disparate-impact provision, Congress could not have adopted one by paralleling its language in another statute passed years before *Griggs*'s announcement.[164] This time, he

154 *Id.* at 536.
155 *Id.* at 537.
156 *Id.* at 547 (Thomas, J. dissenting).
157 *Id.* at 557 (Alito, J., dissenting).
158 *Id.* at 547 (Thomas, J., dissenting).
159 *Id.*
160 *Id.*
161 *Id.* at 549.
162 *Id.* at 550–53.
163 *Id.* at 554–55.
164 *Id.* at 556.

continued to further attack the logic of extending the *Griggs* error "to statutes like the Fair Housing Act, whose operative text, unlike the ADEA's, does not even mirror Title VII's."[165]

While Justice Thomas had written separately, he also fully joined the dissent authored by Justice Alito. Chief Justice Roberts and Justice Scalia also joined Justice Alito's dissent.[166] Justice Alito characteristically began with a pragmatic point: if the FHA had a disparate-impact component, landlords could be liable for making more intrusive efforts to kill rats in the kind of racially defined slums suffering most from their presence—"[s]omething has gone badly awry when a city can't even make slumlords kill rats without fear of a lawsuit."[167]

Justice Alito did not reach back to the proper reading of Title VII. He began instead with the meaning of "because of" in the FHA itself:

> Without torturing the English language, the meaning of these provisions of the FHA cannot be denied. They make it unlawful to engage in any of the covered actions "because of"—meaning "by reason of" or "on account of" [covered demography]. Put another way, "the terms [after] the 'because of' clauses in the FHA supply the prohibited motivations for the intentional acts . . . that the Act makes unlawful."[168]

Justice Alito excoriated the notion that "make unavailable" could fill-in the gaps as a statutory prohibition on effects unmoored from intentions:

> "[M]ake unavailable" must be viewed together with the rest of the actions covered by § 804(a), which applies when a party "*refuse[s]* to sell or rent" a dwelling, "*refuse[s]* to negotiate for the sale or rental" of a dwelling, "*den[ies]* a dwelling to any person," "or otherwise *make[s] unavailable*" a dwelling. When a statute contains a list like this, we "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'"[169]

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165 *Id.*
166 *Id.* at 557 (Alito, J., dissenting).
167 *Id.* at 558.
168 *Id.* at 561 (citations omitted).
169 *Id.* at 563 (emphasis in original) (internal citations omitted).

Having concluded that "[i]t is hard to imagine how Congress could have more clearly stated that the FHA prohibits only intentional discrimination than by forbidding acts done 'because of'" covered demography, Justice Alito nonetheless turned to how "[t]he circumstances in which the FHA was enacted only confirm what the text says."[170]

After doing so, Justice Alito refuted Justice Kennedy's argument for congressional acquiescence to disparate-impact liability in the FHA through the amendment of other portions of the statute in 1988 without correcting the lower courts' interpretation of the statute.

> Congress has done nothing since 1968 to change the meaning of the FHA prohibitions at issue in this case. In 1968, those prohibitions forbade certain housing practices if they were done "because of" protected characteristics. Today, they still forbid certain housing practices if done "because of" protected characteristics. The meaning of the unaltered language adopted in 1968 has not evolved . . . [when Congress] did not modify the meaning of the provisions now before us. In the Fair Housing Amendments Act of 1988, . . . Congress expanded the list of protected characteristics. Congress also gave the Department of Housing and Urban Development (HUD) rulemaking authority and the power to adjudicate certain housing claims. And, what is most relevant for present purposes, Congress added three safe-harbor provisions, specifying that "[n]othing in [the FHA]" prohibits (a) certain actions taken by real property appraisers, (b) certain occupancy requirements, and (c) the treatment of persons convicted of manufacturing or distributing illegal drugs.[171]

None of these changes amended the FHA's prohibitory language. They would have to have done so for their passage to change the meaning of the FHA's prohibitions, because "[t]o change the meaning of language in an already enacted law, Congress must pass a new law amending that language. Intent that finds no expression in a statute is irrelevant. Hence, we walk on quicksand when we try to find in the absence of corrective legislation a

[170] *Id.* at 565.
[171] *Id.* at 566–67.

controlling legal principle."[172] Justice Alito then catalogued the myriad of contexts in which the Court had refused to read congressional inaction as effecting or acquiescing to a change of law.[173]

Finally, presumably because his own opinion would allow the differences to matter in ways that Justice Thomas's full-throated rejection of *Griggs* and *Smith* would not, Justice Alito differentiated the language of the FHA from that of Title VII and the ADEA in greater detail than Justice Thomas had.[174]

5.3. Summing Up the Case Law to Date

It bears repeating where these cases cumulatively leave us. The Court has only twice considered the meaning of § 2(a)(2) in a Title VII case.[175] In neither did it meaningfully engage with the actual language of the statute. The first—*Griggs*—relied exclusively on a poorly executed purposivism. The latter—*Teal*—relied primarily on legislative history, purposivism, and legislative inaction, while secondarily pursuing a half-hearted, ill-considered approach to the text that barely passes a laugh test. Neither credibly explains how the language at issue could mean what it purports to find in it or, more accurately, what they jointly imposed through a cursory reference to it.

In the 44 years since *Teal*, the Court has *never* revisited the meaning of § 2(a)(2) in a Title VII case.[176] The only modern Title VII appellate case to do so—*AutoZone*—takes a radically different approach that appears entirely inconsistent with that of *Griggs* and *Teal*.[177] While the Court has twice revisited this language in dicta in cases interpreting other statutes,[178] even that dicta is deeply problematic. To begin with, the governing opinion in *Smith* concluded *only* that the statutory language was sufficiently ambiguous to

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172 *Id.* at 569–70 (internal quotation marks omitted) (citations omitted).

173 *Id.* at 570–71. Justice Alito's entire analysis of Justice Kennedy's "acquiescence" argument is particularly worth noting as it impacts the OLC's assertion that the 1991 Civil Rights Act "acquiesced" to the propriety of *Griggs*'s conjuring of disparate-impact liability into Title VII. 50 Op. O.L.C., *supra* note 3, at 1. In Title VII, too, inaction cannot alter codified language or the meaning of that language at its enactment.

174 *Inclusive Cmtys. Project*, 576 U.S. at 577–82 (Alito, J., dissenting).

175 *See supra* notes 16–18 and accompanying text.

176 *See* discussion *supra* Section 5.1.

177 See discussion supra Section 5.1.

178 Smith v. City of Jackson, 544 U.S. 228, 239–42 (2005) (plurality opinion); *Inclusive Cmtys. Project*, 576 U.S. at 527–28.

allow deference to an agency's notice-and-comment rulemaking under the ADEA.[179] That does not purport to interpret Title VII, expressly relies on a factor that *does not apply to Title VII*,[180] and gets to its result only by employing the deference to agencies that the Supreme Court ended outright in 2024.[181] The fuller effort at statutory interpretation in the plurality opinion lacked sufficient support to bind anyone even in the ADEA context, much less in Title VII's. And the second—*Inclusive Communities Project*—discusses Title VII analogically (despite the absence of any analogous language in the FHA) to construe *different* language than appears in § 2(a)(2) in a *different* statute to have a meaning that Justices Thomas and Alito persuasively argue wars with the text, context, and history of both Title VII *and* the FHA.[182]

We are left with: (a) old, poorly reasoned opinions; (b) a lower court seemingly inadvertently overruling those old, bad precedents; (c) a single case improperly (in retrospect) "deferring" to an agency in a way incompatible with a parallel interpretation of Title VII; and (d) more recent, unpersuasive dicta.

6. THREE READINGS OF § 2(A)(2)

All the foregoing serves effectively as an introduction to the real question: what *does* § 2(a)(2) actually mean and require? As nearly as I can tell, there are three options: (i) what *Griggs* and *Teal* maintained; (ii) what the dissenting opinions in *Smith* and *Inclusive Communities Project* argued, with mild adjustments to correct the serious problems with their proposal; or (iii) an additional alternative building on the Seventh Circuit's construction of the section from *AutoZone* that I have not seen discussed, but which appears to best reflect the ordinary understanding of the terms of the statute.[183]

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179 *See* discussion *supra* Section 5.2.1.

180 *See* discussion *infra* Section 7.1.

181 Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024).

182 *Inclusive Cmtys. Project*, 576 U.S. at 532–35; *id.* at 553–56 (Thomas, J., dissenting); *id.* at 577–82 (Alito, J., dissenting).

183 An attentive reader will note that I *do not* include in these options the OLC Opinion's suggestion of adjustments to Title VII's disparate-impact regime to bring it up to the constitutional minimums imposed by modern case law. As mentioned *supra* Part 4, OLC's proposal seeks to remedy the constitutional defects that have been with us since *Griggs*, without engaging with or interpreting Congress's actual language in § 2(a)(1), § 2(a)(2), or § 2(a) as a whole. While OLC is surely right that its proposal would

6.1. The *Griggs/Teal* Disparate-Impact Reading

To be blunt, the right answer cannot be that advanced by *Griggs* and *Teal*. The disparate-impact claims they conjured into being assess the propriety of discrete employment policies as rules governing employment decisions (specifically for hiring, for promotion, for allocating compensation, or for setting the terms or conditions of employment).[184] These cases make such claims' validity turn on demonstrations that such rules-of-decision impact different demographic groups differently. They look for such divergences whether or not the challenged policies classify, segregate, or limit anyone "because of" their covered demography.

But § 2(a)(2) says nothing about employment policies. It says nothing about employment decisions. It says nothing about the impact of such employment policies or decisions on any group or groups. In *Smith*, Justice Stevens belatedly characterized the words "or otherwise adversely affect his status as an employee" in § 2(a)(2) as "focuse[d] on the *effects* of the action on the employee rather than the motivation for the action of the employer."[185] Justice Kennedy did the same in *Inclusive Communities Project*. But, in context, those words "focus" no such thing. That language assured the section reaches classifications, limitations, and segregations that denigrate individuals' statuses as employees or applicants *even if* the resulting denigrations *do not* deny or tend to deny those employees or applicants formal employment opportunities. The language simply does not create a separate class of violations to which "because of" doesn't apply.

No, whatever else it may be, § 2(a)(2) is entirely a prohibition on the *classification*, *limitation*, *and segregation* of *individuals*. With everything else wrong in *Teal*, even Justice Brennan got right that the statute is about the treatment of individuals, not of demographic orders.[186]

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address those constitutional concerns, it does not even try to justify its own proposal's consistency with § 2(a)(2). Moreover, as a lasting matter, the executive branch cannot internally resolve these issues. The consistency of OLC's proposed saving-throw interpretation with either Congress's actual prohibitory language or with the Constitutionally proscribed separation of powers remain additional issues to be resolved.

184 *See supra* notes 62–63, 70–74 and accompanying text.

185 Smith v. City of Jackson, 544 U.S. 228, 235–36 (2005) (plurality opinion) (emphasis omitted).

186 Connecticut v. Teal, 457 U.S. 440, 453–54 (1982).

6.2. The Intentional Classification Reading

Next, we should confront—and improve—Justice O'Connor's proposed reading of the statute from *Smith*. Justice O'Connor read "because of" in § 2(a)(2) as a modifier of "classify," "segregate," or "limit," meaning what it always means in Title VII—intentionally disparate treatment.[187] This would make an employer's liability turn on whether the employer chose a classification "because of" covered demography.

What categorizations might an employer choose "because of" covered demography? The most obvious answer would be categorizations of employees or applicants *by* or *into* the five demographic orders proscribed by Title VII: race, color, sex, religion, and national origin. But an employer could select because of covered demography other categorizations motivated by the employer's expectation that such a categorization might "tend to" deny opportunities across covered demography "or otherwise adversely affect [the] status [of] an employee."[188]

A careful reader will notice that I've added "might 'tend to'" in a way that Justice O'Connor did not. Remember that Justice O'Connor had contended that while the "employer actions targeted by paragraph (a)(1)—i.e., refusing to hire, discharging, or discriminating against" someone because of race or other covered demography "are *inherently harmful* to the targeted individual[,]" the "actions referred to in paragraph (a)(2), on the other hand—*i.e.*, limiting, segregating, or classifying" individuals because of race or other covered demography "are *facially neutral*" actions.[189] To cope with this alleged facial neutrality, she read the next statutory language to limit the reach of the section to "clarif[y] that, to give rise to liability, the employer's action must actually injure someone: The decision to limit, segregate, or classify employees must 'deprive or tend to deprive [an] individual of employment opportunities or otherwise adversely affect his status as an employee.'"[190]

This portion of her opinion faces multiple objections. First, there is no reasonable explanation for how Justice O'Connor—as an American who had

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187 *Smith*, 544 U.S. at 249–51 (O'Connor, J., concurring in the judgment).

188 42 U.S.C. § 2000e-2(a)(2).

189 *Smith*, 544 U.S. at 249 (O'Connor, J., concurring in the judgment) (emphasis in original).

190 *Id.*

lived through the 20th century, much less an American who emerged over the 20th century as a leading national jurist—managed straight-facedly to maintain that *segregating people because of race* or other covered demography might be "facially neutral."[191] Not to put too fine a head on it, that contention is insane and wars directly with the Court's best-known and most respected precedents.[192]

Next, Justice O'Connor's language either contradicts itself or reads "would tend to" entirely out of the statute—you cannot simultaneously: (i) say that "the employer's action must actually injure someone;" and (ii) say that a violation is present when a classification only "tend[s] to deprive" that individual of opportunities.[193] Those are different concepts with no overlap.

These are not small "nits." However, if we politely elide over the first contention as unfortunate dicta and put "tend to" back into the equation as necessary to avoid excising a statutory provision without anything like a reason, then Justice O'Connor's proposal has some merit. Indeed, a bar on intentional classifications would infuse all the pieces of § 2(a)(2) with at least some meaning. The proposal is viable and worth considering further.

6.3. The Objective Classification Reading

There is another alternative, however, which—like the Seventh Circuit in *AutoZone*—begins from the "plain statutory language" that is "straightforward enough[.]"[194] One could take Congress at its word and read § 2(a)(2) to mean that employers' *classifications* of employees or job applicants are illegal, regardless of any particular employer's idiosyncratic intentions, if they are the *kind of* classification that would in any way "tend to" advance intentional discrimination by a supervising bigot if there were one. Again, that would clearly include classifications, limitations, or segregations of employees or applicants *by* or *into* the five demographic categories

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191 *Id.*

192 *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that state-imposed racial segregation classifies individuals on the basis of race and causes sufficient harm to violate the Constitution).

193 *Smith*, 544 U.S. at 249 (O'Connor, J., concurring in the judgment).

194 U.S. Equal Emp. Opportunity Comm'n v. AutoZone, Inc., 860 F.3d 564, 566, 568 (7th Cir. 2017).

proscribed by Title VII: race, color, sex, religion, and national origin.[195] This is the core information a hypothetical bigot would want to have before making hiring decisions or doling out employment opportunities. And—like the adjusted-O'Connor-model—this reading would also reach somewhat beyond those demographic orders to cover *other* classifications. Here, it would extend to cover such additional classifications as would materially aid the hypothetical bigot in denying opportunities because of covered demography.

How far would that go? The connection required to trigger liability would have to be dramatically higher than what disparate-impact analysis has imposed since its fabrication a half century ago. I'd argue that—in order to avoid false-negatives—a hypothetical bigot would only be interested in classifications that function as near-perfect proxies for covered demography without directly referencing it. Think of the kinds of inputs that have already been litigated in the § 2(a)(1) context as the grounds for proxy discrimination suits—"wearing a yarmulke," "wearing a hijab," or "keeping Halal." That's the kind of information a hypothetical bigot would want, so that's the information § 2(a)(2) should be read to make illegal for an employer to furnish to him.

7. Defining the Classification Bar and Its Implications

Consistent with what Justice Thomas wrote in *Inclusive Communities Project*, under either viable option, *an employer's classification itself* is the violation of § 2(a)(2), not the later employment action taken utilizing it.[196] Under either viable option, that legislative judgment must inform how we read party standing to litigate § 2(a)(2) claims—no party should be required to show any harm incurred above or outside of an employer's violative classification; that's the governed, prohibited "harm" with or without any further ramifications.

To see how this would work, go back to the example of an employer compiling lists of yarmulke and hijab wearers.[197] One should be able to go to court and obtain injunctive relief the moment an employer starts keeping

195 42 U.S.C. § 2000e-2(a)(2).

196 Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 548–50 (2015) (Thomas, J., dissenting).

197 *See* discussion *supra* Section 6.3.

those lists, without waiting for the employer's declaration that those who do need to use a separate bathroom. Under the adjusted-O'Connor-proposal, the employee could do so based on an allegation that the employer started keeping such lists *because* it expects the classification to tend to yield disparities across covered demography that could be used to deny opportunities or otherwise adversely affect one's status. Under the Objective Classification model, the employee could do so simply because the classification is the kind of proxy for covered demography that a hypothetical bigot would want in hand in order to deny opportunities or otherwise adversely affect one's status because of covered demography.[198]

Still, the two would entail differences. I prefer the latter because it far better avoids transforming § 2(a)(2) into a nearly perfect duplicate of § 2(a)(1). Just as a matter of logic, where a plaintiff can prove that an employer has selected a classification of employees or applicants *with an actual intention to discriminate in employment actions because of covered demography* (as the adjusted-O'Connor-proposal would require), the same evidence will almost always show that the employer *has used* that classification in either setting a related term or condition of employment or in taking *some* kind of covered employment action. But any such term, condition, or employment action would be separately prohibited by § 2(a)(1).[199] Functionally, the adjusted-O'Connor-proposal would leave § 2(a)(2) nearly pure surplusage.

The Objective Classification model avoids this pitfall. It would allow employees to preempt the discriminatory employment actions covered by § 2(a)(1) whenever an employer starts classifying employees and applicants in a proscribed way. It would read "because of" as meaning what it always does—intentional discrimination—but only within the context where it appears in § 2(a)(2) covering categorizations that: (a) deprive individuals of employment opportunities because of covered demography; (b) tend to deprive individuals of employment opportunities because of covered demography; or (c) otherwise adversely affect an individual's status as an employee because of covered demography.[200] It's worth noting that such a reading also

198 *See* discussion *supra* Part 6.

199 *E.g.*, Muldrow v. City of St. Louis, 601 U.S. 346, 354–56.

200 42 U.S.C. § 2000e-2(a)(2).

conveniently best squares with the limited available evidence of how the original interpretive community understood § 2(a)(2)'s text.[201]

8. THE EEO-1 PROBLEM

Having considered how best to read § 2(a)(2), it is worth turning to the administrative actions the EEOC has taken applying it. Two such actions specifically warrant attention: (a) the EEOC's regulation requiring covered employers to annually prepare and file a Form EEO-1; and (b) the EEOC's guidance to employers concerning how they should interact with job applicants before entering an employment relationship.[202]

8.1. The EEO-1 Requirement and EEOC Reporting Authority

In its modern form, Title VII includes two provisions authorizing the EEOC to issue regulations. Title VII's primary regulatory provision gives the EEOC ". . . authority from time to time to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II chapter 5 of title 5."[203] Chapter 5 of Title 5 is the Administrative Procedures Act (APA).[204] APA § 553 imposes the general requirements of notice-and-comment before exempting "interpretive rules . . . or rules of agency organization, procedure, or practice."[205] Taken together, these provisions authorize, alone, the kind of procedural rulemaking that doesn't require notice-and-comment. Under APA § 704, such purely procedural rules are not subject to judicial review.[206] A second provision separately provides that:

> Every employer . . . subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are

[201] *See* discussion *supra* Section 3.2.2.

[202] 29 C.F.R. § 1602.7 (2020); *Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/YX7S-7H2E.

[203] 42 U.S.C. § 2000e-12(a) (emphasis added).

[204] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[205] 5 U.S.C. § 553(b)(3)(A).

[206] 5 U.S.C. § 704.

> being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder.[207, 208]

In May 1972, pursuant to the latter, the EEOC promulgated 29 C.F.R. § 1602.7.[209] This came just a year after the Supreme Court's 1971 *Griggs* decision.[210] 29 C.F.R. § 1602.7 requires all employers subject to Title VII carrying at least 100 employees to annually "file with the Commission . . . executed copies of Standard Form 100, as revised (otherwise known as 'Employer Information Report EEO-1') in conformity with the directions set forth in the form and accompanying instructions."[211] The EEO-1 Component Data Collection Instruction Booklet clarifies that in completing the EEO-1, each employer is "required to report annually the number of individuals they employ by job category and by sex and race or ethnicity."[212] Therefore, as soon as the Supreme Court imposed through *Griggs* Title VII disparate-impact liability onto employers, the EEOC implemented a rule requiring covered

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207 42 U.S.C. § 2000e-8(c). The original 1964 version of the section provided: ". . . every employer . . . subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation . . . , after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder." Civil Rights Act of 1964, Pub. L. No. 88-352, § 709(c), 78 Stat. 241, 263 (codified as amended at 42 U.S.C. § 2000e-8(c)). While Congress substantially rewrote that in 1972 into the present language, in both iterations, the statute expressly authorizes this specific kind of regulation.

208 One could argue that § 8(c) does not actually include a separate authorization of EEOC regulations. This argument would contend that § 8(c) merely requires compliance by employers with any procedural regulation properly promulgated pursuant to § 12(a). While that reading is possible, I do not embrace it because it appears to prove too much: *any* requirement that employers maintain *any* record is substantive, not procedural. If this reading were correct, Congress would have required (through § 8(c)) compliance with regulations that it never authorized the EEOC to promulgate.

209 Requirement for Filing of Report, 37 Fed. Reg. 9219, 9219 (May 6, 1972) (codified at 29 C.F.R. § 1602.7).

210 *Id.*; *see* Griggs v. Duke Power Co., 401 U.S. 424, 424 (1971) (decided March 8, 1971).

211 29 C.F.R. § 1602.7 (2020).

212 *E.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, 2024 EEO-1 COMPONENT 1 DATA COLLECTION INSTRUCTION BOOKLET, OMB CONTROL NO. 3046-0049, at 7 (2025) (footnotes omitted), https://perma.cc/BTR6-XR5J [hereinafter 2024 EEO-1 BOOKLET].

employers to classify *all* of their employees annually by race, sex, and national origin.[213]

8.2. Applicant Guidance and Agency Inconsistency

For decades, the EEOC's informal guidance documents have advised America's employers:

> As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.
>
> . . . .
>
> Although state and federal equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to . . . race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an

[213] The EEOC sometimes ties the EEO-1 back further to its 1966 regulations issued following—and seemingly pursuant to—President Johnson's 1965 issuance of Executive Order 11246. *E.g.*, Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113, 5113 (Feb. 1, 2016). While it may be true that such a regulation once imposed a similar requirement on employers, this is not the history of 29 C.F.R. § 1602.7 and the EEOC's current requirement—in it—for covered employers to submit EEO-1s. Regardless, the difference (if any) bears immaterially on this article's analysis. Whether or not the EEOC began requiring employers to compile and submit something akin to the modern EEO-1 before *Griggs*, the legality of that regulatory imposition would still turn on its consistency with the same Title VII language authorizing EEOC regulations, see discussion *infra* Section 7.3, and on the organic meaning of Title VII's substantive provisions, see discussion *supra* Part 6. And the history described above already highlights that the EEOC chose to impose disparate-impact analysis on its own as soon as the Commission opened; the Supreme Court could only "defer" to the EEOC in *Griggs* as a result of this choice. Similarly, earlier presidents took thematically related actions on their own authority. U.S. Equal Employment Commission, *History of the EEOC: The Early Years*, https://perma.cc/XN4E-D35Y (citing as precursors executive orders of presidents ranging from Franklin D. Roosevelt to John F. Kennedy). Any actions taken by such Presidents or by subordinates pursuant to their orders, including any overlapping record-keeping requirements they imposed onto federal contractors, would not and could not have drawn propriety from Title VII or shed any light on what it authorizes.

> employer's intent to discriminate unless the questions asked can be justified by some business purpose.
>
> Therefore, inquiries . . . which may indicate the applicant's race, sex, national origin, . . . religion, color or ancestry if answered, should generally be avoided.
>
> Similarly, employers should not ask for a photograph of an applicant. If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.[214]

These informal documents do not footnote the authority on which their particular pieces of guidance rely. However, most of this language—lacking any apparent peg to any suggestion of employer *usage* of the identified information in taking any employment action—seems connected to the language of § 2(a)(2) and its doppelgangers in other nondiscrimination statutes.

In short, the federal enforcer of Title VII has long told employers to avoid obtaining information on applicants' covered demography before a hiring. No related questions. No records of related answers. Not even photographs that could capture applicants' demographic information. The EEOC has long told employers to stay away from the cliff by avoiding actions that could even *look* like the prohibited "classification . . . because of" covered demography of job applicants.[215]

8.3. Application to 29 C.F.R. § 1602.7

One place where the differences between the two viable interpretations of § 2(a)(2) become salient would be what they have to say about the propriety of 29 C.F.R. § 1602.7 and the EEO-1. 29 C.F.R. § 1602.7 is proper only if one of two things is true. It could be proper under § 12(a) if § 1602.7 were purely procedural. The EEOC has never maintained this[216] and—given

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214 *E.g.*, *Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/YX7S-7H2E.

215 *See* discussion *supra* Section 8.2.

216 *See* 29 C.F.R. § 1602.7 (2020) (requiring covered employers to file annual EEO-1 reports); *see also* Agency Information Collection Activities: Revision of the Employer

its affirmative imposition of a substantive requirement on millions of employers—it could not credibly do so. The only other avenue to propriety would be for § 1602.7 to fall under § 8(c)'s authorization of regulations requiring the production and maintenance of records that are "relevant to the determination[ ] of whether unlawful employment practices have been or are being committed" that are also "reasonable, necessary, or appropriate for the enforcement of" Title VII.[217]

There is no doubt that—so long as *Griggs* is with us, and to a large degree even if it were not—the EEO-1 *does* provide information "relevant to the determination[] of whether unlawful employment practices have been or are being committed[.]"[218] After all, even without *Griggs*, proof of an employment policy's disparate impact would serve as a kind of rebuttable evidence of intentional discrimination.[219] But it remains *very hard to imagine* how it could be "reasonable, necessary, or appropriate for the enforcement of" Title VII for the EEOC to compel the keeping of these records.[220]

Under the Objective Classification model of § 2(a)(2), the impropriety should be obvious. The classifications the EEOC requires on the EEO-1[221] are *precisely* the core information a hypothetical bigot overseeing employees would want to have available in order to effectively deny employment opportunities or otherwise adversely affect employees' statuses. Whatever an employer's idiosyncratic motivations might be for classifying employees by race and sex (and, for most employers the dominant current motivation would surely be complying with § 1602.7 and so keeping the EEOC as far away as possible), classifying employees by race, national origin, and sex would violate § 2(a)(2). It *cannot be* "reasonable, necessary, or appropriate

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Information Report (EEO-1) and Comment Request, 81 Fed. Reg. at 5113 (explaining that the EEOC requires covered employers to submit EEO-1 reports).

217 42 U.S.C. § 2000e-8(c).

218 *Id.*

219 Even the most committed opponents of the imposition of independent liability based on disparate-impact analysis acknowledge the potential relevance of documented disparate impacts to an actor's intentions. *E.g.*, Heriot, *supra* note 10, at 10; 50 Op. O.L.C., *supra* note 3, at 12–13.

220 42 U.S.C. § 2000e-8(c).

221 2024 EEO-1 BOOKLET, *supra* note 212, at 7 (requiring employers to report employees by race, ethnicity, and sex).

for the enforcement of" Title VII for the EEOC to compel violations of Title VII.[222]

Under the adjusted-O'Connor-proposal, while the propriety of the EEO-1 would be somewhat more complicated, the answer should be the same. That reading makes the idiosyncratic motivation of an employer a complete defense to an action enforcing § 2(a)(2). True. That leaves every employer classifying employees in order to comply with § 1602.7 and so keep the EEOC as far away as possible without the requisite discriminatory intent to establish a statutory violation. This would leave no *inherent* conflict in the EEOC ordering employers to do what would be illegal for them to do on their own. Still, that doesn't fully answer the question. § 8(c) requires a record to be "reasonable, necessary, or appropriate" to Title VII enforcement, not just relevant.[223] Presumably "reasonable, necessary, or appropriate" places the bar somewhere higher than "not affirmatively requiring statutory violations." Compelling an otherwise illegal activity should fall short of that somewhat higher threshold.

An analogy to the Court's recent decision in *Louisiana v. Callais* should shed some light on why and on how much higher it should fall.[224] Are § 1602.7's requirements congruent and proportional to an ongoing set of violations of the statute it seeks to address? Without relying on *Griggs*'s mistakes, it's hard to imagine how that could be the case. For that matter, even if it were once true, *Callais* suggests that it may no longer be so.[225] The EEOC has not altered or repromulgated § 1602.7 since 1991.[226] Congress hasn't amended or re-passed§ 8(c) since 1972.[227] No remedial governmental requirement of racial classifications can last forever without such an analytical refresh. Whether § 1602.7 is 35-years past the last such reassessment, 54-

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222 42 U.S.C. § 2000e-8(c).

223 *Id.*

224 Louisiana v. Callais, No. 24–109, slip op. at 22–23, 26–27 (U.S. Apr. 29, 2026) (majority opinion).

225 *Id.*

226 Requirement for Filing of Report, 56 Fed. Reg. 35755, 35733 (July 26, 1991) (codified at 29 C.F.R. § 1602.7).

227 42 U.S.C. § 2000e-8(c). One might also question the degree to which Congress, when it last amended the section in 1972—broadening the provision's ambit, altering the method for a party to obtain exemption, and authorizing the EEOC or the Attorney General to compel compliance through the courts—necessarily reassessed the scope of ongoing statutory violations.

years past it, or 62-years past it, the Court's precedents would no longer allow it to continue to be a viable remedial action.

One additional detail similarly points toward a conclusion that § 1602.7 cannot be proper. As described above, for decades, the EEOC's guidance documents have maintained that—seemingly because of § 2(a)(2)—employers should not ask job applicants about their covered demography, record job applicants' covered demography, or even take a photograph of any job applicant lest this information result in the classification of any job applicant in violation of the statute.[228] Yet, simultaneously, the EEOC has read the same language of the same provision of the same statute to justify—as necessary to police for disparate impacts—requiring those same employers to track and report to the EEOC through EEO-1s *all* employees' race, sex, and national origin in all job categories once they're hired.[229]

The same language of the same provision of the same statute governs both employers' treatment of employees and employers' treatment of job applicants.[230] That language cannot simultaneously both justify *compelling* a treatment of employees and *forbidding* the same treatment of applicants. Something has to give. § 2(a)(2) could potentially mean *either* of these things. From everything above, it should be remarkably clear which it *does* mean. But one way or the other, simple consistency requires that we resolve the conflict.

9. CONCLUSION: WHAT NEXT?

Griggs is, and since its release has been, indefensible. It does not really try to interpret any language enacted by Congress.[231] It badly mischaracterized the legislative history it relied on, instead, to impose rules the justices thought good policy.[232] Those rules are irreconcilable with the law Congress actually passed. *Griggs* released into the legal ecosystem—in disparate-impact theory—a pathogen encouraging illegal activity in unconstitutional

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228 *See supra* text accompanying notes 166–67.

229 Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113, 5113–14 (Feb. 1, 2016); *see also* 2024 EEO-1 BOOKLET, *supra* note 212, at 7.

230 42 U.S.C. § 2000e-2(a)(2).

231 *See* discussion *supra* Part 6.

232 *See* discussion *supra* Section 6.2.

ways. OLC has rightly diagnosed the constitutional problems *Griggs*'s rules pose and admirably proposed alterations to those rules to bring them up to the minimum floor our constitutional precedents would require of an enacted disparate-impact regime.[233]

But that is not enough. Even if the courts fully adopted OLC's proposals (and, with OLC's analysis only binding the executive branch, that cannot be assumed), we would still be saddled with *Griggs*'s fabrication from whole cloth of a concept untethered from and contradictory to the choices Congress has codified. A less-bad *Griggs* is still *Griggs*. Shorter: *Griggs* does not deserve and cannot be salvaged by even the best-intentioned saving throw.

These observations need to be operationalized. With greatest specificity, the EEOC should go through notice and comment to amend 29 C.F.R. § 1602.7 to end the blanket requirement of covered employers' preparation and maintenance of EEO-1s.[234, 235]

Potentially, the regulatory replacement should authorize the EEOC (or its staff), while conducting investigations into alleged § 2(a)(1) violations in which they decide based on other available evidence in a specific circumstance that it would be justified, to require employers to compile and submit related information. But any such regulation should be narrowly tailored to assure that such a requirement is only imposed when a sufficient quantum of evidence has been administratively determined to justify it.

Further, the EEOC should: (a) revisit *all* of its existing guidance documents to assure that *each* remains consistent with the substance of modern nondiscrimination law; and (b) revisit all of its existing regulations to assure that they are actually procedural in nature or otherwise authorized by Congress.

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233 50 Op. O.L.C., *supra* note 3, at 8–11.

234 29 C.F.R. § 1602.7 (2020).

235 Based on reporting that came to light as this article went to print, the EEOC may agree. *See* H. Juanita Beecher, *OMB Approves EEO-1 Rescission*, HCI: HR DAILY ADVISOR (July 9, 2026), https://perma.cc/REX3-PG9T.