

**PANEL III:
THE EFFECTS TEST—FORCED QUOTAS OR
ELIMINATION OF RACISM?**

INTRODUCTION: THE AGE OF AMBIGUITY

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Please indulge me for a moment while I offer a quasi-autobiographical note. I was pleased to find in the Federalist Society brochure a section entitled "What People Are Saying About the Federalist Society," in which famous people speculated about the power and influence of the Federalist Society. A reference from *The New Republic* caught my eye: "The Federalist Society has evolved from a group of libertarian law students chatting over dinner into the right's primary instrument for capturing the legal establishment."¹ I regard myself as a relic of history. I was one of those libertarian law students chatting over dinner, before there was a Federalist Society, about how to capture the legal establishment or, failing that, how to secure high-paying jobs in the establishment. That was in 1978 when Spencer Abraham and about ten others of us in the Harvard Law School class of 1978 started the *Harvard Journal of Law & Public Policy*.²

Even then, in those pre-Evolutionary days, we perceived the need for an organization to supplement and strengthen the *Journal*. Yet we could not even agree on a name. Those of us chatting over dinner were actually a mixed group of traditional conservatives, judicial strict constructionists, and libertarian-objectivists. I suggested we become known as the Burke, Bork & Roark Society, but that was voted down as being too long for Harvard students to remember, let alone pronounce. Four years would pass before we could agree on a name, the Society could get started, and we could set about capturing the legal establishment.

The topic of this panel is the effects test. Let us move for a moment from the realm of the lawyer to that of the layman. To one unversed in legal theory, the history of the civil rights

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1. Coulson, *Federalist Pipers; Federalist Society*, THE NEW REPUBLIC, Dec. 1, 1986, at 23.

2. See Abraham & Eberhard, *Preface*, 1 HARV. J.L. & PUB. POL'Y v (1978).

movement might appear as follows. After World War II, in the late 1940s and 1950s, civil rights activism began to percolate just beneath the surface of public awareness. In the early 1960s, it erupted, becoming the focus of public attention. That decade marked a period of relatively easy moral identification. By that, I mean it was easy to distinguish the heroes from the villains. On the one hand, there were Martin Luther King, Jr., Rosa Parks, and Medgar Evers. On the other hand, there were Bull Connor, filibustering southern senators, and Klansmen. Some refer to this period in our history as the Romantic Age of Civil Rights. At some indiscernible point, however, the issues began to lose their sharp moral focus. Aligning the cast of civil rights characters into two camps became problematic. Before anyone realized it, the Romantic Age had passed into the Age of Ambiguity.

Returning now to the legal realm, I submit that the location for this pivot in civil rights history might well be the 1971 United States Supreme Court decision, *Griggs v. Duke Power Co.*³ In *Griggs*, the Supreme Court for the first time held that there could be liability under a civil rights statute for conduct that was not intentionally discriminatory. Indeed, from what we can glean from the decision, some of the defendant's employment policies were benevolent and progressive.⁴ Nonetheless, the Court unanimously held that where a company's employment practices operate to exclude a protected minority group, and where that company fails to show that the practices in question are significantly related to job performance, then good intentions or the absence of discriminatory intent will not shield the company from liability.⁵

By a process of social osmosis, issues decided at the judicial level filter down to public perception. After *Griggs*, the perception grew in the public mind that the Romantic Age of Civil Rights, if not over, was at least coming to an end. The villains were no longer easily identifiable. Instead, corporations or individuals following morally neutral practices might be held liable. In other words, liability had been divorced from immorality.

3. 401 U.S. 424 (1971).

4. See *Griggs*, 401 U.S. at 432 ("The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training.").

5. The actual vote was eight-to-zero. Justice Brennan did not participate.

Persuasive arguments can be made for and against the effects test that grew out of *Griggs*. A unanimous Supreme Court would not lightly adopt a test that some might think jettisoned the moral element of the civil rights movement. In presenting *Griggs* as a possible pivot, I do not personally take a position. That is not my role as moderator. Instead, I intend to lay a groundwork for the discussion that follows.