SYLLABUS AND COURSE OUTLINE

REQUIRED TEXT:

Friedman, Joel Wm., The Law of Employment Discrimination, Cases and Materials, 11th ed. 2017), and additional materials also posted on NYU Classes.

ADDITIONAL RESOURCES:

The following texts have been placed on reserve in the library and need not be purchased by students:

Lindemann, Barbara, Employment Discrimination Law (2012)

OFFICE HOURS:

Office hours are set for Wednesdays from 2:30-4:00 p.m. or otherwise by appointment. Students are advised to make appointments for regularly scheduled office hours by contacting my assistant, at the address set forth above, in order to avoid scheduling conflicts with students from this and other courses.

COURSE REQUIREMENTS:

Attendance: The Law School’s Academic Policies Guide provides, in part, as follows:
Rules of the American Bar Association, the New York State Court of Appeals, other state high courts, and the Law School itself all require regular classroom attendance. Students are advised that excessive absenteeism can result without warning in: 1) grade lowering or 2) denial of permission to complete course work and/or sit for the exam or receipt of a grade of WD (withdrawn) or FAB (failed for absence). Missing more than one-fifth of classes is presumptively excessive....

This standard of attendance will be observed as a requirement of the course.

Grades: Final grades will be based on (i) performance on an in-class examination and (ii) class participation. Failure to participate in class on a regular basis may result in the lowering of a final grade up to, but not more than, one full step. The quality of a student’s class participation may also be taken into account in enhancing final grading.

READING ASSIGNMENTS:

Reading Assignment No. 1 covering the first eight weeks of the course is set forth below. Additional reading assignments will be posted during the semester. Approximations for coverage are made on a weekly basis but may be revised if necessary during the semester to accommodate guest speakers or other events. Modifications to the reading assignments will be posted on NYU Classes and also communicated to students by e-mail.

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READING ASSIGNMENT NO. 1
Week 1:

January 17:

PART I: INTRODUCTION

A. Overview of Protection Provided by Federal Law


2. Prohibited Classifications

Race and color: 42 U.S.C.A. Sec. 1981, p. 1180; 781-783 ending after first full paragraph; p. 789, para. 1 and 2

Gender: pp. 397 [bottom] to 399 [top]; Sec. 701(k), p. 1157; pp. 434 [bottom] to 437

Religion: p. 364, para. 2; Sec. 701(j), p. 1157

National origin: p. 393, last para. to p. 394, top.

1Unless otherwise indicated, page references are to the assigned textbook for this course
Week 2:

January 22:

Age: Section 12, p. 1198

Disability: pp. 938, para. 2, to 939 (top); Sec. 512, p. 1221

3. Administration and Enforcement

Equal Employment Opportunity Commission

Excerpt, Avery, pp. 20-34, 38-40, NYU Classes


B. Coverage: Entities, Individuals, Decisions

Rinella, p. 18, Notes 1-4
Alexander, p. 31, Note 1

January 24:

Hishon, p. 37, Notes 1-3

Section D: Exemptions, p. 44
C. Why Regulate? The Policy Bases for Antidiscrimination Law


Week 3:

January 29:

PART II: THE STRUCTURE OF ANTI-DISCRIMINATION LAW

A. Legal Theories of Discrimination

   Teamsters v. United States, NYU Classes


   1. The Elements of Individual Disparate Treatment

      Slack v. Havens, NYU Classes
      Hazen v. Biggins, NYU Classes

   2. The Order and Allocation of Plaintiff’s Proof in Circumstantial Evidence Cases

      McDonnell Douglas, NYU Classes
January 31:

Burdine, p. 63
   Notes 1, 3, 4, 5, 6,

Hicks, p. 80
   Notes 1-5

Week 4:

February 5:

Reeves, p. 101, Notes 1-2

3. Proof of Causation

   a. Mixed-motive Cases

      Price Waterhouse, p. 110
      Causation and the Civil Rights Act of 1991, p. 136-37
      Desert Palace, p. 137, Notes 1-5

   b. After-acquired Evidence Cases

      McKennon, p. 146, Notes 1-3
February 7:

c. Findings of Fact and Appellate Review, pp. 154-155

4. The Defendant’s Case

a. Overview, p. 155

b. The Bona Fide Occupational Qualification Defense

   Johnson Controls, p. 156, Notes 1-3

   Wilson, p. 171, Notes 1-4

C. The Conceptual Framework for Disparate Impact Discrimination

1. The Theory of Disparate Impact

   a. Objective Criteria

      Griggs, p. 267

      Albemarle, NYU Classes

      Notes, 1-3, pp. 271-72

Week 5:
February 12:

b. The Plaintiff’s Case/The Bottom-Line Defense

   Teal, p. 276
   Notes 1-4, pp. 286-289

c. Subjective Criteria

   Note 5 (discussing Watson), p. 289

   Excerpt, Munroe, “The EEOC: Pattern and Practice Imperfect,”

2. Griggs Reconsidered

   Wards Cove, NYU Classes

   Disparate Impact and The Civil Rights Act of 1991, p. 272-75

February 14:

3. The Business Necessity Defense

   Zamen, p. 314
   Notes 1-2, pp. 320-21

   Lanning, I, NYU Classes
Week 6:

February 21: [LEGISLATIVE MONDAY–CLASS WILL MEET ON TUESDAY]

5. Challenging the Remedying of Disparate Impact

Ricci v. DeStefano, NYU Classes

D. Systemic Disparate Treatment Discrimination (including Statistical Proof Generally)

1. Circumstantial Proof of Discriminatory Motive

Teamsters, (skim pp. 1-6 for review only), NYU Classes, Week 3

2. Refining Statistical Proof

Hazelwood, p. 335
Notes 1-5, pp. 342-45
Olson’s Dairy, p. 346
Notes 1-3, pp. 350-52

Ottaviani, p. 352
Notes 1-3, pp. 361-63

February 23:

Statistical Proof (cont.)

3. The “Lack of Interest” Defense

EEOC v. Sears, NYU Classes

Vicki Schultz, “Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument”, NYU Classes

PART III: SELECTED PROBLEMS IN EMPLOYMENT DISCRIMINATION LAW INCLUDING UNIQUE EFFECTS ON PROHIBITED CLASSIFICATIONS

A. Religion

1. Accommodation

Hardison, p. 365
Week 7:

February 26:

2. Exemptions

   Mississippi College, p. 45

   Notes, 1-3, pp. 53-60

B. National Origin

   Espinoza, p. 387,

   Notes 1-5, pp. 391-95

C. Race and Color

   McDonald, p. 395

   Notes 1-4, pp. 396-97

D. Sex

   1. Sex-Plus Discrimination and Pregnancy
February 28:

Notes, 1-3, pp. 405-09

Section 701(k) of Title VII, p. 1157

Newport News, p. 409

Notes, 1-7, pp. 417-27

Week 8:

March 5:

2. Sex-Linked Factors

Manhart, p. 443

Notes, 1-3, pp. 448-449

3. The Family and Medical Leave Act, p. 427 [SKIM]

D. Harassment
1. Quid Pro Quo or Hostile Environment?

   Meritor, p. 183

   Note 1-7, p. 189-199

March 7:

2. Employer Liability

   Burlington, p.199

   Notes, 1-11, pp. 210-21

MARCH 12-14: SPRING BREAK
HAZEN PAPER CO. v. BIGGINS
507 U.S. 604 (1993)

Justice O'CONNOR delivered the opinion of the Court.

[Hazen Paper Company manufactures coated, laminated, and printed paper and paperboard. It is owned and operated by two cousins, petitioners Robert Hazen and Thomas N. Hazen. Walter F. Biggins was hired as technical director in 1977. He was fired in 1986, when he was 62 years old. Biggins sued, claiming to have been discharged in violation of both the Age Discrimination in Employment Act and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140. The company claimed that he had been fired for doing business with competitors. The case was tried to a jury, which rendered a verdict for Biggins on his ADEA claim and also found a violation of ERISA. The district court denied defendant's motion for a judgment n.o.v., and the court of appeals affirmed.]

In affirming the judgments of liability, the Court of Appeals relied heavily on the evidence that petitioners had fired respondent in order to prevent his pension benefits from vesting. That evidence, as construed most favorably to respondent by the court, showed that the Hazen Paper pension plan had a
10-year vesting period and that respondent would have reached the 10-year mark had he worked "a few more weeks" after being fired. There was also testimony that petitioners had offered to retain respondent as a consultant to Hazen Paper, in which capacity he would not have been entitled to receive pension benefits. The Court of Appeals found this evidence of pension interference to be sufficient for ERISA liability, and also gave it considerable emphasis in upholding ADEA liability. After summarizing all the testimony tending to show age discrimination, the court stated:

"Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire [respondent] before his pension rights vested and used the confidentiality agreement [that petitioners had asked respondent to sign] as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire [respondent]. If it were not for [his] age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. [Respondent] was fifty-two years old when he was hired; his pension rights vested in ten years

...The courts of appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority that is empirically correlated with age. We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age. We long have distinguished between "disparate treatment" and "disparate impact" theories of employment discrimination.

"Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics]. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . "Claims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory.

Teamsters v. United States, 431 U.S. 324, 335, n.15 (1977) (citation omitted) (construing Title VII of Civil Right Act of 1964). The disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear. "It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623 (a) (1) (emphasis added).By contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA, see Markham v. Geller, 451 U.S.
In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. Whatever the employer's decision-making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. As we explained in EEOC v. Wyoming, 460 U.S. 226 (1983), Congress promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact... Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers.

Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985). The employer cannot rely on age as a proxy for employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. Pension plans typically provide that an employee's accrued benefits will become nonforfeitable, or "vested," once the employee completes a certain number of years of service with the employer. See 1 J. Mamorsky, Employee Benefits Law § 5.03 (1992). On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of
one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age-based."

The instant case is illustrative. Under the Hazen Paper pension plan, as construed by the Court of Appeals, an employee's pension benefits vest after the employee completes 10 years of service with the company. Perhaps it is true that older employees of Hazen Paper are more likely to be "close to vesting" than younger employees. Yet a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is "close to vesting" would not constitute discriminatory treatment on the basis of age. The prohibited stereotype ("Older employees are likely to be ___") would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an accurate judgment about the employee – that he indeed is “close to vesting.”

We do not mean to suggest that an employer lawfully could fire an employee in order to prevent his pension benefits from vesting. Such conduct is actionable under § 510 of ERISA, as the Court of Appeals rightly found in affirming judgment for respondent under that statute. But it would not, without more, violate the ADEA. That law requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify further characteristics that an employer must also ignore. Although some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect, see McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (creating proof framework applicable to ADEA; employer must have “legitimate, nondiscriminatory reason” for action against employee), this reading is obviously incorrect. For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA.

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, cf. Metz, [v. Transit Mix Co., 828 F.2d, at 1208 (7th Cir. 1987)] (using "proxy" to mean statutory equivalence), but in the sense that the employer may suppose a correlation between the two factors and act accordingly. Nor do we rule out the possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status. Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service, see 1 Mamorsky, supra, at § 5.02[2], and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the
ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service.

Besides the evidence of pension interference, the Court of Appeals cited some additional evidentiary support for ADEA liability. Although there was no direct evidence of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect evidence: Respondent was asked to sign a confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision—here, that respondent had been disloyal to Hazen Paper by doing business with its competitors—is "unworthy of credence." But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present... We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation...
McDONNELL DOUGLAS CORP. v. GREEN
411 U.S. 792 (1973)

Justice POWELL delivered the opinion of the Court.

...Petitioner, McDonnell Douglas Corp., is an aerospace and aircraft manufacturer headquartered in St. Louis, Missouri, where it employs over 30,000 people. Respondent, a black citizen of St. Louis, worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964 when he was laid off in the course of a general reduction in petitioner’s work force.

Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated. As part of this protest, respondent and other members of the Congress on Racial Equality illegally stalled their cars on the main roads leading to petitioner’s plant for the purpose of blocking access to it at the time of the morning shift change. The District Judge described the plan for, and respondent’s participation in, the “stall-in” as follows:

[Five teams, each consisting of four cars would “tie up” five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake, raise all windows, lock the doors, and remain in their cars until the police arrived. The plan was to have the cars remain in position for one hour.

Acting under the “stall in” plan, plaintiff [respondent in the present action] drove his car onto Brown Road, a McDonnell access road, at approximately 7:00 a.m., at the start of the morning rush hour. Plaintiff was aware of the traffic problem that would result. He stopped his car with the intent to block traffic. The police arrived shortly and requested plaintiff to move his car. He refused to move his car voluntarily. Plaintiff’s car was towed away by the police, and he was arrested for obstructing traffic. Plaintiff pled guilty to the charge of obstructing traffic and was fined.]
On July 25, 1965, petitioner publicly advertised for qualified mechanics, respondent's trade, and respondent promptly applied for re-employment. Petitioner turned down respondent, basing its rejection on respondent's participation in the "stall-in."...

The District Court found that petitioner's refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities. The court concluded that nothing in Title VII or §704 protected "such activity as employed by the plaintiff in the 'stall in' and 'lock in' demonstrations."

On appeal, the Eighth Circuit affirmed that unlawful protests were not protected activities under §704(a), but reversed the dismissal of respondent's §703(a)(1) claim relating to racially discriminatory hiring practices. . . .

II

The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination. The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. Griggs v. Duke Power Co. [reproduced at p. 207]. As noted in Griggs, "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. . . ."

There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise. In this case, respondent, the complainant below, charges that he was denied employment "because of his involvement in civil rights activities" and "because of his race and color." Petitioner denied discrimination of any kind, asserting that its failure to re-employ respondent was based upon and justified by his participation in the unlawful conduct against it. Thus, the issue at the trial on remand is framed by those opposing factual contentions. . . .

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. In the instant case, we agree with the Court of Appeals that respondent proved a prima facie case. Petitioner sought mechanics, respondent's trade, and continued to do so after respondent's rejection. Petitioner, moreover, does not

6. Respondent has not sought review of this issue.
13. The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.
dispute respondent's qualifications and acknowledges that his past work performance in petitioner's employ was "satisfactory."

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.

The Court of Appeals intimated, however, that petitioner's stated reason for refusing to rehire respondent was a "subjective" rather than objective criterion which "carries little weight in rebutting charges of discrimination." This was among the statements which caused the dissenting judge to read the opinion as taking "the position that such unlawful acts as Green committed against McDonnell would not legally entitle McDonnell to refuse to hire him, even though no racial motivation was involved...." Regardless of whether this was the intended import of the opinion, we think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned "stall-in," designed to tie up access to and egress from petitioner's plant at a peak traffic hour. Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it. In upholding, under the National Labor Relations Act, the discharge of employees who had seized and forcibly retained an employer's factory buildings in an illegal sit-down strike, the Court noted pertinently: "We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct, — to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property. . . . Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression." NLRB v. Fansteel Corp., 306 U.S. 240, 255 (1939).

Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by §703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

14. We note that the issue of what may properly be used to test qualifications for employment is not present in this case. Where employers have instituted employment tests and qualifications with an exclusionary effect on minority applicants, such requirements must be "shown to bear a demonstrable relationship to successful performance of the jobs" for which they were used. Griggs v. Duke Power Co.
16. The trial judge noted that no personal injury or property damage resulted from the "stall-in" due "solely to the fact that law enforcement officials had obtained notice in advance of plaintiff's [here respondent's] demonstration and were at the scene to remove plaintiff's car from the highway."
17. The unlawful activity in this case was directed specifically against petitioner. We need not consider or decide here whether, or under what circumstances, unlawful activity not directed against the particular employer may be a legitimate justification reason for refusal to hire.
Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (C.A. 10 1970); Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co., and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 91-94 (1972). In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

The court below appeared to rely upon Griggs v. Duke Power Co., in which the Court stated: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." But Griggs differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and in the absence of proof or pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove.21

III

In sum, respondent should have been allowed to pursue his claim under § 703(a)(1). If the evidence on retrial is substantially in accord with that before us in this case, we think that respondent carried his burden of establishing a prima facie case of racial discrimination and that petitioner successfully rebutted that case. But this does

19. The District Court may, for example, determine, after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices." See Blumrosen, supra, at 92. We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to hire. Blumrosen, supra, n. 19, at 93.

21. It is, of course, a predictive evaluation, resistant to empirical proof, whether "an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer." But, in this case, given the seriousness and harmful potential of respondent's participation in the "still-in" and the accompanying inconvenience to other employees, it cannot be said that petitioner's refusal to employ lacked a rational and neutral business justification. As the Court has noted elsewhere: "Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust." Garner v. Los Angeles Board, 341 U.S. 716, 720 (1951).
not end the matter. On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application. . . .
International Brotherhood of Teamsters v. United States

Mr. Justice Stewart delivered the opinion of the Court.

This litigation brings here several important questions under Title VII of the Civil Rights Act of 1964. The issues grow out of alleged unlawful employment practices engaged in by an employer and a union. The employer is a common carrier of motor freight with nationwide operations, and the union represents a large group of its employees. The District Court and the Court of Appeals held that the employer had violated Title VII by engaging in a pattern and practice of employment discrimination against Negroes and Spanish-surnamed Americans, and that the union had violated the Act by agreeing with the employer to create and maintain a seniority system that perpetuated the effects of past racial and ethnic discrimination. In addition to the basic questions presented by these two rulings, other subsidiary issues must be resolved if violations of Title VII occurred—issues concerning the nature of the relief to which aggrieved individuals may be entitled.

I

The United States brought an action in a Tennessee federal court against the petitioner T.I.M.E.-D.C., Inc. (company), pursuant to § 707(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a). The complaint charged that the company had followed discriminatory hiring, assignment, and promotion policies against Negroes at its terminal in Nashville, Tenn. The Government brought a second action against the company almost three years later in a Federal District Court in Texas, charging a pattern and practice of employment discrimination against Negroes and Spanish-surnamed persons throughout the company's transportation system. The petitioner International Brotherhood of Teamsters (union) was joined as a
defendant in that suit. The two actions were consolidated for trial in the
Northern District of Texas.

The central claim in both lawsuits was that the company had engaged
in a pattern or practice of discriminating against minorities in hiring so-
called line drivers. Those Negroes and Spanish-surnamed persons who had
been hired, the Government alleged, were given lower paying, less desirable
jobs as servicemen or local city drivers, and were thereafter discriminated
against with respect to promotions and transfers. In this connection the
complaint also challenged the seniority system established by the collective-
bargaining agreements between the employer and the union. The Govern-
ment sought a general injunctive remedy and specific “make whole” relief
for all individual discriminatees, which would allow them an opportunity to
transfer to line-driver jobs with full company seniority for all purposes.

The cases went to trial and the District Court found that the Govern-
ment had shown “by a preponderance of the evidence that T.I.M.E.-D.C.
and its predecessor companies were engaged in a plan and practice of
discrimination in violation of Title VII.” The court further found that the
seniority system contained in the collective-bargaining contracts between
the company and the union violated Title VII because it “[operated] to
impede the free transfer of minority groups into and within the company.”
Both the company and the union were enjoined from committing further
violations of Title VII.

The Court of Appeals for the Fifth Circuit agreed with the basic
conclusions of the District Court: that the company had engaged in a
pattern or practice of employment discrimination and that the seniority
system in the collective bargaining agreements violated Title VII as applied
to victims of prior discrimination.

II

In this Court, the company and the union contend that their conduct
did not violate Title VII in any respect, asserting first that the evidence
introduced at trial was insufficient to show that the company engaged in a
“pattern or practice” of employment discrimination. The union further
contends that the seniority system contained in the collective-bargaining
agreements in no way violated Title VII. If these contentions are correct, it
is unnecessary, of course, to reach any of the issues concerning remedies
that so occupied the attention of the Court of Appeals.

A

Consideration of the question whether the company engaged in a
pattern or practice of discriminatory hiring practices involves controlling

3. Line drivers, also known as over-the-
road drivers, engage in long-distance hauling
between company terminals. They compose a
separate bargaining unit at the company.
Other distinct bargaining units include ser-
vicemen, who service trucks, unhook tractors
and trailers, and perform similar tasks; and
city operations, composed of dockmen, host-
lers, and city drivers who pick up and deliver
freight within the immediate area of a particu-
lar terminal. All of these employees were
represented by the petitioner union.
legal principles that are relatively clear. The Government’s theory of
discrimination was simply that the company, in violation of § 703(a) of
Title VII, regularly and purposefully treated Negroes and Spanish-sur-
named Americans less favorably than white persons. The disparity in
treatment allegedly involved the refusal to recruit, hire, transfer, or pro-
mote minority group members on an equal basis with white people,
particularly with respect to line-driving positions. The ultimate factual
issues are thus simply whether there was a pattern or practice of such
disparate treatment and, if so, whether the differences were “racially

As the plaintiff, the Government bore the initial burden of making out
a prima facie case of discrimination. Albemarle Paper Co. v. Moody, 422
U.S. 405, 425; McDonnell Douglas Corp. v. Green, supra, at 802. And,
because it alleged a systemwide pattern or practice of resistance to the full
enjoyment of Title VII rights, the Government ultimately had to prove
more than the mere occurrence of isolated or “accidental” or sporadic
discriminatory acts. It had to establish by a preponderance of the evidence
that racial discrimination was the company’s standard operating proce-
dure—the regular rather than the unusual practice.16

We agree with the District Court and the Court of Appeals that the
Government carried its burden of proof. As of March 31, 1971, shortly after
the Government filed its complaint alleging systemwide discrimination, the
company had 6,472 employees. Of these, 314 (5%) were Negroes and 257
(4%) were Spanish-surnamed Americans. Of the 1,828 line drivers, howev-
er, there were only 8 (0.4%) Negroes and 5 (0.3%) Spanish-surnamed
persons, and all of the Negroes had been hired after the litigation had
commenced. With one exception—a man who worked as a line driver at the
Chicago terminal from 1950 to 1959—the company and its predecessors did
not employ a Negro on a regular basis as a line driver until 1969. And, as

15. “Disparate treatment” such as is
alleged in the present case is the most easily
understood type of discrimination. The em-
ployer simply treats some people less favor-
ably than others because of their race, color,
religion, sex, or national origin. Proof of dis-
criminatory motive is critical, although it can
in some situations be inferred from the mere
fact of differences in treatment. See, e.g.,
Arlington Heights v. Metropolitan Housing
Dev. Corp., 429 U.S. 248, 265-68. Undoubt-
edly disparate treatment was the most obvi-
ous evil Congress had in mind when it enact-
ed Title VII. See, e.g., 110 Cong. Rec. 13088
(1964) (remarks of Sen. Humphrey) (“What
the bill does ... is simply to make it an
illegal practice to use race as a factor in
denying employment. It provides that men
and women shall be employed on the basis of
their qualifications, not as Catholic citizens,
not as Protestant citizens, not as Jewish citi-
zens, not as colored citizens, but as citizens of
the United States”).

Claims of disparate treatment may be
distinguished from claims that stress “dispa-
rate impact.” The latter involve employment
practices that are facially neutral in their
treatment of different groups but that in fact
fall more harshly on one group than another
and cannot be justified by business necessity.
Proof of discriminatory motive, we have held,
is not required under a disparate-impact the-
ory. Compare, e.g., Griggs v. Duke Power Co.,
401 U.S. 424, 439-32, with McDonnell Doug-
las Corp. v. Green, 411 U.S. 792, 802-06.
Either theory may, of course, be applied to a
particular set of facts.

16. The “pattern or practice” language
in § 707(a) of Title VII, was not intended as
a term of art, and the words reflect only their
usual meaning.
the Government showed, even in 1971 there were terminals in areas of substantial Negro population where all of the company’s line drivers were white. A great majority of the Negroes (83%) and Spanish-surnamed Americans (78%) who did work for the company held the lower paying city operations and serviceman jobs, whereas only 39% of the nonminority employees held jobs in those categories.

The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination. Upon the basis of this testimony the District Court found that “[n]umerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired.” Minority employees who wanted to transfer to line-driver jobs met with similar difficulties.

The company’s principal response to this evidence is that statistics can never in and of themselves prove the existence of a pattern or practice of discrimination, or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures. But, as even our brief summary of the evidence shows, this was not a case in which the Government relied on “statistics alone.” The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life.

In any event, our cases make it unmistakably clear that “[s]tatistical analyses have served and will continue to serve an important role” in cases in which the existence of discrimination is a disputed issue.... We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases.... Statistics are equally

17. In Atlanta, for instance, Negroes composed 22.38% of the population in the surrounding metropolitan area and 51.31% of the population in the city proper. The company’s Atlanta terminal employed 87 line drivers. All were white. In Los Angeles, 10.84% of the greater metropolitan population and 17.88% of the city population were Negro. But at the company’s two Los Angeles terminals there was not a single Negro among the 374 line drivers. The proof showed similar disparities in San Francisco, Denver, Nashville, Chicago, Dallas, and at several other terminals.

19. Two examples are illustrative:

George Taylor, a Negro, worked for the company as a city driver in Los Angeles, beginning in late 1966. In 1968, after hearing that a white city driver had transferred to a line-driver job, he told the terminal manager that he also would like to consider line driving. The manager replied that there would be “a lot of problems on the road ... with different people, Caucasian, etcetera,” and stated: “I don’t feel that the company is ready for this right now ... Give us a little time. It will come around, you know.” Mr. Taylor made similar requests some months later and got similar responses. He was never offered a line-driving job or an application.

Felisberto Trujillo worked as a dockman at the company’s Denver terminal. When he applied for a line-driver job in 1967, he was told by a personnel officer that he had one strike against him. He asked what that was and was told: “You’re a Chicano, and as far as we know, there isn’t a Chicano driver in the system.”
competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

In addition to its general protest against the use of statistics in Title VII cases, the company claims that in this case the statistics revealing racial imbalance are misleading because they fail to take into account the company’s particular business situation as of the effective date of Title VII. The company concedes that its line drivers were virtually all white in July 1965, but it claims that thereafter business conditions were such that its work force dropped. Its argument is that low personnel turnover, rather than post-Act discrimination, accounts for more recent statistical disparities. It points to substantial minority hiring in later years, especially after 1971, as showing that any pre-Act patterns of discrimination were broken.

The argument would be a forceful one if this were an employer who, at the time of suit, had done virtually no new hiring since the effective date of Title VII. But it is not. Although the company’s total number of employees apparently dropped somewhat during the late 1960’s, the record shows that many line drivers continued to be hired throughout this period, and that

20. Petitioners argue that statistics, at least those comparing the racial composition of an employer’s work force to the composition of the population at large, should never be given decisive weight in a Title VII case because to do so would conflict with § 703(j) of the Act, 42 U.S.C. § 2000e-2(j). That section provides:

"Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

The argument fails in this case because the statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer’s work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population. See, e.g., United States v. Sheet Metal Workers Local 96, 415 F.2d 123, 137 n.7 (8th Cir.). Considerations such as small sample size may, of course, detract from the value of such evidence, see, e.g., Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620–21, and evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant.

"Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." United States v. Ironworkers Local 96, 448 F.2d at 551.
almost all of them were white. To be sure, there were improvements in the company's hiring practices. The Court of Appeals commented that "T.I.M.E.–D.C.'s recent minority hiring progress stands as a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment." But the District Court and the Court of Appeals found upon substantial evidence that the company had engaged in a course of discrimination that continued well after the effective date of Title VII. The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it. Cf. Albemarle Paper Co. v. Moody, 422 U.S., at 413–23.23

The District Court and the Court of Appeals, on the basis of substantial evidence, held that the Government had proved a prima facie case of systematic and purposeful employment discrimination, continuing well beyond the effective date of Title VII. The company’s attempts to rebut that conclusion were held to be inadequate.24 For the reasons we have summarized, there is no warrant for this Court to disturb the findings of the District Court and the Court of Appeals on this basic issue.

23. The company’s narrower attacks upon the statistical evidence—that there was no precise delineation of the areas referred to in the general population statistics, that the Government did not demonstrate that minority populations were located close to terminals or that transportation was available, that the statistics failed to show what portion of the minority population was suited by age, health, or other qualifications to hold trucking jobs, etc.—are equally lacking in force. At best, these attacks go only to the accuracy of the comparison between the composition of the company’s work force at various terminals and the general population of the surrounding communities. They detract little from the Government’s further showing that Negroes and Spanish-surnamed Americans who were hired were overwhelmingly excluded from line-driver jobs. Such employees were willing to work, had access to the terminal, were healthy and of working age, and often were at least sufficiently qualified to hold city-driver jobs. Yet they became line drivers with far less frequency than whites. See, e. g., Pretrial Stipulation 14, summarized in 517 F.2d, at 512 n.24 (of 3,919 whites who held driving jobs in 1971, 1,802 (62%) were line drivers and 1,117 (38%) were city drivers; of 180 Negroes and Spanish-surnamed Americans who held driving jobs, 13 (7%) were line drivers and 167 (93%) were city drivers). In any event, fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the company’s inability to rebut the inference of discrimination came not from a misuse of statistics but from “the inexorable zero.”

24. The company’s evidence, apart from the showing of recent changes in hiring and promotion policies, consisted mainly of general statements that it hired only the best qualified applicants. But “affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.” Alexander v. Louisiana, 405 U.S. 626, 632.

The company also attempted to show that all of the witnesses who testified to specific instances of discrimination either were not discriminated against or suffered no injury. The Court of Appeals correctly ruled that the trial judge was not bound to accept this testimony and that it committed no error by relying instead on the other overwhelming evidence in the case. The Court of Appeals was also correct in the view that individual proof concerning each class member’s specific injury was appropriately left to proceedings to determine individual relief. In a suit brought by the Government under § 707(a) of the Act the District Court’s initial concern is in deciding whether the Government has proved that the defendant has engaged in a pattern or practice of discriminatory conduct.
B

The District Court and the Court of Appeals also found that the seniority system contained in the collective-bargaining agreements between the company and the union operated to violate Title VII of the Act.

For purposes of calculating benefits, such as vacations, pensions, and other fringe benefits, an employee's seniority under this system runs from the date he joins the company, and takes into account his total service in all jobs and bargaining units. For competitive purposes, however, such as determining the order in which employees may bid for particular jobs, are laid off, or are recalled from layoff, it is bargaining unit seniority that controls. Thus, a line driver's seniority, for purposes of bidding for particular runs and protection against layoff, takes into account only the length of time he has been a line driver at a particular terminal. The practical effect is that a city driver or serviceman who transfers to a line-driver job must forfeit all the competitive seniority he has accumulated in his previous bargaining unit and start at the bottom of the line drivers' "board."

The vice of this arrangement, as found by the District Court and the Court of Appeals, was that it "locked" minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers. While the disincentive applied to all workers, including whites, it was Negroes and Spanish-surnamed persons who, those courts found, suffered the most because many of them had been denied the equal opportunity to become line drivers when they were initially hired, whereas whites either had not sought or were refused line-driver positions for reasons unrelated to their race or national origin.

The linchpin of the theory embraced by the District Court and the Court of Appeals was that a discriminatee who must forfeit his competitive seniority in order finally to obtain a line-driver job will never be able to "catch up" to the seniority level of his contemporary who was not subject to discrimination. 27 Accordingly, this continued, built-in disadvantage to the prior discriminatee who transfers to a line-driver job was held to constitute a continuing violation of Title VII, for which both the employer and the union who jointly created and maintain the seniority system were liable.

The union, while acknowledging that the seniority system may in some sense perpetuate the effects of prior discrimination, asserts that the system

27. An example would be a Negro who was qualified to be a line driver in 1958 but who, because of his race, was assigned instead a job as a city driver, and is allowed to become a line driver only in 1971. Because he loses his competitive seniority when he transfers jobs, he is forever junior to white line drivers hired between 1958 and 1970. The whites, rather than the Negro, will henceforth enjoy the preferable runs and the greater protection against layoff. Although the original discrimination occurred in 1958—before the effective date of Title VII—the seniority system operates to carry the effects of the earlier discrimination into the present.
is immunized from a finding of illegality by reason of § 703(h) of Title VII, 42 U.S.C. § 2000e–2 (h), which provides in part:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system, ... provided that such differences are not the result of an intention to discriminate because of race ... or national origin...."

... The issues thus joined are open ones in this Court. 28 We considered § 703(h) in Franks v. Bowman Transportation Co., 424 U.S. 747, but there decided only that § 703(h) does not bar the award of retroactive seniority to job applicants who seek relief from an employer's post-Act hiring discrimination. We stated that "the thrust of [§ 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." 424 U.S., at 761. Beyond noting the general purpose of the statute, however, we did not undertake the task of statutory construction required in this litigation.

Because the company discriminated both before and after the enactment of Title VII, the seniority system is said to have operated to perpetuate the effects of both pre- and post-Act discrimination. Post-Act discriminatees, however, may obtain full "make whole" relief, including retroactive seniority under Franks v. Bowman, supra, without attacking the legality of the seniority system as applied to them. Franks made clear and the union acknowledges that retroactive seniority may be awarded as relief from an employer's discriminatory hiring and assignment policies even if the seniority system agreement itself makes no provision for such relief. 424 U.S., at 778–79. Here the Government has proved that the company engaged in a post-Act pattern of discriminatory hiring, assignment, transfer, and promotion policies. Any Negro or Spanish-surnamed American injured by those policies may receive all appropriate relief as a direct remedy for this discrimination. 29

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28. Concededly, the view that § 703(h) does not immunize seniority systems that perpetuate the effects of prior discrimination has much support. It was apparently first adopted in Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). The court there held that "a departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system," Id. at 517 (first emphasis added). The Quarles view has since enjoyed wholesale adoption in the Courts of Appeals. ... Insofar as the result in Quarles and in the cases that followed it depended upon findings that the seniority systems were themselves "racially discriminatory" or had their "genesis in racial discrimination," 279 F. Supp., at 517, the decisions can be viewed as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption.

30. The legality of the seniority system insofar as it perpetuates post-Act discrimination nonetheless remains at issue in this case,
What remains for review is the judgment that the seniority system unlawfully perpetuated the effects of pre-Act discrimination. We must decide, in short, whether § 703(h) validates otherwise bona fide seniority systems that afford no constructive seniority to victims discriminated against prior to the effective date of Title VII, and it is to that issue that we now turn.

The primary purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S., at 800. To achieve this purpose, Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Id. at 431. Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.

One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination. As the Court held in Griggs: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

Were it not for § 703(h), the seniority system in this case would seem to fall under the Griggs rationales. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices." But both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them....

in light of the injunction entered against the union. Our decision today in United Air Lines, Inc. v. Evans, is largely dispositive of this issue. Evans holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been the subject of a timely charge by the discriminatee. Here, of course, the Government has sued to remedy the post-Act discrimination directly, and there is no claim that any relief would be time barred. But this is simply an additional reason not to hold the seniority system unlawful, since such a holding would in no way enlarge the relief to be awarded. See Franks v. Bowman Transportation Co., 424 U.S. 747, 778–79. Section 703(h) on its face immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre-and post-Act discrimination.
To be sure, § 703(h) does not immunize all seniority systems. It refers only to "bona fide" systems, and a proviso requires that any differences in treatment not be "the result of an intention to discriminate because of race ... or national origin...." But our reading of the legislative history compels us to reject the Government's broad argument that no seniority system that tends to perpetuate pre-Act discrimination can be "bona fide." To accept the argument would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted. It would place an affirmative obligation on the parties to the seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority. The consequence would be a perversion of the congressional purpose. We cannot accept the invitation to disembowel § 703(h) by reading the words "bona fide" as the Government would have us do. Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees....

The seniority system in this litigation is entirely bona fide. It applies equally to all races and ethnic groups. To the extent that it "locks" employees into non-line-driver jobs, it does so for all. The city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white. The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances, the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful.

Because the seniority system was protected by § 703(h), the union's conduct in agreeing to and maintaining the system did not violate Title VII. On remand, the District Court's injunction against the union must be vacated....

38. For the same reason, we reject the contention that the proviso in § 703(h), which bars differences in treatment resulting from "an intention to discriminate," applies to any application of a seniority system that may perpetuate past discrimination. In this regard the language of the Justice Department memorandum introduced at the legislative hearings is especially pertinent: "It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race.... Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title," 110 Cong. Rec. 7207 (1964).
JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in part and dissenting in part.

I agree with the Court that the United States proved that petitioner T.I.M.E.-D.C. was guilty of a pattern or practice of discriminating against blacks and Spanish-surnamed Americans in hiring line drivers. I also agree that incumbent minority-group employees who show that they applied for a line-driving job or that they would have applied but for the company's unlawful acts are presumptively entitled to the full measure of relief set forth in our decision last Term in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). But I do not agree that Title VII permits petitioners to treat Negro and Spanish-surnamed line drivers differently from other drivers who were hired by the company at the same time simply because the former drivers were prevented by the company from acquiring seniority over the road. I therefore dissent from that aspect of the Court's holding, and from the limitations on the scope of the remedy that follow from it.

As the Court quite properly acknowledges, the seniority provision at issue here clearly would violate Title VII absent § 703(h), which exempts at least some seniority systems from the reach of the Act. Title VII prohibits an employer from "classify[ing] his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(2). "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment prac-tices." Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (emphasis added). Petitioners' seniority system does precisely that: It awards the choicest jobs and other benefits to those possessing a credential—seniority—which, due to past discrimination, blacks and Spanish-surnamed employees were prevented from acquiring. Consequently, "[e]very time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias." Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988 (CA5 1969) (Wisdom, J.), cert. denied, 397 U.S. 919 (1970)....
THOMPSON, J.: This action is brought by the plaintiffs, four Black women, who allege they were discriminatorily discharged due to their race, in violation of the Civil Rights Act of 1964, specifically 42 U.S.C. § 2000e-2(a)(1). . . .

4. On January 31, 1968, plaintiffs Berrel Matthews, Emily Hampton and Isabell Slack were working in the bonding and coating department of defendant Industries' plant, engaged in preparing and assembling certain tubing components for defendant's product. A white co-worker, Sharon Murphy, was also assigned to the bonding and coating department on that day and was performing the same general work as the three plaintiffs mentioned above. The fourth plaintiff, Kathleen Hale, was working in another department on January 31st.

Near the end of the working day, plaintiffs Matthews, Hampton and Slack were called together by their immediate supervisor, Ray Pohasky, and informed that the following morning, upon reporting to work, they would suspend regular production and engage in a general cleanup of the bonding and coating department. The cleanup was to consist of washing walls and windows whose sills were approximately 12 to 15 feet above the floor, cleaning light fixtures, and scraping the floor which was caked with deposits of hardened resin. Plaintiffs Matthews, Hampton and Slack protested the assigned work, arguing that it was not within their job description, which included only light cleanup in their immediate work areas, and that it was too hard and dangerous. Mr. Pohasky agreed that it was hard work and said that he would check to see if they had to do it.
5. On the following work day, February 1, 1968, plaintiffs Matthews, Hampton and Slack reported to the bonding and coating department along with Sharon Murphy, their white co-worker. However, Mr. Pohasky excused Sharon Murphy to another department for the day, calling in plaintiff Kathleen Hale from the winding department where she had been on loan from the bonding and coating department for about a week. Mr. Pohasky then repeated his announcement that the heavy cleaning would have to be done. The four plaintiffs joined in protest against the heavy cleanup work. They pointed out that they had not been hired to do janitorial type work, and one of the plaintiffs inquired as to why Sharon Murphy had been excused from the cleanup detail even though she had very little seniority among the ladies in the bonding and coating department. In reply, they were told by Mr. Pohasky that they would do the work, “or else.” There was uncontradicted testimony that at some time during their conversation Pohasky injected the statement that “Colored people should stay in their places,” or words to that effect. Some further discussion took place between plaintiffs and Pohasky and then with Gary Helming, plaintiffs' general supervisor, but eventually each of the plaintiffs was taken to the office of Mr. Helming where she was given her final paycheck and fired. Plaintiff Matthews testified without contradiction that on the way to Mr. Helming’s office Mr. Pohasky made the comment that “Colored folks are hired to clean because they clean better.”

6. The general cleanup work was later performed by newly-hired male employees. Sharon Murphy was never asked to participate in this cleanup before or after the plaintiffs' termination.

7. The day following the plaintiffs' firing a conference was held between plaintiffs and defendant Glenn G. Havens, together with Mr. Helming, Mr. Pohasky and other company officials, but the dispute was not resolved as to the work plaintiffs were expected to do. Apparently, the plaintiffs were offered reinstatement if they would now agree to do the same cleanup work. They refused…..

B. Having concluded that defendant Industries is an “employer” under Title VII of the Civil Rights Act for the purposes of this action, we must next consider whether plaintiffs' termination amounted to unlawful discrimination against them because of their race. Defendants deny that the facts support such a conclusion, contending that plaintiffs’ case amounts to nothing more than a dispute as to their job classification.

Admittedly, the majority of the discussion between plaintiffs and Industries' management on January 31 and February 1, 1968 centered around the nature of the duties which plaintiffs were ordered to perform. Plaintiffs pointed out that they had not been hired with the understanding that they would be expected to perform more than light cleanup work immediately adjacent to their work stations. They were met with an ultimatum that they do the work-or else. Additionally, no explanation was offered as to why Sharon Murphy, a white co-worker, had been transferred out of the bonding and coating
department the morning that the heavy cleaning was to begin there, while plaintiff Hale was called back from the winding department, where she had been working, to the bonding and coating area, specifically for participation in the general cleanup. It is not disputed that Sharon Murphy had less seniority than all of the plaintiffs except plaintiff Hale (having been hired 8 days prior to plaintiff Hale) and no evidence of a bona fide business reason was ever educed by defendants as to why Sharon Murphy was excused from assisting the plaintiffs in the proposed cleaning project.

The only evidence that did surface at the trial regarding the motives for the decisions of the management of defendant Industries consisted of certain statements by supervisor Pohasky, who commented to plaintiff Matthews that “colored folks were hired to clean because they cleaned better,” and “colored folks should stay in their place,” or words to that effect. Defendants attempt to disown these statements with the argument that Pohasky's state of mind and arguably discriminatory conduct was immaterial and not causative of the plaintiffs' discharge.

But defendants cannot be allowed to divorce Mr. Pohasky's conduct from that of Industries so easily. First of all, 42 U.S.C. § 2000e(b) expressly includes “any agent” of an employer within the definition of “employer.” Secondly, there was a definite causal relation between Pohasky's apparently discriminatory conduct and the firings. Had Pohasky not discriminated against the plaintiffs by demanding they perform work he would not require of a white female employee, they would not have been faced with the unreasonable choice of having to choose between obeying his discriminatory work order and the loss of their employment. Finally, by backing up Pohasky's ultimatum the top level management of Industries ratified his discriminatory conduct and must be held liable for the consequences thereof.

From all the evidence before it, this Court is compelled to find that defendant Industries, through its managers and supervisor, Mr. Pohasky, meant to require the plaintiffs to perform the admittedly heavy and possibly dangerous work of cleaning the bonding and coating department, when they would not require the same work from plaintiffs' white fellow employee. Furthermore, it meant to enforce that decision by firing the plaintiffs when they refused to perform that work. The consequence of the above was racial discrimination, whatever the motivation of the management of defendant Industries may have been. Therefore, the totality of Industries' conduct amounted, in the Court's opinion, to an unlawful employment practice prohibited by the Civil Rights Act, specifically, 42 U.S.C. § 2000e-2(a)(1).
B. DISCRIMINATION AND THE FREE MARKET

It may seem an odd question to ask — why discrimination exists — at the end of a long book in which we've encountered literally hundreds of instances of employment discrimination. For theorists, however, it is not an easy question. The problem for economists is not why there are impulses to discriminate — that is the domain of psychologists or maybe evolutionary biologists, see Nancy Wartik, Hard-Wired for Prejudice? Experts Examine Human Response to Outsiders, N.Y. Times, Apr. 20, 2004, at F5. In any event, economists usually take individual preferences as given. Rather, the hard theoretical question is why the free market allows discrimination to continue to exist. An employer that discriminates, after all, must pay a price: artificially contracting the supply of available labor tends to raise the price of the labor purchased. If many employers discriminate, the price (wages) of their workforce will climb. Competitors will be free to exploit the pool of excluded black workers at lower wages, thus gaining a competitive advantage. As more employers seek lower-cost black workers, their value will rise. Thus, discrimination will be corrected by the market, without the need for legal intervention.

While no one believes the competitive model perfectly reflects the real world, noted economists have argued that in the long run the market will in fact eliminate discrimination if government action does not intervene. Professor John J. Donohue III, in Advocacy Versus Analysis in Assessing Employment Discrimination Law, 44 Stan. L. Rev. 1583, 1591 (1992), recounts Chicago School opposition to Title VII's passage:

Thirty years ago, powerful intellectual voices at the University of Chicago registered their strong opposition to the passage of federal civil rights legislation on theoretical grounds. For example, in 1962, Milton Friedman [in CAPITALISM AND FREEDOM] emphasized that fair employment practice laws were unnecessary because the existing free markets were generating great progress for blacks: “The maintenance of the general rules of private property and of capitalism have [sic] been a major source of opportunity for Negroes and have [sic] permitted them to make greater progress than they otherwise could have made.”

Friedman's view became the established orthodoxy for many within the Chicago School tradition who believed that antidiscrimination laws were both unnecessary and unsuccessful at providing economic benefits for blacks. . . . Implicit in this view is the suggestion that (at least absent government compulsion, as in the pre-1964 South) discrimination does not exist; the poor economic status of statutorily protected groups must, therefore, result from their own choices or their lack of the qualifications necessary to compete.

The market forces argument has reappeared periodically, in work by Judge Richard Posner, e.g., An Economic Analysis of Sex Discrimination Laws, 56 U. Chi. L. Rev. 1311, 1312 (1989) (“I believe it is a plausible hypothesis — no stronger statement is possible — that sex discrimination law has not increased, and it may even have reduced, the aggregate welfare of women”), and, most forcefully in a book by Professor Richard A. Epstein, which glossed its economic argument with a strong libertarian thrust against government intervention. As its title indicates, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) was an assault on the whole concept of antidiscrimination statutes. Professor Epstein's book triggered an avalanche of criticism defending the antidiscrimination project.
B. Discrimination and the Free Market

JACOB E. GERSEN, MARKETS AND DISCRIMINATION

In 2004, the Equal Employment Opportunity Commission (EEOC) received 27,696 charges of racial employment discrimination and 24,249 charges of sex discrimination. Whether these figures represent the nagging persistence of employment discrimination in the United States or a remarkable decline in such discrimination is the subject of significant debate. Empirical evidence about the gap between the hiring, wages, and firing of workers of different races and sexes abounds, but the significance of that evidence is hotly contested. Equally important, widespread conflict remains about the accuracy of different positive explanations for discrimination and the implications for the efficiency and efficacy of employment antidiscrimination law. Despite decades of scholarship in law and economics, then, significant disagreement remains about the extent of employment discrimination in the United States, the correct explanation for such discrimination, and the normative implications of the various pieces of the discrimination puzzle.

The law and economics literature contains no shortage of theories about employment discrimination [but there are four main] approaches in the law and economics literature generally understood to be the dominant schools of thought: the taste, statistical discrimination, sorting and search, and status-production theories.

The first general economic approach to employment discrimination was Gary Becker's taste model, presented in his 1955 doctoral dissertation. According to this theory, discrimination is just another exogenously given taste or preference of


employers, employees, or customers that they are willing to pay to indulge. Becker's thinking dominated early work but soon came under attack in the 1970s by advocates of statistical models of discrimination, in which employers use group characteristics to make rational inferences about individual employee productivity. More recently, Richard Epstein and other scholars have presented a mixed sorting and search model that incorporates aspects of both the taste and statistical models. Finally, Richard McAdams has proposed a status-production model of employment discrimination. According to this theory, groups of workers discriminate against others to elevate their own status, a model that is part sociological and part economic.

1. Tastes

The modern economic analysis of employment discrimination is generally traced to Becker's doctoral thesis, a microeconomic account rooted in individual tastes for discrimination either by employers, employees, or consumers. The employer version of the theory posits that some employers have a taste for discrimination which they are willing to pay to indulge. If employers enjoy positive utility from discriminating, they may be willing to trade profits for discrimination. In the context of race discrimination, the employer taste model suggests that although employers with such tastes will be willing to pay whites more than nonwhites, those discriminating firms will also earn lower profits than nondiscriminating firms because of their labor costs. Firms are, therefore, less profitable in the long run when they indulge their discriminatory tastes. In the consumer and employee taste models, consumers or workers demand lower prices or higher wages, respectively, to associate with members of other racial groups. Over time, this produces occupational segregation.

Because discriminating firms in Becker's model are less profitable than nondiscriminating ones, many scholars suggest that the taste model predicts that there will be no employment discrimination in equilibrium, because the discriminating, less-profitable firms will be driven from the marketplace by those with lower labor costs. 40 The dual critique consistently advanced against this model is that "it predicts the absence of the phenomenon it was designed to explain" 41 and requires employers to behave irrationally rather than as profit-maximizers. However, these critiques are only appropriately advanced against the employer taste model, rather than the employee or consumer model.

2. Statistical Discrimination

[Early on, economists developed a series of statistical (or informational) models to respond to the alleged weaknesses of the taste model. These models suggest that with imperfect information about potential employees, employers rely on group characteristics to predict individual characteristics (e.g., productivity). In contrast to taste models (which assume that employers have invidious preferences), statistical models assume that employers differentiate among individuals from different groups for

40. See, e.g., John J. Donohue III, Discrimination in Employment, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 615, 617 (Peter Newman ed., 1998) (claiming Becker's model implies market would "discipline discriminators"); Posner, supra note 6, at 514 (citing Becker's model to support finding that competition should ameliorate effects of discrimination in the long run by rewarding firms that are not constrained by an "aversion to associating with blacks").

B. Discrimination and the Free Market

"benign" profit-maximizing motives. Employers make inferences about individual-level worker characteristics based on an employee's membership in a group.

The initial accuracy of such group-based inferences or stereotypes can vary widely. Over time, however, inaccurate inferences should be driven out of the market. That is, because employers who make accurate inferences about worker productivity have a competitive advantage over firms that consistently make errors, in equilibrium, only accurate inferences should remain. Thus, statistical discrimination may persist in equilibrium if the stereotypes used by employers are accurate.50

Of course, from a policy perspective, the lack of animus need not justify government inaction. Average group characteristics may reflect prior invidious discrimination or be endogenously determined by different incentives for investment in human capital.51 For example, if women or nonwhites are paid lower wages and promoted less often than a favored group, the returns on investment in education or skills training for them may be lower than for members of the favored group. Given the diminished returns, it is rational for members of these disfavored groups to underinvest in education or skills training, which in turn produces group characteristics that mirror employers' stereotypes. In this case, the statistical inference is accurate but only because of historical discrimination. If this occurs, the welfare consequences of statistical discrimination are far from benign, even if there is no underlying invidious discrimination in the current inference.

3. Sorting and Search

In his own analysis of employment discrimination [in FORBIDDEN GROUNDS], Richard Epstein combined elements of both the taste and statistical models. Epstein argued that some portion of employment discrimination is an efficient response by firms to sorting problems. If employee tastes are tied to group characteristics, then employers may prefer homogenous workforces, seeing them as a way to minimize the chance of conflict among employees of the firm.

Thus, while Epstein acknowledges that employment antidiscrimination laws did reduce much invidious discrimination, he suggests that a significant portion of the remaining discrimination is a rational means of avoiding employee conflict, the result of which is sorting or occupational segregation by demographic characteristics. As with the statistical model, discrimination does not result from employers' invidious preferences. Rather, discrimination is a rational response by employers to the discriminatory preferences of their employees. In this sense, the sorting model shares elements of both Becker's employee taste model and the statistical discrimination model.


4. STATUS PRODUCTION

McAdams’s status-production theory of employment discrimination has much in common with what is sometimes termed a cartel theory of discrimination. McAdams argues that the notions of tastes or associational preferences that dominate the economics literature give inadequate consideration to group status. In the status-production model, members of one group invest in elevating the status of their own group by subordinating other groups. Discrimination allows members of one group to raise their self-esteem by lowering the status of the group against whom they discriminate.

Whereas the taste model focuses on the individual discriminator, the status-production model emphasizes the importance of groups and social norms in producing and maintaining discriminatory practices. For example, whites might enforce a norm against hiring or promoting nonwhites. Because employers who fail to adhere to the norm may lose status within their own group and simultaneously risk punishment for violating the discrimination norm, both primary and secondary norms operate to maintain discrimination.

Thus, even though an employer could theoretically obtain cheaper labor and maximize profits by not discriminating, the employer might also face sanctions from other firms or customers, negating the competitive advantage. If those sanctions outweigh potential profit gains, employers who would otherwise hire nonwhites (in the race context) or women (in the sex context) may refrain from doing so.

Not surprisingly, the status-production theory has also drawn criticism. For example, John Donohue has suggested that although the status-production model captured important elements of pre-1960s discrimination, Becker’s model may now provide more insight into current racial discrimination. Be that as it may, the status-production model remains relatively untested, at least compared to various other economic theories of discrimination.

NOTES

1. Testing the Models. After describing the four models, Professor Gersen attempts to test them using data comprised of employment discrimination claims, market conditions, and labor force characteristics. Although he recognizes the limitations of his data and stresses that his conclusions are preliminary, Professor Gersen finds that “the status-production theory has genuine legs” for race discrimination. He notes, however, different findings for race and sex discrimination. See also Major G. Coleman, Racial Discrimination in the Workplace: Does Market Structure Make a Difference?, 43 IND. REL. 660 (2004) (“increased competition has no impact on the


number of discrimination reports, racial wage discrimination, or the racial demographics of the workforce”; thus “competition cannot be relied on to reduce racial discrimination”.

2. A Taste for Discrimination? Professor Gersen refers to the Becker theory that significant discrimination may persist despite free markets because employers have a “taste for discrimination” that they are willing to indulge. The basic idea is that individuals are willing to pay a price to indulge their taste for discrimination (or distaste for associating with certain groups). They will, therefore, forgo the gains to be made by dealing with members of those groups. Such out-groups, precisely because they are less desired in market terms, command a lower price. Refusing to hire or do business with them means passing up desirable opportunities. See Richard A. Posner, ECONOMIC ANALYSIS OF LAW § 27.1, at 525-26 (2d ed. 1977). Presumably, over time, such firms will lose business to firms who are not passing up such opportunities. But see Michael Selmi, The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects, 81 TEX. L. REV. 1249 (2003) (questioning whether the market is having much of an effect on the basis of market reactions to class action settlements).

As Gersen notes, the “taste” may be that of the employer itself or of someone whose tastes the employer has to consider — other employees or customers. It is easier to understand the persistence of discrimination in terms of customer tastes than it is in terms of employer tastes since employers may cater to those tastes without losing much business. In any event, depending on the strength of the taste, an African American may not be employed at all or may be employed at a wage that is low enough to compensate for the “distaste” of employing her. See David A. Strauss, The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards, 79 GEO. L.J. 1619 (1991).

3. Statistical Discrimination. The second model seeks to explain the persistence of discrimination in free markets on the grounds that some types of discrimination are “rational” because race (or sex or some other prohibited ground) is correlated with ability. This theory is sometimes called “statistical discrimination.” A rational employer will discriminate, even if no relevant actor has any discriminatory animus, if the employer concludes that race is a useful proxy for job qualifications.

Discrimination of this form occurs because information about an employee’s qualifications is often costly to obtain. An employee’s race, however, is cheaply ascertained. Therefore, if a firm concludes that an employee’s race correlates with his or her qualifications, and if better information about the qualifications is too costly to discover, it will be rational, profit-maximizing behavior for the firm to offer lower wages to a minority employee than it would offer to a nonminority employee.

A firm might rationally discriminate in this way even if, so far as the firm has determined, the two employees are identical except for race. In a world of cost-free information, the employer could ascertain each employee’s qualifications perfectly. If two employees were found to be identical in every relevant respect, it would not be rational to offer them different wages. In the real world, however, information is costly, and the employer will therefore stop trying to ascertain qualifications at some point. At that point, it may be rational for the employer to rely on a surrogate that it knows to be imperfect but that is cheaply ascertained.

Strauss, Note 2 at 1622.

The logic of statistical discrimination does not require any assertion that racial or gender differences are inherent — the correlation between race or gender and
productivity could be the result of factors such as past employer discrimination or societal discrimination. Particular groups may in fact be different if, due to the diminishing expected returns for them, they disproportionately chose not to invest in human capital. The term “statistical discrimination” does not, however, mean that the employer acts only on the basis of scientifically ascertained differences. Indeed, such discrimination will be more or less “rational” depending on the relationship between the stereotype used and statistical reality. Professor Strauss concludes that, if racial generalizations reflect actual differences among groups, they are more likely to persist than if they do not: “If an employer is using an inaccurate generalization about minority employees in making employment decisions, it has an incentive to correct its assumptions. If it does not, there is an opportunity for an employer who is not using such a generalization to seize a competitive advantage.” Strauss, at 1640. See also David Charny & G. Mitu Gulati, Efficiency — Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for High-Level Jobs, 33 HARV. C.R.-C.L. L. REV. 57, 77 (1998) (“statistical discrimination will sustain itself vis-à-vis job applicants in high-wage sectors of the labor market. Members of minority groups who plan to enter this sector — e.g., those who have begun training to enter a profession — will be induced to make smaller investments in human capital than ‘typical’ applicants because they expect to make lower returns from their investment in training”).

4. Sorting and Search. As Professor Gersen explains, Richard Epstein’s theory is a variant on both the Becker and statistical discrimination models, but it does not require any animus or dislike. Rather, Epstein argues that, while diversity might be a good business model for many employers, other firms are better off with homogeneity in their workforces:

[A]ssume for the moment that all workers have identical preferences on all matters relevant to the employment relation. If the question is whether or not they wish to have music piped into a common work area, they all want music. If the question is what kind of music they wish to hear, the answer is classical — indeed, mostly Mozart. If the question is how loud, the agreement is perfect down to the exact decibel. In this employment utopia, decisions of collective governance are easy to make. The employer who satisfies preferences of any single worker knows that he or she has satisfied the preferences of the entire workforce; it takes little effort and little money to achieve the highest level of group satisfaction. The nonwage terms of collective importance can be set in ways that unambiguously promote firm harmony.

The situation is quite different once it is assumed that there is no employee homogeneity in taste within the workplace. . . . The general proposition is clear: as the tastes within the group start to diverge, it becomes harder to reach a decision that works for the common good. If half the workers crave classical music but loathe rock, and half like rock but disdain classical music, it is very difficult to decide whether music shall be played in the workplace at all, and if so what kind. The wider the variation in taste, the more troublesome these collective decisions are. . . . If the level of dissatisfaction increases exponentially as the gap between private choice and collective decision increases, then the people at either tail of the distribution have additional incentives to leave the group when the decision goes against them.

FORBIDDEN GROUNDS at 61-2. Where Epstein’s theory intersects with the statistical discrimination model is the notion that race (or national origin or sex) is a good predictor for the homogeneity that such employers seek:

The increase in the harmony of tastes and preferences thus works in the long-run interest of all members. To the extent, therefore, that individual tastes are grouped by
race, by sex, by age, by national origin — and to some extent they are — then there is a necessary conflict between the commands of any antidiscrimination law and the smooth operation of the firm. Firms whose members have diverse and clashing views may well find it more difficult to make collective decisions than firms with a closer agreement over tastes.

Id. at 66-7.

5. Status Production Model. In some ways, Professor McAdams model is both the most sophisticated and the most obvious. It views discrimination as a means for a group to gain status by distinguishing themselves from other groups in society. Such status seeking is endemic, whether in the purchase of cars or homes or in association with popular groups. In a sense, we all learned about gaining status in middle school. Professor McAdams, however, adds both the racial and gender component and a sophisticated explanation of how discrimination works to achieve these goals:

[A] material view of human motivation underestimates both the level of cooperation that groups elicit from their members and the level of conflict that groups elicit from each other. A single group dynamic connects these added increments of cooperation and conflict: groups achieve solidarity and elicit loyalty beyond what economic analysis conventionally predicts, but solidarity and loyalty within groups lead predictably, if not inevitably, to competition and conflict between groups. The connection is the desire for esteem or status. Groups use intra-group status rewards as a non-material means of gaining material sacrifice from members, but the attendant desire for inter-group status causes inter-group conflict. . . .

This two-fold importance of status is essential to a genuine understanding of race discrimination, which has eluded economics. Discrimination is a means by which social groups produce status for their members, but pivotal to understanding this form of inter-group conflict is the role that status plays in generating the intra-group cooperation necessary to make discrimination effective. Absent the desire for intra-group status, selfish individuals would not make the material sacrifices that discrimination requires.

108 HARV. L. REV. at 1007-08.

6. The Reality Critique. Both the Becker taste theory and the statistical discrimination theory suggest that, as Milton Friedman argued, the market should eliminate most discrimination over time. Even Professor Epstein would expect most discrimination to dissipate, although it would continue where it was efficient through “voluntary” market segregation.

But if these theories are correct, how did race and gender segregation exist so pervasively in our country before 1964? There were very few laws requiring segregation in employment by either race or sex. See J. Hoult Verkerke, Free to Search, 105 HARV. L. REV. 2080, 2080 (1992) (“With the exception of the South Carolina textile employment segregation law, all of the statutes to which Epstein refers involved areas of economic and social life other than labor markets”). Nevertheless, the mostly-free market left most employment in the South racially segregated. In Griggs, for example, Duke Power’s policy limiting blacks to the Labor Department was not mandated by any law. Similarly, there were relatively few laws segregating occupations by sex; nevertheless, the free market left most employment throughout the nation sexually segregated.

Professor Epstein recognized that discrimination in the South prior to the Civil Rights Act of 1964 may have been influenced by state and local governments condoning private violence to keep the black population “in its place.” See Gregory
S. Crespi, Market Magic: Can the Invisible Hand Strangle Bigotry?, 72 B.U. L. REV. 991, 1002 (1992). Because of this, Professor Donohue notes that, despite philosophical similarities to Friedman, “Epstein departs from the Chicago School orthodoxy by acknowledging the initial economic gains for blacks that [Title VII] generated.” John J. Donohue III, Advocacy Versus Analysis in Assessing Employment Discrimination Law, 44 STAN. L. REV. 1583, 1593 (1992). It is not so clear under Professor Epstein’s analysis, however, why Title VII was necessary to trigger the massive integration of women into fields that had had few if any females prior to 1964. In any event, for him the fact that a dramatic intervention like Title VII was necessary to shift norms does not mean that the antidiscrimination laws continue to be necessary.

7. The Bad Old Days? A pervasive theme in this course has been the question of whether discrimination (however defined) continues to be a major problem along any of the axes of interest. We have seen conflicting views on this throughout the book. Do you think that remaining discrimination is simply a few bad racist or sexist apples; or, conversely, that such actors are numerous and will continue to cause enormous harm unless constrained by the law? Or perhaps you take some middle ground: discrimination continues to be pervasive, but it is of the softer, unconscious bias kind. If the latter, how do the theories Professor Gersen canvasses apply?

8. Where Do We Go from Here? If market forces may reduce discrimination but not eliminate it, the question whether government regulation prohibiting discrimination is necessary, therefore, cannot rest solely on the argument that discrimination does not exist in a free market system. Given that economists acknowledge that discrimination — employment decisions based on membership in a statutorily protected group — exists even when the market is unregulated, the issue becomes the extent to which discrimination is harmful. Even if discrimination is wrong, government prohibition might not be the appropriate solution, but government regulation certainly makes no sense unless discrimination causes meaningful harm.

C. WHY PROHIBIT DISCRIMINATION?

Opponents of the Civil Rights Act argued that prohibiting discrimination infringes on the freedom to associate. In this view, discrimination is not wrongful because it is merely a form of the right to associate with whomever one pleases. Echoes of this debate were heard in connection with the 1987 nomination of Judge Robert Bork as a justice of the United States Supreme Court. In 1963, Judge Bork had written an article attacking proposed civil rights legislation:

Of the ugliness of racial discrimination there need be no argument (though there may be some presumption in identifying one’s own holly controverted aims with the objective of the nation). But it is one thing when stubborn people express their racial antipathies in laws which prevent individuals, whether white or Negro, from dealing with those who are willing to deal with them, and quite another to tell them that even as individuals they may not act on their racial preferences in particular areas of life. The principle of such legislation is that if I find your behavior ugly by my standards, law or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness.
Robert Bork, *Civil Rights — A Challenge, The New Republic*, Aug. 31, 1963, at 22. While Bork’s position contributed to the defeat of his nomination in 1987, the notion that discrimination is not necessarily wrongful and that prohibiting it is bad policy have reappeared in a different form in Professor Epstein’s *FORBIDDEN GROUNDS*:

The [law’s] standard prohibition against force and fraud does not depend on a simple assertion that killing or murder is just illegitimate. Rather, it rests on the powerful, albeit empirical, judgment that all people value their right to be free from coercion far more than they value their right to coerce others in a Hobbesian war of all against all. . . . But there are no similar universal gains from a rule that says people who have distinct and distasteful preferences cannot go their own way by working and associating only with people of similar views. We may find their tastes offensive, just as they find our tastes offensive and our actions meddlesome. But we do not have to determine the relative intensity of clashing preferences in order to make powerful social judgments. . . . [T]here is good evidence that the preferences are so strong on both sides that no mutually acceptable gains are to be made from long-term forced amalgamation. The fallback position when the antidiscrimination norm is eliminated is not violence and anarchy; it is voluntary separation and competition.

*Id.* at 75.

But what of the other side of the coin? The four economic theories all depend upon explaining discrimination without necessarily justifying it. Professor Epstein comes closest to approving of discrimination (as a legal, not necessarily moral, matter). He has three reasons. First, from the libertarian perspective the government should not interfere with private conduct absent “force or fraud,” and discrimination is neither. Second, there are heavy costs in making discrimination illegal. And third, discrimination can be efficient.

This is not the place to debate the libertarian philosophy although it might not be amiss to note that Professor George Rutherglen, in *Abolition in a Different Voice*, 78 Va. L. Rev. 1463, 1469 (1992), critiques Professor Epstein’s consistency. While Epstein has struck a strong libertarian theme in *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985), that government appropriations of property should be compensated, *FORBIDDEN GROUNDS* dismisses any need for government efforts to deal with historic injustices like slavery, perhaps the most complete of “takings.” He rejects all questions of rectification at the outset with the assertion that “there is no adequate remedy” for such historical injustices. See also J. Hoult Verkerke, in *Free to Search*, 105 Harv. L. Rev. 2080, 2085 (1992) (even assuming a libertarian perspective, antidiscrimination laws are “justified as necessary to remedy an unjust distribution of resources”).

As for costs, it would be foolish to deny that enforcing discrimination law is costly. But whether the cost is justified turns on an assessment of the benefits, which includes an analysis of whether it is efficient. That, in turn, requires focusing not only on individual instances but also on more general costs.

Relying on generalizations (perhaps better called stereotypes), whether or not “rational” as some economists use that term, excludes entire groups from full participation in our economy without any assessment of individual abilities. This is particularly problematic if the generalization is itself rooted in prior discrimination. All of the antidiscrimination laws were predicated at least in part on this perception. This economic thrust emerges most clearly with respect to the Age Discrimination in Employment Act and the Americans with Disabilities Act, in both of which Congress stressed the waste of human resources caused by discrimination against older workers.
and workers with disabilities. Employer discrimination results not only in individual harm but also in the loss to society of the contributions of those whose abilities are not fully utilized. Similarly, the economic consequences of discrimination were also prominent in the enactment of Title VII, although the economic goal was often subordinated to the powerful moral imperative of the statute. Congress clearly hoped to facilitate full participation by African Americans in the U.S. economy and to end a vicious cycle by which minorities who anticipated discrimination failed to make the human capital investments necessary to succeed in a competitive economy.

Discrimination, even “rational” discrimination, can be devastating to the individual victims and to the groups to which they belong; indeed, discrimination does not merely affect the immediate victims. Professor Mary Becker, in *The Law and Economics of Racial Discrimination in Employment: Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1664 (1991), writes:

>[A]s a historical matter, current preferences are in part the result of past forms of regulation which are not exogenous to the legal system. Slavery and Jim Crow are closely connected to the refusal of many whites today to interact with African Americans as equals. Past legal limitations on women’s ability to function as autonomous human beings are closely connected to the refusal of many men today to interact with women as equals.

Professor Becker uses “exogenous” to mean preferences arising outside the legal system. A number of scholars, most notably those writing from a feminist perspective, have argued that racial and gender differences are “socially constructed” in part by the legal system, but also by other powerful societal forces. *See also* Nancy E. Dowd, *Liberty vs. Equality: In Defense of Privileged White Males*, 34 WM. & MARY L. REV. 429 (1993) (criticizing Epstein for ignoring the rich literature on the social construction of gender differences and Critical Race Studies scholarship).

Even if the perceived productivity differences are real at this point in time, i.e., that discrimination would truly be rational for any given employer, is it necessarily efficient in the long run for an employer to rely on them? Professor Samuel Issacharoff, in *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219, 1222 (1992), criticizes Epstein’s “fundamental assumption that each individual is delivered to the labor market as a more or less intact bundle of skills and abilities.” This is “a shockingly static view” of what is, in fact, a dynamic process. Indeed, it is the very “disincentives for optimal acquisition of human capital” brought about by discrimination that justify intervention in the market. *See also* Strauss, *supra*; Cass Sunstein, *Why Markets Don’t Stop Discrimination*, in REASSESSING CIVIL RIGHTS 23 (Ellen F. Paul et al. eds., 1991). *But see* John J. Donohue III & James J. Heckman, *The Law and Economics of Racial Discrimination in Employment: Re-Evaluating Federal Civil Rights Policy*, 79 Geo. L.J. 1713, 1725 (1991) (“Since 1980, however, young blacks (those with less than sixteen years of labor market experience) have actually earned somewhat greater returns than their white counterparts from each additional year of schooling.”).

Professor Nancy E. Dowd views Epstein as a relatively frank apologist for racism and sexism. She quotes Epstein to the effect that individual tastes are grouped to some extent by race and sex and that these tastes necessarily conflict with the smooth operation of at least some firms:

>These are outrageous statements, filled with stereotypes and race and gender essentialism reduced to implicit biological “natural” preference, amounting to an outright
justification for skin and gender privilege. Epstein is saying that the costs of diversity make discrimination reasonable and logical. He assumes that the characteristics he names are related to differences that affect governing the workplace with no other authority than his own perception that “[i]t is harder to do business as social distance between persons increases.” What we also know, and what Epstein ignores, is that in most firms of any size women and minorities are present, but in positions of inferiority. That evidence suggests that it is not that privileged white males do not like to associate with women or minorities; rather, they like to associate with them, but only as long as it is in unequal ways. Group stereotyping replaces individual characteristics in Epstein’s scheme. Furthermore, group-identified differences (stereotypes with a basis in fact, he would call these) are presumed to have employment consequences. There is little consideration of the possibility that other characteristics — such as education, class background, socioeconomic status, marital or parental status — may be more predictive of workplace-related governance costs than those he cites. There also is little examination of whether diversity has any benefits — after all, aren’t we looking at both costs and benefits?


In more temperate language, Professor J. Houlton Verkerke, in Free to Search, 105 HARV. L. REV. 2080, 2088 (1992), doubts “the usefulness of racial and ethnic affiliations as a proxy for job-related preferences of workers. The potential for intragroup heterogeneity of preferences seems to me every bit as great as the potential for disagreement between members of different racial or ethnic groups.”

Professor Mary Becker criticizes economic models for ignoring the human dimension. She begins by stressing that much discrimination is not rational. Indeed, “discrimination” is a poorly chosen word because it also means the ability to make fine distinctions.

Racism and misogyny — the belief that people of color and women are less than fully human — are not “discrimination” in this sense. One does not believe that African Americans and women are less than fully human because of an analytically rigorous delineation of subtle differences between them and white men. To the contrary, racism and misogyny are deeply irrational emotions, based on hatred or a lack of empathy for “the other,” often accompanied by the need to establish one’s own importance by denying others’ humanity.

The failure to include the desire to subordinate is a major gap in [the taste for discrimination and the statistical discrimination] economic models of discrimination. Some people discriminate, not because of a desire to work with those like themselves, but because they desire to dominate certain people from other groups.

Another form of discrimination not addressed by the economic models is a lessened ability to empathize and identify with women and people of color and to put oneself in their shoes, incorporating their hurts and needs into one’s perceptions. We all empathize best with those most like ourselves, but we live in a society in which white men disproportionately hold positions of power.

Again, the economic models fail to describe this form of discrimination. It is based neither on an aversion to contact with members of certain groups nor on a perception that groups differ with respect to productivity, the two forms of discrimination encompassed by the economic models. If lessened ability to empathize with women and people of color is widespread, the market will not drive out this unconscious emotional failing. It certainly has not eliminated it yet.
Becker at 1664. While Professor Becker’s argument is designed to identify forms of
discrimination that are not accounted for by economic analysis, doesn’t her approach
also suggest that, whether or not discrimination is otherwise efficient, it causes
psychic harms that the government has an interest in preventing? See also Verkerke
at 2086 (Epstein’s “account ignores the denigration, frustration and anger that the
victim of discrimination experiences”).

Devon Carbado & Mitu Galati, in The Law and Economics of Critical Race
Theory: Crossroads, Directions, and a New Critical Race Theory, 112 YALE L.J. 1757
(2003), agree with Professor Epstein that employers favor homogeneity of their
workforces, at least in positions where teamwork is critical. “In order to increase
efficiency, employers have incentives to screen prospective employees for homoge-
neity, and, in order to counter racial stereotypes, employees have incentives to
demonstrate a willingness and capacity to assimilate.” Id. at 1762. Employers, then,
may not discriminate on the basis of skin color per se but on the basis of char-
acteristics related to race and culture.

A black person’s vulnerability to discrimination is shaped in part by her racial position
on this spectrum. The less stereotypical she is, the more palatable her identity is. The
more palatable her identify is, the less vulnerable she is to discrimination. [This] creates
an incentive for black people to signal — though identity performance — that they are
not conventionally black. These signals convey the idea that the sender is black in a
phenotype but not a social sense.

Id. at 1772. This theory applies not only to African Americans but also to other racial
minorities. In short, while the authors decry the reality, “Epstein need not worry.” Id.
at 1791.

PATRICIA J. WILLIAMS, THE ALCHEMY OF
RACE AND RIGHTS
44-49 (1991)

Buzzers are big in New York City. Favored particularly by smaller stores and
boutiques, merchants throughout the city have installed them as screening devices to
reduce the incidence of robbery: if the face at the door looks desirable, the buzzer is
pressed and the door is unlocked. If the face is that of an undesirable, the door stays
locked. Predictably, the issue of undesirability has revealed itself to be a racial
determination. While controversial enough at first, even civil-rights organizations
backed down eventually in the face of arguments that the buzzer system is a “nece-
sary evil,” that it is a “mere inconvenience” in comparison to the risks of being
murdered, that suffering discrimination is not as bad as being assaulted, and that in
any event it is not all blacks who are barred, just “17-year-old black males wearing
running shoes and hooded sweatshirts.”

The installation of these buzzers happened swiftly in New York; stores that had
always had their doors wide open suddenly became exclusive or received people by
appointment only. I discovered them and their meaning on a Saturday in 1986. I was
shopping in Soho and saw in a store window a sweater that I wanted to buy for my
mother. I pressed my round brown face to the window and my finger to the buzzer,
seeking admittance. A narrow-eyed, white teenager wearing running shoes and
feasting on bubble gum glared out, evaluating me for signs that would pit me against
the limits of his social understanding. After about five seconds, he mouthed "We're closed," and blew pink rubber at me. It was two Saturdays before Christmas, at one o'clock in the afternoon; there were several white people in the store who appeared to be shopping for things for their mothers.

I was enraged. At that moment I literally wanted to break all the windows of the store and take lots of sweaters for my mother. In the flicker of his judgmental gray eyes, that saleschild had transformed my brightly sentimental, joy-to-the-world, pre-Christmas spree to a shambles. He snuffed my sense of humanitarian catholicity, and there was nothing I could do to snuff his, without making a spectacle of myself.

I am still struck by the structure of power that drove me into such a blizzard of rage. There was almost nothing I could do, short of physically intruding upon him, that would humiliate him the way he humiliated me. No words, no gestures, no prejudices of my own would make a bit of difference to him; his refusal to let me into the store — it was Benetton's, whose colorfully punnish ad campaign is premised on wrapping every one of the world's peoples in its cottons and woolens — was an outward manifestation of his never having let someone like me into the realm of his reality. He had no compassion, no remorse, no reference to me; and no desire to acknowledge me even at the estranged level of arm's-length transactor. He saw me only as one who would take his money and therefore could not conceive that I was there to give him money.

In this weird ontological imbalance, I realized that buying something in that store was like bestowing a gift, the gift of my commerce, the lucre of my patronage. In the wake of my outrage, I wanted to take back the gift of appreciation that my peering in the window must have appeared to be. I wanted to take it back in the form of unappreciation, disrespect, defilement. I wanted to work so hard at wishing he could feel what I felt that he would never again mistake my hatred for some sort of plaintive wish to be included. I was quite willing to disenfranchise myself, in the heat of my need to revoke the flattery of my purchasing power. I was willing to boycott Benetton's, random white-owned businesses, and anyone who ever blew bubble gum in my face again.

My rage was admittedly diffuse, even self-destructive, but it was symmetrical. The perhaps loose-ended but utter propriety of that rage is no doubt lost not just to the young man who actually barred me, but to those who would appreciate my being barred only as an abstract precaution, who approve of those who would bar even as they deny that they would bar me.

The violence of my desire to burst into Benetton's is probably quite apparent. I often wonder if the violence, the exclusionary hatred, is equally apparent in the repeated public urgings that blacks understand the buzzer system by putting themselves in the shoes of white storeowners — that, in effect, blacks look into the mirror of frightened white faces for the reality of their undesirability; and that then blacks would "just as surely conclude that [they] would not let [themselves] in under similar circumstances." (That some blacks might agree merely shows that some of us have learned too well the lessons of privatized intimacies of self-hatred and rationalized away the fullness of our public, participatory selves.)

On the same day I was barred from Benetton's, I went home and wrote the above impassioned account in my journal. On the day after that, I found I was still brooding, so I turned to a form of catharsis I have always found healing. I typed up as much of the story as I have just told, made a big poster of it, put a nice colorful border around it, and, after Benetton's was truly closed, stuck it to their big sweater-filled window. I exercised my first-amendment right to place my business with them right out in the street.
So that was the first telling of this story. The second telling came a few months later, for a symposium on Excluded Voices sponsored by a law review. I wrote an essay summing up my feelings about being excluded from Benetton's and analyzing "how the rhetoric of increased privatization, in response to racial issues, functions as the rationalizing agent of public unaccountability and, ultimately, irresponsibility." Weeks later, I received the first edit. From the first page to the last, my fury had been carefully cut out. My rushing, run-on-rage had been reduced to simple declarative sentences. The active personal had been inverted in favor of the passive impersonal. My words were different; they spoke to me upside down. I was afraid to read too much of it at a time — meanings rose up at me oddly, stolen and strange.

A week and a half later, I received the second edit. All reference to Benetton's had been deleted because, according to the editors and the faculty adviser, it was defamatory; they feared harassment and liability; they said printing it would be irresponsible. I called them and offered to supply a footnote attesting to this as my personal experience at one particular location and of a buzzer system not limited to Benetton's; the editors told me that they were not in the habit of publishing things that were unverifiable. I could not but wonder, in this refusal even to let me file an affidavit, what it would take to make my experience verifiable. The testimony of an independent white bystander? (a requirement in fact imposed in the U.S. Supreme Court holdings through the first part of the century).

Two days after the piece was sent to press, I received copies of the final page proofs. All reference to my race had been eliminated because it was against "editorial policy" to permit descriptions of "physiognomy." . . .

Ultimately I did convince the editors that mention of my race was central to the whole sense of the subsequent text; that my story became one of extreme paranoia without the information that I am black; or that it became one in which the reader had to fill in the gap by assumption, presumption, prej udgment, or prejudice. What was most interesting to me in this experience was how the blind application of principles of neutrality, through the device of omission, acted either to make me look crazy or to make the reader participate in old habits of cultural bias.

That was the second telling of my story. The third telling came last April, when I was invited to participate in a law-school conference on equality and difference. . . . I opined:

Law and legal writing aspire to formalized color-blind, liberal ideals. Neutrality is the standard for assuring these ideals; yet the adherence to it is often determined by reference to an aesthetic of uniformity, in which difference is simply omitted. For example, when segregation was eradicated from the American lexicon, its omission led many to actually believe that racism therefore no longer existed. Race-neutrality in law has become the presumed antidote for race bias in real life. With the entrenchment of the notion of race-neutrality came attacks on the concept of affirmative action and the rise of reverse discrimination suits. Blacks for so many generations deprived of jobs based on the color of our skin, are now told that we ought to find it demeaning to be hired, based on the color of our skin. Such is the silliness of simplistic either-or inversions as remedies to complex problems.

What is truly demeaning in this era of double-speak-no-evil is going to interviews and not getting hired because someone doesn't think we'll be comfortable. It is demeaning not to get promoted because we're judged "too weak," then putting in a lot of energy the next time and getting fired because we're "too strong." It is demeaning to be told what we find demeaning. It is very demeaning to stand on street corners unemployed and begging. It is downright demeaning to have to explain why we haven't been
C. Why Prohibit Discrimination?

employed for months and then watch the job go to someone who is “more experienced.” It is outrageously demeaning that none of this can be called racism, even if it happens only to, or to large numbers of, black people; as long as it’s done with a smile, a handshake and a shrug; as long as the phantom-word “race” is never used.

NOTES

1. *Narrative Scholarship.* Professor Williams’s book, *The Alchemy of Race and Rights,* was a pathbreaking effort in a school described as narrative scholarship. Much narrative scholarship tries to bring an outsider’s views into the legal mainstream, often a Critical Race Studies, Lat Crit, or feminist perspective. Williams’s Benetton story critiques not only the retailer’s buzzer system but also the resistance of traditional legal forums, i.e., law reviews, to publish writing discussing such realities from a personal perspective. Some defended the reviews’ resistance to work such as this. The debate, often focusing on Williams and the Benetton story in particular, roiled the legal academy. E.g., DANIEL A. FARBER & SUZANNA SHERRY, *Beyond All Reason: The Radical Assault on Truth in American Law* 50 (1997); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship,* 82 GEO. L.J. 1845 (1994).

One obvious criticism of storytelling is the difficulty of determining the truth, or at least the pervasiveness, of the experiences revealed by the narratives. But does that mean that such stories are irrelevant to law? Even if not, there can be competing narratives. A similar story is told about Condoleezza Rice, although with a considerably different ending. As recounted in the NEW YORKER of Oct. 14, 2002, p. 164, Dr. Rice was shopping at a store and the clerk tried to show her costume jewelry. There followed an exchange of words capped by Dr. Rice saying, “Let’s get one thing straight. You’re behind the counter because you have to work for six dollars an hour. I’m on this side asking to see the good jewelry because I make considerably more.”

2. *The Psychological Literature.* Professor Williams’s intense reaction to perceived discrimination is not unique to her. Professor Richard Delgado reviewed the psychological literature on the impact of prejudice and discrimination in *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,* 17 HARV. C.R.-C.L. L. REV. 135 (1982):

The psychological harms caused by racial stigmatization are often much more severe than those created by other stereotyping actions. Unlike many characteristics upon which stigmatization may be based, membership in a racial minority can be considered neither self-induced, like alcoholism or prostitution, nor alterable. Race-based stigmatization is, therefore, “one of the most fruitful causes of human misery. Poverty can be eliminated — but skin color cannot.”

... Kenneth Clark has observed, “Human beings ... whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth.” Minorities may come to believe the frequent accusations that they are lazy, ignorant, dirty, and superstitious. “The accumulation of negative images ... present[s] them with one massive and destructive choice: either to hate one’s self, as culture so systematically demand[s], or to have no self at all, to be nothing.”

The psychological responses to such stigmatization consist of feelings of humiliation, isolation, and self-hatred. Consequently, it is neither unusual nor abnormal for stigmatized
individuals to feel ambivalent about their self-worth and identity. This ambivalence arises from the stigmatized individual's awareness that others perceive him or her as falling short of societal standards, standards which the individual has adopted. Stigmatized individuals thus often are hypersensitive and anticipate pain at the prospect of contact with "normals." . . .

The psychological effects of racism may also result in mental illness and psychosomatic disease. The affected person may react by seeking escape through alcohol, drugs, or other kinds of antisocial behavior. The rates of narcotic use and admission to public psychiatric hospitals are much higher in minority communities than in society as a whole.

The achievement of high socioeconomic status does not diminish the psychological harms caused by prejudice. The effort to achieve success in business and managerial careers exacts a psychological toll even among exceptionally ambitious and upwardly mobile members of minority groups. . . . As a result, the incidence of severe psychological impairment caused by the environmental stress of prejudice and discrimination is not lower among minority group members of high socioeconomic status. . . .

In addition to such emotional and physical consequences, racial stigmatization may damage a victim's pecuniary interests. The psychological injuries severely handicap the victim's pursuit of a career. The person who is timid, withdrawn, bitter, hypertense, or psychotic will almost certainly fare poorly in employment settings. An experiment in which blacks and whites of similar aptitudes and capacities were put into a competitive situation found that the blacks exhibited defeatism, halfhearted competitiveness, and "high expectancies of failures." . . .


3. **Self-Help?** Should the harm described by Professors Williams and Delgado be a matter of legal concern? Professor Williams resorted to self-help, hanging a damming sign in the window of the offending shop and publishing books and articles exposing her unfair treatment. She also contemplated an economic attack — boycotting Benetton or perhaps all white-owned businesses. Secretary Rice resorted to a more direct put-down. Why aren't these kinds of responses sufficient to control discrimination? Is legal regulation more effective? Is law capable of changing deeply ingrained social attitudes?

4. **Racial Profiling.** Professor Williams viewed the buzzer system as a kind of "racial profiling." Outside the employment context, racial profiling by police has been the subject of considerable news interest and scholarship. _See generally_ Bernard E. Harcourt, _Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally_, 71 U. CHI. L. REV. 1275 (2004). What started out as a focus on police stops of African Americans and Latinos became more complicated in the wake of 9/11 as profiling in airports was extended to persons perceived to be Arabs or Muslims. _See_ R. Richard Banks, _Racial Profiling and Antiterrorism Efforts_, 89 CORNELL L. REV. 1201 (2004).

5. **Psychological Costs and Economics.** Consider Professor John J. Donohue III's criticism of Professor Epstein in _Advocacy Versus Analysis in Assessing Employment Discrimination Law_, 44 STAN. L. REV. 1583, 1587 (1992), which stresses the economic nature of such harms:

To support his contention that governmental efforts to inhibit discrimination in labor markets are misguided, Epstein enlists the standard microeconomic argument that wealth will be maximized if competitive markets can operate without restraint. This conclusion only follows, however, if either all costs are internalized or the transaction costs of the affected parties are low. For example, free markets do not maximize wealth
in settings where pollution costs and bargaining costs are high. Because of free rider problems and other transaction costs, the victims of widespread pollution will generally be unable to induce the polluters to stop polluting, even when the social benefits from such a contract would exceed the social costs. Once it is recognized that discrimination in labor markets imposes external costs that are quite analogous to the costs of pollution, the case for laissez-faire evaporates at a theoretical level and can only be sustained through a proper assessment of the costs and benefits of an antidiscrimination regime. Private discrimination is a form of psychological pollution that corrodes the well-being of both victims and [those who have not personally suffered discrimination but are morally offended by it], and excluding these costs from the social calculus — as Epstein does — would be as illogical as excluding the costs of chemical pollution in assessing environmental programs.

Professor J. Hoult Verkerke agrees that that the psychic harm associated with discrimination is relevant because it creates inefficiencies in the market:

Once black workers learn that they will experience discrimination in the labor market, this dignitary harm operates as a tax on their efforts to search for employment opportunities. Blacks would react rationally to this tax by decreasing their search efforts. [This reduction in search activity is an economic inefficiency of discrimination and if it produces] inefficiencies that private transactions cannot remedy, regulatory intervention would be justified even in Epstein’s libertarian regime.


**D. THE COSTS AND BENEFITS OF PROHIBITING DISCRIMINATION**

Whether the psychic harm associated with discrimination is weighed in the balance as an economic factor or weighed against efficiency as a matter of fairness, the question remains whether laws prohibiting discrimination generate more benefits than costs. Prohibiting discrimination clearly has costs for society. There are possible losses in efficiency, and, even without considering the theoretical losses that might be associated with regulating the free market, prohibiting discrimination imposes administrative costs on society. But before addressing these issues, it is important to understand the economic dimensions of the problems faced by the groups protected by antidiscrimination statutes and the impact of antidiscrimination laws on the economic condition of protected groups.

**1. Weighing Economic Costs and Benefits**

doubt about the progress of women in many sectors of the economy. But these and other groups remain at risk in the American economy. In a book published in 1980, *The Zero Sum Society*, Professor Lester C. Thurow wrote:

The essence of any minority group's position can be captured with the answer to three questions: (1) Relative to the majority group, what is the probability of the minority's finding employment? (2) For those who are employed, what are the earnings opportunities relative to the majority? (3) Are minority group members making a breakthrough into the high-income jobs of the economy?

*Id.* at 184. He reported some sobering facts, including persistent, heavy black unemployment (twice the rate of whites). *Id.* at 185. Similarly, "Using the top 5 percent of all jobs (based on earnings) as the definition of a 'good job,' blacks hold 2 percent of these jobs while whites hold 98 percent. Since blacks constitute 12 percent of the labor force they are obviously underrepresented in this category." *Id.* at 186. Hispanics were doing slightly better than African Americans, although various subgroups showed differing success. Native Americans were the poorest ethnic/racial group. As for women, in 1980, Thurow wrote: "Female workers hold the dubious distinction of having made the least progress in the labor market. In 1939 full-time, full-year women earned 61 percent of what men earned. In 1977 they earned 57 percent as much." *Id.* at 187. Female unemployment also rose relative to male unemployment, and this group held only 4 percent of the top jobs in the country.

Professor Thurow drew many of his statistics from the 1970 census. If the economic conditions of protected groups improved substantially over time, his data would be of historical interest only. After the 1990 census, however, Professor David Benjamin Oppenheimer, in *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921 (1996), updated Thurow's findings. He found improvement to be both spotty and limited:

Blacks, Hispanics and Asian Americans earn substantially less than do whites, and in some respects things are getting worse. In 1980, the average black male worker earned $751 for every $1,000 earned by a white male worker. By 1990 it had dropped to $731. . . .

Women of all races continue to earn substantially less than men. In the 1960s women earned 60% of what men earned on average; by 1993, it had risen only to 72%. The average woman with a masters degree earns the same amount as the average man with an associate (junior college) degree. Hispanic women earn less than 65% of the wages earned by white men at the same education level.

*Id.* at 965. In terms of occupational stratification, "white men make up only 43% of the workforce, [but] they constitute 97% of the top executives (vice-presidents and above) at the 1,500 largest American corporations." *Id.* at 967. Unemployment had also climbed for African Americans, increasing from twice the white rate to 2.76 times higher than the white rate by 1990. *Id.* See also Nancy E. Dowd, *Liberty vs. Equality: In Defense of Privileged White Males*, 34 WM. & MARY L. REV. 429, 476 (1993) (analyzing the economic progress of women).

The 2000 census provided more information, but introduced a complication by for the first time allowing individuals to identify themselves as of more than one race. This makes it hard to be confident about comparisons against prior censuses. Nevertheless, black and Hispanic labor force participation rates, both at about 61%, continued to trail whites (74.3%) and Asians (68%). *Employment Status: 2000,*
The Costs and Benefits of Prohibiting Discrimination

Census 2000 Brief, tbl. at 5. Asian and white unemployment rates were about the same (3%), but African Americans and Hispanics were about double (6.9% and 5.5%, respectively). Earnings followed this pattern with one notable exception. In 2005, Asian men had the highest median income among men, ($48,693), with white men at $46,807; black men’s median was $34,433, and Hispanic males trailed at $27,380. Women’s earnings were always lower within a race, but varied considerable among races: Hispanic females were at 85% of Hispanic males while white women had only 73% of the median earnings of white men. Bruce H. Webster, Jr. & Alemayahu Bishaw, U.S. Census Bureau, American Community Census Reports, ACS-02, Data from the 2005 American Community Survey (2006), http://www.census.gov/prod/2006pubs/acs-02.pdf. See also Judith Hellerstein & David Neumark, Workplace Segregation in the United States: Race, Ethnicity, and Skill, http://papers.ssrn.com.

As this data indicates, while most minorities have made limited progress since the passage of Title VII, Asian Americans have done better. For example, we saw that Asian men had the highest median income among men, ($48,693), almost $2000 higher than white men. Subgroups of Asians, however, do not fare nearly so well, and there has been a spirited debate about the significance of Asian Americans being the “model minority.” See Professors Miranda Oshige McGowan & James Lindgren, Testing the “Model Minority” Myth, 100 NW. U.L. REV. 331, 333 (2006) (“we found that the model minority stereotype is not correlated with hostility to Asians, immigrants, African Americans, or government programs to increase opportunities for minorities. . . . However, the data do strongly support one important part of the Asian critical scholars’ critique. Those who hold positive views of Asians as hard working or intelligent are indeed more likely to believe that there is little or no discrimination against Asian Americans in jobs and housing”). But see Robert Chang & Rose Villazor, Testing the ‘Model Minority Myth’: A Case of Weak Empiricism, 101 NW. U. L. REV. 101 (2007) (critiquing the methodology undergirding these findings).

As for gender, there are more hopeful indicators. The most obvious is with respect to women, whose labor force participation rate is closer to that of men — a 13 point difference, 58% to 71% — than at any time in history. Census 2000 Brief at 4 (in 1990, the gap was 17 points, 57% for women and 74% for men). Yet women’s earnings, even among full-time workers, continued to lag; median earnings of men in 2005 were $41,965, while the women’s median was $32,168, or 76.7 percent of men’s earnings. Webster & Bishaw. In some states, however, the gap was much less, and in some cities, younger women actually earn more than their age cohort of men. Sam Roberts, For Young Earners in Big City, a Gap in Women’s Favor, NY Times, Aug. 3, 2007 (“Young women in New York and several of the nation’s other largest cities who work full time have forged ahead of men in wages”).

The status of two other groups in society of concern to the antidiscrimination laws is more complicated. For example, older Americans are wealthier than the average American, but many subgroups — particularly minority women — are among the poorest in our society. The participation of older individuals in the workforce drops off relatively early. In Census 2000, for example, almost 60% of the age 62-64 cohort was not in the workforce, although, of course, some significant portion of this group voluntarily retired. Census 2000 Brief. at 4. However, many older workers “retire” or accept Social Security involuntarily, and for them there are often inadequate benefits to maintain even minimally decent living standards. Similarly, while older workers who remain employed are often very well paid, those who lose their positions frequently find themselves unable to obtain comparable employment.
Scholarship has considered whether the differences between age discrimination and race/gender discrimination require reconsidering of the rules. Professor George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Laws*, 24 J. LEGAL STUD. 491 (1995), questioned the underlying basis of the ADEA. Taking up this theme, Samuel Issacharoff and Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA’s Unnatural Solution*, 72 N.Y.U. L. REV. 780 (1997), argued that older individuals do not fit into the usual antidiscrimination model because “far from being discrete and insular, the elderly represent the normal unfolding of life’s processes for all persons. As a group, older Americans do not suffer from poverty or face the disabling social stigma characteristically borne by black Americans....” *Id.* at 781. Their article does not recommend repeal of the ADEA but rather proposes modifying it to recognize that “the dramatic shift in wealth towards older Americans and the diminished job prospects of the young provoke grave concern that a misguided antidiscrimination model has allowed a concerted and politically powerful group of Americans to engage in a textbook example of what economists would term ‘rent-seeking.’” *Id.* at 783. *See also* Rhonda M. Reaves, *One of These Things Is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases*, 38 U. RICH. L. REV. 839 (2004) (treating older workers “like” blacks fails to fully address older workers’ unique problems and tends to marginalize the experiences of black workers).

Professor Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813 (1996), agrees that the traditional justifications for antidiscrimination legislation may not apply to the ADEA. However, she argues that the statute may prevent employer opportunism. The empirical observation that older workers are often paid more for doing the same work as younger employees may simply reflect a preference by both workers and employers for wages to rise over time. Such a preference, however, can only be achieved if employers can tie their own hands, that is, avoid the temptations of opportunistically replacing expensive, older workers with cheaper, younger ones. The ADEA, by providing legal protection for older workers, permits this “hands-tying.”

Another group whose economic condition is hard to capture statistically is the disabled. We encountered some of the data concerning individuals with disabilities in Chapter 6, pp. 487-88, but we also saw there that the statutory definition of disability may not match up with the data collected for other purposes, including the census. That does not mean that the disabled do not face profound economic challenges, but it does mean that the ADA addresses only a small part of them.

More alarming, some scholars have suggested that the ADA has actually hurt employment of the disabled. See Samuel R. Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 555-58 (2004), reviewing DAVID C. STAPLETON & RICHARD V. BURKHAUSER, *The Decline in Employment of People with Disabilities: A Policy Puzzle* (2003) (“Empirical evidence is broadly consistent with theoretical reasons to expect that mandated accommodations negatively affect the employment of people with disabilities”; but “alternative explanations are possible, including ‘the real prospect that any disemployment effect of the ADA is a short-term phenomenon,’ in part because of the falling costs of accommodation.”).

Even assuming the ADA is effective, there is the normative question of whether it is efficient. Professor J. H. Verkerke, *Is the ADA Efficient?*, 50 UCLA L. REV. 903 (2003), views the duty of reasonable accommodation as implying that some employers will have to hire workers “whose disabilities make them less productive
than other workers,” which means that the costs of accommodation can be viewed “as a mandated benefit funded by an implicit payroll tax on employers. Predictable objections follow from this characterization . . .” including that “the costs of such benefits are shifted to workers.” Id. at 907. Nevertheless, Verkerke thinks the ADA may be justified on economic grounds in terms of reducing some inefficiencies, including the avoidance of “employee churning” caused by repetitive hiring and discharge of workers with hidden disabilities and “the risk of severe mismatching in comparatively high-risk jobs and the possibility of scarring when repeated discharges make someone unemployable.” Id. at 957. Amy Wax, Disability, Reciprocity, and “Real Efficiency”: A Unified Approach, 44 WM. & MARY L. REV. 1421, 1450 (2003), takes a more conventional distributionist approach to the same question: “[T]he ADA is not necessarily inefficient overall, given the basic safety net and regulatory programs to which our society is committed. Rather, its principal design flaw is that it forces employers to pay costs that should arguably be borne by everyone.”

All this economic data, of course, raises a critical question for this course and our society: to what extent is discrimination by employers responsible for the economic problems of these groups? No one believes that the sole cause of disadvantage of various groups is present-day discrimination by employers or, more generally, by today’s society at large. The economic condition of African Americans, for example, can be traced in large part to slavery and its legacy. See Owen Fiss, in A Theory of Fair Employment Laws, 38 U. CHI. L. REV. 235, 238-39 (1971). Similar points can be made about women. Centuries of pigeonholing women into primary roles as wives and mothers, with employment limited to strictly defined kinds of “women’s work,” are reflected in today’s persistent occupational segregation. Nevertheless, some believe that one substantial explanation for this data is discrimination against women and minority group members. See, e.g., Oppenheimer, at 969-73. However, even if discrimination is largely responsible, the perpetrators may frequently not be employers: Professor Oppenheimer documents other barriers to minority advancement, including education and housing. Nevertheless, he claims that discrimination in employment against women and minorities is “pervasive,” id. at 969, and recurrent manifestations we have seen in this course lend weight to this view. However, others disagree, and the degree to which these problems are the result of continuing discrimination by employers is, to a large extent, the subject of this entire book.

An illustration of the complexity of the problem of ascertaining whether employer discrimination contributes to poor economic outcomes may be drawn from the statistical discrepancy between male and female wages. Factors other than intentional discrimination are clearly at work. Some part of the “gender gap” is undoubtedly due to lower female education rates and less sustained participation in the labor market by women as a group. However, a large part of this gap is due to occupational segregation. Vicki Schultz, in Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749, 1749 n. 1 (1990), reports that “[a]s recently as 1985, over two-thirds of working women were employed in occupations in which at least 70% of the workers were female.” Although the origins of most occupational segregation can be traced to societal and employer discrimination in earlier times, the extent to which it is perpetuated, or at least capitalized on, by current employer practices is much debated. Such practices can range from blatantly discriminatory assignments to channeling of workers through unthinking stereotyping to neutral practices that tend to maintain the earlier segregated occupations. But see Joni Hersch, The New Labor Market for Lawyers: Will Female Lawyers Still Earn
Less?, 10 CARDOZO WOMEN'S L.J. 1, 3 (2003) ("female lawyers who earned their J.D. before 1990 earn substantially less than their male counterparts, even after controlling for gender differences in work-related characteristics," but female lawyers earning their J.D. between 1990 and 1993 "earn more than their male counterparts").

Even if there are positive trends in the economic conditions of various groups, and these can be traced to the enactment of Title VII and other antidiscrimination laws, are any such gains outweighed by losses of efficiency that negatively impact on the economic welfare of society as a whole? This debate can be analyzed in economically oriented terms by considering the application of two different types of "efficiency" — Pareto optimality and Kaldor-Hicks efficiency. A reallocation of resources is Pareto-optimal when someone is better off and no one is worse off. Antidiscrimination laws, like all other sorts of governmental regulation, are unlikely to be Pareto-optimal because, while, say, blacks and women may be better off, others (employers, employee competitors, and white racists) are worse off. That is, of course, one argument against affirmative action.

The competing test for efficiency is "the broader, more controversial Kaldor-Hicks wealth-maximization criterion — which endorses all measures whose total benefits exceed their total costs, as measured by willingness-to-pay, without regard to the incidence of costs and benefits across the affected population." Gregory S. Crespi, Market Magic: Can the Invisible Hand Strangle Bigotry?, 72 B.U. L. REV. 991, 994 (1992). Put otherwise, Kaldor-Hicks "requires only that government action produce sufficient gains for its beneficiaries to allow them hypothetically to compensate those who are injured by the regulation, not that those who are injured in fact are compensated." J. Hoult Verkerke, Free to Search, 105 HARV. L. REV. 2080, 2088 (1992). The antidiscrimination laws have been defended as efficient in the Kaldor-Hicks sense of increasing total societal output. The basic argument is that these laws bring about a more efficient economy by encouraging more efficient use of human resources. Discrimination can underutilize millions of disfavored individuals. In other words, endemic discrimination against certain groups not only prevents members of those groups from fully developing their opportunities but also deprives society of the fruits of that development. By eliminating discrimination, society, not merely the immediate victims, will be better off. Subjecting this belief to a cost-benefit analysis can, however, be daunting. See John J. Donohue III, Is Title VII Efficient?, 134 U. PA. L. REV. 1411 (1986) (Title VII may produce allocative benefits by accelerating the processes by which discriminatory employers will be driven out of the market).

Some have argued that some of the benefits flowing to African Americans from Title VII are offset by concomitant harms to blacks. Professor Epstein, for example, suggests that there are costs to blacks from antidiscrimination laws, including a preference for high-skilled black labor at the expense of low-skilled black labor. Id. at 261-66. Further, he argues that the antidiscrimination laws have benefited middle-class blacks at the expense of poorer blacks. Professor Samuel Issacharoff, in Contractual Liberties in Discriminatory Markets, 70 TEX. L. REV. 1219, 1241 (1992), responds:

Epstein takes as his premise numerous observations, including those of sociologist William Julius Wilson, that Title VII has been a tremendous boon to skilled blacks, particularly in the professions, but has produced no discernible improvement in the life station of the increasing black underclass. Epstein attempts to argue that just as the
minimum wage is thought to raise the cost of marginal labor and actually decrease opportunity for teenage and other marginal laborers, so too must Title VII be responsible for shutting out the low-skilled layers of the black work force: “The chief effect of Title VII is to make highly skilled black labor more desirable relative to low-skilled black labor. As with the minimum wage, Title VII works a redistribution from worse-off to better-off blacks, which is surely far from what its principled supporters intended.”

The logic here is startling. Epstein’s best evidence to support his thesis is that the black lower classes have grown more desperate, more atomized, and more forlorn since the 1960s, when Title VII went into effect. . . . None of this evidence leads to the causation analysis that Epstein reaches for. It is nothing less than stunning that there is no mention in this section of the beginning of the deindustrialization of the United States during the period in question and the long cyclical decline in manufacturing and other industrial jobs that had long provided the primary avenue of advancement for ethnic groups arriving into the work force.

Issacharoff goes on to ask why opening up advancement to the black middle class should not “stand as a real, though partial, gain[.]” Epstein argues that whatever gains blacks accomplished under Title VII must have been at the expense of the lower layers of the black community. The evidence for this is tenuous and unpersuasive.” Id. at 1243.

Christine Jolls, Accommodation Mandates, 53 STAN. L. REV. 223, 225-30 (2000), takes a more theoretic and nuanced approach to Epstein’s point that antidiscrimination laws may not help their intended beneficiaries, or at least not all of them. Speaking to laws requiring employers to provide specified benefits, such as accommodation of the disabled and of family leave, she writes:

In broad terms, my framework predicts that accommodation mandates targeted to disabled workers will increase or leave unchanged the wages of these workers relative to the wages of nondisabled workers while simultaneously reducing disabled workers’ relative employment levels; the framework also predicts that accommodation mandates targeted to female workers will reduce the relative wages of these workers (contrary to the case of disabled workers) and will have ambiguous effects on their relative employment levels. . . .

See also John J. Donohue III, Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers, 53 STAN. L. REV. 897, 904 (2001) (“the Jolls framework indicates that women will pay for the anti-sex harassment mandate with lower wages. Uncertainty remains, however, as to whether the lower relative wages of women are offset by increases in the employment of women (which would be my hunch, as this would be consistent with the observed large increases in female labor force participation in the United States), or whether women suffer the double whammy of lower wages and lower employment (in this case where they value the mandate less than its cost of provision”).

2. **Weighing Noneconomic Costs and Benefits**

Whether or not antidiscrimination laws improve the economic condition of protected groups and whether or not they improve or impair the efficiency of the economy in general, antidiscrimination laws provide protected groups with a remedy
for the loss of dignity and associated psychic harm caused by discrimination. These harms exist even if Professor Epstein's benign "voluntary sorting" occurs. Consider the similarities between Epstein's viewpoint and the following extract from *Plessy v. Ferguson*, 163 U.S. 537, 550-52 (1896), the case that held segregation by the "separate but equal" standard did not violate the Fourteenth Amendment's equal protection clause:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it... Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

Professor George Schatzki, in *United Steelworkers of America v. Weber: An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 56-57 (1980), recognized the advantages of voluntary separation, but nonetheless reached a very different conclusion:

It is not clear we would want to outlaw racial employment discrimination, however irrational we believed it to be, if all persons were sometimes the discriminators and sometimes the discriminatees; if all ethnic groups had equal, statistical access to jobs; if all ethnic groups were equally affluent, prestigious, and influential. At least I am not sure we should want to outlaw a pluralism that allowed random ethnic discrimination. Although, on balance, I might prefer the "melting pot," or I might prefer some integration as well as some identifiable pluralism, it is not clear to me that we, as a society, desire to destroy ethnic pride, consciousness, and behavior. Destruction of that pluralistic attitude and behavior would be difficult; quick destruction might be possible, but only with involvement of the law.

[But] the burden of discrimination (in employment and elsewhere) has fallen on the members of certain ethnic groups. Racial discrimination is not random. Most of us do not suffer the burdens and barbs of ethnic discrimination; more importantly, whether or not we do suffer this irrationality sometimes, most of us have been treated most of the time by dominant persons or institutions without our race being a handicap. Saying that about blacks or chicanos, for example, would be an outright lie. These are people in our society — as a whole — who suffer in a vastly disproportionate way because of their ethnicity. The degrees of suffering and disparity are probably immeasurable, but few — if any — would deny their existence.

Is the benefit of providing a remedy for the "tort" of discrimination outweighed by the economic and social costs of antidiscrimination laws? Are there other benefits associated with antidiscrimination laws? Professor John J. Donohue III, in *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1606 (1992), sounds a chilling note:

In considering the value of antidiscrimination law, one should at least consider that the repeal of Title VII holds the remote possibility of cataclysmic racial conflict. The lessons of slavery, Jim Crow, and Nazi Germany all serve to remind us that racial prejudice can be a dangerous force. Just as efforts to push affirmative action too
forcefully may ignite dangerous passions, the injustices of private sector employment
discrimination, at a time when black incomes and wealth are far below those of whites,
also has a potential for explosive consequences. . . . Therefore, society may tolerate a
law that seems socially costly, based on a purely contemporary assessment of costs and
benefits, in order to diminish the (albeit small) likelihood that the repeal of Title VII
would breach the bigotry threshold and lead to catastrophic social costs [which is the
argument economists use regarding the need to restrain inflation given the small risk
but . . . devastating consequences of hyperinflation.] [S]ociety may not be willing to
gamble with the risk of suffering a near infinite burden — such as the holocaust in Nazi
Germany — even if the chance of such a burden is minuscule.
C. ENFORCEMENT SCHEMES

Because there is no administrative enforcement scheme for employment discrimination claims based upon § 1981 or the Constitution, plaintiffs bringing such claims are not required to exhaust administrative remedies before filing suit. See, e.g., Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975) ("[T]he filing of a Title VII charge and resort to Title VII's administrative machinery are not prerequisites for the institution of a section 1981 action."). Section 1981 and constitutional claims are filed directly in the appropriate state or federal court, subject to the applicable statute of limitations. On the other hand, employment discrimination claims brought under Title VII, the ADEA, and the ADA are subject to both administrative processes and adjudication in civil court. Thus, exhaustion of administrative remedies is a prerequisite to a lawsuit brought under these
statutes. Administrative resolution of employment discrimination charges is primarily the responsibility of the Equal Employment Opportunity Commission (EEOC).

Congress established the EEOC to enforce Title VII. Initially, the EEOC had authority only to investigate charges of unlawful discrimination under Title VII. If the EEOC found reasonable cause to believe that a charge was true, it could attempt to resolve the charge only through "informal methods of conference, conciliation, and persuasion." Title VII, § 706(b), 42 U.S.C. § 2000e–5(b). Because Congress declined to provide the EEOC with the "cease and desist" authority given to some other federal agencies, such as the National Labor Relations Board, NLRA § 10(c), the EEOC initially was characterized as a "poor enebleed thing." Michael I. Sovern, Legal Restraints on Racial Discrimination in Employment 205 (1966).

Since 1965, when Title VII first became applicable, several reforms have strengthened the EEOC's enforcement authority. First, in the 1972 amendments to Title VII, Congress gave the EEOC the authority to seek judicial enforcement of Title VII. 42 U.S.C. § 2000e–5(f). Second, under President Carter's Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1979), reprinted in 5 U.S.C. app. at 1366, the EEOC is now the major federal agency responsible for the enforcement of laws prohibiting discrimination in employment. Prior to the adoption of the Reorganization Plan, federal antidiscrimination enforcement efforts were distributed among eighteen different federal agencies. The EEOC now has the major enforcement responsibility for Title VII, the ADEA, the ADA, and the Equal Pay Act. In addition, the EEOC has taken over responsibility from the Civil Service Commission for employment discrimination enforcement in the federal sector.

The EEOC has statutory authority to promulgate procedural regulations to enforce Title VII, 42 U.S.C. § 2000e–12, and the ADA, 42 U.S.C. § 12116. Those regulations are found at 29 C.F.R. § 1601 (Title VII), and 29 C.F.R. § 1630 (ADA). The EEOC also has promulgated procedural regulations for ADEA claims, 29 C.F.R. § 1626, federal sector employment discrimination claims, 29 C.F.R. § 1614, and other statutes over which it has administrative enforcement responsibility. The EEOC typically does not follow the formal rulemaking proceedings dictated by the Administrative Procedure Act ("APA"), and there has long been a question of what level of deference EEOC procedural regulations should be afforded. The Supreme Court has repeatedly declined to resolve this issue, instead holding that the EEOC's regulations were either plainly correct or plainly incorrect, thus affording no need for deference. See Edelman v. Lynchburg Coll., 555, U.S. 106, 114, 122 S.Ct. 1145, 1150, 152 L.Ed.2d 183, 199 (2002) ("[T]here is no reason to resolve any question of deference here. We find the EEOC rule not only a reasonable one, but the position we would adopt even if there were no formal rule and we were interpreting the statute from scratch."); General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 551, 600, 124 S.Ct. 1236, 1248, 157 L.Ed.2d 1094, 1113 (2004)
(concluding that there was no need for deference where the "[EEOC] is clearly wrong"). Recently, the Supreme Court afforded deference to the EEOC’s interpretation of one of its own regulations regarding what constitutes a charge. See Federal Express Corp. v. Holowecki, 552 U.S. 389, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008). Although the Court has declined to define a specific level of deference, there is little question that the Court weighs the EEOC’s regulations and interpretations as part of its statutory analysis. Several Justices have urged the Court to afford more formal deference to EEOC regulations, even when they are not issued through formal rulemaking. See, e.g., Edelman v. Lynchburg Coll., 535 U.S. at 119, 122 S.Ct. at 1153, 152 L.Ed.2d at 201 (Thomas, J., concurring) ("I concur because I read the Court’s opinion to hold that the EEOC possessed the authority to promulgate this procedural regulation, and that the regulation is reasonable, not proscribed by statute, and issued in conformity with the APA."); id. at 122–23, 122 S.Ct. at 1155, 152 L.Ed.2d at 203 (Scalia, J., concurring) ("I think the EEOC’s regulation is entitled to Chevron deference.").

In addition to procedural regulations, the EEOC has issued guidelines on, for example, claims based on discrimination because of sex, religion, national origin, and harassment, and on employment selection procedures. Unlike the procedural regulations, the guidelines are the EEOC’s substantive interpretations of the statutes. The Supreme Court has held that the level of deference it will accord to the EEOC’s guidelines "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." General Elec. Co. v. Gilbert, 429 U.S. 135, 142, 97 S.Ct. 401, 411, 50 L.Ed.2d 343 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944)).

1. ADMINISTRATIVE EXHAUSTION

As one judge has observed, Title VII is "rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer, yet its enforcement mechanisms are usually triggered by laymen." Egelston v. State Univ. Coll. at Geneseo, 535 F.2d 752, 754 (2d Cir.1976). Moreover, as Professor Brooks has argued, "[p]rocedural mistakes can effectively nullify substantive rights, and poor remedies can render the pursuit of such rights useless and thereby vitiate the law’s effectiveness"; these “propositions” are “[n]owhere better illustrated than in the case of Title VII.” Roy L. Brooks, A Roadmap Through Title VII’s Procedural and Remedial Labyrinth, 24 Sw.U.L.Rev. 511, 511 (1995). What follows is a brief overview of the administrative process followed by a more detailed outline of the administrative requirements that plaintiffs must satisfy prior to filing a civil action under Title VII and the ADA. There are some differences with the procedural requirements for ADEA claims, which will be discussed where applicable below.
Claims filed by individuals covered under Title VII, the ADA or the ADEA must first be filed with the EEOC. The filing is known as a “charge of discrimination,” and the time for filing such claims depends on whether the state has an appropriate state agency. If the individual files with a state agency, generally at the same time the claim is filed with the EEOC, she must file the claim within 300 days from the date the discriminatory act occurred (how that time is calculated is discussed below), whereas in states without a state agency, the claim must be filed with the EEOC within 180 days. The longer filing deadline in states with state agencies was designed to preserve state interests and provide sufficient time for the states to process complaints. Today, most complaints are filed directly with the EEOC, except in certain jurisdictions, and are simultaneously filed with the state when the employee checks a box on the charge form, which satisfies the requirement for the longer filing deadline.

Once a charge of discrimination is filed, the responsible agency will seek to conciliate the charge and, if that fails, the agency conducts an investigation. It is also possible that conciliation efforts will begin after the investigation commences. After conducting an investigation, the agency will make a determination as to whether it believes discrimination occurred. If the agency decides discrimination was the underlying cause of the challenged action, it will issue a “cause” determination explaining its basis for the decision and inviting the employer into settlement talks. If, however, the agency determines discrimination was not involved, the agency will issue a “no cause” determination, and, at the same time, will issue the employee a “Notice of Right to Sue.”

If the agency issues a cause determination, and the charge is not settled, then the EEOC will typically file a federal lawsuit on behalf of the employee. The employee has an absolute right to intervene in that lawsuit, and many employees choose to do so. In addition, the charging party, as the person who files the claim is known, has a right to request a Notice of Right to Sue any time after 180 days have elapsed from the date the charge was filed. Often times the charging party will request the Notice of Right to Sue before an investigation has commenced or has been completed, but the EEOC must issue the notice upon request.

Once the charging party obtains a Notice of Right to Sue, either by request or after a cause determination, she can file a civil action in federal or state court within 90 days of receiving the notice. A right-to-sue notice functions as the party’s ticket to filing a federal complaint, and it is a prerequisite to suit. A more detailed discussion of the procedural requirements follows.

a. Basic requirements for Title VII and ADA claims: An individual seeking relief from unlawful employment discrimination under Title VII or the ADA may not file a civil suit until she has first exhausted administrative remedies before the EEOC. 42 U.S.C. § 2000e-5. See Love v. Pullman Co., 404 U.S. 522, 523, 92 S.Ct. 616, 617, 30 L.Ed.2d 679 (1972). The ADA adopts the same administrative exhaustion requirement.
applicable to Title VII claims. 42 U.S.C. § 12117. An individual (or the aggrieved or charging party) must satisfy two statutory requirements in order to bring a civil action: she must (1) timely file a charge with the EEOC, and (2) timely file a complaint in federal court within ninety days of receipt of the right-to-sue notice from the EEOC. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798, 93 S.Ct. 1817, 1822, 36 L.Ed.2d 668 (1973); Alexander v. Gardner–Denver Co., 415 U.S. 36, 47, 94 S.Ct. 1011, 1019, 39 L.Ed.2d 147 (1974). The administrative exhaustion requirement is covered in this section. The timely filing requirement is covered in the next section on judicial enforcement.

To satisfy the administrative filing requirement under Title VII § 706(e)(1), 42 U.S.C. § 2000e–5(e)(1), an aggrieved party must file a charge with the EEOC “within one hundred and eighty days after the alleged unlawful employment practice occurred” or “within three hundred days after the alleged unlawful employment practice occurred” if the aggrieved party has “initially instituted proceedings with a State or local agency with authority to grant or seek relief.” Most states now have equivalent state agencies so the general filing deadline is 300 days, with some exceptions.

As to the second statutory filing requirement, Title VII § 706(f)(1), 42 U.S.C. § 2000e–5(f)(1), provides that an aggrieved person has ninety days within which to file a civil action after receipt of notice-of-right-to-sue from the EEOC. If these two filing requirements have been satisfied, a federal or state court has jurisdiction to hear and decide the case even though the EEOC has not complied with or completed all of its statutory obligations under Title VII, such as making a reasonable cause determination or attempting conciliation, see, e.g., Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971).

Section 706(b) of Title VII, 42 U.S.C. § 2000e–(5)(b), provides that a charge filed with the EEOC “shall be in writing under oath or affirmation.” An EEOC regulation states that “a charge is sufficient when the [EEOC] receives from the person making the charge a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of.” 29 C.F.R. § 1601.12(b). The regulation further provides that “[a] charge may be amended to cure technical defects or omissions, including the failure to verify the charge. * * * Such amendments * * * shall relate back to the date the charge was first received.” Id. In Edelman v. Lynchburg College, 535 U.S. 106, 122 S.Ct. 1145, 152 L.Ed.2d 188 (2002), the Supreme Court resolved a circuit split over whether an unverified EEOC intake questionnaire that is timely filed but not verified within the filing period constitutes a timely filed charge. Edelman upheld an EEOC regulation permitting a timely filed unverified charge to be verified after the expiration of the charge-filing period. The regulation provides that the verification of a charge relates back to a timely filed unverified charge. The Court upheld the EEOC regulation on
the ground that it was a reasonable interpretation of the provision in Title VII governing the filing of charges of discrimination with the EEOC.

Most charges are filed without the assistance of counsel and have limited information. The scope of the charge, however, will later define the permissible causes of action if a complaint is filed in court. More specifically, a plaintiff's judicial complaint is confined to the scope of the administrative investigation that can reasonably be expected to flow out of the charge. See Bryant v. Bell Atl. Md., Inc., 288 F.3d 124, 132 (4th Cir.2002). The question courts address is what causes of action could be expected "to grow out of the charge of discrimination" from a reasonable investigation. Gregory v. Georgia Dep't of Hum. Res., 355 F.3d 1277, 1280 (11th Cir.2004) (per curiam). As a result, courts may dismiss certain causes of action if they were not sufficiently related to the original charge. See, e.g., Pacheco v. Mineta, 448 F.3d 783, 792 (5th Cir.2006) (finding that disparate impact claim was not within scope of charge that alleged disparate treatment); Bryant, 288 F.3d at 132 (dismissing retaliation claim); Rush v. McDonald's Corp., 966 F.2d 1104, 1111 (7th Cir.1992) (holding that racial harassment claim fell outside scope of charge that mentioned termination).

The ADEA provides that "[n]o civil action may be commenced by an individual under [the ADEA] until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC], 29 U.S.C. § 626(d), but the statute does not define the meaning of a 'charge.'" In Federal Express Corp. v. Holowecki, 552 U.S. 389, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008), the Supreme Court held that "the [EEOC] acted within its authority in formulating the rule that a filing is deemed a charge if the document reasonably can be construed to request agency action and appropriate relief on the employee’s behalf." 128 S.Ct. at 1159. The Court found that a completed "Intake Questionnaire" that was filed with the EEOC along with a detailed affidavit indicating the respondent's desire to obtain relief for age discrimination was sufficient to constitute a "charge," and this ruling should be equally applicable to the other statutes for which the EEOC has authority.

b. Deferral or nondeferral jurisdictions and timely filing: As noted previously, the time requirement for filing an EEOC charge depends upon whether the claim arises in a deferral or nondeferral jurisdiction. A deferral jurisdiction has a state or local agency that is authorized "to grant or seek relief" from employment discrimination or "to institute criminal proceedings" against such practices. Title VII, § 706(c), 42 U.S.C. § 2000e–5(c). A nondeferral jurisdiction is one that does not satisfy the requirements of § 706(c), 42 U.S.C. § 2000e–5(c). The EEOC determines which jurisdictions qualify as deferral jurisdictions, and today, most states have properly authorized deferral agencies. See 29 C.F.R. §§ 1601.70–1601.75. In a deferral jurisdiction, the charge must be filed with the EEOC within 300 days after the alleged unlawful employment practice has occurred, but the charge may not be filed with the EEOC before the
expiration of 60 days after proceedings have been commenced under state or local law, unless such proceedings have been terminated earlier. Title VII §§ 706(e), 706(e), 42 U.S.C. §§ 2000e–5(c), –5(e). With respect to claims arising in nondeferral jurisdictions, Title VII provides that a charge shall be filed within 180 days after the alleged unlawful employment practice has occurred. In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 65, 100 S.Ct. 2024, 2031–32, 64 L.Ed.2d 723 (1980), the Supreme Court held that, in deferral jurisdictions, “initial resort to state and local remedies is mandated.” The EEOC cannot proceed with a charge if that charge should have been filed with a state or local agency in the first instance. The EEOC may, however, refer the charge to a state or local agency on behalf of a charging party, defer its own action on the charge, and then assume jurisdiction over the charge when appropriate deference to the state or local agency has been satisfied. See *Love v. Pullman Co.*, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972).

In *Mohasco Corp. v. Silver*, 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980), the Supreme Court had ruled that, in a deferral jurisdiction, a charge that was initially filed with the EEOC had to be filed within 240 days of the alleged discriminatory event so as to afford the state 60 days to process the complaint. See Title VII, §§ 706(c), (e)(1), 42 U.S.C. §§ 2000e–5(c), (e)(1). By entering into worksharing agreements, however, the EEOC and the various deferral jurisdictions have eliminated some of the procedural hurdles that charging parties previously faced. See Title VII, § 709(b), 42 U.S.C. § 2000e–8(b). The worksharing agreements render the filing with one agency the equivalent of filing with both and typically provide for a waiver of the 60-day investigation period, which effectively terminates the state’s exclusive jurisdiction over the claim. See *EEOC v. Commercial Off. Prods. Co.*, 486 U.S. 107, 125, 108 S.Ct. 1666, 1676, 100 L.Ed.2d 96 (1988) (upholding EEOC interpretation that waiver pursuant to worksharing agreement terminates state proceeding). As a result of the worksharing agreements, the general deadline for filing a charge with the EEOC in deferral jurisdictions is 300 days. See *Maynard v. Pneumatic Prods. Corp.*, 256 F.3d 1259 (11th Cir.2001) (explaining the process).

c. The timely filing requirement: Section 706(e)(1) of Title VII, 42 U.S.C. § 2000e–5(e)(1), requires the timely filing of a charge with the EEOC within either 180 days or 300 days “after the alleged unlawful employment practice occurred * * *.” The question when an “alleged unlawful practice has occurred” so as to trigger the running of the 180- or 300-day filing requirement has been a contentious issue in many cases. The issue most frequently arises in cases in which a plaintiff relies upon a series of alleged adverse employment actions, some of which occurred within and some of which occurred outside of the 180- or 300-day period.
LEDBETTER v. GOODYEAR TIRE & RUBBER CO.
Supreme Court of the United States, 2007.
550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982.

JUSTICE ALITO delivered the opinion of the Court.

This case calls upon us to apply established precedent in a slightly different context. We have previously held that the time for filing a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC) begins when the discriminatory act occurs. We have explained that this rule applies to any “[d]iscrete ac[t]” of discrimination, including discrimination in “termination, failure to promote, denial of transfer, [and] refusal to hire.” National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 114, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). Because a pay-setting decision is a “discrete act,” it follows that the period for filing an EEOC charge begins when the act occurs. Petitioner, having abandoned her claim under the Equal Pay Act, asks us to deviate from our prior decisions in order to permit her to assert her claim under Title VII. Petitioner also contends that discrimination in pay is different from other types of employment discrimination and thus should be governed by a different rule. But because a pay-setting decision is a discrete act that occurs at a particular point in time, these arguments must be rejected. We therefore affirm the judgment of the Court of Appeals.

I

Petitioner Lilly Ledbetter (Ledbetter) worked for respondent Goodyear Tire and Rubber Company (Goodyear) at its Gadsden, Alabama, plant from 1979 until 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors’ evaluation of their performance. In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge. After taking early retirement in November 1998, Ledbetter commenced this action, in which she asserted, among other claims, a Title VII pay discrimination claim and a claim under the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d).

The District Court granted summary judgment in favor of Goodyear on several of Ledbetter’s claims, including her Equal Pay Act claim, but allowed others, including her Title VII pay discrimination claim, to proceed to trial. In support of this latter claim, Ledbetter introduced evidence that during the course of her employment several supervisors had given her poor evaluations because of her sex, that as a result of these evaluations her pay was not increased as much as it would have been if she had been evaluated fairly, and that these past pay decisions continued to affect the amount of her pay throughout her employment. Toward the end of her time with Goodyear, she was being paid significantly less than any of her male colleagues. Goodyear maintained that the evaluations had been nondiscriminatory, but the jury found for Ledbetter and awarded her backpay and damages.
On appeal, Goodyear contended that Ledbetter’s pay discrimination claim was time barred with respect to all pay decisions made prior to September 26, 1997—that is, 180 days before the filing of her EEOC questionnaire. And Goodyear argued that no discriminatory act relating to Ledbetter’s pay occurred after that date.

The Court of Appeals for the Eleventh Circuit reversed, holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the employee’s pay during the EEOC charging period. The Court of Appeals then concluded that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in making the only two pay decisions that occurred within that time span, namely, a decision made in 1997 to deny Ledbetter a raise and a similar decision made in 1998:

* * *

II

Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice” to discriminate “against any individual with respect to his compensation because of such individual’s sex.” 42 U.S.C. § 2000e-2(a)(1). An individual wishing to challenge an employment practice under this provision must first file a charge with the EEOC. § 2000e-5(e)(1). Such a charge must be filed within a specified period (either 180 or 300 days, depending on the State) “after the alleged unlawful employment practice occurred,” ibid., and if the employee does not submit a timely EEOC charge, the employee may not challenge that practice in court, § 2000e-5(f)(1).

In addressing the issue whether an EEOC charge was filed on time, we have stressed the need to identify with care the specific employment practice that is at issue. [National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 110–11, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).] Ledbetter points to two different employment practices as possible candidates. Primarily, she urges us to focus on the paychecks that were issued to her during the EEOC charging period (the 180-day period preceding the filing of her EEOC questionnaire), each of which, she contends, was a separate act of discrimination. Alternatively, Ledbetter directs us to the 1993 decision denying her a raise, and she argues that this decision was “unlawful because it carried forward intentionally discriminatory disparities from prior years.” Both of these arguments fail because they would require us in effect to jettison the defining element of the legal claim on which her Title VII recovery was based.

Ledbetter asserted disparate treatment, the central element of which is discriminatory intent. However, Ledbetter does not assert that the relevant Goodyear decisionmakers acted with actual discriminatory intent either when they issued her checks during the EEOC charging period or when they denied her a raise in 1998. Rather, she argues that the
paychecks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period. Similarly, she maintains that the 1998 decision was unlawful because it "carried forward" the effects of prior, uncharged discrimination decisions. In essence, she suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period. ** This argument is squarely foreclosed by our precedents.

In United Air Lines, Inc. v. Evans, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), we rejected an argument that is basically the same as Ledbetter's. **

We agreed with Evans that the airline's "seniority system [did] indeed have a continuing impact on her pay and fringe benefits," id., at 558, 97 S.Ct. 1885, but we noted that "the critical question [was] whether any present violation exist[ed]." Ibid. (emphasis in original). We concluded that the continuing effects of the precharging period discrimination did not make out a present violation. **

"A discriminatory act which is not made the basis for a timely charge ** is merely an unfortunate event in history which has no present legal consequences." Ibid. It would be difficult to speak to the point more directly.

This same approach dictated the outcome in Lorance v. AT & T Technologies, Inc., 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), which grew out of a change in the way in which seniority was calculated under a collective-bargaining agreement. Before 1979, all employees at the plant in question accrued seniority based simply on years of employment at the plant. In 1979, a new agreement made seniority for workers in the more highly paid (and traditionally male) position of "tester" depend on time spent in that position alone and not in other positions in the plant. Several years later, when female testers were laid off due to low seniority as calculated under the new provision, they filed an EEOC charge alleging that the 1979 scheme had been adopted with discriminatory intent **.

We held that the plaintiffs' EEOC charge was not timely because it was not filed within the specified period after the adoption in 1979 of the new seniority rule. We noted that the plaintiffs had not alleged that the new seniority rule treated men and women differently or that the rule had been applied in a discriminatory manner. Rather, their complaint was that the rule was adopted originally with discriminatory intent. And as in Evans and Ricks, we held that the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred,
not from the date when the effects of this practice were felt. * * * 2

Our most recent decision in this area confirms this understanding. In Morgan, we explained that the statutory term “employment practice” generally refers to “a discrete act or single ‘occurrence’” that takes place at a particular point in time. We pointed to “termination, failure to promote, denial of transfer, [and] refusal to hire” as examples of such “discrete” acts, and we held that a Title VII plaintiff “can only file a charge to cover discrete acts that ‘occurred’ within the appropriate time period.”

The instruction provided by Evans, Ricks, Lorance, and Morgan is clear. The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.

Ledbetter’s arguments here—that the paychecks that she received during the charging period and the 1998 raise denial each violated Title VII and triggered a new EEOC charging period—cannot be reconciled with Evans, Ricks, Lorance, and Morgan. Ledbetter, as noted, makes no claim that intentionally discriminatory conduct occurred during the charging period or that discriminatory decisions that occurred prior to that period were not communicated to her. Instead, she argues simply that Goodyear’s conduct during the charging period gave present effect to discriminatory conduct outside of that period. But current effects alone cannot breathe life into prior, uncharged discrimination; as we held in Evans, such effects in themselves have “no present legal consequences.” 431 U.S. at 558, 97 S.Ct. 1885. Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure.

* * *

Certainly, the 180-day EEOC charging deadline is short by any measure * * * . This short deadline reflects Congress’ strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.

A disparate-treatment claim comprises two elements: an employment practice, and discriminatory intent. Nothing in Title VII supports treating

2. After Lorance, Congress amended Title VII to cover the specific situation involved in that case. See 42 U.S.C. § 2000e-5(e)(2) (allowing for Title VII liability arising from an intentionally discriminatory seniority system both at the time of its adoption and at the time of its application). The dissent attaches great significance to this amendment, suggesting that it shows that Lorance was wrongly reasoned as an initial matter. * * * For present purposes, what is most important about the amendment in question is that it applied only to the adoption of a discriminatory seniority system, not to other types of employment discrimination. * * *
the intent element of Ledbetter’s claim any differently from the employment practice element. If anything, concerns regarding stale claims weigh more heavily with respect to proof of the intent associated with employment practices than with the practices themselves. For example, in a case such as this in which the plaintiff’s claim concerns the denial of raises, the employer’s challenged acts (the decisions not to increase the employee’s pay at the times in question) will almost always be documented and will typically not even be in dispute. By contrast, the employer’s intent is almost always disputed, and evidence relating to intent may fade quickly with time. In most disparate-treatment cases, much if not all of the evidence of intent is circumstantial. Thus, the critical issue in a case involving a long-past performance evaluation will often be whether the evaluation was so far off the mark that a sufficient inference of discriminatory intent can be drawn. This can be a subtle determination, and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened. 4

Ledbetter contends that employers would be protected by the equitable doctrine of laches, but Congress plainly did not think that laches was sufficient in this context. Indeed, Congress took a diametrically different approach, including in Title VII a provision allowing only a few months in most cases to file a charge with the EEOC.

* * * We therefore reject the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period. Ledbetter’s claim is, for this reason, untimely.

III

A

In advancing her two theories Ledbetter does not seriously contest the logic of Evans, Ricks, Lorance, and Morgan as set out above, but rather argues that our decision in Bazemore v. Friday, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (per curiam), requires different treatment of her claim because it relates to pay. Ledbetter focuses specifically on our statement that “[e]ach week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII.” Id., at 395, 106 S.Ct. 3000. She argues that in Bazemore we adopted a “paycheck accrual rule” under which each paycheck, even if not accompanied by discriminatory intent, triggers a new EEOC charging period during which the complainant may properly challenge any prior discriminatory conduct

4. * * * [T]his case illustrates the problems created by tardy lawsuits. Ledbetter’s claims of sex discrimination turned principally on the misconduct of a single Goodyear supervisor, who, Ledbetter testified, retaliated against her when she rejected his sexual advances during the early 1980’s, and did so again in the mid-1990’s when he falsified deficiency reports about her work. His misconduct, Ledbetter argues, was “a principal basis for [her] performance evaluation in 1997.” Yet, by the time of trial, this supervisor had died and therefore could not testify. A timely charge might have permitted his evidence to be weighed contemporaneously.
that impacted the amount of that paycheck, no matter how long ago the discrimination occurred. * * *

_Bazemore_ concerned a disparate-treatment pay claim brought against the North Carolina Agricultural Extension Service (Service). Service employees were originally segregated into “a white branch” and “a Negro branch,” with the latter receiving less pay, but in 1965 the two branches were merged. After Title VII was extended to public employees in 1972, black employees brought suit claiming that pay disparities attributable to the old dual pay scale persisted. The Court of Appeals rejected this claim, which it interpreted to be that the “‘discriminatory difference in salaries should have been affirmatively eliminated.’” _Id._, at 395, 106 S.Ct. 3000.

This Court reversed in a _per curiam_ opinion, but all of the Members of the Court joined Justice Brennan’s separate opinion [concurring in part]. Justice Brennan wrote:

The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries prior to the time it was covered by Title VII does not excuse perpetuating that discrimination after the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII’s effective date * * *

_Id._ at 395, 106 S.Ct. 3000 (emphasis in original).

Far from adopting the approach that Ledbetter advances here, this passage made a point that was “too obvious to warrant extended discussion”; namely, that when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used.

* * *

The sentence in Justice Brennan’s opinion on which Ledbetter chiefly relies comes directly after the passage quoted above, and makes a similarly obvious point: “Each week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII.” _Id._ at 395, 106 S.Ct. 3000.

In other words, a freestanding violation may always be charged within its own charging period regardless of its connection to other violations. We repeated this same point more recently in _Morgan_ * * *. Neither of these
opinions stands for the proposition that an action not comprising an employment practice and alleged discriminatory intent is separately chargeable, just because it is related to some past act of discrimination.

* * *

Because Ledbetter has not adduced evidence that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus, *Bazemore* is of no help to her. Rather, all Ledbetter has alleged is that Goodyear’s agents discriminated against her individually in the past and that this discrimination reduced the amount of later paychecks. Because Ledbetter did not file timely EEOC charges relating to her employer’s discriminatory pay decisions in the past, she cannot maintain a suit based on that past discrimination at this time.

B

The dissent also argues that pay claims are different. Its principal argument is that a pay discrimination claim is like a hostile work environment claim because both types of claims are “‘based on the cumulative effect of individual acts,’” but this analogy overlooks the critical conceptual distinction between these two types of claims. And although the dissent relies heavily on *Morgan*, the dissent’s argument is fundamentally inconsistent with *Morgan*’s reasoning.

*Morgan* distinguished between “discrete” acts of discrimination and a hostile work environment. A discrete act of discrimination is an act that in itself “constitutes a separate actionable ‘unlawful employment practice’” and that is temporally distinct. As examples we identified “termination, failure to promote, denial of transfer, or refusal to hire.” A hostile work environment, on the other hand, typically comprises a succession of harassing acts, each of which “may not be actionable on its own.”* * * In other words, the actionable wrong is the environment, not the individual acts that, taken together, create the environment.

Contrary to the dissent’s assertion, what Ledbetter alleged was not a single wrong consisting of a succession of acts. Instead, she alleged a series of discrete discriminatory acts (arguing that payment of each paycheck constituted a separate violation of Title VII), each of which was independently identifiable and actionable, and *Morgan* is perfectly clear that when an employee alleges “serial violations,” *i.e.,* a series of actionable wrongs, a timely EEOC charge must be filed with respect to each discrete alleged violation.

* * * [T]he should also be noted that the dissent is coy as to whether it would apply the same rule to all pay discrimination claims or whether it would limit the rule to cases like Ledbetter’s, in which multiple discriminatory pay decisions are alleged. The dissent relies on the fact that Ledbetter was allegedly subjected to a series of discriminatory pay decisions over a period of time, and the dissent suggests that she did not
realize for some time that she had been victimized. But not all pay cases share these characteristics.

If, as seems likely, the dissent would apply the same rule in all pay cases, then, if a single discriminatory pay decision made 20 years ago continued to affect an employee’s pay today, the dissent would presumably hold that the employee could file a timely EEOC charge today. And the dissent would presumably allow this even if the employee had full knowledge of all the circumstances relating to the 20-year-old decision at the time it was made. ** We refuse to take that approach.

IV

* * *

Ledbetter, finally, makes a variety of policy arguments in favor of giving the alleged victims of pay discrimination more time before they are required to file a charge with the EEOC. Among other things, she claims that pay discrimination is harder to detect than other forms of employment discrimination.

* * *

Ledbetter’s policy arguments for giving special treatment to pay claims find no support in the statute and are inconsistent with our precedents. We apply the statute as written, and this means that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute.

* * *

[Justice Ginsburg dissented in an opinion joined by Justices Stevens, Souter, and Breyer.]
2. JUDICIAL ENFORCEMENT

Section 706(f)(1) of Title VII, 42 U.S.C. § 2000e–5(f)(1), provides that if the EEOC dismisses a charge, or if, within 180 days of the filing of the charge, the EEOC (or the Attorney General in a case involving a government-mental employee) has not filed a civil action or entered into a conciliation agreement, the EEOC must notify the aggrieved party who may then file a civil action within ninety days of receiving such notice. This notice is known as the “right-to-sue letter.” The Supreme Court has interpreted the phrase “civil action” in Title VII, § 706(f), 42 U.S.C. § 2000e–5(f), to mean a trial de novo, so that the EEOC’s administrative determination has no binding effect in a judicial proceeding. See Chandler v. Roudebush, 425 U.S. 840, 844–45, 96 S.Ct. 1949, 1952, 48 L.Ed.2d 416 (1976) (federal employees); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798–99, 93 S.Ct. 1817, 1822, 36 L.Ed.2d 668 (1973) (private employees). Both federal and state courts of competent jurisdiction are authorized to exercise jurisdiction over Title VII and ADA claims. See Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 821, 110 S.Ct. 1566, 1567, 108 L.Ed.2d 834 (1990).

a. Timely filing in court: Receipt of the right-to-sue letter triggers the beginning of the ninety days within which an aggrieved party must file a civil action in state or federal court. This statutory notice requirement has raised a number of issues. When the EEOC determines that it will likely be unable to process a charge within the 180-day period, a longstanding regulation authorizes sending out a right-to-sue letter prior to the expiration of the 180 days. 29 C.F.R. § 1601.28(a)(2). The courts are divided on the validity of this regulation. Some courts have upheld the regulation on the ground that the practice is not expressly prohibited
under Title VII or that it protects aggrieved parties when the EEOC, a perpetually underfunded agency, clearly will not be able to investigate a charge within the 180-day period. See, e.g., Walker v. United Parcel Serv., 240 F.3d 1268, 1276–77 (10th Cir.2001). Other courts have held that the regulation is invalid on the ground that it undermines the congressional goal of achieving nonadversarial resolution of employment discrimination claims or, alternatively, that the practice will inundate the federal courts with frivolous discrimination lawsuits. See, e.g., Martini v. Federal Nat’l Mtg. Ass’n (Fannie Mae), 178 F.3d 1336 (D.C.Cir.1999) (holding the regulation is invalid and discussing the circuit split).

The courts have adopted different rules on when the 90-day filing period begins to run after the EEOC sends the notice-of-right-to-sue letter. For example, the Seventh Circuit has adopted an actual notice rule, but the rule does not apply to a plaintiff who fails to receive actual notice through her own fault. See Houston v. Sidley & Austin, 185 F.3d 837 (7th Cir.1999). In Harvey v. City of New Bern Police Department, 813 F.2d 652 (4th Cir.1987), the Fourth Circuit expressly rejected the Seventh Circuit’s rule and adopted instead a “reasonable short time” rule within which a plaintiff must pick up the right-to-sue notice after receiving notice from the Post Office that a letter is waiting for her. In Ebbert v. Daimler-Chrysler Corp., 319 F.3d 103 (3d Cir.2003), the court held that oral notice from the EEOC may trigger the 90-day filing rule if it is equivalent to written notice from the EEOC.

The 90–day rule is not jurisdictional, Hill v. John Chezick Imports, 869 F.2d 1122 (8th Cir.1989), and the Supreme Court has stated that equitable tolling of the ninety days may be justified where the notice from the EEOC is inadequate, where a motion for appointment of counsel is pending, where the court has led the plaintiff to believe all statutory requirements for bringing suit have been satisfied, or where the defendant’s misconduct has “lulled the plaintiff into inaction.” Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725–26, 80 L.Ed.2d 196 (1984).

The doctrine of laches may bar suit if an aggrieved party unreasonably delays requesting the right-to-sue notice or the notice is returned to the EEOC because the plaintiff failed to provide the EEOC with a current address and the defendant is prejudiced by the plaintiff’s conduct. See, e.g., Jeffries v. Chicago Transit Auth., 770 F.2d 676 (7th Cir.1985) (laches bars suit where plaintiff filed complaint in court more than ten years after filing the charge with the EEOC), cert. denied, 475 U.S. 1050, 106 S.Ct. 1273, 89 L.Ed.2d 581 (1986). The EEOC is not subject to the same timely filing requirements as private parties, but in Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977), the Supreme Court held that suits filed by the EEOC may be dismissed under the laches doctrine.

A special set of problems arises when the plaintiff is represented by counsel at any time during the course of the administrative proceedings or
before the ninety days expire after receipt of the notice of right-to-sue. If an attorney has been designated as the agent of the plaintiff to receive the EEOC notice, the 90-day period begins to run when the attorney receives the notice. See Jones v. Madison Serv. Corp., 744 F.2d 1309, 1313–14 (7th Cir. 1984).

b. What constitutes a complaint?: In Baldwin County Welcome Center v. Brown, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984) (per curiam), a pro se litigant filed his right-to-sue letter in the district court because he had difficulty obtaining an attorney to represent him. The plaintiff argued that the filing of the right-to-sue letter tolled the running of the 90-day filing period. The Court disagreed, holding that the filing of the notice of right-to-sue does not toll the running of the 90-day filing requirement because the statutory notice, standing alone, fails to satisfy Rule 8(a) of the Federal Rules of Civil Procedure. Under Rule 8(a), a complaint must state the basis of jurisdiction, set forth a short, plain statement of the facts, and a prayer for relief. Because a right-to-sue letter does not contain a statement of the factual basis of the claim, it cannot qualify as a complaint under Rule 8(a). Id. at 149, 104 S.Ct. at 1723.

In Ashcroft v. Iqbal, __ U.S. ___, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), the Supreme Court held that conclusory allegations in a complaint are not entitled to an assumption of truth and therefore should not be considered in deciding whether the plaintiff has adequately stated a claim for relief. Id. at ___, 129 S.Ct. at 1950. The Iqbal opinion concluded that “[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice,” instead, the district court should only consider “well-pleaded factual allegations.” Id. at ___, 129 S.Ct. at 1549–50. See also Bell Atlantic v. Twombly, 550 U.S. 544, 554–60, 127 S.Ct. 1955, 1964–67, 167 L.Ed.2d 929 (2007). Neither Ashcroft nor Twombly were employment discrimination cases, but they reflect a new—more stringent—interpretation of the pleading standards under the Federal Rules of Civil Procedure, which may have an effect on many civil cases, including employment discrimination claims. Melissa Hart, Procedural Extremism: The Supreme Court’s 2008–2009 Labor and Employment Cases, 13 Emp.Rts. & Emp. Pol’y J. 253, 277–83 (2009). See, e.g., Fowler v. UPMC Shadyside, 578 F.3d 203, 209–11 (3d Cir.2009) (discussing effect of Ashcroft and Twombly on the standard of pleading in employment discrimination cases).

c. Suits by the EEOC and the Attorney General: The EEOC has authority to bring civil actions in its own name. Title VII § 706, 42 U.S.C. § 2000e–5. The Court affirmed the authority of the EEOC to bring suits in its own name, independent of the rights or the actions or inactions of alleged discriminatees, in EEOC v. Waffle House, 554 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002). Also, the Attorney General is authorized to bring civil actions against governmental employers who are covered by the relevant statutory scheme. Title VII, § 707, 42 U.S.C. § 2000e–6.
B. SURVEY OF MAJOR FEDERAL LAWS ON EMPLOYMENT DISCRIMINATION

The following is a survey of major federal laws on employment discrimination. Congress has amended most of the statutory provisions at one time or another since the dates of their original enactment. The laws are listed in the order in which they were enacted.

1. *The United States Constitution:*

   a. *The Fifth Amendment:* The Due Process Clause of the Fifth Amendment is a constitutional provision that prohibits federal employers from, *inter alia*, engaging in discrimination in employment. Unlike the Fourteenth Amendment, the Fifth Amendment, which was ratified in 1791, does not have an express clause on equal protection, but the Supreme Court has construed its Due Process Clause as embodying an equal protection component. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499–500, 74 S.Ct. 693, 694–95, 98 L.Ed. 884 (1954); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (describing the Court’s history of applying identical equal protection standards to state and federal action).

   b. *The Fourteenth Amendment:* The Due Process and Equal Protection Clauses of the Fourteenth Amendment, which was ratified in 1868, provides public employees some protections against employment discrimination by state and local government employers. State and municipal employees can use the Fourteenth Amendment and 42 U.S.C. § 1983 to challenge governmental classifications or intentional disparate treatment on the basis of race, sex, alienage, or national origin, but the level of protection is not the same for all classifications. For example, classifications based on race, alienage, or national origin are subject to strict scrutiny, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985), whereas classifications based on sex are subject to “heightened scrutiny,” *Nevada Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 728, 123 S.Ct. 1972, 1978, 155 L.Ed.2d 953 (2003). On the other hand, because classifications based on age and disability are not “suspect,” they are subject to rational basis review under equal protection analysis. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83, 120 S.Ct. 631, 646, 145 L.Ed.2d 522 (2000) (age); *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367, 121 S.Ct. 955, 964, 148 L.Ed.2d 866 (2001) (disability). Moreover, a public employee who claims she is a member of a “class of one” solely because she has been singled out and subjected to arbitrary treatment by her supervisor—and not on the basis of her race, sex, or national origin—cannot rely on the Equal Protection Clause as a basis for relief. *See Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008).

   c. *The First Amendment:* The First Amendment protects public employees against religious discrimination by their governmental employ-
ers. Both the Free Exercise and the Establishment Clauses of the First Amendment have been relied upon to regulate discrimination because of religion in the workplace. Public and private employers also have relied upon the free speech provision in the First Amendment as a defense to workplace harassment claims.

2. The Reconstruction–Era Civil Rights Legislation: Congress enacted a number of civil rights statutes after the Civil War to enforce the rights embodied in the Thirteenth, Fourteenth, and Fifteenth Amendments. Of these Reconstruction–era civil rights statutes, the two most significant for employment discrimination law are 42 U.S.C. §§ 1981 and 1983. Section 1981 was originally § 1 of the Civil Rights Act of 1866, see Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), now codified, as amended, at 42 U.S.C. § 1981. The law is now well settled that the clause in § 1981(a) providing that “[a]ll persons within the jurisdiction of the United States shall have the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens” makes it unlawful for covered entities to discriminate against individuals because of race. See Chapter 5. Section 1983 was originally § 1 of the Civil Rights Act of 1871. See Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Section 1983, unlike § 1981, is not a source of substantive rights, but it provides individuals a cause of action for the deprivation of substantive rights guaranteed under other federal laws or the Constitution. Because of restrictive interpretations adopted by the Supreme Court soon after the enactment of §§ 1981 and 1983, these civil rights statutes remained dormant for many years. One of the major limitations the Court read into the early civil rights legislation was the “state action” doctrine. See e.g., In re Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). The federal courts, including the Supreme Court, revived §§ 1981 and 1983 in a series of cases decided in the 1960s and 1970s. For example, in 1961 the Supreme Court broadly defined the meaning of state action in Monroe v. Pape for § 1983 claims. And in Johnson v. Railway Express, the Court held that § 1981 prohibits private employers from engaging in racial discrimination in employment.


4. Title VII of the Civil Rights Act of 1964: Title VII, 42 U.S.C. § 2000e et seq., makes it unlawful for public and private employers, labor organizations, and employment agencies to discriminate against applicants and employees on the basis of their race, color, sex, religion, and national origin. The enactment of Title VII concluded a legislative process that lasted several decades, “during which Congress considered and rejected
more than 200 fair employment measures." Herbert Hill, *Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and Litigation Record*, in *Race in America: The Struggle for Equality* 263, 263 (Herbert Hill & James E. Jones, Jr. eds. 1993). Among the more significant amendments to Title VII are the 1972 amendments extending coverage to federal, state, and local government employers; the 1978 amendment providing that discrimination because of pregnancy is sex discrimination; and the 1991 amendments providing for compensatory and punitive damages, and jury trials in Title VII cases. The pervasive influence of Title VII's jurisprudence is manifest throughout each of the chapters that follow.

5. *Title VI of the Civil Rights Act of 1964*: Like Title VII, Title VI, 42 U.S.C. § 2000d et seq., was enacted as part of the Civil Rights Act of 1964. Title VI prohibits discrimination because of race, color, or national origin in any program or activity receiving federal financial assistance, e.g., grants, loans, or contracts (other than those of insurance guaranty). Title VI contains a provision limiting the statute's coverage to situations in which the primary objective of the federal assistance is to provide for employment. 42 U.S.C. § 2000d–3. In *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), a case arising under Title IX of the Educational Amendments of 1972, 42 U.S.C. § 1681 et seq., the Supreme Court narrowly construed the phrase "program or activity receiving Federal financial assistance." Title IX, a statute with language similar to Title VI's, is discussed infra note 7. The Court in *Grove City* held that the phrase was intended to apply only to the specific program for which federal financial assistance was awarded. In response to *Grove City*, Congress passed the Civil Rights Restoration Act of 1987, Pub.L.No. 100–259, 102 Stat. 28, 20 U.S.C. § 1687 (2000). The Restoration Act amended not only Title IX, but also other statutes like Title VI, by broadly defining the phrase "program or activity" to mean all of the operations of any entity that receives federal funds. 42 U.S.C. § 2000d–4a.

The Supreme Court has recognized that individuals have a private right of action to seek relief for employment discrimination under Title VI. See *Guardians Ass’n v. Civil Serv. Comm’n of the City of N.Y.*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983). In *Guardians*, a deeply divided court issued six opinions on several issues; nevertheless, seven Justices expressed the view that a violation of Title VI requires proof of discriminatory intent. See *id.* at 608 n.1, 103 S.Ct. at 3235 n.1 (Powell, J., concurring). Title VI, in contrast to Title VII, is not widely used for employment discrimination claims.

7. Title IX of the Educational Amendments of 1972: Title IX, 20 U.S.C. § 1681 et seq., prohibits discrimination on the basis of sex in any educational program or activity that receives federal financial assistance. The federal courts have not yet definitively determined whether employees in federally funded programs have a private right of action for sex-based employment discrimination under Title IX, and, if so, whether proof of intentional discrimination is the only theory under which a plaintiff can prevail. The Fifth Circuit is the only court of appeals to directly consider this issue. In Lakoski v. James, 66 F.3d 751 (5th Cir.1995), the Fifth Circuit held that Title VII is the exclusive remedy for individuals seeking damages for sex-based employment discrimination policies in federally funded programs and activities. The court concluded that Title VII preempts Title IX sex-based employment discrimination claims because of the comprehensive remedial scheme Congress adopted in Title VII. Id. at 758. Subsequently, in Lourey v. Texas A & M University System, 117 F.3d 242 (5th Cir.1997), the Fifth Circuit limited the reach of its preemption analysis under Lakoski, holding that preemption was inapplicable to claims for retaliation under Title IX.

In Jackson v. Birmingham Board of Education, 544 U.S. 167, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005), the Supreme Court agreed with the Lourey court that Title IX provides a private right of action for employees at federally funded educational institutions who claim that they have been subjected to retaliatory employment actions for complaining about the institution’s failure to comply with Title IX. In Jackson, a male coach of a girls’ high school basketball team sued the school-board alleging that he had been fired because he complained that the school’s athletic program discriminated against its female athletes in violation of Title IX. In a five-to-four decision written by Justice O’Connor, the Court held that “[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action. Retaliation is, by definition, an intentional act. It is a form of ‘discrimination’ because the complainant is being subjected to differential treatment.” Id. at 173–74, 125 S.Ct. at 1504. The right recognized in Jackson is limited to retaliation for complaining about Title IX violations; sex discrimination claims filed against Title IX institutions that do not involve retaliation are brought pursuant to Title VII.

8. The Vocational Rehabilitation Act of 1973: Prior to the enactment of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111, the Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 793, 794, was the principal federal statute prohibiting employment discrimination against persons with disabilities. The Rehabilitation Act prohibits the federal government, federal contractors, and federal grantees from discriminating against individuals with disabilities who are otherwise qualified to perform the work. 29 U.S.C. § 791 (federal government); id. § 793 (federal contractors); id. § 794 (entities receiving federal funds).

10. *Title I of the Americans with Disabilities Act of 1990*: Congress enacted the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111 et seq., for the purpose of eliminating discrimination against qualified individuals with disabilities. In addition to covering employment discrimination, this comprehensive statute prohibits discrimination against individuals with disabilities in public accommodations, services provided by state and municipal governments, public and private transportation, and telecommunications. Title I of the ADA prohibits discrimination in employment against qualified individuals with a disability who, with or without reasonable accommodation, can perform the essential functions of the job. Significant amendments to the ADA, known as the ADA Amendments Act of 2008 (Pub.L.No. 110–325, 122 Stat. 3553), went into effect in 2009.


12. *The Government Employee Rights Act of 1991*: The Government Employee Rights Act of 1991 (GERA), 2 U.S.C. § 1201 et seq., establishes procedures to protect employees of the United States Senate, the Architect of the Capitol, and the Superintendent of the Senate Office Building; presidential appointees not subject to Senate confirmation; and the staff of elected officials who were previously exempted from Title VII, the ADEA, the ADA, and Rehabilitation Act. The Act establishes the Office of Senate Fair Employment Practices to process administratively the employment discrimination claims of covered employees in the Senate. The EEOC has administrative responsibility over employment discrimination claims of covered presidential appointees. GERA establishes a four-step administrative and judicial process, and covered employees are entitled to judicial review of the final administrative decision under a narrowly defined
13. **Family and Medical Leave Act of 1993**: Congress passed the Family and Medical Leave Act (FMLA) in an effort "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." FMLA § 2601(b)(1), 29 U.S.C. § 2601(b)(1). The FMLA entitles eligible employees to take up to twelve weeks of unpaid leave "for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." Id. at § 2601(b)(2), 29 U.S.C. § 2601(b)(2).


During the discussions about the CAA, Congress contemplated covering the judiciary. Instead, Congress included a provision of the CAA that directed the federal Judicial Conference of the United States to study and report to Congress on the propriety of applying to the federal judiciary civil rights and labor laws comparable to those that now cover the federal legislative branch. 2 U.S.C. § 1434. The Judicial Conference issued its report in December 1996 and concluded, inter alia, "in light of current judicial branch policies, * * * legislation is neither necessary nor advisable in order to provide judicial branch employees with protections comparable to those provided to legislative branch employees." Study of Judicial Branch Coverage Pursuant to the Congressional Accountability Act of 1995, at 2.

ically linked diseases has become available in part because of research findings from the Human Genome Project. Many potentially high risk individuals have refused to have genetic testing because of their concerns that they would be denied health insurance or jobs if the tests were positive for certain genes. In addition, many employees who were subjected to routine medical screening in the workplace were concerned about whether employers would obtain genetic information about health risks and use this as a basis for discharge.

16. *Presidential Executive Orders*: Beginning with Executive Order 8802 issued by President Roosevelt in 1941, 3 C.F.R. § 234 (1941), every president has issued or affirmed an executive order prohibiting discrimination in employment by private employers who contract with the federal government to perform work above a specified dollar amount. In 1965, President Johnson issued Executive Order 11,246, 3 C.F.R. § 339 (1965). Originally limited to prohibiting discrimination by federal contractors on the basis of race, color, national origin, or religion, Executive Order 11,246 was amended by Executive Order 11,375 in 1967 to include sex discrimination, 3 C.F.R. § 684 (1967). Executive Order 11,246, as amended, is implemented by Revised Order No. 4, 41 C.F.R. § 60 (1999), and enforced by the Office of Federal Contract Compliance Programs in the Department of Labor. See generally James E. Jones, Jr., *Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process Under the Executive Order 11,246 as Amended*, 59 Chi.-Kent L.Rev. 67 (1982).