

**The Department of Justice and the Civil Rights Act of
1964: A Symposium***

SYMPOSIUM PARTICIPANTS

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* This Symposium to commemorate the thirtieth anniversary of the Civil Rights Act of 1964, conducted by the Civil Rights Division Association, was comprised of former and current employees of the Civil Rights Division, United States Department of Justice, and was held in Washington, D.C. on Saturday, May 13, 1994. This is a verbatim transcript of the presentation on May 13, 1994.

INTRODUCTION

Brian K. Landsberg**

Many reasons led to enactment of the Civil Rights Act of 1964.¹ Understanding of the Act requires, however, recognition of the primary reason. President John F. Kennedy, in announcing to the American people his intent to propose the Act, noted:

One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free.²

His speech recognized the overriding national interest which required America to eliminate the racial caste system. He proposed eliminating segregation and discrimination in public accommodations, public schools, and employment, as well as in federally assisted programs. His program substantially increased the role of the federal executive in enforcing the rights of black persons in this nation. It was aimed at both the public and private sectors.

The 1964 Act required and caused massive change in America. Contradicting the slogan that the government "can't legislate morality," racial discrimination is no longer an accepted moral norm. Integrated public accommodations, schools and work places—which would have been incendiary in many places in 1964—are no longer remarkable. Without the Act these changes would have come much more slowly, if at all.

The Department of Justice was designated by Congress as one of the key instruments of change, and many of the advances of the past thirty years came about with the help of the Department. It is therefore fitting that the Civil Rights Division Association, composed of former and current employees of the Civil Rights Division, United States Department of Justice, made the 1964 Act the focus of its 1994 reunion. The speakers at this symposium represent a mix of present and former Department of Justice attorneys along with an honored federal judge whose career is intertwined with civil rights progress, and distinguished scholars who have studied and written about the Act.

** Professor of Law, University of the Pacific, McGeorge School of Law; former Chief, Appellate Section of the U.S. Dept. of Justice, Civil Rights Division; B.A. 1959, University California, Berkeley; J.D. 1962, University of California, Boalt Hall.

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C.A. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (West 1994)).

2. John F. Kennedy, Radio and Television Report to the American People on Civil Rights, PUB. PAPERS 469 (July 11, 1963).

The symposium singles out two topics for discussion: school desegregation and fair employment. School segregation had been declared unconstitutional ten years earlier, but not until 1964 did the Congress confer on the executive branch the tools to make *Brown v. Board of Education*'s³ promise a reality. Employment discrimination was lawful in most of the United States until Title VII⁴ of the 1964 Act took effect.

The speakers paint a picture of progress, but also of incompleteness. The schools of the deep South, virtually 100% segregated in 1964, are now the least segregated in the nation. Employment opportunities are now extended to African-Americans without overt discrimination, and much has been done to change employment practices which have an adverse disparate impact on African-Americans. The official caste system has been shattered. However, an informal and dangerous new caste system has grown from roots of the old one. Racial separation and inferior education in racially impacted urban centers contribute to the inability of residents of those areas to become productive members of the labor market. Conditions noted by the Kerner Commission report in 1968 may have ameliorated somewhat in the 1970s, but returned with renewed vigor in the 1980s.

The 1964 Act dealt effectively with the problems of race discrimination as we understood them in 1964. The Department of Justice in 1994 and beyond must take care not to fight the same war it fought in the 1960s and 1970s. Fact development, common law evolution, focus on priorities, and rejection of facile solutions served the Department well in those earlier days. If the Department is to succeed in addressing today's problems, it must apply those earlier techniques to a new set of problems. The panelists, whose remarks are reproduced below, point to specific problems which law enforcement can address, while acknowledging the limits of non-discrimination law. The Department of Justice compiled a solid record of accomplishment over the past thirty years. If the Symposium sends a message, it is found in Burke Marshall's concluding remarks: The leadership of the Department of Justice, as it redefines the role of the Civil Rights Division, should focus on the "millions of Americans who are identified both by economic class and by race, [who have been] left behind."⁵

3. 347 U.S. 483 (1954).

4. Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-2000e-17 (West 1994).

5. See *infra* notes 94-98 and accompanying text.

OPENING

Stephen Pollak: Good morning. Attorney General Reno, Solicitor General Days, Judge Wisdom, colleagues, guests, distinguished panelists. I am Stephen Pollak, the current chair of the Civil Rights Division Association. It's my great pleasure to welcome you to this symposium. This is the first of what I hope will be many activities of the Association aimed at exploring and recording activities and issues of the Civil Rights Division in enforcement and development of the civil rights laws of the United States.

Our focus this morning is the Civil Rights Act of 1964,⁶ which was enacted thirty years ago. In particular we will focus on its provisions relating to desegregation of education and enforcement of equal opportunity in employment. Under Brian Landsberg's leadership, we have assembled here an exciting array of people, both those who created the record out of which these laws were developed and those who were the first to enforce them. Also, we have more recent arrivals who have focused their professional lives on exploring and analyzing the civil rights aspects of education and employment and the rule of law. And finally there is Judge Wisdom, an heroic member of the Court of Appeals for the Fifth Circuit since June 1957, which coincidentally was the year the Civil Rights Division was established. Judge Wisdom wrote the seminal opinions which led the way for the Supreme Court to vindicate the Constitution and the statutes respecting school desegregation, employment, and voting.

John Doar, who was my primary mentor in the Civil Rights Division, often said that when the nation is seeking to address the most difficult problems through law, it is essential to have the three branches of the federal government committed to the same important goal. The Civil Rights Act of 1964 and the Voting Rights Act of 1965⁷ represent for me the prime examples of John's wisdom. The Congress, the courts and the Executive Branch were all committed to remedying past wrongs based on race. The years of 1964 and 1965 were a time when the nation seemed united in vindicating this commitment. Our symposium will explore some of the outcomes and the role of the Department of Justice in these events, particularly in the areas of education and employment.

Before proceeding, I want to recognize the many distinguished people who are here and who have played major parts in this history. In particular, I want to honor Jim Turner, who on Monday of this week announced plans to retire at the end of this month after thirty-seven years of distinguished federal service. Jim has given the Civil Rights Division steady and enlightened leadership. He served as Deputy Assistant Attorney General for twenty-four years, longer than any other person. Additionally, he served as head of the Division when there was no con-

6. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C.A. § 1447, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (West 1994)).

7. Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973aa-2 (1988).

firmed Assistant Attorney General for more than thirty-six months, which is longer than most of the Assistant Attorneys General who were confirmed. The nation is in Jim's debt. We congratulate him on his outstanding service to his country and the Civil Rights Division. Coincident with Jim's retirement, is the arrival of the new Assistant Attorney General, Deval L. Patrick, who opened his tenure with such a stirring address at his swearing-in. We welcome Deval Patrick and pledge ourselves to assist him in carrying out his responsibilities. Deval wanted to be with us this morning, but a prior commitment precludes his attendance. He has written us a gracious note stating his regret. In this note Deval wrote:

Before I came to Washington I was of course aware of the legendary accomplishments of the Civil Rights Division and the marvelous men and women behind them. And in the six weeks that I have been Assistant Attorney General my respect for the work of the people of this Division past and present has only grown. I am proud to be part of what you have helped create and I hope to carry on your fine tradition.

Now, it is my pleasure to introduce to you the Attorney General of the United States, Janet Reno. She honors all of us by her presence here. We salute you, Attorney General Reno, and welcome your remarks opening this symposium.

Attorney General Reno: Thank you so very much. I'm in a reversal of roles that I had never anticipated when I graduated from law school in 1963. In those days, I swore that I would never be a prosecutor. I thought that prosecutors were more interested in securing convictions than seeking justice. I can remember those days as I followed the passage of the 1964 Civil Rights Act and the legislative debate leading up to its passage. I thought that civil rights enforcement was the single best thing that a lawyer could do. If I could have figured out how to do it more effectively in Miami, I would have done so. But I liked Miami better than Washington and decided I should stay home. In 1972, my predecessor state attorney offered me a job in Miami. I told him: "You don't want me, I have always been the critic of prosecutors." And he said: "Well, you can come do something about that."

I have subsequently realized that prosecutors probably have a better opportunity than anybody in terms of making sure that innocent people don't get charged. But unfortunately, my experience as a prosecutor brought me to Washington, to my responsibilities in civil rights enforcement, without ever really having had the opportunity to understand the sophisticated issues in civil rights enforcement. However, I have been well served, and I too would like to pay tribute to Jim Turner. He has been extraordinary because here he has an Attorney General who does not understand the ins and outs, the technical issues in terms of civil rights enforcement—kind of a bull-headed Attorney General on

occasions, with a lot of ideas, some of which are not totally practical. Jim has put up with me, educated me, and taken me by the hand. He has done an absolutely incredible job in these months as we have waited for Deval Patrick to be confirmed. Jim, I will always be grateful to you. Thank you so very much.

To the other members of the Civil Rights Division, I have been so impressed with all that you do. I have had the opportunity to be educated by you now. Most importantly my understanding of the issues has been developing from the very fine lawyers of the Civil Rights Division. I have a new mission, amongst others in this job, which is to let the people of the United States know how incredibly fortunate they are to have so many distinguished men and women working with them in the Department of Justice. These are great lawyers, great support individuals. It is just a very proud time for me to be working with them.

I also consider myself fortunate to have Deval Patrick in the office. Deval will be one of the great leaders of America. He has already evidenced that by his speech and by the way he has come into office. I look forward to doing things with him for many years to come in terms of making civil rights enforcement the highest priority of the office. But I see so many faces here who have been at this for a lot longer than myself. I ask those of you outside the Department to continue to prod us, to push us.

I received a call yesterday on an issue that has been troubling. It was from a person within the administration, who believed deeply as a matter of principle that we should pursue a particular course. I will never forget that phone call because I get caught up in trying to deal with the day-to-day issues, or trying to work out the strategy and sometimes—I try not to let myself do it—but I sometimes forget the principle that should guide us all. I will always appreciate your phone calls when you see me start down a slippery slope.

The way I come to civil rights enforcement brings me some understanding of what I think we need, and I say this very respectfully. You have no idea what it's like if you have not understood the Department of Justice; if you have never worked in the legislative process; if you don't understand Washington to be a thousand miles away, and try to track what is going on or what the issues are. I think one of the things that we have failed to do in government for too long is to educate all Americans in terms that they can understand. You all just rattle all these titles—this, that and the other—off and you all understand what “this” is. It has taken me a year to start understanding what all the numbers are. We have a responsibility to explain to the American people why civil rights enforcement is in their best interest. We have got to explain to them in terms that they will understand.

We are involved in an effort like this, and it's not employment and education, but I think it was a classic example both in the enforcement of the Americans

with Disabilities Act⁸ and our efforts against lending discrimination. To come in, sit down with people, and say: This is why it is in your best interest, this is how it can be done. ADA enforcement is not a terrifying regulation. It is something that can be reasonably done. Here is how you do it. Let's go out and show you a community that has done it. Now understand, if you continue to thumb your nose at us, we're going to sue you and we are going to take as strong and vigorous action as we can.

But I want to join with all of you, both inside and outside the Department, in doing everything we can to announce to the American people what the law, the Constitution, and just plain morality require. Then we must help the American people to understand how it is in our best interest to move towards that and to take as vigorous action as necessary to enforce those standards.

This is an exciting time in American history, but I think the most important theme of all is something that I have sounded whether I am talking about our anti-violence effort or civil rights enforcement. Too often we think we are going to solve the problem in the courtroom. But too often we have forgotten that we have got to build community and family to give our young people a chance to seek educational opportunities. We have got to give our young people a chance to have the skills that can enable them to be competitive for employment opportunities. As we look at civil rights enforcement, in whatever form, it is important that we put it in the context of neighborhoods, in the context of families, and in the context of child development so that we can reweave the fabric of society around all the children and families of America. It is important that we look at how we position our young people to take advantage of the civil rights laws in the right way. This is going to require all of us working together in a partnership with state and local government. It is going to require the Department of Justice to reach out to the Department of Health and Human Services, HUD, and Labor and Education and form comprehensive partnerships with those agencies. In this way, we can join together in working with communities to rebuild communities and families and to give our young people a true chance to make sure that they have the opportunities both in fact and in law.

One of the great pleasures that I had upon coming to Washington was to meet Judge Wisdom. It was like, "Wow!" He was so wonderfully kind and thoughtful. He and so many others who were with him in the days where so much courage and so much valor was required are going to be standards and symbols to me of the job we still have to do. I will try my best, Judge. Thank you.

8. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (Supp. II 1990)).

FIRST PANEL: VINDICATING THE PROMISE OF *BROWN*—
SCHOOL DESEGREGATION AND THE CIVIL RIGHTS ACT—
PAST, PRESENT, AND FUTURE

Stephen Pollak: We turn now to our first panel: *Vindicating the Promise of Brown—School Desegregation and the Civil Rights Act—Past, Present and Future*. We all know our moderator and the people who are on these panels. Nonetheless, just a word or two about them. Our moderator, Drew Days, headed the Division from 1977 to the end of 1980. Drew was then a Professor of Law at Yale and is now the Solicitor General of the United States.

The Attorney General has remarked on Judge Wisdom. The Judge's biography is aptly described by the Attorney General: "Wow!" Those in civil rights will remember that the Judge authored *Meredith v. Fair*,⁹ and *United States v. Louisiana*,¹⁰ a path-breaking decision respecting freezing relief and voting. Judge Wisdom dissented in *United States v. Barnett*.¹¹ He is the author of the dissent in *Weber v. Kaiser Aluminum*,¹² which the Supreme Court then upheld and which structured employment law for the nation. Judge Wisdom is a member of the Fifth Circuit today and was a member in those years when it was the frontline of the United States in respect to the vindication of the Constitution and the laws respecting race.

Also on the panel is Professor Gary Orfield, Professor of Education and Social Policy at Harvard University Graduate School of Education and the Kennedy School of Government. Professor Orfield has been a Scholar in Residence at the Civil Rights Commission. He has conducted major studies and authored several books on school desegregation. I know he has testified importantly in the major lawsuits in this field.

Finally, there is Brian Landsberg who put together our program this morning. Brian served in the Division, if I have my years right, from 1964 through 1986. He is a Professor of Law at McGeorge. He headed the Division's appellate section, the education section, and was a trial attorney. So he did it all in the Division.

Would the panelists come up? The panel is yours, Drew.

Solicitor General Days: Thank you, Steve. It is a pleasure to be here with so many familiar and friendly faces. The Civil Rights Division is a great division

9. *Meredith v. Fair*, 328 F.2d 586 (5th Cir. 1962), cert. denied, 371 U.S. 828 (1962) (finding evidence warranting an injunction of Mississippi and other states from prosecuting Negroes and other persons from attending the University of Mississippi).

10. *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), aff'd, 380 U.S. 145 (1965); see *United States v. Atkins*, 323 F.2d 733, 743-44 (5th Cir. 1963) (describing "freezing").

11. *United States v. Barnett*, 346 F.2d 99 (5th Cir. 1965).

12. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977) (Wisdom, J., dissenting), rev'd, 443 U.S. 193 (1979).

with a very rich history and it's a pleasure for me to be able to participate in this program this morning.

I got a call this morning from Randall Kennedy. He had spoken last night to Brian Landsberg indicating that he was not going to be able to make it. I wanted to communicate to you his great regret that he is not able to be here. Apparently one of his relatives is deathly ill and he thought remaining in Boston was the wise thing to do under the circumstances.

*Brown v. Board of Education*¹³ in 1954 had three faces. The first face was the one that is perhaps best known and that is that separate but equal education is inherently unequal. But there were two other faces of *Brown* and I would like to provide them as a context for our discussion this morning. The second has to do with the detrimental effect of segregation upon black children, at least insofar as the Supreme Court was aware in 1954. The third has to do with the place of education in our society. Education was described by the Supreme Court as the most important function of state and local governments. These three faces of *Brown* have played out in various ways over the years. I think it is incumbent upon us in the context of this panel discussion to consider those three faces as we talk about specifics.

I want to reassure you that *Brown v. Board of Education* is always on our minds in the Justice Department. Yesterday I received a recommendation from the Civil Rights Division that I authorize an appeal in a case involving the Virginia Military Institute. I did authorize the appeal in that case. But what I found interesting, among other things, in the papers that I reviewed was the order from the judge with respect to implementation of the plan that he had approved which creates a separate institution for women who are interested in military training. The order says that the plan shall be implemented *with all deliberate speed* (emphasis as spoken). If there are reporters in the room, please be gentle and not report that.

There have been difficulties obviously over the forty years since *Brown*, but to the extent that things have gone smoothly it has been as the result of people like John Minor Wisdom. Judge, I wanted to turn to you first and ask what it has been like to be an "unlikely hero," to quote from Jack Bass.¹⁴ I would like you to share with us some of your feelings about the period. You went on the court in the late 1950s and you have been there holding forth ever since. What was it like dealing with school desegregation cases in the late 1950s in New Orleans and throughout the South?

13. 347 U.S. 483 (1954).

14. JACK BASS, UNLIKELY HEROES (1981) (describing as "unlikely heroes" the judges of the Court of Appeals for the Fifth Circuit who acted, at great personal risk, to implement the Supreme Court's *Brown* decision in the South during the 1950s and 1960s).

Judge Wisdom: Well, it was not that bad. I have seen now that it was not as bad as I thought it was. There were even some amusing aspects of it. I used to get a lot of mail, some of it hate mail, some of it just down right amusing. For example, I have never really had as high an opinion of our postal system as I had in those days. For example, I would regularly get letters addressed to Judge Ignorance. There was no hesitancy in the minds of the New Orleans postal service. The post office in New Orleans knew that those letters were addressed to me. I used to get other insulting letters. I kept some of them and threw most of them away, but I do have one or two gems like that left.

I think it took a long time for *Brown* to sink in. There really wasn't very much that was done at first. Just a few obvious things. We made a start in accommodations and in transportation. In sports, for example, there was one case we had involving this issue: the regulation of the Louisiana Boxing Commission which forbade interracial boxing matches.¹⁵ At the time, either in a Sugar Bowl game or in a Tulane game, the Navy was playing. Some of the players on the Navy or the team in question were African-Americans. We didn't use that term then, but it seems to be the preferred term now. Anyway, the city fathers wanted interracial boxing alright, but they were more concerned about the hotels, the restaurants, and the bars. So they wanted me to deal with the question of segregated seating at the game and also in hotels, bars, and restaurants. Here were these guys, many of them members of the citizens council, improperly telephoning me because they had known me all of my life. They would say, for example: "John, I hope I'm not doing anything that's improper." They knew how improper it was alright. And I said: "Well, I'm just going to call the shots the way I see them." I would call to their attention the fact that the very limited issue before us was whether there should be interracial boxing. But before the game was played the hotel association got together and the barroom people got together so that everything was open by the time the game was played.

That was directly related to the civil rights aspects of the decision. I think that really nothing got started and in full movement until we had the imprimatur of the Congress. The American people just do not regard courts or our system of justice that highly. That is a terrible thing to say, but it is true. It was not until Congress got behind the Civil Rights Act and gave us a statute with teeth, like the statute of 1964¹⁶ and the Voting Rights Act of 1965,¹⁷ that we began to make progress.

I give great credit to the Voting Rights Act of 1965. When it came to being elected, that was when it was brought home to our so-called leaders the necessity

15. *Dorsey v. State Athletic Comm'n*, 168 F. Supp. 149, 151 (E.D. La. 1958), *aff'd*, 359 U.S. 533 (1959) (striking down restrictions on interracial boxing based on the principle that classification based on race is inherently discriminatory).

16. Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1988, Supp. I 1989 & Supp. II 1990).

17. Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973aa-2 (1988).

for treating all persons equally. The courts did a good deal, but the Voting Rights Act of 1965 was what made the great change in those years.

Solicitor General Days: Can you talk a little bit about the period leading up to *Jefferson County*?¹⁸ There was the very prevalent distinction between desegregating and integrating.

Judge Wisdom: Well, I was interested in what you said about “with all deliberate speed.” “All deliberate speed” meant all deliberation and no speed. We would do what we could, but there were a great many school boards and federal district judges who dragged their heels. To them, “all deliberate speed” meant that they should interpose as many possible devices as they could devise to prevent equality, especially in desegregating the schools. Some of them really wanted to be told what to do, but they did not want to lose face with their friends with whom they played golf, fished, or hunted. These school boards and federal district judges were looking for directions from the top.

We had a very tough time with the *Briggs*¹⁹ dictum—that the *Brown* case did not require integration, but simply forbids segregation. So all kinds of devices were set up to permit desegregation, but not to require it. It was apparent to me that we had to have affirmative action. Whenever there are such vices in the system, affirmative action has to be taken to completely revise the system. I have had that feeling for some time and it all came to the front in the *Jefferson* case. In that case, I wrote the opinion and I said squarely that the old system has to be dismantled lock, stock, and barrel. The Supreme Court liked that general idea, but it came out slightly differently phrased in the Supreme Court opinion—the old system has to be uprooted “root and branch.”²⁰ But it was the same idea. It meant affirmative action.

If there is anybody who knows about affirmative action here, it is Owen Fiss. He has studied affirmative action in depth, particularly, in regard to injunctions. But the *Jefferson County* opinion was a long time in the making because I tried hard to win over to our thinking some of the judges on our court who purported to be liberal and doing their duty by the Constitution, but were really fighting a rear-guard action a good part of the way. To them, the *Briggs* dictum was the law. *Brown* did not require integration; it simply permitted desegregation.

Solicitor General Days: Let me turn to Brian Landsberg. Brian, you were in the Department during this period. You came around the time of the 1964 Act, around that time *Jefferson* and *Green* took place, as well as a number of other

18. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *modified*, 380 F.2d 385 (5th Cir. 1967) (en banc), *cert. denied*, 389 U.S. 840 (1967).

19. *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955).

20. *Green v. New Kent County Sch. Bd.*, 391 U.S. 430, 438 (1968).

cases. Could you talk about what it was like in the Division during that period and how the Division was able to sort out what the government was going to do under the new legislation?

Brian Landsberg: The first thing I would say is that the Congress was a little grudging in granting the Division this authority. Unlike the voting laws or the public accommodation laws, the Division could not bring suit unless we received a written complaint from a citizen. The 1964 Act had language in it saying that you can't require racial balance.²¹ It took Judge Wisdom, some other courts, and finally the Supreme Court in the *Swann*²² case to interpret that language. So we came out initially not with full support for the kind of relief that Judge Wisdom is referring to. The Civil Rights Division, along with the Department of Health, Education and Welfare, which issued the guidelines, proceeded first with trying to get all the school systems to do something. The initial steps were not to get the affirmative relief Judge Wisdom was talking about, but to get a freedom of choice plan in place. Then we convinced Judge Wisdom and the Fifth Circuit in the *Jefferson County* case that freedom of choice was to be judged by whether it was successful in dismantling the dual system. That became the rule of *Green*. At that point we filed a new round of motions, basically to bring school systems in compliance with *Green*. We had *Green* motions, but then the Court decided *Alexander v. Holmes*,²³ which is not one of the greatest stories of the Civil Rights Division.

In *Alexander v. Holmes County Board of Education*, the Supreme Court finally said the schools must be desegregated at once or forthwith. Then we filed a series of *Alexander* motions. After that we were faced with the question of what to do about the urban school systems and the application of *Green* to urban school systems. This brought us to the *Swann* case. The ambivalence of the country and of the Congress in the Civil Rights Act led to a fairly careful brief in the *Swann* case that didn't really support what the district judge, Judge McMillan,²⁴ had done. But the Supreme Court did support it. I hope to our credit, we filed *Swann* motions which brought about a great measure of desegregation. Without wanting to steal from Professor Orfield, I think it was those efforts that led to the South becoming more desegregated. After this effort the South had the least segregated schools in the country, when prior to this effort they were the most segregated schools in the country.

21. 42 U.S.C. § 2000c(b) (1988).

22. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (stating that Civil Rights Act provisions do not restrict existing power of courts to enforce equal protection, nor withdraw from courts methods of equitable relief).

23. 369 U.S. 19 (1969).

24. Judge McMillan is the district court judge in North Carolina who wrote the trial court opinion in *Swann*.

Solicitor General Days: Brian, could I ask you to back up a little bit? Would you talk about the involvement of HEW,²⁵ the use of Title VI, and fund cut-offs in the school desegregation context?

Brian Landsberg: There were very few school systems whose funds were actually terminated. Nonetheless, I think the threat of fund termination was a powerful tool. The resistance to desegregation was such that we came up with the statewide lawsuits. Slim Barrett, who's here today, tried the *Lee v. Macon County*²⁶ case, which was the first one. We went after all of the school systems that HEW could not get to desegregate on a statewide lawsuit. Once we got that established as a principle in *Lee v. Macon County*, we were able to bring statewide suits elsewhere.

David Norman and Frank Dunbaugh were responsible for bringing statewide suits against Georgia, Texas, Arkansas, Mississippi, and most of the other states of the deep South. The purpose was to pull in those school systems that had not voluntarily desegregated. We were dealing with a large number of school systems at that point. HEW was enlisted to help draft school desegregation plans.

Judge Wisdom mentioned that in some of the school systems, the superintendents really wanted to desegregate, but they did not have political courage or ability to pull it off on their own. Often when the educators from HEW would go down there to draw up a desegregation plan, the superintendent would offer a plan from his hip pocket with the words, "Well, you could try this." In that way we would be imposing on the school system a plan that it really wanted to implement. At least the superintendent felt that educationally, as well as legally, it made sense.

Judge Wisdom: Along those lines I should point out what we tried to do in the *Jefferson* case. In that case we tried to draw a uniform decree that would be applicable throughout the South, especially the deep South. That gave a little relief to the school board too, because then the school board was not acting on its own. Instead it was taking a model decree which had a specific provision, if I remember it correctly, saying that great weight should be attached to the existing *and future* guidelines of the HEW. Elbert T. Tuttle, John R. Brown, and I worked closely with the HEW.

Solicitor General Days: Gary, do you want to speak about HEW since you studied that part of the process quite closely? What was your sense of HEW's role and its relationship to Civil Rights Division during that period?

25. Prior to 1977 the Department of Health and Human Services and the Department of Education were one entity in the Department of Health, Education, and Welfare (HEW).

26. 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967) (ordering statewide desegregation).

Gary Orfield: HEW's involvement in this was very, very powerful because they had thousands of school districts that they were communicating with simultaneously. Once the 1965 Elementary and Secondary Education Act²⁷ passed, HEW had huge amounts of money that went into southern districts. School districts often received twenty to twenty-five percent of their total budget in new federal funds. HEW had administrators who were ready to enforce the law and HEW did cut off the funds of about a hundred school districts. I went to a number of the hearings that HEW held. It was a life and death matter for a great many school systems. The new federal funds changed the balance of power very, very dramatically. Between 1965 and 1972, there was fourteen times as much desegregation as there was in the first ten years after the *Brown* decision. Most of the progress that has ever been achieved in desegregation was achieved in those years. We have made very little progress since then.

HEW only enforced the law seriously for three years. From 1965 to 1968 and as soon as the Nixon Administration came in, that procedure was substantially eliminated. Leon Panetta, the director of the office, was fired. He later became a very famous congressman as head of the House Budget Committee and later President Clinton's Chief of Staff.²⁸

Solicitor General Days: Let's talk about the movement to the cities and the impact of *Swann*²⁹ on the school desegregation process. One of the challenges of *Swann* was to distinguish southern metropolitan districts from northern metropolitan districts and essentially continue to apply the same presumptions about the causes of segregation that had been applied in rural and smaller communities up to that point.

Brian, do you want to start and talk about what it meant to move from small and rural communities in the South in the mid-1960s to large metropolitan areas in the South in the early 1970s? Must we bus, I think is the question.

Brian Landsberg: The first reference to busing that I found was referenced by Governor George Wallace. He used it in connection with Macon County, Alabama, which is a very rural place. In Macon County, the African-American students were being bused away from the white high school to a black high school. Judge Johnson ordered that the bus routes be changed so that the African-American students could go to the white high school. I think that was the origin of the term "busing."

But it became a dirty word. Congress acted to stop HEW from requiring busing so that where busing was required, it had to be done through the courts.

27. 20 U.S.C. §§ 2701-3386 (1988, Supp. I 1989 & Supp. II 1990).

28. See LEON E. PANETTA & PETER GALL, BRING US TOGETHER (1971).

29. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); see *supra* notes 22-27 and accompanying text.

Congress never did succeed in eliminating busing. There were yearly efforts in Congress to stop the Department of Justice from asking for busing and to stop the courts from awarding it, but those never passed because of fear of unconstitutionality.

We were able to make some real progress in some of the big cities. I think Charlotte is a good example, but there was great resistance. The *Austin*³⁰ case is another one. I believe Judge Wisdom sat on that case, where the question was how to desegregate a tri-ethnic school district.

Solicitor General Days: Well, Brian, the *Swann* case was a county-city system which made it somewhat easier to deal with the question of busing than where the jurisdiction in question was a city without the benefit of an already created metropolitan school district. Do you agree?

Brian Landsberg: The ability to desegregate was to a large extent a function of the vagaries of the state's organization of school systems. Some states, such as North Carolina and Florida, had county-wide school systems. Other states did not have county-wide school systems. For example, Birmingham was a separate school system from Jefferson County and there were other smaller school systems within Jefferson County, Alabama. That is where the *Milliken*³¹ decision came in. The efforts to bring about desegregation on a wider scale that Gary referred to were slowed down considerably by the Supreme Court's decision in the Detroit case.³² However, I wouldn't say they came to a complete halt. The decision in the Detroit case required us to show that the racial imbalance as between these city schools and the suburban schools was a result of official state action. We actually had some cases where that showing was made. Indianapolis is a very good example of that, and there has been successful desegregation in Indianapolis. St. Louis is another such case and there are others.

Judge Wisdom: I think the actual statistics show that there were fewer miles of busing after *Brown* than there were before *Brown* in the rural areas. Although desegregation has been most difficult in the urban areas, it has worked pretty well in the rural areas, in small towns, and even small cities where there is a natural balance anyway.

Solicitor General Days: Judge Wisdom, could you talk about busing in Louisiana? I think Louisiana had an interesting busing picture, if I remember cor-

30. United States v. Texas Education Agency, 532 F.2d 380 (5th Cir. 1976), *vacated and remanded*, 429 U.S. 990 (1976).

31. *Milliken v. Bradley*, 418 U.S. 717 (1974) (setting back school desegregation).

32. *Id.*

rectly. Were parochial and private school kids, as well as public school children, bused at state expense?

Judge Wisdom: Yes, we have a large number of parochial schools in Louisiana and those children were bused at public expense.

Solicitor General Days: So this was a state where busing was very much a part of the daily life of education, wasn't it?

Judge Wisdom: Well, we had large areas where most of the population was Catholic and many of the Catholic children attended parochial schools. That complicated the problem, but I think that in those rural areas and in the small towns, busing has been a success and not a failure, contrary to the general opinion.

Solicitor General Days: When I was there, a newspaper headline read: *Massive Forced Crosstown Busing to Achieve Racial Balance*. In fact, there were T-shirts made up at the NAACP Legal Defense Fund.

Gary, you asked the question: "Must we bus?" What was your assessment of busing during that period up through the mid-1970s? Also, could you address the question we seem determined to get to before I want to get there: What about the movement north of school desegregation litigation and *Milliken v. Bradley*? Could you talk about that transition? Perhaps, Brian, you could also pick up what were the discussions in the Department about moving from a Birmingham to an Indianapolis or Omaha?

Gary Orfield: Big question. If you look at the country statistically, the *Green*³³ and *Swann* decisions had a huge effect on the urban South. There were over one hundred new school segregation plans in one year in 1971, thanks to all of these motions that were being filed. In the South there was, for the first time in American history, desegregation across the system of residential apartheid.

In the North, we had extremely intense residential segregation. It wasn't quite as bad in some southern cities as in the North. Residential segregation really is the third system of racial subordination. We had slavery. We had Jim Crow.³⁴ Now we've got racial residential segregation, which is related to inequality in every aspect of life. Yet, residential segregation is considered legitimate as a way to distribute unequal educational resources and opportunities. Residential segregation

33. *Green v. New Kent County Sch. Bd.*, 391 U.S. 430 (1968); *see supra* notes 24-27 and accompanying text.

34. "[D]iscrimination . . . against a racial or ethnic group other than white . . . by either legal enforcement or traditional sanctions and [usually] by restrictive measures designed to prevent intermingling . . . on equal terms in public places." WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1216 (3d ed. 1981).

had been considered normal in the North all along, but the courts after almost twenty years realized they had to say something about the northern and western situation.

We really had an opening of this issue in 1973 and a closing of a practical remedy in 1974 with the *Keyes*³⁵ and the *Swann* decisions. It was a very short opening in terms of viable solutions because by the time the court got to the northern cases, most of the northern school systems were either predominately minority or on a demographic trend that was moving very rapidly in that direction, except for a few cities like Minneapolis and Seattle, which took another twenty years to reach that point, but are there now. You had an effort to apply the law in a situation where almost all the effort had to go into proving guilt because you did not get an automatic remedy. Nobody knew what the remedy should be. The demographic trends were so negative, especially in the biggest cities, that the remedies were likely to rapidly unravel. Even fairly conservative judges, like Judge Roth in Michigan, recognized the difficulties and saw that it would not work.

The story of the period since then is really adverse to figuring out some ways to hold something in the face of the demographic patterns and the absurdity of the disconnect between the remedies and the urban communities. We have ignored the fact that almost all of the good educational opportunities in most metropolitan areas are now divided by boundary lines. These legal boundary lines have been given constitutional status by the *Milliken* decision. Poor kids and minority kids are now significantly more isolated by both race and poverty in many cities than they were previously.

The other thing that happened is that in 1973 we recognized in the *Keyes* decision that there was another minority group in the country besides African-Americans. Latinos were recognized and were given protection. Nothing was ever really done to enforce the rights of Latinos, and our statistics show a steady, inexorable increase of segregation for Latinos across the country. Latino students are now the largest minority in fifteen states.

Brian Landsberg: I would like to answer what the Department of Justice was doing at that time. In 1968, Attorney General Clark and Steve Pollak worked with HEW on a project to go after segregation in northern urban school systems. I think it may have been during that period that HEW actually tried to cut off funds to the Chicago school system.

Solicitor General Days: It was in 1965.

35. *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

Brian Landsberg: Was it 1965? Well, in 1968 we filed several northern school system cases. The first one was the South Holland³⁶ case, which I think Nick Flannery was responsible for, then we filed the *Pasadena*³⁷ case, which was handled by Chad Quaintance, who is here. He filed that case or we intervened in a private suit. We also filed a *Tulsa*³⁸ case, which was sort of a northern case or at least further north than we were accustomed to. So we had a number of cases filed. We really didn't file any more until the *St. Louis*³⁹ case. I think it was under Drew Days' term?

We got involved in the *St. Louis* case and the *Yonkers*⁴⁰ case. The big problem was that the *Brown* decision, which was fairly unambiguous as far as southern school systems were concerned, left a lot of open questions with respect to northern school systems. State-imposed segregation was an issue in the northern cases. However, exactly what we meant by state-imposed segregation was a question. The Court answered that to some extent in the *Denver* decision.⁴¹ The Court rejected Justice Powell's suggestion that all school systems should have an affirmative obligation to do what was reasonably available to desegregate. Instead, the Court held that there had to be proof of intentional state segregation. That proof has been hard to come by. Even though the figures may suggest something is going on, we have to show how the schools got that way and we have to pin the rap on the state. We succeeded in doing that in every northern case that we initiated. However, they have been tough cases to prove. Those cases have been very resource intensive and they have dragged on for years. In the *Indianapolis*⁴² case, which was filed in 1968, the remedy didn't come until many years later in 1980. I think that raises a question as to whether the Division today should be looking at segregation in big northern cities.

Solicitor General Days: There were efforts during this period to amend the Constitution to prohibit busing. Why did those efforts fail in your estimation? What is your sense of the dynamics during that period? Judge Wisdom, you might want to comment as well.

36. *United States v. School Dist. 151 of Cook County, Illinois*, 286 F. Supp. 786 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1968), *modified*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971).

37. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

38. *United States v. Board of Educ. of Tulsa County*, 429 F.2d. 1253 (10th Cir. 1970), *vacated*, 413 U.S. 916 (1973) (judgment vacated and case remanded in light of *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973)).

39. *Liddell v. Board of Educ. of St. Louis*, 469 F. Supp. 1304 (E.D. Mo. 1979), *rev'd sub nom. Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980), *cert. denied*, 454 U.S. 1091(1981).

40. *Spallone v. United States*, 493 U.S. 265 (1990).

41. *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *see supra* note 35 and accompanying text.

42. *United States v. Board of Sch. Comm'rs of Indianapolis*, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd in part and vacated in part*, 637 F.2d 1101 (7th Cir. 1980), *cert. denied sub nom. Metropolitan Sch. Dist. v. Buckley*, 449 U.S. 838 (1980).

Gary Orfield: I was very actively involved in 1972 when all those proposals were up in the Congress. Several of us who were working at the Civil Rights Commission did a lot of work with Congress at that time. It was a close call a number of times. What really made the proposals fail was two things. First, many members of Congress when they came right down to it, did not want to set some kind of precedent and were really worried about infringing on the courts. Second, the Court changed and backed away from confronting the political issue. That protected the suburbs and perhaps protected the Court. I don't know what would have happened.

Judge Wisdom: I was going to bring up an unrelated question, but I think it is an important one. To me the most intractable problem today is at the level of higher education. I just don't see how that is going to be worked out.

I was on a three-judge district court not long ago, I think in 1975, and we worked out a consent decree. The consent decree proved to be completely unworkable. There were all kinds of legal maneuvering on the assumption that the consent decree continued in effect until another plan was made. Many years later we really started from scratch again and this time appointed a special master, Paul Verkuil, a very bright guy who was Dean of Tulane Law School and President of William and Mary. He had the assistance of David Boyer, one of the best lawyers in New York. They worked out what seemed to me a very reasonable plan. For example, Southern Law School was just two miles away from LSU Law School, but the quality of law at Southern was very inferior compared with that at LSU. We would have merged the two, but when it got up to the Supreme Court, the Supreme Court dismissed it for lack of jurisdiction, apparently on the theory that it never should have been a three-judge district court case anyway. So now a single judge is starting back again.

The trouble is fundamental. The alumni of formerly all-black colleges, the student bodies, and faculties are very proud of those colleges and of their graduates. They don't want to be absorbed by formerly all-white colleges or universities. On the other hand, they don't have the money to furnish the good teachers or the good equipment. I think this is the most difficult problem facing us in education today in terms of civil rights and equal opportunities for African-Americans at the college level or the graduate level. I don't know what the solution should be. I for one don't know my own thinking. What is the thinking in the Department of Justice?

Solicitor General Days: Certainly we can say that the Mississippi higher education desegregation case⁴³ has gone to trial just last week and a lot will flow

43. *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987), *vacated and remanded sub nom.* *United States v. Fordice*, 112 S.Ct. 2727 (1992), *vacated sub nom.* *Ayers v. Fordice*, 970 F.2d 1378 (5th Cir. 1992) (en banc).

from what happens in that case. Certainly Louisiana will be affected. Maybe someone from the Division can speak about that.

But your comment about higher education desegregation raises broader questions as to the future of school desegregation generally, it seems to me, and that is going back to what I call the three faces of *Brown*.⁴⁴ There is the comment that black children are harmed by segregation. We have in this country, as Gary Orfield was indicating, highly segregated communities. Black parents, school board members, and educators have been heard to say: "We're not interested in having our children just sit along side white children. We are interested in education, and if we can get quality education where our children are, then that's what we want."

Besides that, isn't it unrealistic to expect that this intense residential segregation is going to be corrected any time soon? That is, why do we think that there is actually something in the future to hope for in terms of desegregation? I wanted to hear from the panel about that, particularly in terms of the future efforts of the Civil Rights Division in the school desegregation area. It picks up, Judge, some of the same points that black communities are saying: "We are not beholden to whites. We have a tradition. We have a culture. It is insulting to be told that our children have to be bused out to a suburb in order for them to get a decent education."

Gary Orfield: I thought maybe I could start answering that by telling you about the statewide survey we just released in Indiana about a week and a half ago, where we actually studied 8th graders, 10th graders, 12th graders, their parents, and their counselors, and followed the students two years into college.

Indianapolis is the most integrated Midwestern metropolitan area in terms of education. It's only because of that lawsuit—there certainly was never any leadership there to do anything. We asked students two years into college if it was an advantage, disadvantage, or made no difference to go to an interracial school? An overwhelming majority of African-Americans and whites said it was an advantage. Eighty-five percent of the students supported integration. More than sixty-five percent of each racial group, white as well as minority, supported busing. The students in the schools that we studied reported extensive interracial friendships. They reported fair treatment in the schools. The parents reported that the substantially integrated schools were more responsive than the African-American concentrated schools that we had in northwest Indiana. They also reported problems. African-American students were less likely to be in college preparatory programs.

When we compared the segregated schools in the state to the integrated schools we found that the concentration of poverty was 400% higher in all-black

44. See *supra* note 13 and accompanying text.

schools. The all-black schools were overwhelmed with all kinds of educational and other problems. The test scores were drastically lower in the all-black schools, so that the level of competition in those schools was much lower. We thought we would find those schools most responsive to parents and community groups. However, we found community groups from minority communities actually more involved in the substantially integrated schools. So we found a picture that is very unlike what people say about busing.

I had a meeting two days ago with the black leaders from Indianapolis to talk to them about this data. One of the attorneys, who has been filing complaints about the school district, came up to me and she said, "Maybe I hear about the worst cases." I think that that is what we have been hearing about for a long time on this. I think we have been hearing about it because it has been in the interests of people to publicize the worst cases. And almost nobody has gone and asked the young people in the country how it's really working. Every survey of college students during the 1980s showed a majority in favor of busing. The practical problem for black students isn't sitting next to black kids—it's being in isolated poverty schools. Desegregation can be a solution.

The federal government had the statistics for the first time ever in the 1991-1992 school data to look at the relationship between racial segregation and poverty segregation. We found when we analyzed that data for all the schools in the country, that a segregated black or latino school was 14 times as likely to be predominately poor as the segregated white school. That level of poverty relates to educational achievement, drop-out rates, and every single outcome of schooling. It is the most powerful relationship there is in educational research. So that basically, you are not segregating people by race alone. For minorities, you are segregating by race and income. Income is related to parent education, to mobility in school, to untreated health problems, to violence problems, and to every aspect of life that effects schooling. It's also related very strongly to the presence of more poorly trained teachers in the schools.

So we have also been looking recently at the *Milliken II*⁴⁵ remedies and the *Kansas City*⁴⁶ case and the *Norfolk*⁴⁷ case, where the Norfolk system went back to segregated schools, to find out what actually happened. We see no real evidence of progress on the separate but equal remedies. However, we see instant redevelopment of tremendous inequality in the return to neighborhood schools in the *Norfolk* case. It happened almost within the first year. There was evidence of a widening academic achievement gap, but the key mechanism isn't race—it's class. But class is so related to race in the United States that it is very, very difficult to overcome all the cumulative disabilities of isolation by poverty.

45. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

46. *Missouri v. Jenkins*, 495 U.S. 33 (1990), *cert. granted*, 115 S.Ct. 41 (1994).

47. *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986).

Solicitor General Days: Judge or Brian?

Brian Landsberg: I think that what Gary said and also something the Attorney General said about that—the courts are not the only answer. It seems to me that first of all there has been from the civil rights community, as well as from the foes of civil rights, a lot of, what I would call, trashing of school desegregation. People saying it hasn't worked. I think that the real picture may well have been obscured. The message of studies like Gary's is being overshadowed by this litany about busing is bad and kids want to go to their neighborhood schools and so on. I think that a place to start is to get the record corrected. I don't know if this is something for the Civil Rights Division to do, but maybe for all us, certainly the alumni who are going back to their various cities, to try to start correcting the record because some of the solution has got to be a political solution.

If Gary's figures are correct, if the study in Indiana is correct, then maybe a political solution that we wouldn't have thought was possible twenty years ago might be possible today. I think it would be because of the advances we have made under *Brown*. Then the other questions are: What about the law? What about bringing cases? As I have already said, the law doesn't give us a handle for any kind of massive attack on segregation. It might give us a handle for attacking school segregation in some cities where we have not yet brought suit, and I think that the Division should be paying attention to those. But unless it's going to try to change the *Keyes* and *Milliken* decisions, I don't know how much further we could go.

There is one further question. Gary alluded to *Norfolk*. *Norfolk* is the beginning of what could become a very disturbing trend; that is, the issue of resegregation of school systems that have gone through the kinds of affirmative steps that Judge Wisdom described and have complied with the law. Then suddenly, by waving a magic wand, they are declared unitary and allowed to retrogress back to where they started. When Norfolk abandoned its desegregation plan, many of the schools that were one-race schools under the dual school system reverted to one-race status. The same thing has happened in Austin, Texas. There are not very many school systems where that has happened. But I do think that the Division should be paying a lot of attention to the question of keeping the desegregation that we have, and not allowing further backsliding.

The legal standards that the Supreme Court has set so far are very vague and fuzzy. I believe this gives us a lot of room for creative legal thinking, as well as developing the facts to show that what the school board is proposing is simply to reinstate the effects of past discrimination. So I would hope that the Division would put some efforts there.

Solicitor General Days: I would like to open up the discussion to include questions from the floor. Are there questions or comments from people in the audience that are on point here? There is a lot of wisdom out there—speaking

about wisdom and ignorance out in the audience. Would you stand up and identify yourself?

Audience Member: [A question is asked about vouchers and what viability they might have with respect to the desegregation process.]

Judge Wisdom: My own feeling about vouchers is that they will tend to destroy the public school system. I'm strongly opposed to vouchers. I think vouchers will only help the private schools.

Gary Orfield: We have some voucher experiments going on in the country right now. One of them is in Indianapolis, and I'm on the advisory board that is looking at the research on it. So far most of the vouchers are going to families who already have kids in parochial schools. Thus, the educational effects are minuscule and very hard to discern.

There is another experiment going on in Wisconsin. There is one in San Antonio and another one going on in Atlanta. I think that there are not going to be that many voucher plans adopted by state governments because of the power of the teachers' organizations. I think that the broader question is about choice plans that allow choice within or between school districts. I think there could be a very creative role in figuring out ways to make sure that the choice system is set up to be equitable and fair and to provide information, transportation, and other things that were necessary to make freedom of choice even slightly fair in the middle 1960s. A lot of these state laws that provide choice don't provide the basic protections that the South had to offer in 1965.

Dave Gregory: I'm Dave Gregory,⁴⁸ and I was honored to say I was hired by Bob Owen and Steve Pollak. There is a very interesting and illuminating little story associated with *Jefferson*.⁴⁹ I would like to ask Judge Wisdom to make comments on it and the *Greenwood Mississippi* case.⁵⁰ As I recall it, *Jefferson* was the consolidation of about fourteen different school systems. But when the *Jefferson* decision came down only thirteen were in the caption and Greenwood, Mississippi, was not included.

Judge Wisdom: I didn't even know that story. It certainly was not a factor in our thinking. We did not intend to leave out Greenwood.

48. Professor of Law, University of Maine Law School.

49. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), *modified*, 380 F.2d 385 (5th Cir. 1967) (en banc), *cert. denied*, 389 U.S. 840 (1967); *see supra* notes 18-29 and accompanying text.

50. *United States v. Greenwood Mun. Separate Sch. Dist.*, 406 F.2d 1086 (5th Cir. 1969), *cert. denied*, 395 U.S. 907 (1969).

Owen Fiss: I'm Owen Fiss and, among other things, a colleague of Drew Days. This question is meant to embarrass you, Drew.

Solicitor General Days: All right, I'm easily embarrassed.

Owen Fiss: One of the great missions of the Civil Rights Division and the Department of Justice was not simply accepting law as it had been developed, but also changing law and pushing law to new frontiers. This is what happened during the 1960s. The Civil Rights Division was not just receiving the decisions of the 1950s, but it was also formulating new principles and ideas to realize the ambition and aspirations of racial justice. I think we have located a critical juncture in the development of constitutional doctrine in the *Milliken* decision.⁵¹ I would also put *Washington v. Davis*⁵² in that framework. That law was progressing through the 1960s and moving from *Green*⁵³ to *Swann*⁵⁴ to *Keyes*.⁵⁵

I don't think I would agree with Brian's interpretation of *Keyes* because I think Justice Brennan left open the eventual evolution of the law to the direction Justice Powell was pointing to. But the critical juncture comes in *Milliken* and *Washington v. Davis*, which takes the law in a radically new direction and, in my view, frustrates the progressive evolution of the idea that was going on in the 1960s.

The question that I put to you, Drew, since you are the highest ranking public figure in public justice here and also because of the disturbing comments during the confirmation, is: What is the Department of Justice doing to move the law in the opposite direction of *Milliken* and in the opposite direction of *Washington v. Davis*?

If the comments of Brian and Gary are to be taken seriously, we have a rupture in the law at that historic point and it seems to me that something has to be done at this point if we are going to do any further progress to move in the opposite direction that first started in that period of 1974, 1975, and 1976.

Solicitor General Days: I certainly accept the premise of your comment and your question that it is important for the Justice Department and the Civil Rights Division to take a leadership role in this respect. I think in the school desegrega-

51. *Milliken v. Bradley*, 418 U.S. 717 (1974).

52. 426 U.S. 229 (1976).

53. *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968); see *supra* notes 23-26 and accompanying text.

54. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); see *supra* notes 23-27 and accompanying text.

55. *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); see *supra* note 42 and accompanying text.

tion area the *Columbus-Dayton*⁵⁶ decisions actually pointed in a different direction from where we thought we were going and opened up new tools for desegregation and litigation. I also like to think that the *Yonkers*⁵⁷ case that we filed during the time when I was the head of the Civil Rights Division, was also an effort to bring some reality to the understanding of what was going on with respect to school segregation: that it wasn't just segregated schools, it was segregated housing, and that there was an interaction between those two forces that needed to be addressed through litigation.

Insofar as what will be the new directions. . . . When I became Solicitor General, I was invited to give a speech to the 30th Anniversary Banquet of the Lawyers Committee for Civil Rights Under Law. When I walked into the hotel someone yelled out: "Hey Drew, you going to give us raw meat tonight?" And I looked at him and said, "No, raw meat was my old job. I'm Solicitor General now and you are going to get something fairly bland and non-controversial." That's still true.

We have been waiting for Deval Patrick to arrive to head the Civil Rights Division. I mentioned at his swearing-in that he was the immediate successor I never had and I'm looking forward to his making decisions about where he wants to take the Division. I certainly will be supportive of his efforts. But I don't want to predetermine, absent his decision, as to what the direction should be, where we ought to be going in this regard. However, he certainly can count on my support. In fact, the Civil Rights Division takes me all too much for granted, and I am going to have to do something about that.

Without quoting anyone, let me go back to the Virginia Military Institute decision. I was told Deval Patrick wanted a quick decision on whether an appeal was to be taken in that case. It was a couple of days between that conversation and when Deval wanted to announce it. My deputy said to the Division lawyer, "Well, you know we need something from the Division to indicate what you want to do and why you want to do it." And the response was: "Well, we will get that, but with Drew as Solicitor General do you think its going to take very long?" It didn't take very long!

So I am sorry I'll have to demur, Owen. But I really think its Deval's call. I certainly will be consulting with him and providing whatever guidance I can, but I don't want to make policy for the Division. Well, we are at 11:03. We have got perhaps one more question or comment.

Audience Member: [A question is asked regarding busing.]

56. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

57. *Spallone v. United States*, 493 U.S. 265 (1990); *see supra* note 40 and accompanying text.

Gary Orfield: In Indianapolis, it is a very unfair plan in terms of who is bused because the judge ordered one-way mandatory busing to the suburbs. There is two-way busing inside the city. Now whether you consider busing as a burden or not is an important issue. Most kids go to school in buses in the United States. There really isn't a speck of social science evidence that suggests that busing is a burden. So the question is going to integrated schools. In the case of most of the minority students who are bused, they are bused to much better schools. In a district where a poor minority kid is sent to a poor white school, it is not as clear a case.

When we were doing the survey following up the students in their college year, I was down in Bloomington, Indiana, in the survey research lab. We had the computer set up so that I could watch the results coming in as the questionnaires were filled out by different interviewers. I could tune in and listen to any student I wanted to hear and then come in at the end to ask them questions. It was fascinating when I asked, "Why do you feel that way?" about their belief that integration was an advantage. One African-American student who we tracked down at the University of Michigan at Ann Arbor was studying Biological Sciences. That student said, "You know I never would have heard of this place." The white students tended to say things like, "Well you know my suburb wasn't the real world. That's not what the world is like."

I think it's not that there aren't problems and difficulties with desegregation because there certainly are. But kids think the interracial experience—and in terms of minority students from high poverty neighborhoods, the actual better education that they get—and the connections to different opportunities in their lives are worth it.

Neighborhood schools often provide bad education. Look at what happens in a city like Chicago which never was desegregated and has sixty-five high schools of which nine-tenths can't prepare you for college. There are literally no connections between the schools and anything that happens after high school in an effective way. Then, you know you have students being educated in totally different planets.

In Denver, you had a demographic decline. Denver's school district only included the central city. Indianapolis included the city and the whole Marion County area because of this lawsuit. In Denver, you only have the city and the city was cut off from expansion by an amendment by the state constitution called the Poundstone Amendment.⁵⁸ The Amendment cut the school district off from expansion and as the Denver metro grew it had a smaller and smaller part of the population of the metropolitan area. It's exactly the kind of case that the Justice Department ought to look at because the state constitution was changed during the busing controversy in a way that has prevented the Denver school district from

58. COLO. CONST. art. XIV, § 3, art. XX, § 1.

ever expanding, and nobody has ever seriously looked at the legality of that. I think really looking at that and changing that would be the key to having a viable long term solution in Denver.

Solicitor General Days: Great! It has taken forty years to get here. It's not going to be figured out in an hour. I want to thank Judge Wisdom, Brian Landsberg, and Gary Orfield for joining us this morning. Thank you very much.

**SECOND PANEL: THE TOOLS OF TITLE VII ENFORCEMENT,
THEN AND NOW**

Stephen Pollak: Our second panel is entitled: *The Tools of Title VII Enforcement, Then* (meaning 1964, 1965) *and Now*. Our Moderator is John Doar, who joined the Division in 1960 as the First Assistant and went on to lead the Division from April of 1965 through the end of 1967. John is a major figure in the Division's history and we are delighted he is the moderator of this panel.

With him on the panel is Judge Wisdom. I have spoken about Judge Wisdom and you have already heard him. I needn't say more.

Also, on Judge Wisdom's left is David L. Rose, who was an attorney in the Department of Justice starting in 1956 with the Civil Division. In 1967, he saw the light and came to the Civil Rights Division. He was the Attorney General's special assistant in connection with enforcement of Title VI of the Civil Rights Act of 1964.⁵⁹ He headed the Division's employment section for probably as long a period as anyone has led that important section. He is now a private practicing attorney, demonstrating that there is life after the Division.

On David Rose's left is Alfred W., known to us as Al Blumrosen. I remember Al as being present at the creation of Title VII and his biography refers to him as having been in charge of liaison with federal and state agencies for the EEOC in 1965. So he really was there "at the creation." His long term position is Professor of Law and today he is the Thomas A. Cowan Professor of Law at Rutgers University.

On Al's left is William Eskridge, who is a Professor of Law at Georgetown. I have to say with pride that he spent a little time on his way there with my law firm, Shea & Gardner. I'm sure he needs no more introduction than that, but his teaching area includes civil procedure, constitutional law, and legislation.

We are delighted to have these distinguished and knowledgeable members of the panel, and I turn the proceedings over to you, John.

59. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4a (1988) (providing for nondiscriminatory use of federal funds).

John Doar: What I think I would like to do in this session is to encourage more questions from the audience. I like those Owen Fiss questions, particularly because I don't think you can ask them to me. Before we get into the questions, which I'm going to try to get into as quickly as possible, I'm going to just put to all the panelists with respect to Title VII enforcement—how are we doing really? And how can we do better?

But before I do that I would like to ask Judge Wisdom this question. I met Charles Clark in Jackson, Mississippi, when he was representing the Attorney General and the Governor of the State of Mississippi. Charles Clark went on to become a member of the Fifth Circuit and then to become Chief Judge of the Fifth Circuit. Charles said to me while he was still at the Attorney General's Office: "John, you are going to be able to do all right in the voting cases and you'll make some progress in the school cases, but you will never be able to touch us in the Title VII cases." So I ask Judge Wisdom: What was it really like within the Fifth Circuit, with respect to the Title VII cases, when they came before you?

Judge Wisdom: Well, I think I'll start by saying that it was not like it was in the education cases. I was in Washington once and I went to the home of a very distinguished Justice. I was met at the door by the wife of another distinguished Justice. She was from Louisiana, and she had known all about how I had been very active for Eisenhower. She said, "I'm so glad you're here. I want you to tell, (and she gave the first name of her husband) I want you to tell X that there are not enough soldiers in the United States Army to desegregate Tallulah in Madison Parish, Louisiana."

I tell you that story because I was not met with anything like that in the employment cases. They were somewhat different. There was not as much intense feeling as there was in the school cases. But there were strong feelings, especially among white workers who felt that they were not being given a fair shake because sometimes they were passed over in the interest of changing the system. The white workers thought because of their seniority nothing should interfere with it. You can understand how they felt when they were passed over.

But take a situation like New Orleans. We had no major, captain, lieutenant, or sergeant of the African-American race in the police of New Orleans. We have a very heavy population of African-Americans. The black policemen make better police officers in dealing with the other members of the African-American race. I think that that is quite a difference. There was feeling, but it was not nearly as intense.

I remember we had a case that arose out of Bogalusa, another little town in Louisiana. The Klan had taken a strong position. So we had trouble not only with the actual members of the union but also with members of the Klan. But generally speaking the cases were not as stressful, as the school cases were.

But before I finish this little parenthesis, I would like to say that it has been a tremendous pleasure for me to meet old friends and some of them are considerably older than they were when I last saw them. But, thanks to the name tags I recognized some of them and others—my old friend like John here on my right, Burke in front of me, and of course Owen Fiss over there—I recognize them without their tags. It was a great, great pleasure to work with them. In fact, I think I worked so closely with them then that if the ethics committee had been an active ethics committee in those days, they might have been after me. But we got great help from all of them, and they are wonderful, wonderful people. Thank you.

John Doar: Well, Dave, can you take the lead on where we are and how we can do better?

David Rose: I have been asked that question repeatedly. We sued the city of Chicago in 1973 for both the police department and the fire department. Chicago was much like New Orleans. It had a few lieutenants and sergeants, but they were in precincts that were substantially black. The police department was 6 or 7 percent black, but you never saw black cops in the “Loop” or in the main business districts. The fire department, I remember vividly, was 4 percent black when we sued them. There had been segregated firehouses and that was where the few blacks were.

There have been dramatic changes. They were most dramatic in the public sector. There are very interesting statistics that show that for state and local governments, the African-American participation is almost double what it is in the private sector. That’s even true in jobs like fire fighter and police officer where there had been virtually zero at the time of the passage of the 1972 Act. There had been some changes before the 1972 Act, mostly as a result of elections in some of the big cities and that sort of thing. But there has been really dramatic improvement in the state and local government sectors. There has been improvement in the private sector; I think it was sharp improvement based on statistics I’ve seen through the 1970s.

In the 1980s and I think in the early 1990s, the changes in the appointments to the bench and different signals from Washington gave the message to the business community and to some of the state and local government communities that they were free to go back to whatever they wanted to do. There has been a little bit of regression I think from 1984 until now. I’m not really sure. As far as the law was concerned, although the basic principles of law have been established, the Supreme Court decisions in 1987 and 1989 really did make an enormous difference. I left the Department in December 1987 after being the Chief of the Section for eighteen years. By 1990 and 1991, I talked to lawyers who had practices in Title VII law and some of whom had tried to make their living practicing Title VII law. A number of them had stopped bringing Title VII cases

because they got such a hostile reception from the federal bench that they couldn't do it any more—black and white lawyers both.

The 1991 Act⁶⁰ is certainly going to make tremendous differences. There was an article in yesterday's paper about a 3.5 million dollar judgment in favor of one woman against the Army Corps of Engineers for sex discrimination.⁶¹ Some of those large numbers are going to capture the attention of managers, I think.

You know that we can do better. Certainly the judicial appointments are absolutely critical, a little bit less so with juries, I think, than with judges. In the Eastern District of Virginia and in Baltimore, if you had a case in federal court you almost better forget about it. It's been very, very hard to get to a jury. Summary judgment is routinely affirmed by the Fourth Circuit in cases where there are big factual issues. It has been very bad. There are other federal district courts throughout the country where that's true, where the bench had basically decided they weren't going to grant judgments in favor of plaintiffs, and particularly black plaintiffs in cases of this kind. That was particularly true in individual cases, but was not true throughout the country. However, things were going in that direction. I think that with the new administration and an appointment of more open-minded judges, I would say open minded to the facts, or at least letting the juries decide the facts, that should be better.

To the credit of Brad Reynolds, there was started in the mid-1980s the suburban litigation program. It was first started against Cicero. Then we duplicated it against a series of suburbs in the Chicago area and later in the Detroit area. I have been doing some of that as far as I can for the NAACP in New Jersey and a little bit in Connecticut and Ohio. I think that some of the patterns of racial segregation and housing segregation that were discussed in the last panel are directly related to police conduct in the white suburbs of many of our metropolitan areas. Almost all young black people that I talked to would say that you know you can't go to Parma, Ohio. If you do, the cops are almost surely going to stop you. If you drive through Harrison, New Jersey, they will tail you the whole way. If they can stop you for anything, they will.

The message that you are not wanted is given basically through the police department and it's frequently not as a result of any overt direction by the mayor or the council. I think that the police believe that is what is wanted, and they want to keep the town the 99.44% white, which it frequently is. I think we need more and more cases of the kind that we are bringing in more parts of the country and a renewed bringing of these cases by the Justice Department. There are white suburbs that ring most of the cities with big minority populations. One way to break down the housing segregation is to get minorities, and particularly blacks,

60. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

61. *Johnson v. West*, No. 92-2461, (D. D.C. May 10, 1994).

employed by the municipality so it's not so easy for the police to be doing that sort of thing, and to monitor what the police in suburban communities do.

As far as the private sector, we have the statistics from employers of a hundred or more employees. There were dramatic improvements in the 1970s and the early 1980s. These improvements have not continued. One of the major problems confronting equal employment opportunity, particularly for people who are in the lower socio-economic status and people without the best educations, is the dramatic change in our economy toward smaller enterprises. The larger companies now employ a much smaller sector of the work force. The good unskilled jobs are going or are gone. The steel industry is a tenth the size that it was and it's producing more steel. The deregulation of the trucking industry, which had very high paid, blue collar jobs, has meant the Teamsters can't get those kinds of prices anymore. So they are less desirable jobs.

There is more and more movement to smaller companies and we don't know really how the lesser ones are doing. My general sense is that smaller companies are more likely to discriminate either overtly or by just relying on friends and relatives for their employees. So I think there are major problems, some of which are economic. Some of the problems are the same kind of result of residential segregation that you heard in the last panel,⁶² but I think the 1991 Act is probably a very valuable tool and it will be helpful.

John Doar: Al, do you want to pick up?

Alfred Blumrosen: Yes, I can. Dave has made it very easy. I agree with about ninety-four percent of what he said. There is only one point where I differ. I was surprised to find this in doing research for my book, *Modern Law, the Law Transmission System, and Equal Employment Opportunity*, published last year by the University of Wisconsin Press. I found that the improvement in occupational distribution that was generated in the late 1960s and continued very heavily in the 1970s, continued right on up through 1988. I was surprised at that because I thought that given the attitude of the administration, it would have tailed off. It didn't. It didn't tail off until the 1990 recession. All the evidence with respect to the 1990 recession is that all the bad things which we thought were going to happen in earlier recessions had not happened, but they did happen in 1990.

So on the upside, my glass tends to be half full. The fact that the affirmative action efforts and the anti-discrimination efforts continued through the 1980s in the face of overt opposition from certain quarters that we need not pursue because they may be members of this association—although I don't see very many of them here—is optimistic. It means that something happened deep within the structure of the industrial relations system as a result of the forces that all of us

62. See *supra* notes 38-40 and accompanying text.

helped set in motion. The inertia was at least during the 1980s on the side of continued participation.

Now with respect to the future, particularly with respect to the jurisdiction that the Division has over state and local government employment—I want to focus on that. I focused enough to write a little memorandum⁶³ which I will be happy to leave with anybody who would like a copy of it. Because of the Voting Rights Act,⁶⁴ there is now in many states a considerable political constituency for affirmative action programs at the state or local level. One of the most important things that could be done now, in light of that fact, is for the Department to clarify the conditions under which state and local governments may take affirmative action.

When you look at the Supreme Court opinions with respect to that question, you find a wonderful muddle. On the one hand, you find the Fourteenth Amendment law of *Washington v. Davis*⁶⁵ and *Croson*,⁶⁶ which require strict scrutiny and narrow tailoring of affirmative action programs. All this leads to a very narrow concept of what affirmative action can mean in the state and local government context. The other half of that muddle is the 1972 statute that extended the Title VII to state and local governments.⁶⁷ Title VII was already carrying the imprimatur of the *Griggs*⁶⁸ principle of disparate impact at the time that statute was adopted. The law of the private sector regarding disparate impact is much more generous with respect to the circumstances under which one may take affirmative action. You need a “manifest imbalance”⁶⁹ that you can correct and by measures that do not “unnecessarily trammel”⁷⁰ the interests of the white or male employees. There is no strict scrutiny standard there. It’s more of a reasonable relationship between what you try to do and how you try to do it. The federal regulations parallel the Title VII case law. The uniform guidelines of 1978⁷¹ managed to survive the 1980s and the EEOC affirmative action guidelines⁷² are quite generous on when you can take affirmative action.

63. See *infra* Appendix, Alfred W. Blumrosen, *Some Notes on State Affirmative Action in Employment* (May 11, 1994).

64. Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973aa-2 (1988).

65. *Washington v. Davis*, 426 U.S. 229 (1976); see *supra* note 63 and accompanying text.

66. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating the minority set-aside program of the City of Richmond, and requiring strict scrutiny of state and local affirmative action programs).

67. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as 42 U.S.C. § 2000e(a) (1988 & Supp. II 1990)).

68. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (recognizing a disparate impact claim in Title VII cases which an employment practice operates to exclude minorities and cannot be shown to be related to job performance).

69. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979).

70. *Id.*

71. Uniform Guidelines on Employee Selection Procedures (1978), 43 Fed. Reg. 38290 (Aug. 25, 1978) (codified at 29 C.F.R. § 1607 (1994)).

72. Equal Employment Opportunity Commission Discrimination Guidelines, 29 C.F.R. § 1608 (1994).

That law has been binding on the states since 1972. So the states are now subject to two different standards with respect to how they can conduct their affairs if they want to take affirmative action. But if you are sitting in a state house and asked to advise the governor on what kind of affirmative action the state can take, which of these bodies of law do you look at?

The courts have tended to look at that Fourteenth Amendment law. When you look at the Fourteenth Amendment body of law and you start with strict scrutiny from *Croson*, you are going to come out with a narrow permissive area for affirmative action. That's the state of the decisions right now. I think what the answer to the conundrum ought to be—and John Doar bears some responsibility for this, having been involved in *Katzenbach v. Morgan*⁷³—that Congress in its power under the fifth section of the Fourteenth Amendment, combined with its power under the Commerce Clause may—in effect—change the meaning of the Fourteenth Amendment with respect to the matters of affirmative action. Congress may impose on the states a broader obligation not to discriminate than *Washington v. Davis*. That will necessarily carry with it a broader opportunity to take affirmative action. I think getting to that point in the law as quickly as it can be done within our system would be a very important step. I think that mainly means looking for the right case to go to the Supreme Court. There are cases floating around. There was one decided by the Eleventh Circuit out of Birmingham last week.⁷⁴ There also is one out of the Fifth Circuit.

I think this is the lesson that we should learn from the 1980s. The Civil Rights Division in the 1980s was unable to impose anti-affirmative action standards. I think a primary reason for that failure was that the Division concentrated solely on the court systems to try to achieve a narrowing of the law. Given the point that Dave Rose was making about the appointment of lower court judges, it's more important than it has ever been, for the Department to participate with other agencies in substantive rule making that will lay a foundation for a broader affirmative action concept. The lower court judges are not going to be sympathetic. The Supreme Court during the early stages of the Reagan administration made it very clear that when a new presidential administration comes in, if regulatory agencies change their policies in light of the direction that the new president wants to go, that's okay.⁷⁵ Not only is that okay, but if the agencies act within the parameters of their authority and adopt a permissible construction of the statute, then what the agencies say will be binding. To the extent that you can deal with these questions by rulemaking, it's a way around the lower court judges.

73. *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (holding that § 4(e) of the Voting Rights Act of 1965 is a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment and that by force of the Supremacy Clause, Article VI, the New York literacy requirement cannot be enforced to defeat the mandate of § 4(e)).

74. *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994).

75. *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984).

I think this ought to be thought through very carefully by some kind of inter-agency coordination group.

I have a final point. We tend to think in terms of case law and we tend to think in terms of, "Okay, it's going to take ten years to work it all out." I think Attorney General Reno was making a point—that we must try to think in addition about ways of facilitating things happening out there in society that don't depend quite so much on case law. That's why advising the states concerning the circumstances under which they may take affirmative action and what form of affirmative action they may take, might be the most important thing the Division could do in the next few years.

William Eskridge: I shall discuss the progress we have made, some caveats I have about it, and what I think are some of the key conceptual issues now facing Title VII jurisprudence.

The biggest success of Title VII is that it has made open discrimination on grounds of race and other categories socially unacceptable. I grew up in a system of apartheid. I grew up in the South. African-Americans and other minorities were prohibited even from applying for most of the good jobs in the city where I grew up.

Two weeks ago, I attended a funeral for Ms. Florence (Ella) Brown, a very close family friend, who died at the age of 101. At the funeral in Cash's Hill,⁷⁶ I met many members of her family and other relatives. People of color in Ella Brown's generation had very few job opportunities. They were mostly housekeepers for other people (as Ella Brown was) and workers in the dirt. The next generation had a lot more opportunities including some in teaching and in some of the professions. Most strikingly, the third generation, the generation that is fairly young, includes a lot of people, who have done extraordinarily well. You can just go through the three generations that I saw at that funeral and see the tangible effect of Title VII.

On the other hand, progress has not been impressive in other respects. Consider the *Brenda Patterson*⁷⁷ case. The record in that case is filled with openly bigoted remarks and may reflect prejudicial policies that are followed by some employers. I'll mention in a second *de jure* discriminatory policies that are still followed by the federal government. Although Title VII has had tangible results in terms of jobs and the dispersion of jobs, I'm more pessimistic than the other commentators.

The unemployment rates for racial minorities have remained stubbornly higher than the unemployment rates for Caucasians, for example. There have been a number of interesting studies suggesting that it's not enough just to have

76. Cash's Hill is a rural community in West Virginia.

77. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that the scope of § 1981 is limited to refusals to make and enforce contracts and is not applicable to post-formation conduct).

jobs.⁷⁸ We should be very interested in the wage rate differentials for minority employees and similarly qualified white employees. My conclusion from the studies is that the biggest gains were made by African-Americans in the 1940s and 1950s. There were also substantial gains between 1965 and 1972. Some of the studies find few or no gains after 1972. So this problem of different wages for the same work remains stubbornly with us, as well as the unemployment problem.

A further gain I think that the country has made is that we have a much more complex idea about the varieties of discrimination. In the early 1960s, our culture was mainly concerned with and aware of discrimination against African-Americans. That was the main thrust of Title VII. As we all know, sex discrimination was added through the good graces of Judge Howard Smith, a vigorous opponent of the bill. Yet even though sex discrimination was not much of a focus of early Department of Justice and EEOC enforcement, it has become a major part of the statute. Subsequent statutes have focused on age discrimination and disability discrimination. It is not just racial discrimination or discrimination on grounds of ethnicity that is socially unacceptable, but so is gender discrimination and so is discrimination based upon disabilities. I think we have a long way to go, however, even in this regard. Discrimination based upon sexual orientation is socially acceptable in most circles, and it is also government policy. The main employer in this country is the United States. A large chunk of its jobs are in the armed forces, which still by statute discriminates. This discriminatory policy is being defended by the Department of Justice in a series of lawsuits, and the defenders are themselves noted civil libertarians. A policy where civil rights *leaders* defend an "apartheid of the closet" is a policy with much to learn about discrimination.

This definitional debate over the definition of "discrimination" shows up also in the affirmative action controversy. Discrimination is defined in the dictionary as "any differentiation." Yet we all knew from the Civil Rights Bill in 1963-64 that there was an "invidiousness" that was involved when we were talking about "discrimination." But what is "invidious" differentiation? The government really has not articulated a clear theory of invidiousness. This is not just in the 1980s. This is a broader criticism. The government has not articulated a sophisticated conception of discrimination in any decade. I would also lay the blame at Congress, because all of those issues were deliberately fudged in 1964 so that they could get the vote of Senator Dirksen, who held the 67th vote that was needed to break the Senate filibuster by the Southern Democrats. I think that is a key issue. I think many of these other issues fall out from that, including the question of whether discrimination based on sexual orientation is actionable discrimination either under Title VII or an amended version of Title VII.

78. See James Heckman & Brook Payner, *Determining the Impact of Federal Anti-Discrimination Policy on the Status of Blacks*, 79 AM. ECON. REV. 138 (1989); James Smith & Finis Welch, *Black Economic Progress After Myrdal*, 27 J. ECON. LIT. 819 (1989).

Another conceptual issue reveals a legacy of Owen Fiss, who was my Civil Procedure teacher (or, as we called the course, “Metaprocedure”). We learned in Fiss’ very theoretical course a staggering amount of practical stuff. One of the things that we learned was the substantivity of procedural tropes like burdens of proof. This was the centerpiece of the 1991 Act: the question of burdens of proof. Burdens of proof determine what cases are going to be brought, how many cases are going to be brought, and how much human resources have to go into assembling the record. The burden of proof debate has been keen ever since *Griggs*. This debate was highlighted in several 1989 decisions, particularly *Wards Cove*,⁷⁹ and then in the 1991 override.⁸⁰

Although burdens of proof are the special province of the courts, the Department of Justice has a very important role since it does play a role in amending the Federal Rules of Civil Procedure, in the education of its litigators and others, and in passing statutes. The Department has often been very active in passing statutes to amend Title VII. My recollection is that when *Gilbert*,⁸¹ the pregnancy decision in 1976, came down, the Department of Justice was very important in getting the Pregnancy Discrimination Act adopted in 1978.⁸²

There are three issues involving burdens of proof. First are substantive burdens. That’s the squabble over what does *Griggs* mean and was *Wards Cove* wrong or how wrong was it. Most importantly: What does the 1990-1991 Act actually mean today? Has *Griggs* been reinstated? What burdens does the plaintiff have to meet under new section 703(k) of the Civil Rights Act of 1964? These battles are going to continue to be fought in the courtroom, perhaps in the legislature, and perhaps in the Department of Justice.

Second are pleading requirements. The federal courts in the last twenty years have been falling all over themselves to impose additional pleading requirements, not only in Title VII cases, but in race discrimination cases across the board. Again, this has got to be fought at the Federal Rules level and the Supreme Court level. There was an encouraging opinion written by Chief Justice Rehnquist on pleading issues last year, which I think ought to give us some ammunition in the lower courts.

Third are the minimum requirements to withstand a summary judgment motion or a directed verdict. In connection with the pleading standards and the

79. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (reducing the employer’s burden in disparate impact cases so that an employer need only show a justification, not a business necessity, to rebut plaintiff’s prima facie case).

80. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (codified at 42 U.S.C.A. 2000e-2(k) (West 1994)) (amending § 703 of the Civil Rights Act of 1964 and overruling the *Wards Cove* decision).

81. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that a disability plan was facially neutral in its exclusion of pregnancy coverage, in that it covered no risk for men for which women were not covered).

82. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988 & Supp. II 1990)).

substantive standards, the courts have been much more willing in our cases to grant summary judgment and motions to dismiss. This is an area of Federal Rules contention as well as an area of contention throughout the various parts of the law. So, as a Fiss student, I want to emphasize that we as lawyers, as legal reformers, and as commentators on the Federal Rules of Civil Procedure, have a very important role to play in thinking about those issues as well as the issues raised by *Martin v. Wilks*,⁸³ as well as its 1991 override.⁸⁴

The final, and most important, issue that I want to emphasize is inter-connectivity. I think that all the issues we have talked about today—segregation in the schools, segregation residentially, continuing wage differentials, and workplace presence of racial and ethnic minorities—are all interconnected. One of the great tragedies of our country is that to the extent that progress has been made in greater participation of racial minorities in the workplace, it has been a two-track progress, where some people have done very well, and some people have been left completely behind. My impression, and it is only an impression, is that a lot of racial minorities are worse off today than they were thirty or forty years ago, particularly ones that are stuck in pervasive patterns of segregation in the ghettos of big cities. What I would emphasize is the interconnection of all of this to residential segregation. I think we actually should have had a panel on residential segregation, since we have not mentioned the 1968 Act,⁸⁵ an Act which is virtually unenforced in many jurisdictions and an Act, which as far as I can tell, is flagrantly violated by the government itself, as the Yonkers case illustrates.⁸⁶

I'm a pessimist, because I think we haven't solved the problems. Notwithstanding my discussion of burdens and the conceptual question of discrimination, and I think they are terribly important, but the overwhelming issue is an issue of the connection between what Durkheim would call "the structural anomie of the ghetto," and what Gary Orfield has found to be the recrudescence of educational segregation, and also what some people have documented to be the pervasiveness of inequality in the workplace.

John Doar: Well let me invite questions from the audience, if there are any.

Joel Friedman: I would like to actually relate a piece of information that I have observed because it relates to most of the remarks that were made. My name is

83. *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing white firefighters, who were not parties to a consent decree, to collaterally attack the consent decree which set forth an extensive remedial scheme for the hiring of black firefighters in Birmingham, Alabama).

84. Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071 (1992) (amending § 703 of the Civil Rights Act of 1964, 42 U.S.C.A. 2000e-2, by adding § 703(n)).

85. The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601-3631 (1988, Supp. I 1989 & Supp. II 1990).

86. *Spallone v. United States*, 493 U.S. 265 (1990); see *supra* note 47 and accompanying text.

Joel Friedman. I teach at Tulane Law School, although I'm here in a more exalted role as Judge Wisdom's biographer.

As I go around the various circuit court conferences I have been asking the judges how they are dealing with the 1991 Act. I have attended Eastern conferences, which are mostly attended by the district judges, although sometimes some of the superiors on the Circuit Court also are in attendance. I've been marked by their interest about two major issues, both of which were mentioned today. First, how should they handle summary judgment motions, particularly in the so-called single motive cases after the *St. Mary's*⁸⁷ case? There is a tremendous amount of confusion in the lower courts, to such a point that I got a call three days ago from one of the judges that I had recently spoken with at a conference. He had just written an opinion granting summary judgment in a way which seemed to me was inconsistent with *St. Mary's*. He yelled and screamed at me: "You know, if we read *St. Mary's* the way you are talking about it, we will never grant summary judgment to anyone."

Number one: I think the Justice Department still has, as Professor Eskridge said, a job to do here in formulating the law post the 1991 Act, post *St. Mary's*, particularly on this very important issue of summary judgment. Number two: the other question I often ask the district judges is: What has been the impact to the extent you are trying cases now with juries under the 1991 Act? It's not a lot of cases yet that have gone all the way through a jury. In those cases where I ask the question and I get an answer, I often get the same response and that it is: "No different than it was before juries." In the race and sex cases the plaintiffs lose, and in the age cases the plaintiffs win. When I ask why that is, they say that the jurors can relate to age discrimination, but they can't relate to sex and race discrimination.

John Doar: Dave, do you have any reaction to that?

David Rose: My practice is in Washington and after thirty-seven years of practice I had my first jury trial last September and October, so I'm not an expert in juries by any means. I have talked to practitioners in Birmingham and other places where they have been successful with juries in both race and sex cases. Certainly the remedies are better and much more complete. I would worry about a jury in many parts of the country. In Washington, D.C., I would worry a lot less. I worry more about the judges in Washington.

There is a conflict right now regarding *St. Mary's*. There are two lawyers who signed the petition for *cert.*, both alumni of the Civil Rights Division. I am one

87. *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742 (1993) (holding that the Title VII plaintiff at all times bears the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff).

of the signers. I think there is a flat out conflict between the Fourth and First Circuit and the Second after *St. Mary's*. We had that issue, I think, fairly well presented. I'm not sure it's the right case, but they have got to resolve that conflict. We would dearly love to have the Justice Department on our side. Certainly summary judgment has become the vehicle for defeating plaintiffs' cases in the field of equal employment opportunity and with the active participation of at least some of the Circuit Courts of Appeals.

Judge Wisdom: I would like to make one comment. I think it is very hard to generalize as you are generalizing now with respect to juries because there are so many judges who feel that they are more competent than juries to decide this type of case. I just question to what extent you can generalize. There are even some judges who don't want to play golf that afternoon.

Alfred Blumrosen: I was a little nervous when the civil rights establishment decided to go for punitive damages in jury trials because it came out of frustration with the conservative judges on the federal bench. But the experience that said it would be a good thing was basically the age discrimination cases. I believe that they are different and will appear to be different to many juries in many places than the race and sex cases. It may not turn out to be as useful a tool in addressing employment discrimination, although its going to bring in some income in particular cases to the clients and a little bit to the lawyers. There is a downside to that which I am worried about and that is back to your single person discrimination case. A lot of those cases which could have found lawyers before the 1991 Act will probably not find lawyers now because the lawyers are going to want to concentrate on those cases where you can show malice or reckless indifference and thus have an avenue for major damages. The judges are going to want to hold a tight rein on malice or reckless indifference and lawyers will accommodate that. So I think there is a risk that the run of the mill, garden variety, single person case may not get the kind of legal attention that it previously has gotten. That could lead to reviving old notions of providing an administrative remedy as an alternative in those kinds of cases where you are not going to be likely to get punitive or massive compensatory damages and that might be something we should think about.

John Doar: I noticed in the Washington Post yesterday that in connection with the acquisition by one bank of another bank here in this area, that a major suit by 125 persons was filed in the district court here in Washington. Some counts are based on race discrimination. Some counts are based on age discrimination. However, the plaintiffs asked for a jury trial. That's going to be a very interesting case if it ever gets to trial. I think there is an awful lot of money involved. Are there any other questions from the audience?

Sarah Kaltenborn: I'm Sarah Kaltenborn. We seem to be talking about procedures and summary judgment which relates to my question about the use of alternative dispute resolution in civil rights enforcement. There seems to be a trend toward the theory that litigation is not a good thing and it should be avoided as much as possible. I just wanted to know what the panel thought about ADR as a law enforcement tool?

Alfred Blumrosen: I'll speak to that. I think that the lawyers make a judgment about what is going to be good for their client and if they think the jury and litigation is going to be good for the client. That's both sets of lawyers looking at the same alternatives. To get alternative dispute resolution by consent, you need consent of both parties. If there are big bucks coming in through litigation, the employer is going to think alternative dispute resolution is fine and the plaintiffs are not. If the plaintiffs are always losing, then the employer is not going to go to voluntary arbitration. I think that alternative dispute resolution is an effective way of mass producing results. But I think that the courts lead the way and the alternate resolutions are limited by the bounds of what the courts are doing in that particular location.

Sarah Kaltenborn: I think my question really is: Is ADR something that the Civil Rights Division of the Department of Justice should be doing?

Alfred Blumrosen: In a way, Title VII anticipated this alternative dispute resolution. The whole process of conciliation was intended initially to provide another mechanism. The way in which conciliation was conducted at the EEOC during the time that Eleanor Holmes Norton was chair, was really a different animal than how it had been done originally or had been originally intended. The investigator simultaneously tried to investigate and settle. When the system was in place—and it took three or four years to get that in place—it produced a settlement rate at the EEOC—before anything went to the lawyers, of about forty percent. During the 1980s that system was pretty much dismantled. The settlement rate at the EEOC for the last year that I know about where they have statistics, which is only through 1988 or something like that, was down to about fifteen percent. If the President gets around to appointing a new chair of the EEOC sometime during his term, one of the things that the EEOC ought to re-examine is its own internal processes, which lend themselves to almost any kind of ADR that you care to mention in the hands of an imaginative agent.

William Eskridge: I would like to say three things if I could. One is that I don't think we should severely dichotomize ordinary litigation and ADR. Most ordinary litigation is settled by consent decree, which is a process of negotiation, and a lot of ADR is very adversarial.

Secondly, I like AI's implicit distinction. If this is your distinction I completely agree with it: The statute was originally designed so that the EEOC would settle disputes. ADR was done at the retail level. Most of the retail work was done at the EEOC, where the individuals were coming in and saying, I have been discriminated against. The EEOC would try to conciliate, and there were a number of conciliations. The EEOC was not given substantive rulemaking power, although they have assumed a lot of rulemaking power in the interim. The Department of Justice was the wholesale enforcer. They were to bring the pattern or practice lawsuits. It seems to me that ADR is much less useful at the wholesale stage—where there are a lot of third party effects; where there are a lot of people who are situated and effected similarly; where what you are trying to do is either change the law or create some kind of Fissian public value. The Fissian public value is preferable to the Rehnquistian public value.

Third, ADR itself is a source of contention. It seems to me that ADR is most useful in situations where the people who are involved deal with one another on a fairly equal footing; where you have an assurance of good faith discussions; and where the situations have not become hysterical or participants have not "dug in." In race discrimination issues and sex discrimination issues, those conditions do not often adhere. I'm skeptical about invoking ADR as a civil rights cure-all.

John Doar: Several years ago I happened to meet Judge Wisdom in the alumni club at the University of Chicago. He was there, I don't know why, but he was meeting his former law clerk for dinner. I was there because Owen Fiss had asked me to come to the University of Chicago. Judge Wisdom said: "Let's meet after dinner and have a drink." So the three of us—Judge Wisdom, his former law clerk, and I—met in the alumni house at the University of Chicago and we had a good long evening of visiting. Then, at the end of the evening Judge Wisdom said he would have to go up to bed. I took his arm and we walked to the foot of the stairs at the alumni club. We walked up the stairs to the first landing. Judge Wisdom stopped and turned to me and said, "John," and I think he was speaking for all of us, "We have nothing to be ashamed of."

I certainly know that Judge Wisdom has nothing to be ashamed of. As I think back he is such a remarkable man—his rectitude, his courage, his decisiveness, and his ability to write. Of all the judges I know, Judge Wisdom comes the closest to being the judicial poet of this century. I want to just read this to you. It's what he wrote in *U.S. v. Louisiana*:⁸⁸

88. *United States v. Louisiana*, 225 F. Supp 353 (E.D. La. 1963) (holding, by a three-judge district court, that the interpretation test was unconstitutional because of its unlawful purpose, operation, and inescapably discriminatory effect).

The Louisiana *Codes Noir* of Colonial times
the Black Codes of the eighteen sixties;

the pre-Civil War denial of the vote to Negroes,
even to wealthy and educated free men of color;

the ebb and flow of Negro rights
in the Constitutions of 1864 and 1868;

the 1879 transfer of political power from police juries and the legislature
to the Governor;

the close election of 1892
and the 1896 victory for white supremacy;

the grandfather clause
and the complicated registration application form
in the Constitution of 1898;

the invalidity of the grandfather clause
and the consequent resort to Mississippi's understanding and interpreta-
tion clause;

the effectiveness of the white primary
as a means for disfranchising Negroes;

the invalidity of the white primary and the consequent need to revive
enforcement of the interpretation test;

the White League and the Citizens' Councils;
the Black League and the NAACP;

the Battle of Liberty Place in 1874 and the Ouachita voting purge of
1956—

these are all related members of a series,
all reactions to the same dynamics
that produced the interpretation test
and speak eloquently of its purpose.

. . . the interpretation test
is another grandfather clause.
Its purpose is rooted

in the same history.

It has the same objective
the delegates to the Constitutional Convention
of 1898 envisaged for the grandfather clause.

It is capable of producing
the same effective disfranchisement
of Negroes today
that the grandfather clause produced
sixty-five years ago.⁸⁹

Now isn't that really marvelous writing.

Judge Wisdom: I just want to say again what a pleasure it has been for me to see so many old friends and so many new friends, I hope. It has just been a joy working with the Civil Rights Division. I certainly enjoyed working with them.

Stephen Pollak: John Doar, Judge Wisdom, Al Blumrosen, Dave Rose, and Bill Eskridge, thank you for this panel. It was so rewarding to be present and to hear you. Thank you.

The next item on our agenda is to hear from Monica Gallagher respecting an announcement about David L. Norman. Monica is distinguished as the Associate Solicitor for Fair Labor Standards in the Department of Labor, distinguished by her service in the Civil Rights Division, distinguished by her graduation at the top of her class at the Washington University Law School, and distinguished by my hiring her into the Division, which gives me distinction.

Monica Gallagher: Thank you. What a fabulous morning! I knew it would be. I knew with these stars that we have had the honor to hear that many people would be saying to themselves: "Where is David Norman? What's going on?" I thought it was fair and appropriate to describe what is going on. David is very sick. He has Alzheimer or some Alzheimer-like degenerative brain disease. He can barely recognize people on occasion. He doesn't understand language much at all. He is at the Washington Home which is a very nice nursing home, not too far from here on Upton Street NW near Wisconsin. It's fine for him to have visitors, but it's difficult because he probably will not recognize you.

Steve asked me to say a few words about Dave's history in the Civil Rights Division, and I'm honored to do that. As with many of us, David had his first job after law school in the Justice Department. He came to the Criminal Division in

89. *Id.* at 380-81; *see supra* note 10 and accompanying text.

the Civil Rights Section in 1956. He became one of the charter members of the Civil Rights Division when it was formed in 1957. And he was promoted up the career level ladder from his GS-7 level—which he constantly told me he was hired at and earned \$3525 a year, by way of telling me that we were all very well paid and ought to stop complaining—through the various career attorney grades and in 1971 gave up his career status to become Assistant Attorney General in the second half of the Nixon Administration. He did his best for civil rights and was figured out as a career civil rights attorney wolf disguised in conservative Republican rhetoric. The administration figured that out and decided to unload him quietly on the Superior Court of District of Columbia, which they did. He served there for ten years until his retirement.

David loved the Civil Rights Division—its work, its people—and he especially loved devising the theories to make the government's position seem inevitable and incontrovertible. He loved to capture the phrases that would turn the arguable into the unavoidable. He loved thinking about our difficult problems, both legal and practical, and figuring something out about them. As the mix of the Division's work changed, particularly in implementing the Civil Rights Act of 1964, he was responsible for designing the two major structural reorganizations which were planned with a view to making us more effective. As Brian said, David was responsible for the idea of turning the school desegregation program into a program of statewide cases after he saw *Lee v. Macon County*⁹⁰ as an opportunity to make that effort more efficient. He is widely credited with inventing the freezing theory⁹¹ which is now pretty much a relic. He is credited with persuading the Supreme Court to decide nine to nothing that an illiteracy test given in the context of unequal education was inherently discriminatory⁹² even when the same court had decided nine to nothing the other way around a few years earlier.

Many of you will have memories of other creative things that he did. Certainly I do. He hired a lot of us, fired a few of us, corrected a lot of our work over many years, and taught us a lot about all kinds of things: facts, theory, and lawyering. He did set a wonderful example, both of dedication and of overcoming obstacles. I think most of all he cared enormously about the work of the Civil Rights Division and about the objective of equality. That is something he never forgot until he literally forgot everything. I'm sure you know he would have been here if he had been himself and if he could. I know that I'm not the only one who's thinking of him today.

90. *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd sub nom. Wallace v. United States*, 389 U.S. 215 (1967) (ordering statewide desegregation); *see supra* note 28 and accompanying text.

91. *See United States v. Atkins*, 323 F.2d 733, 743-44 (5th Cir. 1963) (describing "freezing").

92. *Gaston County, North Carolina v. United States*, 395 U.S. 285 (1969).

Stephen Pollak: Thank you Monica. It's important for us to remember David and his great contribution and to remember other colleagues who can't be with us. Our concluding comments are by Burke Marshall, who is the father of the Civil Rights Division and who we revere and love. He came to the Division after having been a marvelous antitrust lawyer. I say that because we live in a world where people think the only people who can do anything are the people who have done it forever. Burke, of course proved he could do civil rights just as he could take on any other assignment. He headed the Division from 1961, at the beginning of the administration of President John Kennedy, through early 1965. He has held distinguished positions both with the IBM Corporation and then at the Yale Law School, where he is now Professor Emeritus. We are honored to have you, Burke, and anxious to hear what you want to tell us.

Burke Marshall: I had to take this chance to sit in this seat because I've always wanted to sit in Judge Wisdom's seat. This is an unrivaled opportunity for me. This has been a wonderful morning for me and for I'm sure all of you. I could not possibly summarize all the notes that I made with respect to the issues that are confronting the Civil Rights Division now. They are quite detailed both with respect to education and with respect to employment. Of course we didn't mention the effects of *Shaw v. Reno*,⁹³ the difficulties enforcing the 1968 Housing Act,⁹⁴ the complications of getting into the Americans with Disabilities Act,⁹⁵ and the enormously expanded jurisdiction and authority of the Civil Rights Division.

I just wanted to make, in conclusion, a couple of comments—maybe three. Bill Eskridge just taught me how to count my comments. I'm not going to number them. When I came to the Civil Rights Division and when I worked with some of you, our mission was clear. It makes things easy if you have a very clear mission. Our mission was clearly to dismantle the system that Judge Wisdom described in his Louisiana decision that John just read to you, which was endemic in a large part of the country. So that was our mission. The tools that we had in 1961 were just two statutes, the 1957 and the 1960 Civil Rights Acts. Those two statutes did two things. They set up the Division and they gave the Division the authority to bring voting cases. So that was our authority. What we came to do, in the years that I was there, went far beyond that because we got deeply involved in what Judge Wisdom called the job of "making *Brown* sink in." That had become a reality for the school districts, the governors, the sheriffs, and the states that thought it would never become a reality in their districts on their watches.

93. 113 S.Ct. 2816 (1993).

94. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601-3631 (1988, Supp. I 1989 & Supp. II 1990).

95. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (Supp. II 1990)).

So we had that job, in addition to the enormously difficult job of trying to make voting rights. Voting rights litigation in those days was county by county, registrar by registrar, contempt action by contempt action. When one of the registrars refused to comply with an order, as Judge Wisdom will remember, we spent days in Hattiesburg trying to get Theron Lynd⁹⁶ to comply with the Fifteenth Amendment and with a court order directing him to comply with the Fifteenth Amendment. So that was arduous litigation and that's what we had the job to do. We could not do that without the assistance of Congress. So it became clear by 1963—really it was clear before that—but that became the opportune moment to enlist Congress in that effort, hence the 1964 effort and the 1965 Act. But my point here is simply that the mission of the Civil Rights Division and the world that the Civil Rights Division wanted to see at the end of its term was very clear to us.

Now it seems to me that the Civil Rights Division has to redefine its mission because its mission is diffused by the diversity of interests and diversity of problems that it has to deal with; and because on the racial front there are two overarching problems that are related to each other but which have become clear in the discussion this morning and are very difficult to deal with by law.

One problem is the connections and interconnections between residential segregation and all other rights. In what was talked about this morning, the intertwining of residential segregation and school segregation is clear as crystal. The Department has made some effort to do something about it. The *Yonkers*⁹⁷ case is still going on; it hasn't cleanly been resolved to this day. It is also clear that there is such an intertwine between residential segregation, as was mentioned this morning, and jobs so that you cannot bring about true integration, true inclusion in the work force for black Americans and latino Americans, without doing something somewhere about residential segregation.

The other related problem is the people left behind. The people left behind are people that are untouched by all the statutes that the Civil Rights Division has at its disposal to try to deal with racial problems of this country. They are the people in the inner cities that are growing up without educational hope; without economic hope; without law hope, just in terms of crime and crime abatement; without any escape so that it appears to go on generation after generation. There are millions of Americans who are identified both by economic class and by race and are left out and left behind.

Now whose job is it to focus on them? The only place that seems to be able to focus on that, or should focus on that is the Civil Rights Division in the Department of Justice. So at least some definition of what the goal and the mission of

96. *United States v. Lynd*, 321 F.2d 26 (5th Cir. 1963).

97. *Spallone v. United States*, 493 U.S. 265 (1990); *see supra* note 46 and accompanying text.

the Civil Rights Division is sort of equivalent to what I have described and is perfectly clear to me.

I was asked to give some concluding comments on the panel presentation. Those are my concluding comments other than to say—it was grand.

Stephen Pollak: Thank you Burke. We will make certain that those remarks are placed before the persons running the Division and the Department of Justice.

I want to make two announcements. Judge Walter Gorman of Rhode Island, in Washington has made a contribution to the Civil Rights Division Association of this bit of history, for which we thank him. It's not as old as it should be. It's dated the Marion Times Standard Thursday, October 31, 1946: *Vote to Keep White Supremacy in Alabama*. It's signed by Guester T. McCorvey, Chairman of the State Democratic Executive Committee of Alabama. One of the things that the Civil Rights Division Association aspires to do is to assemble pieces of history about the work, issues, mission, accomplishments, and failures if there are any (and I'm sure there are) of the Civil Rights Division and the history of which it is a part. What we will do with these pieces and histories, including the video tape of the morning session, we don't really know. But I'm sure that our all-knowing board of directors will work it out.

The other thing that I want to say is that on Monday at 2:00 p.m., in the Great Hall of the Department of Justice, there will be a symposium on the 40th anniversary of *Brown v. Board Education*. I believe the sponsors of the program include the National Bar, the Bar Association of the District of Columbia, and the Department of Justice, and you are all invited. There will be illustrious participants including Burke Marshall, Judge Wisdom and others whose names I just don't have. I think William T. Coleman, Chairman of the NAACP Legal and Educational Defense Fund is to be the keynote speaker of this session.

Finally, thank you for coming. It was a grand morning.

APPENDIX
SOME NOTES ON STATE AFFIRMATIVE ACTION IN EMPLOYMENT*
Alfred W. Blumrosen**

Twenty-two years ago, when the Department of Justice was given responsibility for bringing Title VII actions against state and local governments, there were major unanswered questions of statutory interpretations and of proof of employment discrimination. These questions have, in important respects, been answered over the years, importantly in the *Hazelwood School*¹ and *Teamster*² cases which outlined the statistical proof necessary to prove intentional discrimination.

Today, a major issue facing the Department is to clarify the conditions under which state and local governments may take affirmative action in employment and the nature of the actions they may take. A State may take affirmative action to correct its own history of discrimination in employment against minorities and women, and to avoid engaging in current discrimination.³ But beyond that general proposition, there is genuine confusion arising from two seemingly inconsistent standards—or definitions of discrimination—under which state governments must operate. The Courts of Appeals assume that the legal standard to measure affirmative action programs by state and local government is the “strict scrutiny” test of *City of Richmond v. J.A. Croson*.⁴

This analysis limits the extent to which States may take affirmative action. The narrower the concept of discrimination, the less affirmative action will be viewed as an appropriate remedy. Conversely, the broader the concept of discrimination, the wider the range for appropriate affirmative action.⁵

* Distributed at the Department of Justice and the Civil Rights Act of 1964 Symposium on May 14, 1944.

** Thomas A. Cowan, Professor of Law, Rutgers, the State University of New Jersey; B.A., J.D., University of Michigan; Chief of Conciliations, Director of Federal State Relations, EEOC, 1965-76; Consultant to Chair, EEOC, 1977-79, concerning Uniform Guidelines on Employee Selection Procedures, Affirmative Action Guidelines, agency procedures and organization; Special Attorney, Civil Rights Division, U.S. Department of Justice, 1968; Consultant to OFCCP, 1969-71; Counsel to NAACP on amicus brief in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and in *NAACP v. Edwin Meese, III*, 615 F. Supp. 200 (D.D.C. 1985).

1. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).
2. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).
3. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *see City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *United States v. Paradise*, 480 U.S. 149 (1987); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

4. 488 U.S. 469 (1989).

5. ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* 254 (1993). The most recent example is the May 4, 1994 opinion of the Eleventh Circuit in *Ensley Branch, NAACP v. Seibels*, 20 F.3d 1489 (11th Cir. 1994), *op. withdrawn, substituted op.*, 31 F.3d 1548 (11th Cir. 1994), a case which has been going on for more than 20 years.

The first standard which governs state action is that provided by the Fourteenth Amendment. That Amendment prohibits States from engaging in intentional discrimination because of race.⁶ The Supreme Court does not require that a State prove that it had discriminated or to admit that it had done so in order to take affirmative action. Rather, the Court requires that States have a “strong basis in evidence” that would justify that conclusion.

What kind of evidence would show that it was likely that the State had intentionally discriminated? Aside from anecdotal evidence, the answer is statistics which show a pattern of intentional discrimination. The Supreme Court, in cases brought by the Department of Justice, has established the statistical method which can demonstrate a pattern of intentional discrimination.⁷ That method demonstrates that a difference in employment and promotion of minorities (or women) is not likely to be the result of random factors. This is demonstrated by a showing that there is less than one chance in twenty that the pattern of employment was the result of chance. When this is demonstrated, we say that there is “statistical significance,” and will attribute the result to an intention to discriminate. All of this is relatively straightforward.

But there is another—and different—standard which also governs state actions. In 1972, Congress amended Title VII of the Civil Rights Act of 1964 to cover the employment activities of state and local governments.⁸ In the previous year, the Supreme Court had adopted the principle that employment practices which had a disparate impact on minorities (or women) and were not justified by business necessity were discriminatory and illegal.⁹ Under this principle, once the consequences of an employment practice are shown to be different for whites and minorities (or men and women), the employer must demonstrate business necessity, or else change the practice.¹⁰ It is not necessary to prove intent or to establish “statistical significance” to maintain a case under this principle. It is only necessary to convince a court that the differences are “important” enough to be

6. *Washington v. Davis*, 426 U.S. 229 (1976). The Amendment does not prohibit States from acting in ways which have a disparate impact on racial minorities. Proof of such a disparate impact may be some evidence of an intent to discriminate, but it is not sufficient. The state action to violate the Fourteenth Amendment must have been taken “because” of the prohibited factor, not just in disregard of it. *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979).

7. *Hazelwood*, 433 U.S. 299 (1977); *Teamsters*, 431 U.S. 324 (1977).

8. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 5 U.S.C.A. §§ 5108, 5314, 5315, 5316 (West 1980 & Supp. 1995); 42 U.S.C.A. §§ 2000e, 2000e-1-2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17 (West 1994)).

9. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The *Griggs* opinion was discussed in the Congressional Committee reports on the 1972 act. See BLUMROSEN, *supra* note 5, at 147-49.

10. Disparate impact is generally demonstrated by comparing the relevant segment of the employer’s workforce with the pool of basically qualified persons who can be considered for the position in question. This principle protects the employer from any obligation to hire unqualified persons.

remedied.¹¹ The fact that these differences might have been produced by “chance” loses its significance since the employer is required by the Uniform Guidelines on Employee Selection Procedures to “know” the consequences of its selection processes. This knowledge then can provide the basis for a decision to defend or to modify the system, sometimes by affirmative action. In the interests of simple administration, the federal agencies have adopted the so called “four-fifths” or “eighty percent” rule which states that if the selection (or promotion) rates for minorities or women are less than eighty percent of that of the rate of whites (or males), there is presumptively disparate impact, so that the employer must keep records and justify on the grounds of business necessity.¹² All of this jurisprudence has also been worked out over the last decade and a half.

Up to this point then, we have two bodies of law; the Fourteenth Amendment which requires strict scrutiny of state action which is to be based on “strong evidence” of an intent to discriminate, which in turn requires that the differences in selection rates for minorities and whites be “statistically significant” and the remedial actions be “narrowly tailored,” and the Title VII standard which requires that state actions not have disparate impact on minorities or women unless justified by “business necessity,” with disparate impact proved by differences which are viewed as important, but not necessarily as statistically significant, where the federal administrative agencies have adopted the “four-fifths” or “eighty percent” rule, and the remedial action should not “unnecessarily trammel” white or male interests.

The question then becomes which set of rules are applicable to the states? In 1972, when Congress acted, it seemed quite probable that the Fourteenth Amendment would be interpreted to regulate the discriminatory effects of state action, regardless of the intent of the State. The Supreme Court had decided a case on that basis in 1971.¹³ In 1972, at least one court of appeals had also decided that the Fourteenth Amendment prohibited state employment practices with disparate impact.¹⁴ Therefore, the extension of Title VII to the States may not have appeared to create conflict between the obligations of the Fourteenth Amendment and those of Title VII. In 1976, in *Washington v. Davis*, the Supreme

11. See *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 995-96 n.3 (1988). The level of proof may be less than that “gross disparity” necessary to make a case of intentional discrimination. See *Shidaker v. Tisch*, 833 F.2d 627, 631 (7th Cir. 1986); *Page v. U.S. Indus.*, 726 F.2d 1038, 1046 (5th Cir. 1984).

Justice O'Connor has stated that, “it is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.” *Watson*, 487 U.S. at 992. This concern is most relevant in connection with discrimination in recruitment, but affirmative action in this area has never been considered intrusive of the rights of others. In connection with hiring and promotion decisions, Justice O'Connor's concern seems less on point because the pool, either of applicants or employees, is sufficiently well-defined that a disparate selection rate would appropriately call for an explanation.

12. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978).

13. *Palmer v. Thompson*, 403 U.S. 217 (1971).

14. *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

Court decided that the Fourteenth Amendment prohibited only intentional discrimination.¹⁵ *Washington v. Davis* created the inconsistency between Fourteenth Amendment and Title VII jurisprudence.

This difference was sharpened in succeeding years. In 1977, the Supreme Court applied the disparate impact doctrine to state government, and has done so on a number of occasions since.¹⁶ In 1978, in *Regents of University of California v. Bakke*, the Supreme Court refused to allow a set aside of seats for minority students under the Fourteenth Amendment.¹⁷ But the following year, in *United Steelworkers v. Weber*, the Court allowed private employers broader leeway to take affirmative action under Title VII upholding a set aside of half of the seats in a training program for minorities.¹⁸ The EEOC also authorized such action in its guidelines issued that year.¹⁹

In 1986, the Court applied a Fourteenth Amendment analysis to local government action in *Wygant v. Jackson Board of Education*,²⁰ but in the following year, in *Johnson v. Transportation Agency*,²¹ the Court applied a *Weber* type analysis to a state affirmative action program.²²

In 1989, the Court sharpened the conflict between the Fourteenth Amendment requirement for affirmative action and that under Title VII by holding that the Amendment required "strict scrutiny" of any use of race by a State, including its use in connection with affirmative action programs.²³ This "strict scrutiny" would examine whether there had been evidence of intentional discrimination by the State, thus reinforcing the notion that a statistical basis for affirmative action would have been found in "statistical significance" which precluded the likelihood that "chance" produced the result.²⁴

15. *Washington v. Davis*, 426 U.S. 229 (1976).

16. See *Johnson*, 480 U.S. 616 (1987); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 337 (1977) (upholding affirmative action based on "manifest imbalance").

17. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

18. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

19. 29 C.F.R. § 1608 (1979). On the effect of these guidelines, see Alfred W. Blumrosen, *The Binding Effect of Affirmative Action Guidelines*, 1 LABOR LAW. 261 (1985).

20. 476 U.S. 267 (1986).

21. 480 U.S. 616 (1987).

22. Justice Scalia, frustrated by the failure of Mr. Johnson to claim a violation of the Fourteenth Amendment, would have rejected the *Weber* analysis on statutory grounds, since he could not reach the constitutional question. *Id.*

23. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

24. Justice O'Connor is particularly concerned that "chance" not be included within the scope of the disparate impact doctrine. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 992 (1988). However, where the employer knows that the chances are that a particular practice will exclude minorities or women, the fact that it operates through unidentified, and perhaps unidentifiable, mechanisms we call "chance" should not affect its liability. The disparate impact doctrine contains other limitations which operate to protect employers against unfair imposition of liability, such as the requirement that the disparate impact be measured by comparing the qualified work force with the employer's workforce.

The federal court opinions since then have attempted valiantly to make a coherent whole of this body of law. At the same time they recognize the "difficult and often confusing standards that have characterized so many of the Supreme Court's pronouncements regarding discrimination."²⁵ For example, the Tenth Circuit has stated the difference between the constitutional and Title VII theories as follows:

The purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination. . . . The level of proof necessary to justify the considerations of race in an employer's hiring practices, however, differs depending on whether the challenge invokes the Equal Protection Clause or Title VII. Under Title VII, an affirmative action plan must be justified by the existence of a "manifest imbalance" in a traditionally segregated job category. . . . Once this imbalance is demonstrated, the court must also consider whether the rights of the discriminatee are "unnecessarily trammled" by the affirmative action plan. . . . By contrast, review of a claim of an equal protection violation is made under the more demanding "strict scrutiny" analysis. . . . Under this standard, the preference given to minorities in the District's layoff decisions must be justified by a compelling governmental interest that is achieved only through narrowly tailored means.²⁶

In a footnote to this statement, the court continues:

Because plaintiff has made both equal protection and Title VII claims, *defendant may prevail on this appeal only if its conduct can pass muster under the more probing strict scrutiny analysis*. Although courts normally avoid resolution of constitutional issues when the case may be decided on nonconstitutional grounds, the interrelatedness of the constitutional and statutory issues in this case persuade us to review the trial court's conclusions under both the constitutional and statutory standards.²⁷

25. *Cunico v. Pueblo Sch. Dist.*, 54 F.E.P. 88, 99 (10th Cir. 1990).

26. *Id.* at 93.

27. *Id.* (emphasis added). The result of this court's approach is that the equal protection analysis rather than the Title VII analysis prevails. See *Billish v. City of Chicago*, 58 F.E.P. 1269, 1275 (7th Cir. 1992) (providing the same analysis); see also *Aiken v. City of Memphis*, 63 F.E.P. 721 (6th Cir. 1993) (providing the same analysis, but finding justification for the affirmative action program in using the disparate impact analysis); *Officers for Justice v. Civil Service Comm'n of the City of San Francisco*, 62 F.E.P. 868 (9th Cir. 1993) (using both analyses, and upholding the "banding" of scores by the civil service commission).

The result of this analysis is that the “intent plus strict scrutiny standard” rather than the disparate impact standard governs the decision. Given the dual standards recognized by the courts, it is no wonder that states wish to clarify the conditions under which affirmative action may take place. Does the State have to have “strong evidence” of prior intentional discrimination? Or must it show no more than a “manifest imbalance” in the relevant work force? And, whichever it must show, does it have to then limit itself to a “narrowly tailored” remedy, or may it use affirmative action which does not “unnecessarily trammel” the interests of white (or male) employees?

These types of questions are usually answered by the Supreme Court. Obviously, the most recent Eleventh Circuit opinion involving Birmingham police and fire departments provide an opportunity for court review, and I hope the Department will examine it carefully to determine whether to seek certiorari.²⁸

The question of whether the Title VII or Fourteenth Amendment standard should govern state action may have been clarified by the enactment of the Civil Rights Act of 1991.²⁹ The 1991 Act recognized and supported the concept of disparate impact which had been adopted by the Supreme Court in *Griggs v. Duke Power Co.*³⁰ In 1989, in *Wards Cove Packing Co. v. Atonio*, the Supreme Court had limited the *Griggs* principle in several respects.³¹ The Congress restored the *Griggs* principle as it had existed before the *Wards Cove* case.³² This was the first time that Congress itself had explicitly recognized the “disparate impact” principle of employment discrimination law, even though the courts had been applying it for twenty years, and the congressional committee reports concerning the 1972 Act, which applied Title VII to the States, recognized and approved of the “new” doctrine.³³

In addition, the Congress provided that, “nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.”³⁴

The Congress was aware that its new statute applied to public employment. One of the issues which the 1991 Act addressed was the circumstance under which consent decrees providing for affirmative action in public employment could be challenged. *Martin v. Wilks*, involved a challenge by white fire fighters

28. See *Ensley Branch, NAACP*, 20 F.3d at 1489.

29. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

30. 401 U.S. 424 (1971).

31. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). In *Wards Cove*, the Court eased the standards which would justify a practice with disparate impact from “business necessity,” to a legitimate business reason, and shifted the burden of persuasion on the issue from the employer to the complaining workers.

32. BLUMROSEN, MODERN LAW, *supra* note 5, at 425, n.52.

33. *Id.* at 147-49.

34. Pub. L. No. 102-166, Title I, § 116, 105 Stat. 1079 (42 U.S.C. § 1981 note (1991)).

in Birmingham to a consent decree which established an affirmative action program for hiring and promotion of public employees.³⁵

The Civil Rights Act of 1991 then represents the conscious congressional affirmation of the "disparate impact" doctrine of employment discrimination as applied to state and local governments.³⁶ If the "disparate impact" theory of discrimination is applicable, the state and local governments may take affirmative action in accordance with that theory, rather than in accordance with the "constitutional standard" of the Fourteenth Amendment. Thus, the basis for affirmative action may be a "manifest imbalance," and programs are justified if they are related to the problem to be addressed and do not unnecessarily trammel the interests of whites and males. In short, the Civil Rights Act of 1991 facilitates a resolution of the confusion arising from the dual standards of the Constitution and Title VII.

May Congress, in effect, change the meaning of the Fourteenth Amendment from the "intent to discriminate" standard to the "disparate impact" standard with respect to state employment? The precedents from the voting rights field indicate that the answer is: Yes. In the Voting Rights Act,³⁷ Congress had prohibited literacy tests, which the Supreme Court held were permitted by the Fourteenth Amendment, and had been upheld by the Court.³⁸ It has substituted the disparate effect doctrine for the intent doctrine in voting rights cases. These cases are justified on the grounds that section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment provided general legislative power for Congress to implement its view of the principles of the Amendments.³⁹

The analogy between Title VII and the Voting Rights Act is incomplete. Voting rights can be expanded for a group without formally interfering with voting rights of others. However, job opportunities may be allocated to different individuals depending on whether affirmative action is permitted or not. Thus white or male workers would argue that they have a Fourteenth Amendment right not to have race used against them, absent evidence of intentional discrimination by the State, a right which Congress is not authorized to take away under section 5 of the Fourteenth Amendment.

In the *City of Rome* voting rights case, the Supreme Court allowed the "effect" standard to replace the intent standard under the Fifteenth Amendment on the grounds that Congress sought to avoid the proof problems and delays inherent in the use of the concept of intentional discrimination.⁴⁰ This same rationale has been used by Justice O'Connor and Justice Powell to explain the

35. 490 U.S. 755 (1989).

36. Alfred W. Blumrosen, *Society in Transition IV: Affirmation of Affirmative Action Under the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 903 (1993).

37. 42 U.S.C.A. §§ 1971, 1973 (West 1994).

38. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

39. See *City of Richmond*, 488 U.S. 469, 490 (1989).

40. *City of Rome v. United States*, 446 U.S. 156 (1980).

disparate impact doctrine in employment discrimination law.⁴¹ The *Griggs* doctrine was born of an effort to avoid the “good faith” defense, which is inherent in the “intentional discrimination” doctrine.⁴²

Beyond that, Justice O’Connor’s opinion in the *Croson* case emphasizes the power of the federal government, in contrast to that of the States, to take actions to implement the congressional view of what the Fourteenth Amendment requires.

Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to “enforce” may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state powers over matters of race. Speaking of the Thirteenth and Fourteenth Amendments in *Ex parte Virginia*, the Court stated: “They were intended to be, what they really are, limitations on the powers of the states and enlargements of the power of Congress.”⁴³

The congressional power was further explicated in the *Metro Broadcasting* case involving preferences for minority radio station owners.⁴⁴ Thus, I suggest that the 1991 Act and its overt recognition by Congress of the disparate impact doctrine is constitutionally effective under the Fourteenth Amendment and the Commerce Clause to alter the web of rights and responsibilities in order to facilitate protection of minorities and women against discrimination. That being so, two matters follow: First, the law of affirmative action with respect to the private sector is fully applicable to the State, including the basis for identifying disparate impact. Secondly, the EEOC guidelines on affirmative action are fully applicable to immunize state governments from “reverse discrimination cases.”⁴⁵

These principles should be worked out in ways which will not leave the States which engage in affirmative action in legal limbo for another decade. The

41. See *Watson*, 487 U.S. 977 (1988). Justice Powell stated:

“Title VII jurisprudence has recognized two distinct methods of proof . . . In disparate impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of inference—by showing that an employer’s selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs.”

Connecticut v. Teal, 457 U.S. 440, 458-59 (1982) (Powell, J., dissenting).

42. ALFRED W. BLUMROSEN, *MODERN LAW*, *supra* note 5, at 112-14.

43. *City of Richmond*, 488 U.S. at 490 (citations and quotations omitted); see *Ex parte Virginia*, 100 U.S. 339 (1880).

44. *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990).

45. See Blumrosen, *supra* note 5.

Department should develop cases which will test the thesis suggested here and secure a resolution of the constitutional question. The Department should also examine whether the substantive rulemaking authority of the federal government, either within the Department or in other agencies, lies the power to adopt an interpretation by regulation to accomplish all or part of the analysis suggested here. Matters of affirmative action are becoming highly technical and the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* had indicated that where agencies have the power to issue substantive rules, their decisions within the range of permissible interpretation of regulatory statutes will be binding.⁴⁶ This is especially important since there are substantial numbers of federal judges on the lower courts who were appointed during presidents who were not in sympathy with affirmative action concepts.

* * *

It is a positive commentary on the last twenty years that we are now as much concerned with the law under which affirmative action may be taken as with the law which will establish state discrimination against minorities and women. The collapse of the Soviet State has demonstrated that human antagonisms based on ancient hatreds cannot be obliterated by the sword, or by forcing people to call each other "comrade." We have sought to address these issues through law. Twenty-five years ago, we said, "if we can go to the moon, we can eliminate discrimination." With all of our difficulties and uncertainties, we are building a society of which Jefferson—who was hostile to "every form of tyranny over the mind of man"⁴⁷—would have been proud.

46. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

47. Engraved on the Jefferson Memorial.