Civil Rights Act of 1964 — Title VII — Reverse Discrimination — Ames v. Ohio Department of Youth Services

Sixteen years ago, Justice Scalia warned of an "evil day on which the [Supreme] Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[1] That evil day approaches.[2] Last Term, in *Ames v. Ohio Department of Youth Services*,[3] the Court braced for it by reaffirming seminal disparate impact doctrine and a colorblind, anticlassification vision of equal protection.[4] The Court repudiated the Sixth Circuit's "background circumstances" rule,[5] which imposed a heightened evidentiary burden on majority-group plaintiffs alleging employment discrimination under Title VII.[6] The surprisingly succinct opinion for a surprisingly unanimous Court rested solely on Title VII's text and the Court's Title VII precedents,[7] which the Court took to mean that majority-group plaintiffs cannot be treated differently from minority-group plaintiffs.[8] But the Court's embrace of a formalist, symmetrical Title VII was an implicit embrace of a formalist, symmetrical Equal Protection Clause.[9] In rejecting the background circumstances rule, the Court put Title VII disparate impact doctrine (that is, liability for facially neutral actions that have a discriminatory impact[10]) on firmer constitutional footing, but further jeopardized an antisubordination vision of antidiscrimination law.

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[1] Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring); *see* 42 U.S.C. §§ 2000e-2 to -17.

[2] *See, e.g.*, Dan Morenoff, *Disparate-Impact Liability: Unfounded, Unconstitutional, & Not Long for This World*, 26 FEDERALIST SOC'Y REV. 193, 193 (2025) (arguing Title VII disparate impact doctrine has been "an unwarranted mistake"); Exec. Order No. 14,281, 90 Fed. Reg. 17537, 17537 (Apr. 23, 2025) ("Disparate-impact liability is wholly inconsistent with the Constitution.").

[3] 145 S. Ct. 1540 (2025).

[4] *Id.* at 1546.

[5] Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 824 (6th Cir. 2023) (per curiam).

[6] *Ames*, 145 S. Ct. at 1545–46. Title VII renders unlawful an employer's "fail[ure] or refus[al] 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." 42 U.S.C. § 2000e-2(a)(1).

[7] *Ames*, 145 S. Ct. at 1543–44; *see infra* note 43 and accompanying text.

[8] *Ames*, 145 S. Ct. at 1546.

[9] *See* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1085 (2004) ("[O]ur legal structure does not permit a formal racial distinction in proof of discrimination."); William R. Corbett, *Reverse Discrimination: An Opportunity to Modernize and Improve Employment Discrimination Law*, 79 U. MIA. L. REV. 160, 180 (2024) ("[A]n Equal Protection challenge could be leveled against the imposition of an additional requirement on reverse discrimination plaintiffs . . . .").

[10] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494, 503–04 (2003).

In 2019, Marlean Ames, a heterosexual woman,[11] applied for a promotion.[12] She had worked at the Ohio Department of Youth Services since 2004, starting as an Executive Secretary, earning a promotion to Community Facility Liaison in 2009, and working her way up to an Administrator in 2014.[13] When the Department created a new Bureau Chief position in 2019, Ames interviewed for the job.[14]

The Department decided not to promote Ames.[15] With input from Ames's direct supervisor (a gay woman),[16] the Department's Director (a straight man)[17] and Assistant Director (a straight woman)[18] determined Ames — despite her generally positive performance reviews[19] — lacked the "vision" and "leadership skills" for the new position.[20]

Ames was then demoted.[21] Shortly after Ames interviewed for the promotion, the Director and Assistant Director decided to dismiss Ames from her current role because of her lack of vision, slow disbursal of grant funds, and the Department's new priorities.[22] The Department offered Ames a demotion, which she took.[23] It then selected a gay man as Ames's replacement and later chose a gay woman for the Bureau Chief role for which Ames was passed over.[24]

In November 2020, Ames filed a complaint in the Southern District of Ohio, alleging sexual orientation discrimination under Title VII on the basis of her status as a heterosexual.[25]

In an unpublished opinion, the district court granted the Department's motion for summary judgment.[26] The court applied the three-step *McDonnell Douglas Corp. v. Green*[27] framework for evaluating Title VII disparate treatment claims, under which an employee "bears the initial burden of establishing a *prima facie* case of" employment

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[11] Ames v. Ohio Dep't of Youth Servs., No. 20-cv-05935, 2023 WL 2539214, at *1, *8 (S.D. Ohio Mar. 16, 2023).

[12] *Id.* at *3.

[13] *Id.* at *2–3.

[14] *Id.* at *3.

[15] *Id.*

[16] Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 824 (6th Cir. 2023) (per curiam).

[17] *Id.*

[18] *Id.*

[19] *Ames*, 2023 WL 2539214, at *4.

[20] *Id.* at *3, *4.

[21] *Ames*, 87 F.4th at 824.

[22] *Ames*, 2023 WL 2539214, at *3–5.

[23] *See id.* at *3.

[24] *Id.* at *4–5.

[25] *See id.* at *6. Ames also asserted sex discrimination on the basis of her status as a woman. *Id.* The district and circuit courts found that Ames failed to establish the Department's stated reason for her demotion was pretextual. *Id.* at *11–12; *Ames*, 87 F.4th at 826–27. The sex discrimination claim was not before the Supreme Court. *See Ames*, 145 S. Ct. 1543–44. Seven other state and federal law claims were all dismissed on a motion for judgment on the pleadings. *Ames*, 2023 WL 2539214, at *6.

[26] *Ames*, 2023 WL 2539214, at *12.

[27] 411 U.S. 792 (1973).

discrimination.[28] Typically, to make out a prima facie case of discrimination at the first step of *McDonnell Douglas*, a plaintiff must demonstrate she (1) was a "member of a protected class; (2) . . . suffered an adverse employment action; (3) . . . was qualified for the position; and (4) . . . was treated differently than similarly-situated, non-protected employees."[29] If she succeeds in establishing a prima facie case, the burden of production shifts to the employer to demonstrate "a 'legitimate, nondiscriminatory reason' for its actions."[30] If the employer provides a nondiscriminatory rationale, the burden then shifts back to the employee to show the employer's "proffered reason was a mere pretext for discrimination."[31]

The district court's analysis of Ames's sexual orientation discrimination claim turned on the Sixth Circuit's "background circumstances" rule, which imposed a heightened evidentiary burden on members of majority groups.[32] To establish the first element of the prima facie case, the Sixth Circuit required that "a plaintiff alleging reverse discrimination . . . show that 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.'"[33]

The court found that Ames failed to adduce sufficient evidence of background circumstances in either the denial of her promotion or her demotion.[34] Specifically, Ames failed to show "statistical evidence of past reverse discrimination," employer policies reflecting a preference for LGBTQ+ employees, or evidence that "the decisionmakers behind her demotion . . . were members of the LGBTI community."[35]

On appeal, the Sixth Circuit affirmed.[36] In a per curiam opinion, the court agreed Ames did not make the requisite showing of background circumstances on her sexual orientation discrimination claim.[37]

Judge Kethledge concurred.[38] He agreed with the court's application of the background circumstances rule, precedent the "panel [was] bound to apply," but disagreed with the rule itself.[39] Citing the text of Title VII, Judge Kethledge maintained that "[t]he statute expressly extends its

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[28] *Ames*, 2023 WL 2539214, at *7 (citing *McDonnell Douglas*, 411 U.S. at 802–04).

[29] *Id.* (quoting Briggs v. Univ. of Cincinnati, 11 F.4th 498, 508 (6th Cir. 2021)).

[30] *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 802)).

[31] *Id.* (quoting Kenney v. Aspen Techs., Inc., 965 F.3d 443, 448 (6th Cir. 2020)).

[32] *See id.* (quoting Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985)).

[33] *Id.* (quoting *Murray*, 770 F.2d at 67). Note the background circumstances requirement only applies to claims requiring an inference of discrimination under *McDonnell Douglas* — not claims in which majority-group plaintiffs present "direct evidence" of discrimination. Weberg v. Franks, 229 F.3d 514, 522–23 (6th Cir. 2000).

[34] *Ames*, 2023 WL 2539214, at *8–9.

[35] *Id.* at *9.

[36] Ames v. Ohio Dep't of Youth Servs., 87 F.4th 822, 827 (6th Cir. 2023) (per curiam).

[37] *Id.* at 825.

[38] *Id.* at 827 (Kethledge, J., concurring).

[39] *Id.*

protection to 'any individual'; but our interpretation treats some 'individuals' worse than others — in other words, it discriminates — on the very grounds that the statute forbids."[40] Noting a circuit split on the background circumstances rule, which five circuits had adopted and seven had not, Judge Kethledge expressly invited the Supreme Court to weigh in.[41]

Accepting Judge Kethledge's invitation, the Supreme Court vacated the judgment below and remanded the case for further proceedings.[42] Writing for a unanimous Court, Justice Jackson stated that the background circumstances rule was "consistent with [neither] Title VII's text [n]or [the Court's] case law construing the statute."[43] The rule diverged from the statute's text, Justice Jackson wrote, because "Title VII's disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs," meaning "Congress left no room for courts to impose special requirements on majority-group plaintiffs alone."[44] The Court reinforced its reading of Title VII by looking to the gloss offered by prior cases interpreting the statute: namely, *Griggs v. Duke Power Co.*[45] and *McDonald v. Santa Fe Trail Transportation Co.*,[46] which the Court cited for the proposition that Title VII contemplated the "same standards" for proving discrimination against members of majority and minority groups.[47]

Furthermore, Justice Jackson held that the background circumstances rule could not be squared with the *McDonnell Douglas* standard. She wrote: "This Court has repeatedly explained that the 'precise requirements of a prima facie case [under *McDonnell Douglas*] can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic,"'"[48] an "admonition" the Sixth Circuit "disregard[ed] . . . by uniformly subjecting all majority-group plaintiffs to the same, highly specific evidentiary standard in *every* case."[49] Ohio's arguments to the contrary — that the background circumstances requirement was not a requirement at all, but merely "another way of asking whether" an adverse employment action was made "because of a

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[40] *Id.*

[41] *Id.* at 827–28 ("[N]early every circuit has addressed this issue one way or another. Perhaps the Supreme Court will soon do so as well."). *Contrast* Parker v. Balt. & Ohio R.R. Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981) (adopting background circumstances rule), Mills v. Health Care Serv. Corp., 171 F.3d 450, 457 (7th Cir. 1999) (same), Hammer v. Ashcroft, 383 F.3d 722, 724 (8th Cir. 2004) (same), *and* Notari v. Denv. Water Dep't, 971 F.2d 585, 588–89 (10th Cir. 1992) (same), *with* Iadimarco v. Runyon, 190 F.3d 151, 160 (3d Cir. 1999) (rejecting background circumstances rule), *and* Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1325 n.15 (11th Cir. 2011) (same).

[42] *Ames*, 145 S. Ct. at 1548.

[43] *Id.* at 1543–44.

[44] *Id.* at 1546.

[45] 401 U.S. 424 (1971).

[46] 427 U.S. 273 (1976).

[47] *Ames*, 145 S. Ct. at 1546 (emphasis omitted) (quoting *Santa Fe Trail*, 427 U.S. at 280).

[48] *Id.* (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002)).

[49] *Id.* at 1546–47.

protected characteristic" — directly contradicted the Sixth Circuit's mechanical application of the evidentiary test.[50] Because of the rule's atextuality, asymmetric burden on majority-group plaintiffs, and rigidity, the Court vacated the Sixth Circuit's judgment and remanded to the courts below.[51]

Justice Thomas concurred.[52] Writing "to highlight the problems that arise when judges create atextual legal rules," Justice Thomas said he "would be willing to consider whether the *McDonnell Douglas* framework [itself] is a workable and useful evidentiary tool."[53] He began by enthusiastically agreeing with the Court that the background circumstances rule "lacks any basis in the text of Title VII."[54] But he went further. In a footnote, he argued that "[t]he 'background circumstances' rule is also plainly at odds with the Constitution's guarantee of equal protection,"[55] citing the Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[56] (*SFFA*).[57] In that case, the Supreme Court ratified anticlassification theory — the idea that equal protection harm results from the government's classification of individuals by their protected characteristics, as opposed to the harm resulting from de facto subordination on the basis of those characteristics — in the Title VI and Fourteenth Amendment contexts.[58] Justice Thomas also argued "the 'background circumstances' rule is emblematic of the serious challenges that can arise when judges invent atextual requirements"[59] — for instance, how to determine when an individual is a member of a majority group in the absence of "underlying legal authority" capable of "resolv[ing] doctrinal ambiguities."[60] Pushing that logic, Justice Thomas cast doubt on *McDonnell Douglas*, suggesting it "is incompatible with the summary-judgment standard; it fails to encompass the various ways in which a plaintiff could prove his claim; it requires courts to maintain artificial distinctions between direct and circumstantial evidence; and it has created outsized judicial confusion."[61] And he stated that lower courts may "proceed without the . . . framework" at their discretion.[62]

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[50] *Id.* at 1547 (quoting Brief of Respondent at 10, *Ames*, 145 S. Ct. 1540 (No. 23-1039)).

[51] *Id.* at 1548.

[52] *Id.* (Thomas, J., concurring). Justice Thomas was joined by Justice Gorsuch.

[53] *Id.* Earlier in the Term, Justice Thomas dissented from the Supreme Court's denial of certiorari in *Hittle v. City of Stockton*, 145 S. Ct. 759 (2025), a potential vehicle for the Court to reconsider *McDonnell Douglas*. *Hittle*, 145 S. Ct. at 759, 763 (Thomas, J., dissenting from the denial of certiorari). There, too, Justice Thomas was joined by Justice Gorsuch. *Id.* at 759.

[54] *Ames*, 145 S. Ct. at 1548 (Thomas, J., concurring).

[55] *Id.* at 1548 n.1.

[56] 143 S. Ct. 2141 (2023).

[57] 145 S. Ct. at 1548 n.1 (Thomas, J., concurring).

[58] *See SFFA*, 143 S. Ct. at 2161–62.

[59] *Ames*, 145 S. Ct. at 1551 (Thomas, J., concurring).

[60] *Id.* at 1549.

[61] *Id.* at 1553.

[62] *Id.* at 1555.

Although *Ames* was not a constitutional case, Justice Jackson's opinion, Justice Thomas's concurrence, and the parties' briefing and argumentation bore the unmistakable imprint of the Court's anticlassification equal protection jurisprudence.[63] In discarding the background circumstances rule, Justice Jackson may have been gathering ammunition for the bigger battle to come — the "evil day" when Title VII disparate impact liability and the Equal Protection Clause collide.[64] *Ames* did not fully resolve that doctrinal tension — far from it — but Justice Jackson's argumentative moves may put disparate impact liability on firmer ground. Nonetheless, in triaging disparate impact, the Court departed ever further from the underlying purpose of Title VII as a tool to redress "the secondary social status of historically oppressed groups,"[65] and further from the ongoing realities of employment discrimination.[66]

The principles of equal protection suffused the parties' argumentation and Court's decision. In the words of Petitioner Ames: "[A]t the heart of this case, at bottom, all Ms. Ames is asking for is equal justice under law."[67] Title VII, the Court affirmed, "draws no distinctions between majority-group plaintiffs and minority-group plaintiffs."[68] Nor does "the [evidentiary] standard for . . . disparate treatment under Title VII . . . vary based on whether or not the plaintiff is a member of a majority group."[69] All the Justices and all the parties were, in the words of Justice Gorsuch, "in radical agreement" on this point.[70]

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[63] *See supra* notes 44–47, 55–56 and accompanying text; *infra* notes 67–68 and accompanying text; *see also* Bartlett v. Strickland, 556 U.S. 1, 21 (2009) ("Of course, the 'moral imperative of racial neutrality is the driving force of the Equal Protection Clause,' and racial classifications are permitted only 'as a last resort.'" (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 518–19 (1989) (Kennedy, J., concurring in part and concurring in the judgment))). The Court's unanimity may have been aided by less-than-zealous advocacy by Respondent Ohio, which effectively conceded at oral argument that the background circumstances rule was incompatible with the principle that majority- and minority-group plaintiffs be treated equally. Transcript of Oral Argument at 43–44, *Ames*, 145 S. Ct. 1540 (No. 23-1039), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/23-1039_1an2.pdf [https://perma.cc/55EG-TSSP].

[64] Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

[65] Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9 (2003); *see* Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the* McDonnell Douglas *Prima Facie Case Test*, 50 CASE W. RSRV. L. REV. 53, 61 (1999).

[66] *See, e.g.*, Caleb Smith & Haley Norris, *The LGBTQI+ Community Reported High Rates of Discrimination in 2024*, CTR. FOR AM. PROGRESS (Mar. 12, 2025), https://www.americanprogress.org/article/the-lgbtqi-community-reported-high-rates-of-discrimination-in-2024 [https://perma.cc/DMG7-C4JX] ("Nearly 1 in 4 LGBTQI+ adults reported experiencing discrimination in the workplace.").

[67] Transcript of Oral Argument, *supra* note 63, at 64.

[68] *Ames*, 145 S. Ct. at 1546.

[69] *Id.*

[70] Transcript of Oral Argument, *supra* note 63, at 55, 58; *see also id.* at 4–5 (statement of Xiao Wang, Counsel for Petitioner) ("[The background circumstances rule] doesn't eradicate discrimination; it instructs courts to practice it by sorting individuals into majority and minority groups based on their race, their sex, or their protected characteristic, and applying a categorical

The background circumstances requirement may well be incompatible with existing equal protection doctrine. Government distinctions on the basis of individuals' protected characteristics are subject to heightened scrutiny under the Equal Protection Clause,[71] and judge-made law is not exempt from constitutional constraints.[72] Several scholars have suggested that, by imposing a heightened evidentiary burden on majority-group plaintiffs, the background circumstances rule *is* a government distinction based on individuals' protected characteristics.[73] Consequently, background circumstances would be subject to heightened scrutiny. Some disagree, pointing out that the first element of the *McDonnell Douglas* prima facie case *itself* asks whether a plaintiff "belongs to a minority group,"[74] and the background circumstances test is merely the means by which majority-group members establish "circumstances . . . similar to those faced" by minority-group members.[75]

Justice Jackson avoided a direct confrontation with these constitutional issues by repudiating background circumstances on statutory grounds as incompatible with the Court's gloss on Title VII.[76] Crucially, in so doing, Justice Jackson cited to *Griggs* — the landmark case that established disparate impact liability under Title VII[77] — for the proposition that "[d]iscriminatory preference for any group, minority *or majority*, is precisely and only what Congress has proscribed."[78] While disparate impact claims are not cognizable under the Equal Protection

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evidentiary presumption not in favor of but against the non-moving party based solely on their being in a majority group, however you define it."); *id.* at 44 (statement of T. Elliot Gaiser, Counsel for Respondent) ("I think the idea that you hold people to different standards because of their protected characteristics is wrong."); *id.* at 42 (statement of Justice Kagan) (stating "the absolutely critical language" in the Sixth Circuit opinion is: "Because Ames is heterosexual, she must make a showing in addition to the usual ones for establishing a prima facie case," a burden that would not have applied had she been gay).

[71] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (applying strict scrutiny to city government's racial classification); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (applying strict scrutiny to all "[f]ederal racial classifications").

[72] *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 431–32 (1984); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267–68 (1964).

[73] *See* Christian Joshua Myers, *The Confusion of* McDonnell Douglas*: A Path Forward for Reverse Discrimination Claims*, 44 SEATTLE U. L. REV. 1065, 1111 (2021); Sullivan, *supra* note 9, at 1103; Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1545 (2004).

[74] Onwuachi-Willig, *supra* note 65, at 55.

[75] *Id.* at 80.

[76] *Ames*, 145 S. Ct. at 1546.

[77] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

[78] *Ames*, 145 S. Ct. at 1546 (quoting *Griggs*, 401 U.S. at 431 (1971) (emphasis added)). Justice Jackson also cited *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), for the proposition that "Title VII prohibit[ed] racial discrimination against . . . white petitioners . . . *upon the same standards* as would be applicable were they Negroes." *Id.* (quoting *Santa Fe Trail*, 427 U.S. at 280 (alteration and emphasis added)).

Clause,[79] *Griggs*, and then the Civil Rights Act of 1991,[80] created liability under Title VII for disparate impact.[81] The upshot: The background circumstances rule "flouts th[e] basic principle" "that the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group."[82] In other words, Title VII — and *Griggs* — embrace a symmetrical view of discrimination vis-à-vis reverse discrimination, and so Title VII — and *Griggs* — are compatible with an anticlassification Equal Protection Clause.

Although *Ames* was a disparate *treatment* case, Justice Jackson's reliance on *Griggs* may gird disparate *impact* doctrine against equal protection challenges. There have long been rumblings that a challenge to disparate impact doctrine could wind its way to the Court,[83] rumblings that have increased in intensity in recent years.[84] As Justice Scalia argued, equal protection may bar disparate impact liability where such liability would require employers to use affirmative action to benefit the negatively impacted class — and, consequently, to classify on the basis of protected classes.[85]

Justice Jackson's reliance on *Griggs* may delay an equal protection challenge to disparate impact liability in at least three ways. First, by resorting to *Griggs* for the proposition that antidiscrimination law protects members of all groups — minority and majority — on equal terms,[86] Justice Jackson positioned herself to argue not only that disparate impact and an anticlassification theory of antidiscrimination law are compatible, but also that *Griggs* is itself an anticlassification case. Second, citing to *Griggs* for that anticlassification principle kept the opinion grounded in *statutory* rather than constitutional precedent, (temporarily) averting Justices Thomas and Gorsuch's apparent enthusiasm to import *SFFA*'s *constitutional* anticlassification principle into the Title VII context.[87] Finally, citing to a case can ward off arguments that it is no longer good law,[88] and *Griggs* had not been cited by the Court since 2015 (and only then in an opinion from which Chief Justice Roberts and

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[79] *See* Washington v. Davis, 426 U.S. 229, 239, 247–48 (1976).

[80] Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of the U.S. Code).

[81] *Griggs*, 401 U.S. at 429–30; Civil Rights Act of 1991 § 3(3), 105 Stat. at 1071.

[82] *Ames*, 145 S. Ct. at 1546.

[83] *See, e.g.*, Primus, *supra* note 10, at 495.

[84] *See* sources cited *supra* note 2.

[85] *See* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

[86] *Ames*, 145 S. Ct. at 1546.

[87] *Id.* at 1548 n.1 (Thomas, J., concurring) (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2162 (2023)).

[88] *Cf., e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2291 (2024) (Gorsuch, J., concurring) (noting the Court had not applied Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), for eight years).

Justices Scalia, Thomas, and Alito dissented).[89] Although *Griggs* is no longer strictly necessary for maintaining disparate impact after Congress codified disparate impact in Title VII,[90] reaffirming disparate impact's implicit role in antidiscrimination law could buttress it against constitutional attacks.

But the deep doctrinal tension between Title VII disparate impact liability and an anticlassification Equal Protection Clause remains. Disparate impact *is* an antisubordination, not anticlassification, doctrine. Among Congress's animating purposes in enacting Title VII was the amelioration of employment discrimination against historically marginalized groups.[91] As Senator Hubert Humphrey, a sponsor of the Civil Rights Act of 1964, expressed: "The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them. . . . Title VII is designed to give Negroes . . . a fair chance to earn a livelihood and contribute their talents to the building of a more prosperous America."[92] The Court has expressly embraced this antisubordination reading of Title VII, including in *Griggs*, in which Chief Justice Burger wrote that Title VII's purpose:

> was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[93]

The underlying purpose of disparate impact is to challenge subordination — not classification.

Moreover, the *McDonnell Douglas* prima facie case is, at its core, an empirical presumption that tells courts they can infer discrimination from circumstantial evidence such as disparate outcomes.[94] The

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[89] Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 530–31 (2015); *id.* at 547 (Thomas, J., dissenting); *id.* at 557 (Alito, J., dissenting). Justice Alito was joined by Chief Justice Roberts and Justices Scalia and Thomas.

[90] Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(3), 105 Stat. 1071, 1071 (codified as amended in scattered sections of the U.S. Code).

[91] *See* Onwuachi-Willig, *supra* note 65, at 61 ("The debates . . . indicate that Congress enacted Title VII primarily as a means for destroying old patterns of racial segregation and hierarchy . . . .").

[92] 110 CONG. REC. S6548 (daily ed. Mar. 30, 1964) (statement of Sen. Hubert Humphrey).

[93] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

[94] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."); e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 452 (1998) ("In large measure, the inference of discrimination for the prima facie case exists because of the presumption of disadvantage in the workplace that is identified in the first prong inquiry. Adverse treatment of an individual whose identity is not privileged creates an inference of discrimination where that individual is qualified."); Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the*

background circumstances test emerged from the prima facie case's empirical approach: Because discrimination remains asymmetrical — LGBTQ+ individuals, as a matter of empirical fact, "experience discrimination at higher rates than their cisgender and heterosexual peers," including in the workplace,[95] and the same is true for women and racial minorities[96] — any evidentiary test ought to reflect that empirical asymmetry. In barring such asymmetry, *Ames* further eroded antidiscrimination law's antisubordination goals.

In attempting to reconcile disparate impact and equal protection doctrines in preparation for Justice Scalia's "evil day,"[97] the Court has risked jeopardizing an antisubordination vision of antidiscrimination law. The Court ought to heed Professor Richard Primus's words of caution: "Abandoning that historical orientation" — that Title VII was meant to end social hierarchies in employment — "in an attempt to rescue the doctrine might sacrifice the very thing that is most worth saving."[98]

Basic Assumption, 26 CONN. L. REV. 997, 1007–08 (1994) (explaining that the *McDonnell Douglas* test is based on the "underlying" presumption that "discrimination exists in this society and that absent some other explanation, discrimination is the likely explanation for the adverse treatment regularly experienced by women and members of minority groups").

[95] Smith & Norris, *supra* note 66.

[96] Onwuachi-Willig, *supra* note 65, at 74, 79–80.

[97] *See supra* note 1 and accompanying text.

[98] Primus, *supra* note 10, at 499–500.