THE EVOLUTION OF EMPLOYMENT DISCRIMINATION LAW: CHANGED DOCTRINE FOR CHANGED SOCIAL CONDITIONS

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INTRODUCTION

Times change, and often, when they do, the law must change as well. This is an issue that has typically been overlooked in our legal system, a system that is based on precedent with limited means for adjusting that precedent and no clear avenue for judicial updating of the law. Courts typically overturn or distinguish precedent—they may even modify it—but they rarely declare that prior law no longer fits current conditions. In other words, a court rarely proclaims something to the

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effect of, "That was then, this is now." Rather, when statutes become outdated, courts often wait for Congress to alter the statute rather than changing past precedent to conform to the changed conditions.[1]

Employment discrimination law has long been ripe for updating. Many of the core cases regarding how discrimination is defined and proved arose in the 1970s in a very different era and were designed to address very different kinds of discrimination. Those early cases came on the heels of the Civil Rights movement, when overt discrimination and segregated workforces were the norm, and when men and women were routinely considered to have different abilities and interests. Equally clear, those early cases invariably dealt with the remnants of overt segregation. To take a prime example, the well-known disparate impact case of *Griggs v. Duke Power Company*[2] involved employment practices that were adopted the day the 1964 Civil Rights Act became effective by an employer that had previously confined African Americans to its least desirable jobs.[3] Yet, the law that was established in *Griggs* remains—with slight modifications—the same today, even though the conditions that motivated the Court to create the disparate impact cause of action have clearly changed.[4] In light of the progress our society has made, one can reasonably ask whether a practice that is facially neutral but has discriminatory effects should be treated as discrimination today and whether the justification for doing so remains the same today as it was 40 years ago. The answer to that question may very well be yes, but neither Congress nor the Court has had an open discussion regarding the relevance of the disparate impact theory for contemporary society, though as will be discussed in detail below, the Supreme Court has recently and implicitly suggested that the theory no longer fits.

Indeed, over the last few years the Supreme Court has taken notice of the way social conditions have changed, and it has begun a deliberate,

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1. One area where the Court has been moving to adjust a statute to contemporary conditions is with the Voting Rights Act, where the Supreme Court recently invalidated a requirement that certain jurisdictions with a detailed history of discrimination had to seek federal government approval for voting rights changes. *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). An important part of the Court's determination was that the rules that governed jurisdictions based on discrimination from the 1960s and 1970s no longer had the same relevancy. *See id.* at 2625 (noting that "[n]early 50 years [after the Voting Rights Act was passed], things have changed dramatically" and proceeding to document those changes).

2. 401 U.S. 424 (1971).

3. *Id.* at 425–26.

4. Today the disparate impact section is codified as part of Title VII, and the statutory standards are quite similar to what was originally established in *Griggs* and later amplified by a second case, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422–23 (1975). The statutory provision was added as part of the Civil Rights Act of 1991 and can be found at 42 U.S.C. § 2000e-2(k) (2012).

but unannounced, revamping of existing case law. During this time period, the Supreme Court has decided four important employment discrimination cases that all resembled claims from an earlier era, and it has decidedly rejected the old models of proof and has done so without overturning a single case.[5] In each of the recent cases, the Supreme Court has rejected some of the earlier doctrine—whether that has to do with the relevance of the disparate impact theory, the power of rudimentary statistical analysis to establish class claims of intentional discrimination, or the fear of retaliation that might prevent someone from complaining about discriminatory practices—but it has done so without directly confronting the ill-fit between the aged case law and the changing nature of discrimination. With one important exception, Congress has remained on the sidelines in this deliberate doctrinal transformation.[6]

Discrimination law is different from other areas of the law such as contracts, torts, or even constitutional law in that it has long been assumed that one purpose of the civil rights laws was to substantially reduce the amount of discrimination that exists in our society. The law was designed to do more than just resolve inevitable disputes; the law was intended to alter social conditions, and once that purpose was satisfied, the law would need to adapt to the new conditions. Most scholars in the area, myself included, firmly believe that the purpose of reducing discrimination has not yet been fully realized, but it would be difficult to contend that the prevalence of discrimination has not receded. This is one issue on which many liberal commentators have been less influential than they might have otherwise been because their work can be interpreted to suggest that discrimination has not receded but, in fact, has become even more pervasive and entrenched in society.[7] Yet, in

5. The four cases are: *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *AT&T v. Hulteen*, 556 U.S. 701 (2009); and *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

6. The exception was the passage of the Lilly Ledbetter Fair Pay Act of 2009, which repudiated the Supreme Court's *Ledbetter* decision. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended at 42 U.S.C. § 2000e (2012) and 29 U.S.C. § 626 (2009)).

7. Among legal scholarship, there are two groups that emphasize that discrimination has changed rather than receded. One group concentrates on the institutional nature of discrimination—the way in which discrimination seeps into organizations or societies. *See, e.g.*, Tristin Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Tristin Green, *A Structural Approach to Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); Ian Haney Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012). The other group consists of scholars who tout the importance of the Implicit Association Test as an indicator of discrimination. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*,

charting a future doctrinal path, it is crucial to acknowledge the dramatic decrease in discrimination our society has experienced, and the real question for courts and commentators is how the changing nature and extent of discrimination should be reflected in contemporary antidiscrimination law.

The Supreme Court's answer to this question has been wholly unsatisfactory. The Court has largely rejected the continuing relevance of the disparate impact doctrine and statistical proof of discrimination, presumably under the notion that neither is relevant to contemporary discrimination. While it may have made sense to look at an employer's workforce in the 1970s and proclaim that the underrepresentation of women or minorities was the product of discrimination, that conclusion no longer holds force. Today when the Supreme Court looks at an imbalanced workforce—like the one that was at issue in the *Wal-Mart Stores, Inc. v. Dukes*[8] class action litigation—it is likely to shrug its shoulders before proclaiming that it does not know what accounts for the composition of the workforce.[9] Discrimination is no longer seen as the default explanation. In a similar vein, when employees come to the Court to complain about the continuing effects of discrimination that occurred many years earlier, the Court is likely to be entirely dismissive of the notion that there is any need for remedial action, and it is more likely to criticize employees for not complaining sooner.[10] And when employees complain about the disparate effects of examination results, the Court is more likely to see those results as the product of merit rather than discrimination.[11]

This, however, is not the unsatisfactory part of the doctrine. Indeed, I believe the Court is largely correct to conclude that the kind of proof or actions that constituted discrimination 40 years ago no longer have broad application to claims of contemporary discrimination. What is disturbing about the Court's recent decisions is what it has left in its wake. Although it is certainly true that discrimination has sharply receded since the 1970s, it is also true that the discrimination that remains has changed in character, becoming more subtle, more entrenched, and more systemic in nature, which in turn means more difficult to identify or prove. This has been the unequivocal message of virtually all of the research conducted over the last two decades in a variety of fields and is also a

35 SEATTLE U.L. REV. 795 (2012). The issue of implicit bias is taken up in Part IV.A, and I will discuss the institutional discrimination thesis (much of which I agree with) in Part IV.B.2.

8. 131 S. Ct. 2451 (2011) (discussed *infra* Part II.D).

9. *See infra* Section II.D.

10. *See Ledbetter*, 550 U.S. at 637 (discussed *infra* Part II.A).

11. *See Ricci v. DeStefano*, 557 U.S. 557, 587 (2009) (discussed *infra* Part II.C).

common mantra among those who delve into the complexity of contemporary discrimination, including, on occasion, the Supreme Court.[12] Yet, the Court has not modified the case law to take into account the changed nature of discrimination but instead remains tied to doctrinal methods of proof that largely fail to capture more subtle forms of discrimination. The primary message arising out of the Supreme Court is that discrimination has receded not that it has changed. And while the Court is shedding some of its older doctrines, it remains mired in a limited and old-fashioned mindset when it comes to identifying or defining discrimination, a mindset that continues to see discrimination as the product of isolated and aberrational bad actors. We are thus left with a large gap between what we know about contemporary discrimination and the ability of antidiscrimination law to identify that discrimination.

This Article will proceed as follows. The next Part will detail the evolution of the doctrine in the 1970s and explain how most of the doctrine arose from cases of easily identifiable and overt exclusions. From there, this Article focuses on four recent Supreme Court decisions to demonstrate the Court's rejection of the past doctrine, particularly with respect to recent cases seeking to challenge systemic discrimination. Those cases all could have emerged straight from 1970s central casting, and the Court's recent decisions indicate that what constituted discrimination in that earlier era may no longer be seen as discrimination today. Part IV turns to an exploration of how discrimination has changed, how it has become more subtle and complex over time, and also how the Supreme Court has, or more specifically, has not adapted to the evolving nature of discrimination. This has been particularly true of systemic claims of discrimination where the Supreme Court seems wedded to a vision that only sees discrimination in the most blatant circumstances and is unable to identify patterns of discrimination when it is necessary to draw inferences of discrimination. In this last Part, I will also critique the current academic obsession with what is known as implicit bias and call

12. For a sampling of important work in this area, see IAN AYRES, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001); NANCY DITOMASO, THE AMERICAN NON-DILEMMA: RACIAL INEQUALITY WITHOUT RACISM (2013); GLENN LOURY, THE ANATOMY OF RACIAL INEQUALITY (2002); CECILIA RIDGEWAY, FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD (2011); VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN (1998); John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829 (2001). It bears emphasizing that the changed nature of discrimination is not a new concept. *See, e.g.*, PREJUDICE, DISCRIMINATION AND RACISM (John F. Dovidio & Samuel L. Gaertner eds., 1986) (discussing new theories of discrimination including modern and aversive racism). The Supreme Court has been the most attentive to issues of subtle discrimination in the area of criminal law. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 474 (2008) (rejecting as implausible a race-neutral explanation for striking a juror).

instead for better ways to illustrate the subtlety and complexity of contemporary discrimination.

I. THE 1970S AND THE DEVELOPMENT OF SUPREME COURT DOCTRINE

A. The Origins of Employment Discrimination Law

Passed in 1964, Title VII—the primary federal antidiscrimination law that targets employment—became effective for private employers the following year and seven years later to public employers, and immediately generated substantial case law and controversy.[13] The Department of Justice, which had primary enforcement authority at the time, quickly filed lawsuits against several large unions and later targeted police and fire departments for their discriminatory practices—particularly their use of written examinations that adversely affected minority applicants.[14] The National Association for the Advancement of Colored People (NAACP) Legal Defense Fund (LDF), in conjunction with a small North Carolina law firm, brought suit against major North Carolina employers, and many of the efforts of LDF and the Justice Department resulted in the important early Supreme Court cases.[15]

These cases were all of their era. Filed in the late 1960s and early 1970s, the lawsuits targeted entrenched patterns of discrimination typically against employers with a history of overt exclusion, and the cases raised some difficult issues that have now largely been forgotten. For example, a number of the cases raised the issue of whether an employer was responsible for remedying its past discriminatory

13. *See* 42 U.S.C. § 2000e (2012).

14. *See, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 324 (1977) (suing union for discrimination among drivers); *United States v. Sheet Metal Workers Int'l Ass'n, Local No. 36*, 416 F.2d 123, 124–25 (8th Cir. 1969); *see also United States v. City of Chicago*, 385 F. Supp. 543, 546 (N.D. Ill. 1974) (police); *Officers for Justice v. Civil Serv. Comm'n*, 371 F. Supp. 1328, 1330 (N.D. Cal. 1973) (police that included Justice Department involvement).

15. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 408–09 (1975) (North Carolina paper company sued for discriminatory tests); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 3 (1971) (Charlotte North Carolina desegregation case involving mandatory busing); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971) (North Carolina energy company sued for discriminatory tests). A number of seminal Supreme Court cases arose from North Carolina, in part because of an active law firm that brought many of the cases in conjunction with the NAACP Legal Defense and Educational Fund. *See*, *History*, CENTER FOR C.R., U. N. CAROLINA SCH. L., http://www.law.unc.edu/centers/civilrights/about/history/ (last visited Oct. 5, 2014); *Julius Chamber – Biography*, HIST. MAKERS, http://www.thehistorymakers.com/biography/julius-chambers-39 (last visited Oct. 5, 2014).

practices.[16] Many of the cases involved seniority systems and the workforce imbalance that originated when discrimination was lawful, and in these circumstances, the Supreme Court held that the employer had no obligation to remedy those past practices.[17] A decade later the Court would revisit the issue in a pay discrimination case—a case originally filed immediately after the statute became applicable to public employers—where past discriminatory pay decisions had a continuing effect on current pay.[18] In that case, the Supreme Court unanimously held that the employer had a duty to remedy its past discrimination so long as an employee's current salary was affected.[19] It is not entirely clear why the Supreme Court shifted gears when it came to pay discrimination, but it is certainly easier to remedy pay inequities than to uproot past hiring or promotion decisions, and it may also be that the Court was concerned that the pay inequities had not been remedied in the dozen years since the Act had been passed.[20]

The famous *Griggs* case also fits the model described above. Duke Power, a large North Carolina energy company, had limited the employment opportunities of African Americans to its worst jobs until the day Title VII became effective.[21] Thereafter, the employer required its employees to pass two written examinations in order to move out of those laborer jobs.[22] Whether or not the examinations were instituted with an intent to discriminate, there was little question that the effect of the examinations would be to perpetuate the company's segregated workforce—to leave things the way they had been—and the Court concluded that such a pattern would be contrary to the purpose behind Title VII.[23] Although the *Griggs* Court did not require the employer to

16. *See, e.g.*, *Int'l Bhd. of Teamsters*, 431 U.S. at 353.

17. *See id.* at 353–54 (finding no obligation to remedy effects of legitimate seniority system implemented prior to the Act's effective date despite its discriminatory nature).

18. *Bazemore v. Friday*, 478 U.S. 385, 395 (1986).

19. *Id.*

20. To make the issue more concrete: In *Bazemore* the state of North Carolina had paid its African American extension agents less than its white agents until Title VII forbade such practices. *Id.* at 389–91. Thereafter, the question was whether the state had an obligation to eliminate those past disparities rather than just moving forward with equal pay scales or salary increases. *Id.* at 394. With the seniority systems, the question was whether an employer was obligated to disrupt the seniority system that preexisted Title VII where only whites typically had access, and accrued seniority, for the most desirable jobs.

21. *Griggs v. Duke Power Co.*, 401 U.S. 424, 426–27 (1971).

22. *Id.*

23. *Id.* at 429–30, 436. One reason for this was, as the Court noted, the discriminatory and deficient education that had been provided to African Americans within North Carolina. *Id.* at 430 ("Because they are Negroes, petitioners have long received inferior education in segregated schools . . . .").

remedy its past practices, it did require them to take steps to move away from a fully segregated workforce through what became known as the disparate impact theory.[24] The important novelty of the case was that plaintiffs could establish a claim of discrimination without the burdensome need to prove intent to discriminate.[25] Discriminatory results and the lack of an adequate justification were sufficient to prevail on a claim and, equally important, were defined as unlawful discrimination.[26]

These cases highlight how the Supreme Court was creating law against a particular historical backdrop—a backdrop of pervasive and overt exclusionary practices. As a statute, Title VII is notoriously short-winded, so it was necessary for the Court to give meaning to the particular provisions. And it did so primarily by emphasizing the purpose behind the statute, which was to end the segregated practices but with a minimal amount of disruption among existing employees.[27]

Other cases that arose at the time also involved explicit discriminatory practices and the perpetuation of past discrimination. The explicit cases typically involved gender restrictions; the very first case that arose under Title VII struck down an employer's refusal to hire women with children.[28] Another early case restricted the employment opportunities of women who sought to work in male prisons.[29] The Court also considered the permissibility of an employer's practice of hiring by word-of-mouth for its construction jobs.[30]

This latter case, *Furnco v. Waters*,[31] raised a number of thorny issues that had befuddled the lower courts.[32] *Furnco* presented two related questions—could employers use word-of-mouth recruiting, and was such a practice lawful.[33] The case also raised the question whether

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24. *Id.* at 431, 436.

25. *Id.* at 430–31.

26. *Id.* at 431.

27. This is where the seniority cases came in. Although there was little question that white individuals, almost always white men, had benefited by past discriminatory practices, the Court determined it was too late to disrupt their employment and thus focused on prospective changes. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 350–56 (1977).

28. *See Phillips v. Martin Marietta*, 400 U.S. 542, 544 (1971). A similar case arose a few years later in the well-known case *Monell v. Department of Social Services*, which permitted suits under 42 U.S.C. § 1983 and involved a New York City policy requiring pregnant women to take unpaid leave. 436 U.S. 658, 660–63 (1978).

29. *Dothard v. Rawlinson*, 433 U.S. 321, 323 (1977).

30. *Furnco v. Walters*, 438 U.S. 567, 570 (1978).

31. 438 U.S. 567 (1978).

32. *Furnco* involved an employer's practice of hiring only bricklayers who the plant superintendent knew or were referred to him, which resulted in a nearly all-white group of bricklayers. *See id.* at 570.

33. *Id.* at 574 n.6.

an employer should be required to use employment practices that would maximize opportunities for minority workers.[34] As anachronistic as it may seem today, the court of appeals held that the employer must adopt the practice that would best open up positions for minority workers—a conclusion the Supreme Court ultimately rejected—while also holding that word-of-mouth, or subjective decision making, was not a per se violation of Title VII.[35] In *Furnco*, and as was true in *Griggs* and the gender cases, we see the Court making judgments about what kinds of practices were permissible and what kinds of practices the new statute was designed to eradicate. At the same time, the Supreme Court tempered the law's development by only requiring employers to refrain from discriminating rather than being required to hire more minority workers.

During the same Term the *Furnco* case was decided, the Supreme Court addressed two cases that raised issues regarding the role of statistics in proving claims of discrimination.[36] Although it is now widely accepted that statistics are an essential tool for proving class action claims, these early cases raised the question whether statistics could be relied on to prove intent to discriminate. Here the Court was addressing in a class action context the very same issue it had previously addressed in an individual case—under what circumstances should courts draw inferences of discrimination.[37] The two cases involving the use of statistics were similar in nature, and both were brought by the Department of Justice.[38] In *International Brotherhood of Teamsters v. United States*,[39] no African Americans held the most prestigious job of long-distance driver, even though about five percent of the company's workforce was African American.[40] The second case, *Hazelwood School District v. United States*,[41] involved a suburb just outside St. Louis where there were very few African American teachers, even though just over 15 percent of the teachers in the City of St. Louis were African American.[42]

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34. *Id.* at 574, 578.

35. *Id.* at 578 (noting that the employer is not required to adopt practices that will maximize opportunities for minority workers); *id.* at 580 n.9 (rejecting challenge to subjective practices as discriminatory).

36. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339–40 (1977).

37. In the context of individual claims, the case is *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799–800, 804–05 (1973).

38. *Hazelwood*, 433 U.S. at 301; *Teamsters*, 431 U.S. at 328.

39. 431 U.S. 324 (1977).

40. *Id.* at 337. Several African Americans were hired after the litigation commenced. *Id.*

41. 433 U.S. 299 (1977).

42. *Id.* at 303.

Both cases presented strong grounds for identifying discrimination as a cause of the workplace imbalances because both defendants had a long and open history of excluding African Americans.[43] Both cases were also a product of their time as they presented questions of the employer's duty to remedy past discrimination—one in the form of a seniority system and the other in the form of a deeply imbalanced workforce that experienced relatively little turnover.

Most important to the development of the law, the cases involved the use of statistics to establish an intent to discriminate, and both relied on relatively unsophisticated statistical claims. The question posed in both cases was whether discrimination could be defined as the cause of the workforce imbalance. Put more directly, why were there no African Americans among the long-haul truck drivers, even while there were a significant number who worked the shorter routes? Similarly, why were there so few African American teachers in Hazelwood, particularly when many qualified African American teachers were working nearby in the City of St. Louis? Statistics came into play by demonstrating that the workforce compositions were not likely a chance occurrence. When the numbers were so stark, statistical analysis could rule out chance as a likely cause, and at this point in time, courts were willing to assume discrimination was therefore a likely cause. It was, to be sure, only a presumption that an employer could rebut by offering another cause for the disparity. But crucial to the future development of the law was the fact that neither case involved extensive analysis of statistics, and both borrowed loosely from an earlier case that addressed the same issue but in the context of a jury composition.[44]

These last three cases represented important statements by the Court regarding employers' obligation to remedy past discrimination and the way the Court would define discrimination moving forward. Statistics could plainly establish an inference of discrimination but, at the same time, an employer had no obligation to uproot existing employees or to adopt practices that would most clearly benefit African Americans. An

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43. For example, in *Hazelwood* the Court noted that Hazelwood hired its first African American teacher in 1969, and by 1973, 22 of its 1,231 faculty members (or 1.7 percent) were African Americans. *Id.* In contrast, of the 19,000 teachers employed in the St. Louis area, 15.4 percent were African American. *Id.* In *Teamsters*, the government "bolstered its statistical evidence with the testimony of individuals who recounted 40 specific instances of discrimination." *Teamster*s, 431 U.S. at 338.

44. In conducting a rudimentary statistical analysis, the Court borrowed from its very recent precedent in a jury discrimination case. *See Castaneda v. Partida*, 430 U.S. 482 (1977). In that case, the Court employed a standard deviation analysis to determine whether the observed disparities might be attributable to chance or whether something else, such as discrimination, likely explained those disparities. *Id.* at 486 n.17. The Court performed the same analysis in *Hazelwood*. *See Hazelwood*, 433 U.S. at 311 n.17.

employer, for example, might argue that it had so few African American teachers because it had previously discriminated against them when it was allowed to do so, and it simply had not done enough hiring to change that balance. An employer might also argue that too few African Americans were qualified for, or interested in, the positions. And it soon turned out that many courts were relatively quick to accept such explanations. Indeed, after establishing the broad parameters for proving discrimination, the Supreme Court began to pull back from its broad protective stance by noting what has now become talismanic in employment law: "Courts are generally less competent than employers to restructure business practices and unless mandated to do so by Congress they should not attempt it."[45]

While the Court was developing Title VII law, it also began to confront the complicated issue of affirmative action, a connection that is often lost when the focus is only on the development of employment discrimination law. The well-known *Regents of University of California v. Bakke*[46] was decided the same year as *Furnco*, and shortly thereafter the Court addressed two affirmative action cases that arose under Title VII.[47] Both of these cases were essentially identical to *Teamsters* in that unions had been sued for their history of discrimination.[48] The main difference was that the Title VII affirmative action cases involved remedial questions, and the law of affirmative action became divided between claims that were designed to remedy past discrimination and the diversity justification that was ultimately established in *Bakke*.[49] Employers, the Supreme Court concluded, could administer affirmative action programs, even ones that contained quotas, so long as the programs were designed to remedy past or present discrimination.[50]

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45. *Furnco v. Walters*, 438 U.S. 567, 578 (1978).

46. 438 U.S. 265 (1978).

47. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 426 (1986); *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979).

48. *Sheet Metal Workers*, 478 U.S. at 421; *Weber*, 443 U.S. at 193.

49. *See Weber*, 443 U.S. at 197 (upholding a private affirmative-action program that was designed to address a past practice that had largely excluded African Americans from certain positions). Another case arose a few years later in which the Court upheld an affirmative-action plan that a court had imposed upon a union to remedy past discrimination and the union's refusal to address its discrimination. *See Sheet Metal Workers*, 478 U.S. at 438–40.

50. *Sheet Metal Workers*, 478 U.S. at 475; *Weber*, 443 U.S. at 197. In *Weber*, the Supreme Court upheld a voluntarily implemented affirmative-action program that was designed to address a racial imbalance in the workforce. *Weber*, 443 U.S. at 197. One aspect of the case that is often overlooked is that the imbalance was the direct result of the overt exclusion of African Americans from craft positions. *See id.* at 198. In footnote one of its opinion, the Court listed many findings of overt exclusion. *See id.* at 198 n.1. The *Sheet Metal Workers* case involved a judicially imposed affirmative-action plan designed to remedy a lengthy and judicially determined history of discrimination against

Without a remedial justification, entities could use race as a factor in their decisions so as to provide greater diversity to a class (this became relevant primarily for educational entities). And the Court later concluded that an employer might also be able to use gender to address a manifest imbalance in its workforce.[51]

As this brief historical discussion makes clear, by the end of its first decade interpreting Title VII, half of the decisions rendered by the Supreme Court and all of the large class action cases involved employers with a demonstrated history of discrimination. Even though some of the cases, like *Griggs*, involved the creation of substantive law, a central question in all of the cases involved a mandate to prevent the perpetuation of past practices and the discrimination that flowed from those practices. This was a slightly different question from whether employers had an obligation to remedy those past practices, but it was clear the Court was trying to steer the law into a different era. And by the end of the decade that different era had arrived. The affirmative action cases presented an important but underappreciated change in direction. Within 10 short years the Court had gone from focusing on employers with a clear history of discrimination to employers and educational entities that sought to take voluntary action to diversify the workplace or student body. From this perspective, the interests of employers were becoming more aligned with racial minorities and women, and the concern for judicial supervision switched from employers who were discriminating to employers who were seeking to benefit women and minorities at the expense of white employees.

Not only was the Court grappling with the divisive issue of affirmative action, but at the same time it was also addressing the even more controversial issue of school busing as a means of remedying our segregated past. Although the Court gave a rather broad imprimatur to busing as a remedial measure at the beginning of the decade,[52] by the middle it had signaled a major change by limiting the power of school districts to breach district lines to integrate schools, giving the green light to what came to be called "white flight."[53] Indeed, by the end of the

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African Americans. *See Sheet Metal Workers*, 478 U.S. at 428–40 (describing the history).

51. *See Johnson v. Transp. Agency of Santa Clara Cnty.*, 480 U.S. 616, 620 (1987) (upholding a voluntary affirmative-action plan designed to address a significant gender imbalance in the workforce).

52. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30–32 (1971) (upholding a busing plan to address segregation).

53. *See Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974) (striking down a student busing plan that crossed school district boundaries).

decade, the very concept of discrimination had changed, as had the Court's fidelity to broad remedial measures to address discrimination.[54]

The most important insight to be drawn from the cases just discussed is that they were borne of an era, and none of the cases, including *Griggs*, produced any detailed discussion of how discrimination was to be proved or identified. Most of the cases were not complicated and all involved stark exclusions: in *Griggs*, African Americans were confined to the laborer jobs;[55] in *Teamsters*, there were no African American long distance drivers;[56] in *Hazelwood*, there were strikingly few African American teachers;[57] in *Furnco*, there were no African American bricklayers;[58] and in the gender cases, there were no pregnant teachers and no women working in male prisons or as road dispatchers.[59] As a result, because the cases were so clear, the Court provided broad pronouncements about what kinds of acts were or were not discriminatory, often in potentially contradictory form. For example, while the Supreme Court held that workforce underrepresentation, by itself, was not evidence of discrimination, strong statistical proof could establish an intent to discriminate.[60] Yet, in making these pronouncements, the Court failed to recognize that statistical proof involved little more than documenting underrepresentation in the workforce, and it would be another 30 years before the Court sought to reconcile those contradictory impulses.[61]

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54. In addition to the cases discussed above, this change was signaled in the important case of *Personnel Administrator v. Feeney*, in which the Court upheld the use of veterans' preferences against a constitutional gender discrimination challenge. 442 U.S. 256, 257 (1979). Notably, in *Feeney* the Court held that an "awareness of [the] consequences" of an act is not the same as purposeful discrimination. *Id.* at 279. The Supreme Court also upheld a policy, against a disparate impact challenge, that prohibited the hiring of drug users, including those who were using methadone. *See N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 594 (1979).

55. *See supra* note 21 and accompanying text.

56. *See supra* note 40 and accompanying text.

57. *See supra* note 42 and accompanying text.

58. *See supra* note 32 and accompanying text.

59. *See supra* notes 28–30 and accompanying text.

60. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

61. Many of the early cases, including *Teamsters*, *Hazelwood*, *Griggs*, *Furnco*, *Sheet Metal Workers*, and *Weber*, were primarily focused on statistical imbalances in the workforce. *See generally Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421 (1986); *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979); *Furnco v. Walters*, 438 U.S. 567 (1978); *Hazelwood*, 433 U.S. 299; *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court did not return to the issue until the recent *Wal-Mart* case. *See infra* Part II.D.

B. The Political Backlash of the 1980s

By the end of the seventies, the Court had come full circle from an acknowledgement that discrimination was pervasive and needed to be remedied to a modest questioning of the relevance of the antidiscrimination laws with a concern that employers were now going too far in their efforts to address past discrimination. That modest questioning would take a serious skeptical turn in the 1980s when the Supreme Court adopted the distinctly conservative political views that were in vogue at the time. For a variety of reasons, this period has little to do with the contemporary doctrine, so I will only spend a brief time discussing the Court's hostile turn, which began in the early 1980s but picked up steam with the addition of Justice Scalia to the Supreme Court in the mid-1980s.[62]

With the passage of time, it is easy to forget the powerful influence President Ronald Reagan had on the courts and, more broadly, on the defining role the courts should play in modern life or in fomenting social change. The Reagan Revolution was premised in significant part on creating a more limited role for the courts, and it was also distinctly hostile to the civil rights legacy.[63] Opposition to affirmative action was a central tenet of the administration's policies, and it quickly set out to refashion the judiciary and civil rights enforcement.[64] The Reagan Administration appointed decidedly conservative and often high-profile individuals to the federal courts to an extent that seems unthinkable today. These individuals included: Richard Posner and Frank Easterbrook; Richard Bork to the D.C. Circuit; Edith Jones and Patrick Higginbotham to the Fifth Circuit Court of Appeals; and very young judges Alex Kozinski and Diarmuid O'Scannlain to the Ninth Circuit

62. Justice Scalia joined the Court for the Term that began in October 1986, and within six months, in his very first case involving employment issues, he issued a stinging dissent on a gender discrimination affirmative-action case. *See Johnson v. Transp. Agency of Santa Clara Cnty.*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting).

63. For discussions of the approach of the Reagan Administration, see NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988); RAYMOND WOLTERS, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION AND BLACK CIVIL RIGHTS (1996). For a more recent and excellent reflection on the era, see DANIEL T. RODGERS, AGE OF FRACTURE (2011).

64. *See* sources cited *supra* note 63.

Court of Appeals.[65] Likely the most important appointment was the placement of now Justice Antonin Scalia on the D.C. Circuit.[66]

The appointment of Justice Scalia to the Supreme Court marked the high water moment for the conservative revolution and also began the intensive reconsideration of settled antidiscrimination doctrine. In the mid-1980s, the Supreme Court began to issue what became a series of highly controversial and hostile civil rights decisions, many of which modified or overturned prior decisions.[67] The Court's attack on established precedent was relentless and largely embodied the political views of the Republican Party, which saw the civil rights era as having evolved into a racial entitlement program. Although the Court was unsuccessful in eliminating affirmative action,[68] it did manage to cut at the margins, particularly with the various contract set-aside programs that existed at the time.[69] It also significantly revised the law governing educational desegregation in what might be described as the beginning of a wind-down period.[70]

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65. BERNARD SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION 222–23 (1990). For a biography of the individual judges mentioned in the text, see *Biographical Directory of Federal Judges, 1789-Present*, U.S. COURTS, http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx.

66. *See Biographical Directory of Federal Judges – Antonin Scalia*, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=2108&cid=999&ctype=na&instate=na (last visited Oct. 7, 2014). Much has been written about President Reagan's effort to transform the judiciary in his conservative image. *See, e.g.*, Walter F. Murphy, *Reagan's Judicial Strategy*, *in* LOOKING BACK ON THE REAGAN PRESIDENCY (L. Berman ed., 1990); SCHWARTZ, *supra* note 65, at 222; Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318 (1988–89).

67. Many of the cases involved issues relating to employment discrimination and were largely overturned by the passage of the Civil Rights Act of 1991. The major cases were: *Patterson v. McLean Credit Union*, 491 U.S. 164, 183–84 (1989) (limiting scope of § 1981); *Martin v. Wilks*, 490 U.S. 755, 768–69 (1989) (permitting collateral attacks on consent decrees); and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 (1989) (altering and tightening the standards for proving disparate impact claim).

68. The Supreme Court took up several cases in the 1980s that seemed to have the potential to sharply limit the use of affirmative action, but most of the cases fizzled. *See Firefighters v. Cleveland*, 478 U.S. 501, 530 (1986) (upholding consent decree that allowed relief for individuals who were not actual victims of the challenged discriminatory practices); *Firefighters v. Stotts*, 467 U.S. 561, 583 (1984) (reversing court injunction preventing the use of seniority-based layoffs as inconsistent with consent decree).

69. *See Adarand Constr. v. Pena*, 515 U.S. 200, 237–39 (1995) (applying strict scrutiny to federal set-aside program and rejecting prior case establishing lower standard of review); *City of Richmond v. Croson*, 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to strike down local set-aside program).

70. *See Freeman v. Pitts*, 503 U.S. 467, 490–91, 499 (1992) (permitting incremental release from consent orders even though jurisdiction had not obtained full compliance); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1991) (allowing jurisdiction to

When it came to employment discrimination law, the Supreme Court set its sights on the disparate impact theory and sought to restrict the force of that doctrine through the highly controversial decision of *Wards Cove Packing Co. v. Atonio*.[71] The disparate impact doctrine had always been high on the conservative list of targets because it was widely associated with affirmative action. Because the disparate impact doctrine did not require proof of intent and largely turned on establishing statistical disparities in a workforce, one way for employers to avoid disparate impact lawsuits, the argument went, was to hire by the numbers.[72] This was a crude but influential interpretation of the doctrine, and in the *Wards Cove* case, the Court sought to make it more difficult for plaintiffs to succeed on such claims on two different levels. The Supreme Court first rejected the plaintiffs' statistical analysis and then shifted the burden of proof to plaintiffs on a critical element of the proof structure.[73]

At the time, all of this was incredibly important and could have altered the doctrine significantly. But the Court ultimately overplayed its hand, and Congress stepped in almost immediately after the *Wards Cove* decision was issued to address the litany of Supreme Court decisions that were hostile to employment discrimination plaintiffs. It took two years but Congress ultimately passed the Civil Rights Act of 1991 (CRA 1991), a statute that was designed to overturn or modify seven Supreme Court decisions.[74] This was a powerful and influential rebuke of the Supreme Court, and as I have commented elsewhere, the statute seemed

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be released from court supervision when it obtained desegregation "to the extent practicable").

71. 490 U.S. 642 (1989).

72. This was a standard argument raised at the time and one that was used to challenge both the Civil Rights Act of 1990 (vetoed) and the Civil Rights Act of 1991 (passed). Indeed, President Bush's veto message for the 1990 Act included a reference to the quota issue. *See* Steven A. Holmes, *President Vetoes Bill on Job Rights: Showdown is Set*, N.Y. TIMES, Oct. 23, 1990, at A1 (quoting veto message as stating that the bill "employs a message of highly legalistic language to introduce the destructive forces of quotas into our national employment system"); *see also* CHARLES FRIED, ORDER WITHOUT LAW: ARGUING THE REAGAN REVOLUTION – A FIRSTHAND ACCOUNT 118–22 (1991) (explaining role of quotas in opposition to legislation).

73. *See Wards Cove*, 490 U.S. at 642, 660. The Court's reasoning on the statistical analysis, namely that the plaintiffs relied on an unrefined statistical analysis that failed to account for necessary job qualifications, remains the law today and was not a significant departure from prior law. *See id.* at 654. The shifting of the burden of proof was a major change in the law and was ultimately overturned by the Civil Rights Act of 1991. *See id.* at 660.

74. *See* Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of Titles 29 and 42 of the United States Code).

to restrain the Supreme Court for nearly two decades.[75] Following the CRA 1991, the Supreme Court moved cautiously, and plaintiffs fared much better in the cases that came before the Court, with an important exception. While in the late 1980s, the plaintiffs failed on virtually all of their cases that went before the Court, after the CRA 1991, plaintiffs prevailed in the majority of cases other than those that touched on substantial political issues.[76]

It is important, however, to emphasize the difference between the hostility of the Supreme Court in the 1980s and its more recent judicial reconsideration of the doctrine. In the 1980s, the Supreme Court's decisions seemed decidedly political in nature and were not in response to a substantial decrease in discrimination. Indeed, some of the hostile decisions were issued within half a dozen years of the expansive cases involving the proof of intent through statistics. The doctrinal changes in the late 1980s were politically motivated whereas, although the current Court remains deeply conservative, the more recent cases seek to adjust the doctrine to meet changing social conditions, an issue explored in detail in Part II.

II. THE COURT'S RECENT UPDATING OF THE DOCTRINE

The seventies marked the Court's development of employment discrimination doctrine, and the latter half of the 1980s witnessed a substantial and politically-inspired retrenchment of protections for the victims of discrimination. That retrenchment led to statutory action in the form of the CRA 1991, which provided new remedies and also reversed a series of Supreme Court decisions. The following decade was relatively quiet, with modest doctrinal innovations and a series of relatively minor procedural decisions.[77] It was only recently that the Court began to revisit its earlier doctrine with a concerted eye towards aligning that doctrine with contemporary social conditions.

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75. *See* Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 282, 304 (2011) (discussing the Supreme Court's reaction to the passage of the CRA 1991).

76. *See id.* at 295–98.

77. *See, e.g.*, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 406–07 (2008) (broadly interpreting filing requirement consistent with EEOC regulations); *Robinson v. Shell Oil*, 519 U.S. 337, 346 (1997) (former employees can pursue claims); *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) (finding that an age discrimination plaintiff need not prove that she was replaced by person who falls outside of protected class). Some of these cases, like *Robinson*, were designed to overturn outlier decisions by a single appellate court. *See, e.g.*, *Robinson*, 519 U.S. 337.

A. Ledbetter v. Goodyear Tire*: Rejecting the Continuing Violations Doctrine*

The case involving Lilly Ledbetter's challenge against Goodyear was the first of the recent cases in which the Supreme Court began to realign its existing legal principles. Like some of the other recent cases, *Ledbetter v. Goodyear Tire & Rubber Company*[78] had all of the trappings of a case that easily could have arisen in the 1970s. Ledbetter was one of the first, and for most of her employment history, the only female supervisor in the Alabama Goodyear plant where she worked.[79] During her employment, she encountered a series of problems and eventually discovered that she was the lowest paid supervisor, even though she had greater seniority than many of her male peers.[80] Toward what would turn out to be the end of her Goodyear career, Ledbetter filed a charge with the Equal Employment Opportunity Commission (EEOC) raising various claims of discriminatory treatment, including a salary discrimination claim.[81]

When the case reached the Supreme Court, Ledbetter was seeking to recover for the salary discrimination she had experienced throughout her career even though she had not filed a claim until just before she resigned.[82] Although under Title VII's short filing deadlines Ledbetter's salary claim would have been time-barred, there was precedent—in this instance from the 1980s case *Bazemore v. Friday*[83]—that seemed to support allowing her claim to go forward. *Bazemore* involved the segregation and subsequent pay claims of the North Carolina Agricultural Extension Service, which prior to the effective date of Title VII, had two separate divisions based on race and paid its African American agents substantially less than their white counterparts.[84] Much of that pay discrimination arose prior to the effective date of the Civil Rights Act, and part of the *Bazemore* case concerned whether an employer had an obligation to remedy pay discrimination that originated when such discrimination was lawful.[85] In language that seemed to apply directly to Ledbetter's situation, the Supreme Court unanimously held

78. 550 U.S. 618 (2007).

79. *See id.* at 643 (Ginsburg, J., dissenting).

80. *Id.* (Ginsburg, J., dissenting).

81. *Id.* at 621–22. Ledbetter was hired in 1979. *Id.* at 621. In March 1998, she submitted a questionnaire to the EEOC and filed a formal charge of discrimination in July 1998. *Id.* She took early retirement in November 1998 and subsequently filed her lawsuit. *Id.* at 621–22.

82. *See id.* at 622–23.

83. 478 U.S. 385 (1986).

84. *Id.* at 386–87, 394.

85. *Id.* at 386–87.

that the extension service must correct the current effects of the discrimination, stating: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . ."[86] In other words, the state was required to remedy the salary disparities even though they arose before the statute deemed them discriminatory.

But that language came 20 years before *Ledbetter* and involved a situation that originated in the 1970s—a situation and time that was very different. In *Bazemore*, there was no delay in the filing of the complaint, but the issue was whether the employer could continue to pay its African American agents less than the white agents because they had done so historically.[87] From that perspective, the issue was largely the same as presented in *Griggs*: could the employer perpetuate past practices if that led to differential pay or a segregated workforce. The issue in *Ledbetter* was quite different, namely why had she not complained sooner and, relatedly, what it would mean if the Court allowed her claim to go forward to challenge what was alleged to be a career marred by discrimination. There was no easy answer to the first question regarding the lateness of her complaint, and surprisingly, none was offered.[88] Instead, her attorneys sought to rely on the language from *Bazemore* without explaining why she had failed to complain earlier in her career.[89] Oddly enough, the best explanation might have been true: she did not know about the pay discrimination until someone provided her with an anonymous note, which was the explanation she offered to the media after the case was decided but not to the courts.[90] This is one way in which wage claims are distinct from other discrimination claims since employees often do not have wage information regarding their coworkers and will be unaware of any pay discrepancies.[91]

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86. *Id.* at 395–96 (Brennan, J., joined by all other Members of the Court, concurring in part).

87. *Id.* at 386–87.

88. *See Ledbetter v. Goodyear Tire & Rubber Company*, 550 U.S. 618, 633–37 (2007).

89. *Id.*

90. *See Barriers to Justice: Examining Equal Pay for Equal Work: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 6 (2008) (testimony of Lilly Ledbetter). Ms. Ledbetter provided her clearest explanation for why she failed to file a claim earlier in her congressional testimony in support of the Lilly Ledbetter Fair Pay Act. *Id.* During her court case, she failed to offer an explanation for her delayed filing but instead sought to rely on the legal precedents to argue that her claim was timely. *See Ledbetter*, 550 U.S. at 633–37. For a thorough discussion of the background, see Charles A. Sullivan, *Raising the Dead? The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 507–10 (2010).

91. Often this lack of knowledge is due to employer policies that prohibit employees from discussing their pay. These policies likely run afoul of the protection of

Another possible explanation for the late filing reflects the changed landscape of antidiscrimination law. Employees frequently contend that they failed to file a timely complaint because they feared retaliation from their employer.[92] Such a fear is surely not irrational, and retaliation remains a substantial concern for many employees.[93] At the same time, over the last decade the Supreme Court has created extensive legal doctrine that is highly protective of retaliation claims, thus presumably minimizing an employee's fear of retaliation.[94] Indeed, this is one of the ways in which employment discrimination law has evolved; no longer can an employee simply articulate a fear of retaliation to excuse a failure to file a claim since the Court has made it clear that the law will protect those who file complaints. And, in the context of a complaint-based system, it surely makes sense to require employees to file complaints so as to bring issues to an employer's attention.

As a result, the real issue in the case was whether the Court would apply its reasoning from *Bazemore* to allow Ms. Ledbetter's claim to go forward or whether it would find a way to distinguish or repudiate that case. If her claim had arisen in the 1970s or the 1980s, the Court likely would have allowed it to proceed, but the passage of time highlighted the differences in the cases. As noted, *Bazemore* involved the continuation of pay discrimination from the time the extension service had lawfully segregated its employees—it was blatant and relatively easy to measure and a circumstance that would have a finite ending.[95] Once the Supreme Court announced in *Bazemore* that an employer was obligated to remedy pay discrimination that occurred prior to the effective date of the Civil Rights Act, employers would presumably correct those pay disparities. In other words, this was a quintessential first generation issue. In contrast, if Ledbetter's claim were allowed to move forward, salary claims would always remain alive so long as a past discriminatory, and typically discrete, act had current effects. From an employer's perspective, these two issues were dramatically different.

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the National Labor Relations Act but remain common. For a discussion, see Leonard Bierman & Rafael Gely, *Love, Sex and Politics? Sure. Salary? No Way: Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167 (2004).

92. The fear of retaliation, often well founded, is discussed in Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 903–05 (2008).

93. *Id.* at 905.

94. This issue is discussed in more detail below, but by the time the *Ledbetter* case was decided, the Supreme Court had issued a series of cases that provided strong protections relating to retaliation claims. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) (adopting a liberal standard for determining when an individual had been retaliated against).

95. *Bazemore v. Friday*, 478 U.S. 385, 391 (1986) (discussing the perpetuation of pay disparities).

Not surprisingly, the Court dismissed Ms. Ledbetter's claim but did so in a disingenuous way. Rather than stating that the *Bazemore* language was designed to address a different issue from a different era, it chose to distinguish the case by emphasizing that the policy at issue in *Bazemore* was facially discriminatory.[96] This was simply not true; indeed, the disparities at issue in the case were not attributable to a single, or facially discriminatory, policy.[97] As will be true in the other cases discussed in this Article, the Supreme Court sought to distinguish rather than overturn its precedent, and in doing so, emasculated that precedent. There simply are no more facially discriminatory pay structures, and thus the *Bazemore* decision is no longer applicable to contemporary pay cases.

There was a related but implicit issue the Supreme Court addressed in *Ledbetter*, and that is the confounding issue of the "present effects of past discrimination," or what is sometimes known as the continuing violations doctrine.[98] This was an issue that had some vitality in the early years of Title VII but never gained currency because there was no ready definition of what constituted a continuing violation.[99] The *Ledbetter* situation was one such example—the effects of salary determinations made early in her career had a continuing effect on her later salary but

96. The Court distinguished the situations by emphasizing that *Bazemore* involved a "facially discriminatory pay structure that put[] some employees on a lower scale because of race." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 634 (2007).

97. The defendants made a number of arguments to establish that salary disparities between African American and white agents were not discriminatory, including that some of the disparity was attributable to open discrimination that occurred prior to 1965. *Bazemore*, 478 U.S. 385. That discrimination may have been considered "facial," but the defendants also argued that the disparities were attributable to the qualifications of white agents and to other facts, such as county pay disparities. *See id.*, 478 U.S. at 394–95 (discussing pre-Act disparities); *id.* at 398–402 (discussing qualifications and county disparities). These explanations were at the heart of the prolonged litigation and could not be defined as facial discrimination. Indeed, prior to the *Ledbetter* decision, *Bazemore* had been interpreted by lower courts for 20 years, and none had emphasized the facially discriminatory nature of the original pay scale. *See Shear v. Rice*, 409 F.3d 448, 452 (D.C. Cir. 2005) (applying *Bazemore* to allow a claim to go forward because plaintiff had received "less pay with each paycheck"); *Cardenas v. Massey*, 269 F.3d 251, 257 (3d Cir. 2001) (following *Bazemore* to conclude that "each of plaintiffs' paychecks constituted a distinct violation of their right to nondiscriminatory compensation").

98. *See Ledbetter*, 550 U.S. at 624, 628, 637.

99. The continuing violations doctrine typically meant one of three situations. *See Elliot v. Sperry Rand Corp.*, 79 F.R.D. 580, 585–86 (D. Minn. 1978). One was a practice or policy that was, in fact, continuing and therefore was subject to suit so long as the policy was in place. *Id.* Other times the concept was a synonym for a pattern or practice claim, *id.*, while occasionally it fell into some murky territory so that one court could say "the relevant strain of continuing violation[s] doctrine is that a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period." *Williams v. Owens-Illinois*, 665 F.2d 918, 924 (9th Cir. 1982).

that seemed unsatisfactory because it would apply to all such situations, even if the entity itself had implemented clear nondiscriminatory policies in the intervening years. So in one fell swoop, the *Bazemore* decision and the continuing violations doctrine were gone.

B. AT&T v. Hulteen *and Lost Pension Rights*

Of the four cases discussed in this Part, *AT&T v. Hulteen*[100] was likely the least controversial and is likely to be the least influential. Like *Ledbetter*, the case involved an allegation of discrimination that had occurred some 30 years earlier but the underlying question was whether the employer had a duty to remedy that discrimination,[101] an issue that mirrored those the Court addressed in the formative 1970s period. There was, however, a significant difference with the *Ledbetter* case that may have made *Hulteen* potentially more attractive to the Court—the issue here was not why Hulteen had failed to complain earlier but whether the employer had a duty to address the effects of a discriminatory practice that directly affected current pension payouts.[102]

One reason *Hulteen* felt old is that it was. The plaintiffs had all taken pregnancy leave prior to 1979 under a policy that treated pregnancy leave discriminatorily but lawfully until 1978 when the Pregnancy Discrimination Act (PDA) was enacted.[103] Once the PDA was passed, AT&T changed its policy, but it did not correct its prior practice that failed to take into account pregnancy leave when calculating seniority and pension benefits.[104] The plaintiffs argued that AT&T had a duty to rectify its past practice but, citing a series of cases that dated from the 1970s and 80s, the Court upheld the policy, holding, in effect, that the company had no duty to remedy a practice that was lawful when enacted.[105]

Together *Hulteen* and *Ledbetter* put an end to the eighties notion of a continuing violations theory and the related concept of the present effects of past discrimination. These concepts, including the *Bazemore* case, had survived in the lower courts but had not found their way into the Supreme Court for decades. The era of correcting discrimination that

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100. 556 U.S. 701 (2009).

101. *Id.* at 704–09.

102. *See generally id.*

103. *Id.* at 705.

104. *Id.*

105. *Id.* at 707–11, 716. Virtually all of the cases the Court relied on were decades old. *See Bazemore v. Friday*, 478 U.S. 385 (1986); *Cal. Brewers Ass'n. v. Bryant*, 444 U.S. 598 (1980); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

arose years ago has now officially ended. The next two cases took up important concepts regarding class action cases and patterns of discrimination, and as was true with the present effects of past discrimination, the Court was reluctant to make the old clothes fit the new emperor.

C. Ricci v. DeStefano*: Rejecting the Disparate Impact Theory*

Ricci v. DeStefano[106] involved discriminatory tests that were administered by the city of New Haven for promotions within its fire department.[107] Although the procedural posture was different, the underlying facts of *Ricci* offered a carbon copy of the many testing claims that had arisen involving fire or police examinations reaching back several decades. Cases involving police and fire departments were among the very first cases brought by the Department of Justice's Civil Rights Division in large part in response to the Kerner Commission Report that had concluded that one of the reasons for the urban riots of the late-1960s was that the composition of police departments failed to reflect their communities.[108] As soon as Title VII became applicable to public employers, lawsuits were filed against most major cities, and the vast majority of the claims involved challenges to written examinations.[109]

Those examinations had two common features: they were multiple choice tests that often had little connection to police or fire work, and they uniformly had an adverse impact on African Americans and, in

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106. 557 U.S. 557 (2009).

107. *Id.* at 562.

108. *See* NAT'L ADVISORY COMM'N ON CIVIL DISORDER, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDER 9–11 (1968).

> We have cited deep hostility between police and . . . communities as a primary cause of the disorders surveyed by the Commission. . . . [I]n practically every city that has experienced racial disruption since the summer of 1964 – abrasive relationships between police and [African Americans] . . . have been a major source of grievance, tension, and ultimately disorder.

Id. at 299. The report, originally published in 1968, concluded by recommending increased diversity so that police departments better reflected the communities they served. *Id.* at 316–17.

109. *See, e.g.*, *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (police); *United States v. Virginia*, 620 F.2d 1018 (4th Cir. 1980) (police); *United States v. City of Chi.*, 549 F.2d 415 (7th Cir. 1977) (police); *United States v. City & Cnty. of S.F.*, 656 F. Supp. 276 (N.D. Ca. 1987) (fire); *United States v. New Jersey*, 614 F. Supp. 387 (D.N.J. 1985) (fire); *United States v. City of Yonkers*, 609 F. Supp. 1281 (S.D.N.Y. 1984) (police); *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978) (police and fire).

some jurisdictions, Latinos.[110] Many jurisdictions settled the claims by entering into consent decrees that provided for integrating the department while creating new examinations.[111] Over time, the cases began to trail off and some moved to the promotional levels, but the underlying issue of the adverse impact of the examinations has never waned.

By all appearances, *Ricci* involved what was another first generation dispute. The New Haven Fire Department had a lengthy history of both discrimination and litigation, and this particular dispute involved promotional examinations for lieutenant and captain positions.[112] The city of New Haven is a diverse mid-sized city with approximately 130,000 residents, with whites comprising just over 40 percent of the population, African Americans just over a third, and Latinos making up a quarter.[113] In contrast, the officer ranks within the fire department were nearly 80 percent white, even though the firefighter ranks more closely resembled the city's population.[114] Lawsuits had plagued the department since the mid-1970s.[115]

Although the *Ricci* controversy began in 2003, the similarities to the seventies-style litigation were hard to miss. For example, the disparity in the officer ranks was similar to what was typically found in the early

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110. *See* cases cited *supra* note 109. Many of the early tests were "off-the-shelf" tests that resembled IQ examinations and rarely had any connection to police work. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976) (where the test at issue asked logical reasoning questions that one might find in an SAT examination). A copy of that test was attached as an appendix to the appellate court decision, *see Davis v. Washington*, 512 F.2d 956, 967 (D.C. Cir. 1975), and is discussed in Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006).

111. *See, e.g.*, *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982) (approving consent decree for San Francisco police department); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979) (upholding police department's voluntary affirmative-action plan); *United States v. City of Phila.*, 499 F. Supp. 1196 (E.D. Pa. 1980) (entering consent decree in challenge to employment of women in Philadelphia Police Department). For a discussion of the litigation regarding police and fire departments, see Paul Burstein & Susan Pitchford, *Social-Scientific and Legal Challenges to Education and Test Requirements in Employment*, 37 SOC. PROBS. 243 (1990).

112. *Ricci*, 557 U.S. at 557, 562–63, 630 n.8.

113. These figures are from the 2010 census and are available at *State & County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/09/0952000.html (last visited Sept. 25, 2014). Between 2000 and 2010, the population grew about 5% with a significant influx (16.7%) of foreign-born individuals. *See id.*

114. *Ricci*, 557 U.S. at 610–11 (Ginsburg, J., dissenting). As of 2003, African Americans constituted 30% of the city's firefighters but only 9% of officer ranks at Captain or higher, while Hispanics represented 16% of the firefighter ranks but again only 9% of the officers. *See id.* (Ginsburg., J., dissenting).

115. For a discussion of the fire department's history of discrimination and related litigation, see Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 88–91 (2010).

cases, and New Haven created written examinations that were likewise similar to the kinds of examinations that were routinely administered in the seventies. In this respect, New Haven was a contemporary outlier, as many jurisdictions had moved away from multiple-choice examinations to what are known as assessment centers, where leadership skills that are difficult to measure through written examinations are assessed through simulations.[116] To be fair, New Haven was not entirely to blame for its continued reliance on written examinations—a negotiated agreement with the union, as well as a provision in the city charter, established the procedures and the scoring weights that were to be used for the firefighter promotional examinations.[117] Yet, by all appearances, New Haven looked to be operating on principles that had been established in the seventies and eighties—principles that had been repeatedly successfully challenged in litigation.

The other obvious connection to those older practices came with the examination results. Both the captain's and the lieutenant's examinations had substantial adverse impact, particularly when the focus was on where individuals placed on the examination rather than on the pass/fail rates.[118] As is true with many public employers, New Haven was required to select its officers among the top three scorers.[119] Given these restrictions, it appeared that no African Americans and perhaps one or two Latinos would be selected for the captain positions, and all of the lieutenants would be white.[120] This would have created a nearly all-white officer group in a diverse city with a diverse group of firefighters.

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116. Assessment centers are commonly used for promotional examinations and have been demonstrated to be better predictors of performance than written tests. *See, e.g.*, George C. Thornton III & Michael J. Potemra, *Utility of Assessment Center for Promotion to Police Sergeants*, 39 PUB. PERSONNEL MGMT. 59 (2010) (documenting utility of assessment center process). Assessment centers have been around for many years. *See, e.g.*, Joan E. Pynes & H. John Bernardin, *Predictive Validity of an Entry-Level Police Officer Assessment Center*, 74 J. APPLIED PSYCHOL. 831 (1989).

117. *Ricci*, 557 U.S. at 564 (noting that the contract with the union required that a written exam count for 60 percent of the score with an oral exam counting for 40 percent of the total score and that the city charter requires use of written examinations).

118. *Id.* at 586–87.

119. *Id.* at 564.

120. *Id.* at 566. The Supreme Court reported the numbers as follows:

> Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant. Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven

One aspect of the litigation that had changed over the years is that the city of New Haven was troubled by the test results.[121] This was also true in some of the early litigation, particularly where New Haven had undergone political changes so that the Mayor's office was occupied by an African American in a majority black city.[122] Many of those early cases were settled and led to some of the more controversial Supreme Court rulings in the eighties that allowed white firefighters to challenge settlements even after they had been approved by a court.[123] So even New Haven's concern for the adverse impact of the examination was not entirely new, and the case undoubtedly looked like many of the cases that had previously come before the Court stretching back to the 1970s.

The twist, to the extent there was one, was that New Haven voluntarily discarded the test results and opted to wait to make promotions until a better examination could be developed.[124] New Haven's decision followed a series of commission hearings regarding the test results and at least nominally the validity of the test, though New Haven never commissioned or performed a formal validation study to determine the merits of the examination.[125] Rather, the hearings suggested that New Haven might be vulnerable to a lawsuit if it promoted based on the examinations given the examinations substantial adverse impact.[126] The dynamics of the New Haven Fire Department made this a situation New Haven could not win, as their decision to abandon the test results led to a lawsuit by the white firefighters.[127]

In this respect, the litigation may have resembled some of the many reverse discrimination claims that were filed in the 1980s but enough had changed since then so that the litigation also proceeded in a different direction. Outside of the intervention case—*Martin v. Wilks*[128]—the

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> captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.

Id. (citations omitted) (citing *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006)).

121. New Haven's decision not to certify the test results after several days of hearings sparked the litigation. *See id.* at 574.

122. For a comprehensive discussion regarding many cities, see AFRICAN-AMERICAN MAYORS: RACE, POLITICS, AND THE AMERICAN CITY (David R. Colburn & Jeffrey S. Adler eds., 2001).

123. *See Martin v. Wilks*, 490 U.S. 755 (1989).

124. *Ricci*, 557 U.S. at 574.

125. *Ricci*, 557 U.S. 557. New Haven's contract with the test developer contemplated the preparation of a "technical report." *Id.* at 566. Although it is not clear what the contents of the report would have been, or whether it would have served as a validation study, New Haven opted not to request the report. *Id.* at 566–74.

126. *Id.* at 572.

127. *Id.* at 574.

128. 490 U.S. 755 (1989).

reverse discrimination fury of the eighties never yielded the results anti-affirmative action zealots had expected, and much of that litigation subsided after the lower courts made it more difficult for such claims to proceed to trial.[129] But the change that captivated the Supreme Court was simply a matter of time—it was one thing for the Court to give the benefit of the doubt to challenges to adverse results in the seventies and eighties, a time when the segregated and inferior quality of most schools attended by minority students was still acutely present, and it was quite another to continue that stance some thirty years later.

To be more specific, when someone asked in the 1970s why the examinations had adverse impact, the answer was all but obvious and never really in dispute: African Americans had been provided with inferior education and training. This was, after all, the rationale that lay behind the creation of the disparate impact theory.[130] But the same question did not yield the same answer 30 years later, and one of the odd aspects of disparate impact litigation is that the reason the examination has an adverse impact is rarely at issue; the mere fact of adverse impact requires the employer to justify its practice. That may have made sense in an earlier era but by the time *Ricci* reached the Supreme Court, the presumption that the test results were the product of unequal educational opportunities was far more attenuated. And because of the way the cases unfold, no other explanation was offered, leaving the Court to its own assumptions regarding the source of the test disparities.

This is an important point that bears emphasis, particularly since it is central to the underlying claim I am advancing. I do not mean to suggest that racial inequities in education have been eliminated; far from it as our educational system remains stubbornly plagued by such inequities.[131] Rather, what I mean to suggest is that the source of those

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129. *See id. Wilks* was part of a litany of cases challenging the use of racial preferences in consent decrees with mixed results. *Id.* For example, although the Court vacated an injunction prohibiting the use of seniority-based layoffs that were inconsistent with the terms of a consent decree, *see Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), it rejected a challenge to the use of broad remedial measures that went beyond what a court could have ordered as judicial relief. *See Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986). *Wilks* was subsequently superseded by a provision of the CRA 1991. *See* 42 U.S.C. § 2000e-2(a)(1) (2012).

130. *See supra* note 17 and accompanying text.

131. Contemporary analyses of data continue to demonstrate substantial inequities across our educational system. This was the conclusion of a recent report commissioned by the Secretary of Education. *See* EQUITY & EXCELLENCE COMM'N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 13 (2013) ("If, on average, African American and Hispanic students performed academically at the level currently achieved by white students, overall student performance for the United States would rise from below the developed-country average to a respectable position ahead of, for example, Australia and Germany."). The report goes on to identify many causes of the persistent inequality. *See id.*; *see also* WILLIAM H. SCHMIDT & CURTIS

inequities has changed—no longer can they be readily traced to the "separate but equal" regime that directly accounted for the disparities in the early disparate impact cases. Thirty years is a long time to be replaying the same dispute, and it would be a mistake to claim that the problems at issue in *Ricci* were the same that were at issue in *Griggs*.

This perspective focusing on changed social conditions helps explain the Court's *Ricci* decision, though as was true in *Ledbetter* the Court's discussion was anything but direct. It was clear, however, that whatever patience the Court had for the disparate impact theory had long since evaporated. Without at least some explanation for why the minority candidates fared worse than their white counterparts, it appeared that the disparate impact theory was no longer serving any purpose, particularly since among those who are not sympathetic to the disparate impact theory there are neutral explanations for the results. For example, the majority opinion alludes to the hard work of the white firefighters as an explanation for the test results.[132] Indeed, if the examination results are the product of merit, there is little reason why the disparate impact theory would displace those results so long after the original *Griggs* decision.

I do not mean to suggest that the results were the product of merit, rather I want to emphasize the assumptions or themes that underlie the Supreme Court's decision, and there is little question that its decision to uphold the examinations was premised on the view that the examination results were consistent with a meritocratic process. There was certainly good reason to question this assumption given that no evidence was ever introduced regarding the validity of the tests, just as there was no meaningful evidence introduced to explain the reason for the adverse results.

These two facts—the absence of evidence on either the validity or the underlying results—demonstrate how the disparate impact theory no longer fits our social conditions, and in this respect, validates the Supreme Court's decision to uphold the challenge brought by the white firefighters. As noted previously,[133] in the early years of the disparate impact theory, no evidence was necessary to explain the source of the

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C. MCKNIGHT, INEQUALITY FOR ALL: THE CHALLENGE OF UNEQUAL OPPORTUNITY IN AMERICAN SCHOOLS (2012); PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2012); WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS AND CHILDREN'S LIFE CHANCES (Greg J. Duncan & Richard J. Murnane eds., 2011).

132. *Ricci*, 557 U.S. at 593. Toward the end of the opinion, Justice Kennedy noted the "justified expectations" of the candidates and added: "Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the end of the process was all the more severe." *Id.*

133. *See supra* Part II.

adverse results. Today it is difficult to indulge that same presumption. It certainly may be true that New Haven's minority firefighters attended inferior schools that left them ill-prepared for written examinations, and it might also be that the more diffuse discrimination that African Americans and Latinos experience today limited their test-taking abilities. Yet, the grounds for assuming that these factors explain the test disparities are no longer as strong as they once were, and it is also possible that the white firefighters did study more for the test, and they might have done so not for any reason that would be tied to their whiteness but rather because a promotion might have meant more to someone who came from a long line of firefighters, as is more common for the white firefighters.[134] It was also possible that the white firefighters had simply been on the job longer and that their longer service gave them an edge on the examination.

Whatever the reason, it is no longer feasible or desirable to ignore these or other factors that might explain the examination results. Similarly, there is no longer any basis for assuming the test is discriminatory in its substance, an assumption that seems to continue to pervade popular mythology. There was nothing about this particular test that indicated that it was biased in a way that would favor white test takers. There were concerns that some of the questions were inappropriate for New Haven—questions that asked about "downtown" that made little sense within New Haven and may have been borrowed from a New York City examination—but there was no reason to believe that those questions would be racially skewed in a way that would favor whites.[135] Questions were also raised about the costs of the material,[136] but again it is not clear why white firefighters would be more able to afford the cost of the study materials.[137]

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134. *See* Ann C. McGinley, Ricci v. DeStefano*: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 587–92 (2010) (discussing urban firehouses with particular focus on New Haven); Stephen Reinhardt, *Remarks at UCLA Law School Forum on Affirmative Action: "Where Have You Gone, Jackie Robinson?*," 43 UCLA L. REV. 1731, 1739 (1995) (discussing the prevalence of family connections among white firefighters).

135. *See Ricci*, 557 U.S. at 613 (Ginsburg, J., dissenting) ("A number of the exam questions . . . were not germane to New Haven's practices or procedures.").

136. *Id.* (Ginsburg, J., dissenting). This issue was raised by Justice Ginsburg in her dissent. *Id.* (Ginsburg, J., dissenting). In addition to the cost, she also noted that some individuals had to wait for a month and a half to receive the materials, while others had obtained the materials earlier. *Id.* (Ginsburg, J., dissenting).

137. It is certainly possible that the African American firefighters were paid less than their white counterparts, although that seems less likely within a department that was presumably tied to civil service pay scales. Moreover, if pay discrimination explains the lack of access to materials, the disparate impact theory is a very poor vehicle for addressing that problem.

Perhaps the most mystifying part of the litigation was not the explanation for the disparate results but the fact that no one seemed interested in whether the examination provided any useful information. In fact, this was one of the original justifications for the disparate impact theory—the employer was required to justify the use of its test when the results disfavored a historically disadvantaged group.[138] Yet, despite its lengthy administrative and judicial history, there was no testimony in *Ricci* regarding how effective the examination was at choosing or predicting who would be successful officers. Ordinarily, this would be the issue at the center of a validation study, but New Haven eschewed any validation effort and did so without offering any explanation for its decision.

Something seems to have gone seriously awry when, more than 40 years after the Civil Rights Act was passed, years of litigation can go by without anyone explaining either the reason for the disparate test results or the validity of the examination—the two questions that should be the most critical part of any disparate impact inquiry. This is another sign that the old theory does not fit the new social conditions, and the Supreme Court effectively sent a message that these old-style claims would no longer have an easy path. At least that is one way to read the case, as it remains too early to determine how lower courts will interpret the case.[139] Another possibility is that the lower courts will simply treat this case as involving an employer's voluntary effort to address the adverse effects of its examinations and find little in the decision for the more common circumstance when plaintiffs sue to challenge the validity of the examination.

D. Wal-Mart v. Dukes *and Statistical Proof of Discrimination*

In some ways the massive sex discrimination class action suit against the retailer Wal-Mart might appear to be a classic third

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138. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). This is also one of the widely misunderstood parts of the disparate impact test—the presence of adverse impact does not invalidate the test, it only requires the employer to justify its use.

139. To date, only a handful of cases have sought to apply *Ricci*, and most have distinguished the case. *See, e.g.*, *Maraschiello v. City of Buffalo*, 709 F.3d 87 (2d Cir. 2013) (distinguishing *Ricci* in rejecting white firefighter's challenge to replacing old test results with a new promotional test); *United States v. City of N.Y.*, 731 F. Supp. 2d 291, 298 (E.D.N.Y. 2010), *vacated and remanded on other grounds*, 717 F.3d 72 (2d Cir. 2013) (noting that "*Ricci*'s specific holding does not control here, since a federal court attempting to remedy identified discrimination enjoys far more authority than an employer attempting to remedy potential discrimination"). In one case that was factually similar to *Ricci*, a district court applied *Ricci* to hold the city liable for discarding test results. *See Oakley v. City of Memphis*, No. 06-2276 D/P, 2010 WL 6908345 (W.D. Tenn. 2010).

generation claim. Here the plaintiff class was suing the world's largest retailer—one with a fierce reputation for litigating rather than settling—for company-wide discrimination against its female employees in pay and promotions.[140] Yet, the underlying claim in the case largely mapped onto a strategy that had been developed in the 1970s to challenge the hiring and assignment of women in grocery stores, and the statistical analysis that was offered to document Wal-Mart's discriminatory ways turned out to be fairly rudimentary akin to a first generation claim, in this instance based on the earlier cases of *Teamsters* and *Hazelwood*.

Before proceeding further, it is important to note that the *Wal-Mart* litigation never proceeded beyond the class certification stage,[141] so it is quite possible that the attorneys representing the plaintiffs would have advanced a different and more sophisticated analysis at trial. Nor should the following discussion be seen as a criticism of the plaintiffs' strategy, though I will say that they should have been aware that the Supreme Court was likely to view their evidence skeptically since it was so basic as to make it difficult to draw any broad conclusions in a world where gender discrimination is no longer perceived as the automatic explanation for segregated job patterns.

To provide some context to the case, it will be helpful to describe briefly the grocery store cases. Beginning in the 1970s, and continuing for the next 30 years, many of the largest grocery store chains were sued, and the cases all followed a similar pattern that focused on the assignment policies of the stores.[142] Within grocery stores, men were traditionally assigned to the most important departments—meat and produce—while women tended to be clustered at the cash registers and in newer or less desirable departments such as bakeries and delicatessens.[143] These assignments ultimately led to lower pay and fewer

140. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

141. *See id.* The case was originally filed in 2001 and was litigated for more than 10 years through the Supreme Court decision, but never moved beyond the class certification stage. *See* Complaint, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. C-01-2252-MJJ). The court of appeals had twice affirmed the lower court's decision to certify the class, though there was a lengthy period between the two decisions. *See Wal-Mart Stores, Inc. v. Dukes*, 603 F.3d 571 (9th Cir. 2010) (en banc), affirming lower court decision reported at 222 F.R.D. 137 (N.D. Cal. 2004).

142. I have discussed these cases previously. *See* Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMPLOY. POL'Y J. 1, 12–19 (2005). Many of the cases were initiated in the 1980s. *See id.* at 17.

143. *See* Nicole Harris, *Revolt at the Deli Counter*, BUS. WK., Apr. 1, 1996, at 32. A New York Times article summarized the allegations in one of the cases as: "The women said they were channeled into dead-end jobs, either working the cash registers or relatively new departments like bakeries and delicatessens, rather than in the main

promotional opportunities for women. One of the more interesting aspects of the litigation is that grocery stores traditionally post photographs of its management staff at the front of the stores, and the attorneys would send paralegals into the stores to do a "visual" inspection of the management staff.[144] In addition to the photographic evidence, plaintiffs had rudimentary statistical data that charted how many women worked for the stores and their job assignments.[145]

As was true with so many of the cases that arose in the 1970s and 1980s, the grocery store cases were not particularly complicated. Most of the jobs required little education or experience, so there was no real dispute about different qualifications for men and women, and this was also an industry where managers traditionally rose up through the ranks. The defenses offered by the grocery store chains typically involved claims of women's lack of interest in management jobs or their refusal to relocate to find an appropriate position.[146] This lack of interest defense, even at this early stage of the law, was also tried and true and provided these cases with an overlay from one of the best known of all sex discrimination cases—the EEOC's case against Sears in which the company successfully defended a class claim that women were discriminatorily deprived of commission jobs by asserting that women lacked interest in the higher pressure sales positions.[147]

The grocery store cases represented classic first-generation discrimination claims involving overt exclusions and often direct evidence in support of the discriminatory treatment of women. The cases

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grocery and produce sections . . . where jobs are generally better paid and can lead to promotions." Jane Gross, *Big Grocery Chain Reaches Landmark Sex-Bias Accord*, N.Y. TIMES, Dec. 17, 1993, at A1. The case, one of the few with a published opinion, is *Stender v. Lucky Stores Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992).

144. *See, e.g.*, Christine Blank, *Ingles Hit By Class-Action Sex-Bias Suit*, SUPERMARKET NEWS, Mar. 9, 1998, at 4 ("[A] visual survey of management pictures in 39 Ingles' stores showed that 100% of the manager, assistant manager and produce, meat and grocery manager positions were held by men, the plaintiffs' lawyers said."); Anne Hull, *A Woman's Place*, ST. PETERSBURG TIMES, Feb. 2, 1997, at 1A (quoting a union representative as stating: "My God, you'd go in the stores and you didn't need a clipboard to write down what you saw. It was all white guys on those pictures.").

145. *See, e.g.*, *Shores v. Publix Super Markets Inc.*, No. 95-1162-CIV-T-25(E), 1996 WL 407850, at *7 (M.D. Fla. Mar. 12, 1996).

146. *See, e.g.*, Kimberly Blanton, *In the Publix Eye: $81.5 Million Settlement Is a Showcase for EEOC's Activism in High-Profile, Class Action Suits*, BOSTON GLOBE, Feb. 16, 1997, at E1 (company official quoted as saying that "many female associates do not have an interest in stocking").

147. *See E.E.O.C. v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1322 (N.D. Ill. 1986), *aff'd* 839 F.2d 302 (7th Cir. 1988). In the case involving Lucky stores, the district court judge catalogued the list of excuses the company offered for the lack of women in management positions: "[W]omen do not want to work late shifts, . . . men don't want to compete with women or have a woman as their boss . . . [and] women do not have the drive to get ahead." *Stender*, 803 F. Supp. at 332.

also lent themselves to rudimentary statistical analysis and often involved what the law describes as the "inexorable zero" where no women held the contested jobs.[148] The statistics did little more than measure the disparity of women in those positions and offered an estimate of the likelihood that the job assignments occurred by chance; what, for example, was the chance that all of the women would end up in the bakery rather than behind the meat counter. The vast majority of the cases settled with minimal litigation beyond the class certification stage.[149] Following on the heels of the grocery store cases, a substantial claim was filed, and ultimately settled, against the retailer Home Depot that was based on similar allegations, namely that women were consigned to cash registers while men worked the floors from which promotions arose.[150]

Even though it was filed nearly 30 years after the first grocery store cases were initiated, the *Wal-Mart* litigation was virtually identical in substance. There were two basic claims underlying the *Wal-Mart* litigation. The one that drew the most attention, and was likely most critical to obtaining substantial damages, involved the lack of women managers throughout the company. Here the plaintiffs made simple calculations: women comprised more than 70 percent of the employees but only about 30 percent of the managers.[151] On this level, there was no material difference between these basic calculations and those that were advanced in the grocery store cases and, not surprisingly, the defendants raised many of the same defenses—women lacked interest in management jobs, were unwilling to relocate, and were less qualified.[152] But the real issue in the case, even at the class certification stage, was whether it should be possible to assert a claim of systemic discrimination based on these simple mathematical comparisons. In other words, is it

148. The language comes from the Supreme Court's decision in *Teamsters*. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) ("[T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero.'").

149. *See* Selmi, *supra* note 142, at 12–19 (discussing cases).

150. *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1338 (2002). *Stender* is the only published case on liability. *Stender v. Lucky Stores Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992). As a general matter, if a case is certified as a class action, there is a very high probability the case will eventually settle.

151. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2563 (2011) (Ginsburg, J., dissenting) ("Women fill 70 percent of the hourly jobs in the retailer's stores but make up only 33 percent of management employees."). Oddly enough, these figures only appeared in the dissenting opinion issued in the *Wal-Mart* case. *See id.* (Ginsburg, J., dissenting).

152. *Id.* at 2554. This latter issue, the disparate qualifications of men and women, was complicated by Wal-Mart's lack of records for many of the managerial positions. *See Dukes v. Wal-Mart Stores*, 222 F.R.D. 137, 165 (N.D. Cal. 2004) (noting the incomplete applicant data Wal-Mart provided to plaintiffs).

still possible to attribute discrimination as the cause of statistically significant disparities showing fewer women in managerial roles than one might expect? Another way of raising this issue is to ask whether the same inference of discrimination that would arise from the statistical disparities in the 1970s should arise some 40 years later.

These are complicated questions that the parties failed to grapple with. To be sure, the *Wal-Mart* plaintiffs sought to explain why the statistical analysis should be seen as the product of discrimination relying on what is sometimes labeled "social framework" evidence to explain how sex discrimination occurs in large organizations.[153] This evidence, put forward through an expert declaration, described how discretionary selection systems like the one in place at Wal-Mart often operated on stereotypical assumptions about women.[154] The plaintiffs also offered additional statistical analyses but, in terms of the managerial positions, they did not offer much more than the basic statistical conclusion that women were severely underrepresented in management positions.[155]

As noted, when the case reached the Supreme Court, the question was whether the plaintiffs had satisfied the procedural requirements for class certification, and here there was an unusual twist that again complicated matters for the plaintiffs. Although Wal-Mart was highly centralized in its supply chain of goods, it was remarkably decentralized in its hiring and promotion decisions. Stores were divided into regions and districts and store managers were provided with budgets to cover labor costs but could, within a limited range, determine how to structure the budget.[156] In a closely divided decision, the Supreme Court ultimately concluded that the plaintiffs had failed to establish the commonality necessary to warrant class certification.[157] This conclusion has led the plaintiffs to file a number of smaller class actions around the

153. *See Wal-Mart*, 131 S. Ct. at 2553–54. The evidence was discussed, and largely dismissed, by the majority. *See id.*

154. *Id.* at 2553 (noting that plaintiff's expert "testified that Wal-Mart ha[d] a 'strong corporate culture,' that makes it 'vulnerable' to 'gender bias.'"). Needless to say, establishing that a system is "vulnerable" to discrimination is not, and should not be, the same as proving discrimination, just as proving that an individual is vulnerable to criminal activity should not lead to a criminal conviction.

155. *See generally id.*

156. *Id.* at 2547. The Supreme Court explained:

> [The] stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. . . . Pay and promotion decisions . . . are generally committed to local managers' broad discretion, which is exercised 'in a largely subjective manner.' Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight.

Id. (quoting *Dukes*, 222 F.R.D. at 145).

157. *Id.* at 2555–56.

country—perhaps in a legal version of the old adage, "be careful what you ask for"—although to date, it appears that the strategy has proved costly and unsuccessful for the plaintiffs.[158]

The Court, however, went beyond the procedural deficiencies to express deep skepticism regarding the plaintiffs' evidence of discrimination. For example, the Court criticized the plaintiffs' social framework evidence because the plaintiffs' expert—who had worked on several of the grocery store cases—was unable to quantify how likely discrimination was to have influenced Wal-Mart's decision making.[159] Instead, the expert concluded only that the system was "vulnerable to gender bias," but establishing a vulnerability to discrimination is a long way from proving discrimination, and there was nothing especially retrogressive about the Court's conclusion on this point.[160]

There remained the question of the statistically significant disparities in female managers, and here is where the Court subtly repudiated its past precedent. There is little question that the plaintiffs' statistical presentation satisfied the Court's 1970's jurisprudence and was, in fact, presented in a far more sophisticated way. Recall that in *Teamsters* and *Hazelwood*, the Supreme Court was willing to accept the minimal statistical proof as relevant to discrimination on the merits, not just at the class certification stage.[161] The statistical proof in *Wal-Mart* was far stronger than either of those cases with statistically significant disparities that were strongly indicative of discrimination, and yet the

158. Following the Supreme Court decision, the attorneys for the plaintiffs filed class action lawsuits in California, Texas, Tennessee, Wisconsin, and Florida. *See, e.g.*, Complaint, *Ladik v. Wal-Mart Stores, Inc.*, 291 F.R.D. 263 (W.D. Wis. Feb. 20, 2013) (No. 3:13-cb-00123); Complaint, *Love v. Wal-Mart Stores, Inc.*, No. 0:12-cv-61959-RNS, 2013 WL 5434565 (S.D. Fla. Oct. 4, 2012); Complaint, *Phipps v. Wal-Mart Stores, Inc.*, 925 F. Supp. 2d 875 (M.D. Tenn. Oct. 2, 2012) (No. 3:12-cv-01009); Complaint, *Odle v. Wal-Mart Stores, Inc.*, 2012 WL 5292957 (N.D. Tex. Oct. 28, 2011) (No. 3:11-cv-02954-O); Plaintiff's Fourth Amended Complaint, *Dukes v. Wal-Mart Stores, Inc.*, 2011 WL 7037084 (N.D. Cal. Oct. 27, 2011) (No. C-01-2252-CRB). One district court has dismissed class certification. *See Ladik v. Wal-Mart Stores*, 291 F.R.D. 263 (W.D. Wis. 2013) (denying class certification for lack of common questions).

159. *See Wal-Mart*, 131 S. Ct. at 2554–55.

160. *See id.* at 2552 (noting that "Bielby testified that Wal-Mart has a 'strong corporate culture,' that makes it 'vulnerable' to 'gender bias'") (quoting *Dukes*, 222 F.R.D. at 152). The natural response is to note that the case involved the issue of class certification rather than a judgment on the merits. The difficulty with this position involves the sheer cost of class action litigation as well as the rather clear evidence that most large employment discrimination cases settle after a class is certified. It is a fair and complicated question whether a court should take into account the likelihood that a case might settle in applying procedural rules, but it would also seem problematic to ignore that fact.

161. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

Court failed to draw an inference of discrimination and, in fact, was distinctly unimpressed by the evidentiary record.[162] And the reason seems clear, though not without controversy. Looking out on the floor at Wal-Mart and seeing only male managers, the Court no longer saw discrimination as the most likely cause. The evidence the Court found compelling in the 1970s was now found wanting.

Like so many of these issues, the Court did not articulate either its repudiation of the past precedent or the rationale, and there is a difficult question lurking in the background that requires addressing. That question is, given the changes in our society and the indisputable decrease in discrimination over the last 40 years, should discrimination today be easier or more difficult to prove? This is a question on which there has been remarkably little debate. Liberals often act as if discrimination has not receded, or that discrimination today is as pervasive as it was in the post-Jim Crow era, while conservatives tend to think of discrimination as having all but vanished. The truth is obviously somewhere in between.

Discrimination has declined and changed, but that does not make it any less disruptive to the lives of its victims. But it also seems unlikely that when we look out on a workplace today and find racial or gender disparities—as we will in most workplaces—that we can conclude, without something more, that those disparities invariably arise from the discriminatory practices of an employer. In the 1970s, when there were no women or minorities in a workplace or in a particular job, it was easy to conclude that discrimination was the most likely cause—discrimination was everywhere and in the prior decade overt discrimination had been lawful. Today we know that discrimination is less prevalent, which can also lead us to a greater reluctance to see discrimination as a causal factor.

Yet, and this is the issue at the heart of contemporary discrimination, there is no question that discrimination remains an entrenched feature of the workplace one that is often more difficult to identify because it is more complex in nature. Different names are used to describe the complexity—subtle discrimination, implicit discrimination, structural discrimination, and occasionally unconscious discrimination—but what they all have in common is that they describe discrimination that is manifestly different from what might be called first-generation or old-fashioned discrimination, the kind of discrimination around which much, if not most, of the existing case law developed. I will return to the difficulty of proving complex discrimination momentarily, but at this point I want to emphasize how the Court has largely shed its fidelity to its former case law in response to

162. *Wal-Mart*, 131 S. Ct. 2541.

the changing nature of discrimination. The proof offered in the *Wal-Mart* litigation may have sufficed to uncover discrimination at one time, but today, the Court demands something more with the primary problem being that it does not really know, and certainly has not said, what that "more" is. But if the Court is to update the law—and this makes the issue different from that involved with the disparate impact theory—it will need to determine what kinds of statistical analysis can reliably document contemporary discrimination.

IV. THE COURT'S MODERN TURN

There is nothing particularly problematic about the Court's decision to update the law unless one views that decision as infringing upon Congress's mandate. While Congress could certainly update the law as necessary—and this might be a preferred method in the abstract—the reality is that it rarely does so, and in the discrimination field it typically amends laws in response to Supreme Court decisions.[163] This suggests that the two branches have reached a reasonably stable equilibrium with respect to who defines the law: Congress allows the Court to shape the law until the Court provides too restrictive a definition at which point Congress provides a correction.[164] It is also possible that the correction or iterative process might proceed in the opposite direction—the Court would interpret the antidiscrimination statutes too broadly—but at least as measured by Congressional overrides this has never occurred in the employment discrimination field.[165]

Putting aside the institutional issue, we can proceed to assess what the Court has replaced its old jurisprudence with, seeking to determine whether a new model has arisen that better fits contemporary discrimination. In making this assessment, it will be helpful to divide the Court's doctrine into the traditional categories of individual claims of discrimination and systemic claims of discrimination, typically defined

163. The two most recent substantial amending acts were both in response to restrictive Supreme Court interpretations—the now more than 20-year-old CRA 1991 and the more recent amendments to the Americans with Disabilities Act. *See* American with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, codified at 42 U.S.C. § 12101 (2012); Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k) **(**2012) **(**discussed *supra* Part I.B).

164. For a discussion of the relationship between the Supreme Court and Congress, with a particular focus on the Civil Rights Act of 1991, see Selmi, *supra* note 75.

165. One might contend that the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), recognizing the disparate impact cause of action, was broader than Congress originally intended, but the point here is that Congress has never stepped in to correct a Supreme Court decision because it was deemed too expansive or protective of civil rights.

as class actions alleging either intentional discrimination or based on a theory of disparate impact. From this perspective, the Court's doctrine with respect to individual claims might be considered a modest upgrade on past jurisprudence; the changes the Court has made in the last decade include recognitions of different models of proof, including those that involve multiple actors or multiple motives that offer the potential to better capture contemporary discrimination.[166] Even more important, the Court has established strong and clear guidelines for adjudicating retaliation claims. At the same time, the Court's vision with respect to systemic discrimination is deeply problematic for, while the Court has shed its past doctrine, it has failed to replace that doctrine, thus leaving a substantial void for claims that seek to uncover a pattern of discrimination. In particular, the Court seems to see discrimination as fading rather than evolving and focuses exclusively on individual claims of discrimination. Before exploring how the doctrine has evolved, it will be helpful to discuss how discrimination has changed over the last two decades in order to evaluate whether that doctrine conforms to that change.

A. The Changed Nature of Discrimination

The premise of the prior Part was that discrimination has changed both in its prevalence and its origin. It is worth repeating that there is little question that discrimination has declined substantially since the foundational discrimination doctrine was established. To be blunt, this is not a point worth debating, though just how much it has declined is often at the core of continuing disputes over the scope of antidiscrimination doctrine. Those who believe discrimination has become an anomaly are often skeptical of the need for a vibrant disparate impact doctrine, for example, or ready access to the class action device as a means to attack entrenched discrimination.[167] Under this view discrimination became too easy to allege and to prove, and the various inferences the early doctrine turned on are no longer relevant to contemporary claims of discrimination. This is the view that is best aligned with the recent Supreme Court doctrine where the Court has implicitly vacated the earlier inferences.

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166. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (discussed *infra* Part IV.B.1.a).

167. *See, e.g.*, Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132–35 (2009) (cautioning against class certification in the *Wal-Mart* case); Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 624–26 (2011) (arguing for changing disparate impact standard to reflect changed social conditions).

Even if one accepts that discrimination has declined substantially, there remains the question why antidiscrimination doctrine would need to change. It could be that there would simply be fewer cases because there is less discrimination, or perhaps if the volume of cases did not decline more of the claims would simply fail. This argument, however, overlooks the fundamental nature of proving discrimination: ultimately, discrimination is a legal conclusion designed to explain observed social conditions, and it necessarily relies on drawing inferences from circumstantial evidence. If we see discrimination as having less explanatory power today, then we may be less likely to attribute certain behavior or disparities to discrimination. This might lead to more defense verdicts, but it might also mean that cases that succeeded a decade or two ago would now fail. In other words, the proof structures crafted when discrimination was a common cause might require modification, either implicitly or explicitly, to match current social conditions.

There is another view that needs to be integrated into the new proof structures or the new inferential causal chain. This perspective emphasizes how discrimination has changed rather than how it has receded—how discrimination has become more subtle in nature and less likely to be linked to one bad actor.[168] And because it is more subtle, it is by definition more difficult to establish. Rather than advocating a tightening of proof standards—as we see in the perspective that concentrates on how discrimination has declined—this perspective calls for a loosening of standards so that subtle discrimination could be more easily uncovered.

Within legal literature over the last decade, there has been an explosive interest in the changing nature of discrimination, with a particular focus on what is now termed implicit bias, sometimes also referred to as unconscious bias.[169] This concept is not necessarily new.

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168. *See* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 477–80, 493 (2007) (describing the difficulties in applying antidiscrimination laws to the newly understood subtle forms of bias and discrimination).

169. The list of legal scholars who have recently emphasized implicit or unconscious bias is lengthy. For a partial listing, see Bagenstos, *supra* note 168; Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1311–17 (2012); Melissa Hart, *Subjective Decisionmaking & Unconscious Discrimination*, 56 ALA. L. REV. 741, 745–49 (2005); Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506–14 (2004); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1128–35 (2012); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking & Misremembering*,

Indeed Charles Lawrence's famous antidiscrimination article was written in 1986 and focused on what he then termed "unconscious discrimination."[170] The more recent focus on implicit bias differs primarily in the social psychology research that has arisen over the last two decades, whereas Charles Lawrence's article was based primarily on a Freudian theory that was not tied to experimental research.[171]

The basic premise behind the concept of implicit discrimination is that individuals are often unaware of their own biases. A measurement instrument, known as the Implicit Association Test (IAT), has been developed by social psychologists and is available over the Internet for those who wish to use it, as millions of individuals have now done.[172] The IAT measures rapid-response word associations;[173] for example, a photograph of a famous African American might appear on the screen and the test taker then associates the photograph with words from a list. Based on what is now a database that includes several million test takers, individuals are often quicker to associate African Americans with negative words, and the response times are then translated into a test score that measures implicit bias.[174] A key aspect of the implicit bias research is that individuals who have high scores on the test frequently

57 DUKE L.J. 345 (2007); Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010). For an excellent overview with cautionary notes, see Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter? Law, Politics & Racial Inequality*, 58 EMORY L.J. 1053 (2009).

170. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

171. *See id.*; sources cited *supra* note 169. Within employment discrimination scholarship, Linda Hamilton Krieger was largely responsible for moving law into the social psychology literature. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

172. *About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html (last visited Sept. 28, 2014). The literature on the Implicit Association Test is now extensive. For a review by the founders, see Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18–19 (2009) [hereinafter Greenwald et al., *Implicit Association Test*]. For additional discussions, see Brian A. Zosek, Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* SOCIAL PSYCHOLOGY & THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 265–67 (John A. Bargh ed., 2006); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465–66 (1998); Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior and Explicit Measures of Racial Attitudes*, 37 J. EXPER. SOC. PSYCHOL. 435, 435–36 (2001).

173. *About the IAT*, *supra* note 172.

174. *See* Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES INTERGROUP REL. 359, 363 (2007).

proclaim values that are steeped in equality and would consciously disclaim any intentional bias.[175] This disconnect between test scores and expressed antidiscrimination norms is what leads researchers to proclaim that individuals are often unaware of the biases they hold.

The IAT has been widely used but has more recently come under criticism, particularly by a small group of determined academics.[176] One of the critiques of the IAT is that demonstrating implicit bias based on rapid word associations will not necessarily translate into biased actions, particularly in the workplace where most actions are based on deliberation rather than rapid or instantaneous associations.[177] A series of studies have recently sought to document a connection between measured implicit bias and discriminatory conduct.[178] These studies have generally relied on college students and artificial workplace decisions—limitations that are common to experimental psychology—and the studies have identified limited but meaningful relationships between IAT scores and discriminatory conduct.[179] There are also questions about what the test is actually measuring, but in terms of applying the test to questions of identifying unlawful discrimination, more serious issues arise.

Accepting the test results at face value, the IAT simply provides a measure of implicit attitudes, and even if one accepts that the test can serve as a fairly reliable predictor of discriminatory conduct, no court would (or should) allow a judgment of liability based on a statistical correlation or a predictive model. The various assumptions that would go into such a determination would violate any notion of fairness or due process because liability would impermissibly turn on a proclivity to discriminate. But that does not mean the IAT has no role to play in uncovering discrimination; rather, the IAT can be quite useful in explaining the more subtle nature of discrimination for contemporary society. However, from this angle, the concept of implicit bias is not as novel as it is often assumed.

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175. This is a frequent problem in measurements of discrimination, namely that explicit statements are inconsistent with actions, or, in the case of the IAT, with implicit attitudes. *See, e.g.*, *id.* at 360–61 (in two studies the IAT predicted behaviors after controlling for explicit behavior).

176. *See, e.g.*, Hal R. Arkes & Phillip E. Tetlock, *Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?"*, 15 PSYCHOL. INQUIRY 257, 259 (2004) (critiquing the attribution of prejudice); Hart Blanton et al., *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 J. APPLIED PSYCHOL. 567, 567–68 (2009); Gregory Mitchell & Phillip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1030 (2006).

177. *See, e.g.*, Blanton et al., *supra* note 176, at 580.

178. *See* Greenwald et al., *Implicit Association Test*, *supra* note 172, at 18.

179. *See id.* at 23.

Implicit bias is closely related to earlier theories of discrimination, particularly the concept of aversive discrimination that was developed in the 1970s largely by the pioneering work of Samuel Gaertner and John Dovidio.[180] "Aversive racism" was the label that applied to observed behavior that was inconsistent with an individual's proclaimed social norms.[181] The theory developed around what are known as "helping studies" where a person would, for example, drop a bag of groceries and wait to see if anyone came to help pick them up.[182] The studies documented that individuals were quicker to help members of their own race, and this was true even among individuals who espoused theories of equality.[183] It was hypothesized that these individuals failed to internalize accepted social norms.[184] In other words, people would say one thing and do another, much like the results suggested by the IAT. Both of these theories demonstrate that deep lingering forms of bias can translate into discriminatory conduct despite the expressed intent of the actors.

As may be apparent, the theories are also closely related to the concept of stereotyping; indeed, stereotyping likely explains at least some significant portion of the IAT results.[185] There is extensive literature going back decades on stereotyping, and there are different forms, some more innocuous than others.[186] At least in one respect

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180. *See, e.g.*, Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION AND RACISM 61–62 (John F. Dovidio & Samuel L. Gaertner eds., 1986); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism & Selection Decisions: 1989 & 1999*, 11 PSYCHOL. SCI. 315, 315 (2000); Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 316 (2009).

181. *See* Pearson et al., *supra* note at 180.

182. *See* Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 551 (1980); Samuel L. Gaertner & John F. Dovidio, *The Subtlety of White Racism, Arousal, and Helping Behavior*, 35 J. PERSONALITY & SOC. PSYCHOL. 691, 692–93 (1977).

183. Gaertner & Dovidio, *supra* note 182, at 692–93.

184. *Id.* at 693.

185. *See, e.g.*, Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Student*s, 109 PNAS EARLY EDITION 16474, 16474 (2012) ("Past studies indicate people's behavior is shaped by implicit or unintended biases, stemming from repeated exposure to pervasive cultural stereotypes."); *see also* Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They?*, 81 J. PERSONALITY & SOC. PSYCHOL. 757, 757–58 (2001).

186. For some early discussions of stereotyping, see Susan T. Fiske, *Stereotyping, Prejudice & Discrimination*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 357–58 (Daniel T. Gilbert et al. eds., 4th ed. 1998); Anne Locksley et al., *Sex Stereotypes and Social Judgmen*t, 39 J. PERSONALITY & SOC. PSYCHOL. 821, 821–22 (1980); Shelley E. Taylor et al., *Categorical and Contextual Bases of Personal Memory and Stereotyping*, 36 J. PERSONALITY & SOC. PSYCHOL. 778, 778–79 (1978). In a recent article, Professor Charles Sullivan traced the issue of stereotyping back to 1961 in terms of its appearance

stereotyping is an overbroad group judgment applied to individuals, and today it seems to have its strongest effect as applied to gender where stereotypes abound. For example, one might correctly note that women remain primary caretakers on average and then mistakenly conclude that all women are likely to be primary caretakers. The stereotype becomes pernicious when it is applied to exclude women from various employment opportunities. One important difference with gender stereotypes is that they are less likely to be implicit in nature if by implicit we mean that the person who holds the stereotype is unaware of doing so.[187] A person may be unwilling to admit fidelity to the gender stereotype, but that is not the same as being unaware of its force.

Implicit bias is also sometimes equated with unconscious bias, but I believe it is important to distinguish between these two concepts, particularly as they apply to the law. One reason for this is that when we talk about the unconscious, there is an implication that the behavior at issue cannot be controlled. And if it cannot be controlled, some have suggested that it would be inappropriate to hold employers responsible for unconscious discrimination.[188] Research, however, has shown that there are various ways in which implicit bias can be held in check, including engaging in deliberate conduct that will ameliorate the influence of bias on snap judgments.[189] Using the term "unconscious" also brings up the old Freudian concept and might lead to psychiatrists in court trying to uncover the deep-seated motives of employers.[190] As a matter of terminology, my preference has always been to use the term "subtle discrimination," which is also most congruent with existing doctrine.

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in cases. *See* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1468 n.160 (2012).

187. For a recent discussion on the role of gender stereotypes and inequality, see RIDGEWAY, *supra* note 12.

188. *See* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1131–33 (1999).

189. *See, e.g.*, Nilanjara Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 801 (2001) (can modify simplistic evaluations by sending frequent counter-stereotype reminders); Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297, 319 (2003) ("In a variety of studies, the more motivated show evidence of having 'corrected' for their automatically activated attitudes."); Zinda Kunda & Steven J. Spencer, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application*, 129 PSYCHOL. BULL. 522, 523 (2003) (prolonged contact of 10 minutes or more can reduce stereotype influence).

190. Some of this might just be a reaction to the seminal article discussing unconscious discrimination that did, in fact, rely on the work of Sigmund Freud. *See* Lawrence III, *supra* note 170.

The real issue with the focus on implicit bias is how the law ought to adjust to our evolving understanding of discrimination. In the next Subpart, we will see what adjustments the Supreme Court has made over the last decade, and we will also see that the Court has mostly been insensitive to issues relating to implicit or subtle bias. But it is also difficult to know what implications to draw from the shift to subtle discrimination. One problem with implicit bias is that it is omnipresent, and if applied to legal cases, it could mean that virtually any decision might be tinged with bias. That is obviously too broad a principle, and I think it explains why most courts have not relied on the concept to inform their judicial decisions.[191]

The obsessive focus on implicit discrimination has also obscured a more important aspect of contemporary discrimination. Although discrimination has become more subtle, the more important issue is the realization that discrimination today is frequently the product of cumulative acts that are not traceable to a single actor or event. Rather, discrimination arises from small acts of disrespect or distrust that leads to disparate opportunities or results and is often informed by stereotypes throughout the process.[192] For example, an African American enters the workplace and certain coworkers or supervisors assume that the individual is the product of affirmative action, which makes that person appear less qualified in their eyes. This may or may not be the product of implicit bias, but the result is that the employee is afforded fewer opportunities in the workplace and even within those limited opportunities will perform under a cloud of suspicion.[193] The employee

191. Only a handful of cases have addressed the concept of implicit bias and generally in a summary fashion. *See, e.g.*, *Saka v. Holder*, 741 F.3d 244, 251 (1st Cir. 2013) (summarily rejecting a claim of implicit bias in an immigration case). Two cases have relied on the concept in ruling for plaintiffs. *See Diaz v. Jiten Hotel Mgmt., Inc.*, 762 F. Supp. 2d 319, 327 n.11 (D. Mass. 2011) (acknowledging complexity of discrimination and concept of implicit bias in denying defendant's motion for summary judgment); *Kimble v. Wis. Dept. of Workforce Dev.*, 690 F. Supp. 2d 765, 778 (E.D. Wis. 2010) (concluding that defendant "behaved in a manner suggesting the presence of implicit bias"). A court recently struck the proposed testimony of Anthony Greenwald—one of the founders of the IAT—in a case involving class allegations of race discrimination because the court found the testimony did not satisfy the federal evidentiary standards for expert testimony. *See Jones v. Nat'l Council of YMCA*, No. 09-C-6437, 2013 U.S. Dist. LEXIS 129236, at *8–9 (N.D. Ill. Sept. 5, 2013). In that case, the defendant proffered a report challenging the basis of the IAT by Philip Tetlock, one of the chief antagonists of the concept of implicit bias. *Id.* at *5–6.

192. For an excellent discussion of the cumulative effect of discreet acts, see VIRGINIA VALIAN, *Effects on the Self*, *in* WHY SO SLOW? THE ADVANCEMENT OF WOMEN (1998).

193. An excellent example of the complicated ways discrimination can influence an employment process is found in the story and lawsuit of Lawrence Mungin, who sued after his quest for partnership was delayed. *See Mungin v. Katten Muchin & Zavis*, 116

may also be subject to biased evaluations. In this situation, the employee might react in different ways—perhaps by working harder to prove himself, or he may begin to slack off under the assumption that no matter what he does, he will not succeed. If he were to slack off, it would almost certainly be noticed and result in a completion of the circle that ends with poor performance evaluations. If the individual were a woman, the stereotypes that started the process would be different, but the results would likely be the same. The beginning assumption might be either that the individual was not competent because the job at issue was a "man's" job, or it might be that the woman was likely to leave the workplace when she has children. In either scenario, the individual might also be subjected to harassment while on the job—taunts, or statements questioning one's competency, whatever the case may be. That behavior will, in turn, often affect the employee's performance, confirming the initial stereotype of her limited competence. The individual might also decide to leave the workplace, and that too might be seen as confirming the expectation that women have a weaker attachment to the workforce.

The important aspect of this form of discrimination is that there is no single actor, no single event, but instead the discrimination arises as a result of the cumulative effect of a series of discrete acts. How one assesses this situation might depend on the time frame one analyzes. If one looks just at the failed promotion, it might appear that the person was justifiably denied a promotion due to poor performance evaluations or even poor performance. One would have to step further back to understand that the person was treated in a discriminatory fashion from the beginning. But it is not an easy story to tell, and the story is, more often than not, complicated by bringing the concept of implicit bias into the equation.

B. The Changed Doctrine

1. INDIVIDUAL CLAIMS OF DISCRIMINATION

Over the last decade, the Supreme Court has altered the doctrine relating to individual claims of discrimination in two particular ways. First, the Court has made it easier for plaintiffs to proceed under what is known as a mixed-motives theory in a circumstance where an employer has multiple motives for its action, at least one of which is

F.3d 1549, 1557 (D.C. Cir. 1997). He initially received a large jury verdict, which was overturned on appeal. *Id.* at 1558. The case itself does not fully capture both the complexity and ambiguity of discrimination. For that, one has to turn to the excellent book written by Mungin's college roommate, see PAUL BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA 1–6 (1999).

discriminatory.[194] As discussed more fully below, this judicial innovation was primarily the product of clear statutory interpretation and has turned out to be of limited utility for most plaintiffs, despite its initial enthusiastic academic reception.[195] More important than the expansion of the mixed-motives theory, the Supreme Court has crafted a far-reaching doctrine relating to retaliation claims, and here the evolution of the doctrine has provided employees with an important tool to protect their statutory rights while highlighting the individualized complaint-based system that defines the contemporary antidiscrimination law.

a. The Development of the Mixed-Motives Theory

If one were looking for a way the Court has adapted the law to contemporary discrimination, one might look to the development of the mixed-motives theory, as reflected in the Court's decision in *Desert Palace, Inc. v. Costa*.[196] The mixed-motives theory involves a circumstance where an employer has multiple motives for its decision, some of which might be legitimate while others are discriminatory.[197] A number of scholars have championed the mixed-motives theory as best reflecting the reality of actual workplace decisions where it is unlikely that a single motive underlies a complicated employment decision.[198] While it is true that the concept of a mixed motive may best describe how decisions are actually made, the Supreme Court deserves little credit for moving the law forward on this basis, and in fact, the mixed-motives

194. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92–93 (2003) (allowing mixed-motive cases to be based on circumstantial evidence).

195. The Supreme Court's *Costa* decision was initially met with a wave of enthusiasm by academics who saw in the case the potential for greater success on claims of discrimination. *See, e.g.*, Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *Into a "Mixed Motives" Case*, 52 DRAKE L. REV. 71, 78–79 (2003); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither McDonnell Douglas*, 53 EMORY L.J. 1887, 1891 (2004).

196. 539 U.S. 90 (2003).

197. *See id.* at 93. The theory is not unique to Title VII and first arose in the Supreme Court in a First Amendment case involving a teacher's rights. *See Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977). Some 20 years later, the issue resurfaced in a famous case involving the denial of a partnership to a woman in the accounting firm of Price Waterhouse, discussed *infra* notes 201–04 and accompanying text. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–32, 252 (1989).

198. *See* Hamilton Krieger, *supra* note 171, at 1165–66 (advocating greater use of mixed-motives proof model); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2319 (1995) (critiquing single-motive theory as inconsistent with realities of the modern workplace). The initial enthusiasm for the mixed-motives theory arose in the mid-1990s shortly after the passage of the CRA 1991. *See* Hamilton Krieger, *supra* note 171, at 1171; Malamud, *supra* at 2320.

theory has not been particularly useful in uncovering subtle discrimination.[199]

The *Costa* decision addressed a narrow issue—whether the mixed-motives theory was limited to claims that involved direct evidence.[200] The notion that direct evidence was required to pursue a mixed-motives claim arose in the venerable case of *Price Waterhouse v. Hopkins*[201] as a result of Justice O'Connor's limiting concurring opinion.[202] In that case, Ann Hopkins was denied consideration for partnership in her accounting firm, and the Court treated the case as involving mixed reasons, some of which might have been discriminatory and others legitimate.[203] Although a plurality of the Court permitted such a claim to move forward, O'Connor concluded that the mixed-motives theory should be available only in cases that involve direct evidence.[204] That case was later modified by the CRA 1991, which broadened the standard for succeeding on a mixed-motives claim from proving discrimination was "the motivating factor" to establishing that it was "a motivating factor."[205] In *Costa*, the Supreme Court found that the statutory change was not intended to be limited to cases involving direct evidence—which are but a small subset of cases—but instead encompassed the far more common case that turns on circumstantial evidence.[206] Given that the path to *Costa* ran through Congress, it would seem a stretch to attribute the development of the mixed-motives theory to the Supreme Court, particularly since the Congressional action was prompted by what was perceived as a restrictive Court decision.[207]

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199. Any notion that the Supreme Court was moving the law forward via the mixed-motives theory has been clearly refuted in its subsequent decisions that declined to extend the theory to other contexts. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013) (holding that the mixed-motives framework does not apply to retaliation claims); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 169–70 (2009) (declining to apply mixed-motives framework to an age discrimination statute).

200. *Costa*, 539 U.S. at 92 ("The question before us . . . is whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII . . . .").

201. 490 U.S. 228, 258 (1989).

202. *Id.* at 276 (O'Connor, J., concurring) (advocating limiting mixed-motives theory to situation where the plaintiff can "show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

203. *Id.* at 231–32.

204. *Id.* at 276 (O'Connor, J., concurring).

205. 42 U.S.C. § 2000e-2(m) (2012).

206. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003).

207. This always struck me as an odd interpretation of *Price Waterhouse* if for no other reason than the plurality decision, which was altered by the 1991 Act, was written by Justice Brennan. Yet, regardless of how one characterizes the decision, there is little question that the statutory change significantly broadened the scope of the mixed-motives theory.

As noted above, the *Costa* decision was initially met with robust enthusiasm by academics and some courts as offering a more expansive view of discrimination.[208] The very concept of a mixed motive seemed to better capture the reality of the contemporary workplace where things are messier and less prone to the presence of a single motive for any decision. Relatedly, the move from having to prove that discrimination was "the motivating factor" to "a motivating factor" should have opened up many circumstances to a finding of discrimination, especially once the direct evidence limitation was discarded. And initially, several courts incorporated the theory into their summary judgment standards, making it, at least on the surface, harder for employers to obtain summary judgment since employees only needed to present sufficient evidence to demonstrate that discrimination played a motivating role in the decision.[209]

Ultimately, however, the initial enthusiasm was not reciprocated by the practicing bar—and for reasons that should have been fairly predictable. Although the mixed-motives theory makes it easier for a plaintiff to establish discrimination, the defendant—and this goes back to the early 1970s—is afforded an opportunity to prove that it would have made the same decision absent the discriminatory motive.[210] After the 1991 Act, a plaintiff is entitled to a judgment of liability after proving that discrimination was a motivating factor, but if the defendant succeeds in establishing it would have made the same decision anyway, the remedies are limited to injunctive relief and attorney's fees.[211] In that situation, the employee wins only to the extent it recovers its attorney's fees which is generally not the primary goal of most litigants. The mixed-motives theory thus provides limited appeal as a trial strategy for most plaintiffs and has had very little influence on expanding the definition of discrimination. In particular, the theory has not turned out to be a more effective means of uncovering subtle discrimination, and most of the cases that have been pursued under the mixed-motives framework have resembled traditional cases. Indeed, the theory largely fits within

208. *See* William R. Corbett, *An Allegory of the Cave and* Desert Palace, 41 HOUS. L. REV. 1549, 1551 (2005) (claiming that "*McDonnell Douglas*, divested of any procedural significance after *Desert Palace*, no longer serves the purpose it served during its first thirty-one years"); Zimmer, *supra* note 195, at 1948 (claiming that *McDonnell Douglas* should only apply to a small subset of cases).

209. *See, e.g.*, *Roberson v. Alltel Info Servs.*, 373 F.3d 647, 652 (5th Cir. 2004); *Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc.*, 285 F. Supp. 2d 1180, 1196 (N.D. Iowa 2003). The Sixth Circuit has summarized the various approaches courts initially adopted. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 397–99 (6th Cir. 2008), *cert. denied*, 556 U.S. 1235 (2009).

210. § 2000e-5(g).

211. *Id.* § 2000e-5(g)(2)(B)(i).

the restrictive model the Court has developed—it is premised entirely on individual claims of discrimination, and as a theory, provides only limited remedies to plaintiffs.

b. Retaliation Claims

If the mixed-motives theory has proved of limited value, the invigorated retaliation cause of action has offered enhanced protections for those who oppose discriminatory practices. This has been one of the most interesting developments within antidiscrimination law over the last two decades. In a series of cases, many of which were textually problematic, the Supreme Court has strengthened the protections for individuals who complain about discrimination, and those cases have sparked a torrent of retaliation claims. For nearly a decade, retaliation claims have been the fastest growing of the antidiscrimination claims filed with the EEOC.[212] Yet, there is also a cautionary note within the case law development. Although at first glance the cases might appear surprisingly protective of the rights of plaintiffs, they are, in fact, consistent with the vision that animates the Court's recent doctrine, one that is steeped in individual claims of discrimination and, equally important, individual responsibility.

The concept of retaliation has always been present in the various antidiscrimination statutes, but as a cause of action, the issue remained largely dormant until the last decade. The new interest in retaliation emerged in a curious case that found its way into the Supreme Court. In *Burlington Northern & Santa Fe Railway v. White*,[213] the plaintiff alleged that she had suffered retaliation in the form of a reassignment and suspension without pay after she complained about her working conditions.[214] The lost pay was eventually provided when she was reinstated and the reassignment involved duties that fell within her original job description.[215] As the case reached the Supreme Court, the question was what the proper standard should be to assess whether someone is the victim of actionable retaliation.[216] Unlike some substantive actions, retaliation can be meted out in various subtle ways,

212. *Charge Statistics FY 1997 Through FY 2013*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Sept. 14, 2014). Between Fiscal Year 1997 and Fiscal Year 2012, the number of retaliation claims filed with the EEOC doubled, increasing from 18,198 to 37,836 and increasing from 22 percent of the total charges to 38 percent. *Id.* No other claim that is tracked by the EEOC has increased as fast or even nearly as fast. *Id.*

213. 548 U.S. 53 (2006).

214. *Id.* at 58–59.

215. *Id.* at 70–71.

216. *Id.* at 57.

from office shunning to less desirable surroundings such as office space, and the Court had to determine what actions could give rise to a claim under Title VII's retaliation provision. Lower courts had been split on this issue. Some circuits adopted restrictive standards that largely paralleled Title VII's substantive antidiscrimination standard while other circuits adopted a more liberal approach that focused on the purpose behind retaliatory acts, which are generally designed to punish and deter employees from complaining.[217]

The curious part of the *White* case was that the plaintiff had prevailed in the lower courts under the most restrictive standard, thus potentially rendering the case a rather poor vehicle for assessing the merits or the need for a more liberal standard.[218] Under those circumstances, one might have expected the Supreme Court to dismiss the case as improvidently granted, but on the contrary and in a clear sign of what was to come, the Court adopted a significantly more generous and flexible legal standard, namely that an employee could prevail on a retaliation claim by demonstrating that the employer's action might deter others from filing claims.[219] This standard can capture many, though not all, of the various acts thrown at individuals who file complaints or raise concerns about their working conditions, and it is generally quite protective of employee interests. Indeed, in its opinion the Court specifically mentioned the possibility that scheduling changes or the absence of invitations to lunch could constitute retaliatory acts.[220] Even though Ms. White's loss of income was restored when she was reinstated, the Court specifically noted the hardship that attended her loss of income for more than a month.[221] This was, by any standard, a remarkable decision that was highly protective of the employee's interests.

From there, the Court has unleashed an impressive and unprecedented string of decisions expanding the scope of antidiscrimination retaliation provisions while extending those protections to other statutes. For example, under the Fair Labor

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217. *Id.* at 60. The Supreme Court discussed the various standards, the more restrictive of which required the employee to establish that a decision was "materially adverse" or an "ultimate employment decision." *Id.* at 67–68. (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)) (internal quotation marks omitted).

218. *Id.* at 59.

219. The standard the Court adopted required an employee to demonstrate that an employer's action "might have dissuaded a reasonable employee from making or supporting a charge of discrimination." *Id.* at 68.

220. *Id.* at 69. I should be clear that the Supreme Court did not hold that such acts were always retaliatory but that "context matter[ed]" and such acts could be the type that would deter individuals from proceeding with claims. *Id.*

221. *Id.* at 72.

Standards Act—a statute that has generated an enormous amount of litigation in recent years—the Court held that oral complaints can form the basis of a retaliation complaint.[222] The Court also held that retaliation claims could be premised on an employer's internal investigation,[223] and in perhaps the most revealing decision, the Court read into the federal sector Age Discrimination in Employment Act (ADEA) a retaliation provision that was clearly not there.[224] Retaliation provisions are extremely common in antidiscrimination statutes but the typical provision was missing from the federal ADEA, and yet, the Court construed the language to include antiretaliation protections in order to render it consistent with other statutes.[225] This was likely a pragmatic decision—there was little question that had the Supreme Court failed to interpret the statute to encompass retaliation claims, Congress would have amended the statute and done so quickly. But soon thereafter the Court read the filing provisions restrictively in *Ledbetter*, leaving it to Congress to issue a statutory fix and suggesting that there was, in fact, something distinctive about retaliation claims. The Court has also read a retaliation provision into a Civil War-era statute and approved of so-called third-party claims in the case of an individual who alleged he was retaliated against after his fiancée filed a sex discrimination claim.[226]

This streak of plaintiff victories might portend an emerging concern for the rights of employees, but in the context of all of the various decisions, a different interpretation might better explain the doctrinal development. The purpose behind retaliation provisions is to ensure that employees can avail themselves of the protections Congress has afforded; the provisions, in other words, are designed to protect the statute as much, or more than, the individuals who are filing clams.[227] If an employer were free to intimidate or terminate workers for taking advantage of statutory protections, those protections would largely become meaningless for the vast majority of employees. Former employees, on the other hand, would likely still be willing to pursue

222. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 113 S. Ct. 1325, 1329–30 (2011).

223. *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 273–74 (2009).

224. *See Gomez-Perez v. Potter*, 553 U.S. 474, 477–79 (2008).

225. *Id.* at 479–84. The Court based its decision on an earlier case that interpreted Title IX to include a retaliation provision. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171–75 (2005).

226. *See Thompson v. N. Am. Stainless*, 131 S. Ct. 863 (2011) (permitting third-party claims); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 445 (2008) (holding that 42 U.S.C. § 1981 encompasses retaliation).

227. This is what Professor Richard Moberly has dubbed the "Antiretaliation Principle." Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2010). For a thoughtful and influential discussion of the concept of retaliation, see Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 18–25 (2005).

claims since they would have no fear of workplace repercussions. But the message behind the strong protection against retaliation is that employees must file complaints and must do so in a timely manner. In other words, employees are responsible for bringing the complaints to their employer's attention, and they will have no excuse if they fail to do so since the Court has made it clear that it will primarily protect those who file complaints.

This emphasis on filing complaints has had its greatest effect—and it might be said came home to roost—in the area of sexual harassment law where the Court crafted an affirmative defense for employers when no tangible workplace action was taken against the employee.[228] There are two elements to the affirmative defense, which is designed to afford employers an opportunity to address workplace harassment, and one of those elements requires employees to file claims in a timely fashion with some possibility of explaining why they failed to take advantage of an employer's sexual harassment policy if they failed to file such a claim.[229] It is this latter area that courts, particularly lower courts, have enforced strictly, effectively requiring employees to file complaints or lose their right to proceed on the claim.[230]

Retaliation claims are also quintessentially individual claims; the right runs to the individual who registers a complaint. This would be true even when an individual filed a claim that included class allegations, unless the employer took retaliatory actions against all class members or potential class members; but even then the rights at issue would be those of individual class members. There is no concept of a retaliation claim that applies generically to a class.

Nor do retaliation claims raise issues relating to subtle or implicit discrimination. One of the reasons retaliation claims are on the rise and have relatively high success rates is that the claims tend to be overt in nature, hardly ever subtle. Retaliation claims often turn on timing—an individual files a complaint and she is promptly fired or sent to an inferior job. Indeed, many courts draw inferences based solely on the

228. *Compare Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998), *with Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998). *Burlington Industries* and *Faragher* were two cases decided on the same day in slightly different ways. *See Burlington Indus.*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

229. *See Burlington Indus.*, 524 U.S. at 764–65 (establishing elements of the affirmative defense).

230. For a recent article discussing the way in which lower courts have interpreted the affirmative defense, see Zev J. Eigen, Nicholas Menillo & David Sherwyn, *When Rules Are Made to Be Broken* (Northwestern Pub. Law Research Paper No. 13-04), *available at* papers.ssrn.com/s013/papers.cfm?abstract_id=2225978.

timing of the retaliatory acts.[231] It also makes little sense to describe retaliatory acts as indirect; those with retaliation on their mind execute their acts deliberately and directly.

c. The Issue of Comparators

If the focus is on the doctrine created by the Supreme Court, the two areas noted above—mixed-motives and retaliation claims—constitute the areas that might be considered doctrinal innovations designed to address discrimination in the contemporary world, although it should now be clear that neither area is designed to address more subtle or complex forms of discrimination. Indeed, one of the lasting legacies of the early doctrine is that individual claims of discrimination continue to be proved through a process of identifying similarly situated employees who were treated differently. This established method is imperfect to be sure as it often is difficult to identify any comparators, and some courts apply extremely strict definitions of comparably situated employees which often will lead to a failure of an individual's claim because there will be no admissible comparison.[232] At the same time, this method of proof comports with common conceptions of discrimination and the concept of discriminatory treatment—someone is treated differently because of a protected category, and the way we know that is by identifying someone who is similar in all ways but the protected characteristic and demonstrating that they were not treated the same. There is also, it should be emphasized, nothing about this method of proof that would exclude evidence of subtle or complex discrimination since such evidence would be relevant to proving differential treatment so long as one is willing to identify discrimination amid the complexity of the underlying case. In the end, the real issue is convincing courts and employers that discrimination underlies the way someone is treated, and the method of comparison can adequately serve that purpose. In other words, the problem is not with the doctrine but with the limited vision of

231. *See, e.g.*, *Jones v. Bernanke*, 557 F.3d 670, 677 (D.C. Cir. 2009) (quoting *Woodruff v. Peters*, 482 F.3d 521, 529 (D.C. Cir. 2007)) (noting that "temporal proximity between protected EEOC activity and adverse action can support an inference of causation when the two events are 'very close' in time"). The Supreme Court has cautioned that actions within three or four months will usually not be sufficient to raise a causal question based on "mere temporal proximity." *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74 (2001) (per curiam). Some courts require some other evidence in addition to temporal proximity. *See, e.g.*, *Mumfrey v. CVS Pharm., Inc.*, 719 F.3d 392, 405 (5th Cir. 2013).

232. For a detailed critique, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731–43 (2011).

discrimination many courts, including a majority on the Supreme Court, and jurors bring to the claims.[233]

The complicating factor in proving discrimination is that it is necessary to draw inferences from ambiguous evidence. Those who see discrimination as playing a minimal role in contemporary society are unlikely to see discrimination among the ambiguity and will instead look for clear evidence of discrimination, evidence that is not likely to be forthcoming. The turn to implicit bias was designed to address some of these limitations, but using the IAT as the vehicle to demonstrate the presence of subtle discrimination has turned out to be a misstep because it creates a presumption of discrimination that is difficult to overcome.[234] To give one example: if one is asked, in the context of the IAT, how one knows that discrimination provides the causal explanation for an observed behavior, the answer is likely to be that we know that decision makers harbor implicit biases that they are unaware of. And this would be true of virtually all—some might even say all—decision makers. In light of that kind of explanation, there is little one can do or say in response, and that is the problem the IAT has introduced. In contrast, a richer, fuller explanation of the complexities of modern discrimination might offer a bridge to those who are reluctant to see discrimination other than in its most blatant forms. It is not just that discrimination is more subtle or implicit today but that it is more complex, often arising from a complicated chain of events.

2. SYSTEMIC CLAIMS

If the Supreme Court has reinforced the individual system of claim adjudication, it has primarily dismantled the systemic discrimination edifice. By rejecting the statistical proof offered in the *Wal-Mart* case and treating the city of New Haven's actions in *Ricci* as a form of intentional discrimination, the Court has largely turned its back on these systemic discrimination claims, and at present, it is unclear what kind of proof the Court might accept as indicative of discrimination. It is certainly possible that it would be open to a straightforward disparate impact claim, but as I have noted previously, those claims are both rare

233. The problem is not unique to courts. Professor Samuel Sommers and his coauthor have performed a series of jury studies that have led them to conclude: "[W]hen laypeople think about White racism, they tend to focus on overt, old-fashioned forms." Samuel R. Sommers & Michael I. Norton, *Lay Theories About White Racists: What Constitutes Racism (and What Doesn't)*, 9 GROUP PROCESSES & INTERGROUP REL. 117, 131 (2006).

234. *See supra* notes 176–79 and accompanying text.

and increasingly difficult to establish because courts are now willing to accept most employer justifications for the disparate impact.[235]

There is also a deep irony in the Court's current approach to claims of systemic discrimination. One of the issues that plagued the *Wal-Mart* litigation was that there was no identifiable policy or practice that one could point to as the source of the discrimination.[236] This is certainly not surprising, and the Court's reference to a policy of nondiscrimination is likewise wholly unsurprising and arguably entirely disingenuous since every company now has a policy of nondiscrimination and has for many years. The irony, however, comes in that if there had been a formal policy—say one that required prior experience as a manager—that was causing the observed disparities, that policy would most likely be challenged under the disparate impact theory unless there was evidence that the policy was implemented with a specific intent to favor men. Given the Court's lengthy assault on the disparate impact theory, it would be highly ironic if systemic discrimination could now be challenged only under that theory.

Indeed, from the Court's recent decisions, particularly in *Ricci* and *Wal-Mart*, it is not at all clear what evidence the Supreme Court would accept to demonstrate a pattern of systemic discrimination. One of the more disturbing aspects of those cases is that in neither case did the Court majority even acknowledge the presence of discrimination or the lengthy history of discrimination in the New Haven Fire Department.[237] On the contrary, the Court seemed to accept that the disparate results were the product of legitimate nondiscriminatory forces, such as hard work in *Ricci*[238] and a general pattern reflecting interests and abilities in

235. *See* Selmi, *supra* note 110. The number of new disparate impact cases—at least those that are litigated—continue to decline, and many of the cases involve claims that arose many years before. *See, e.g.*, *Lewis v. City of Chi.*, 702 F.3d 958, 960 (7th Cir. 2012) (rejecting intervention effort in a case pending for 14 years); *Cleveland Firefighters v. City of Cleveland*, 669 F.3d 737, 738–39 (6th Cir. 2012) (dissolving consent decree in 30-year case).

236. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011).

237. *See id.* at 2556; *Ricci v. DeStefano*, 557 U.S. 557, 562–63 (2009).

238. *Ricci*, 557 U.S. at 587–88. This is reflected in the Court's conclusion that "[t]here is no genuine dispute that the examinations were job related and consistent with business necessity," even though no evidence was introduced on that issue at all. *Id.* The Court also discussed the "high, and justified, expectations of the candidates," adding, "[m]any of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City's reliance on raw racial statistics at the end of the process was all the more severe." *Id.* at 593. Presumably this sentiment applied to all applicants, not just the white applicants, and all of the applicants had a reasonable expectation that the test would satisfy legal standards, including that it would be job related.

Wal-Mart.[239] A similar sentiment ran through the Court's recent decisions involving school integration efforts, where again the Court seemed blind to the role that discrimination had played in establishing the housing patterns the school districts were seeking to address.[240] It may be the case that the Supreme Court is incapable of seeing discrimination other than in its most blatant forms.

Again, the irony in the Court's position should be apparent: it can see discrimination only in its most blatant forms but everything we know about discrimination suggests that contemporary discrimination looks very different. Certainly it cannot be the case that an unambiguous discriminatory policy is necessary to establish a pattern of discrimination—those cases thankfully are no longer common, but they are also the easiest kind of claim to prove, and surely Title VII is not designed to uproot only the most obvious or plain examples of discrimination. Indeed, in the venerable case of *McDonnell Douglas v. Green*,[241] the Supreme Court affirmed the importance of eradicating what it called "subtle" discrimination—and that was in 1973.[242]

At the same time, it seems clear that the old statistical models of proof developed in the 1970s are no longer sufficient to prove discrimination. Those models primarily relied on statistical imbalances in the workforce as proof of discrimination (not just evidence, but proof), and the inferences courts were apt to draw in the era that immediately followed decades of intentional discrimination no longer seem appropriate.[243] One of the issues that ought to be addressed is the most basic question, namely why statistics should constitute proof of intent to discriminate. I suspect that, even today, the most common response to

239. *Wal-Mart*, 131 S. Ct. at 2553, 2555. In *Wal-Mart*, the Court emphasized that the company had a "policy" that "forbids sex discrimination" that was enforced by "penalties for denials of equal employment opportunity." *Id.* at 2553. This is so obviously irrelevant—every company in the country has such policies—that it suggests the Court was going out of its way to avoid seeing discrimination. The Court was also entirely dismissive of the testimony of William Bielby, noting that it "doubt[ed]" whether his testimony would satisfy the standards for admitting evidence by an expert. *Id.* at 2554. Finally, the Court noted that allowing supervisor discretion was a "presumptively reasonable way of doing business." *Id.*

240. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 712–13 (2007). For a discussion of the Court's blindness to the role discrimination played in housing patterns, see James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 140–41 (2007) ("But every level of government—local, state, and federal—has also played an integral and underappreciated role in fostering residential segregation by race, and there has never been a concerted effort by courts or legislatures to remedy past housing discrimination.").

241. 411 U.S. 792 (1973).

242. *Id.* at 801 ("[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

243. *See supra* Part I.

that question might be because the Supreme Court said they could, which, while true, is an incomplete and unsatisfactory answer. In the 1970s, the answer was fairly clear: stark disparities in the workforce, along with the presence of widespread discrimination, suggested that employers continued in their discriminatory ways despite the passage of the Civil Rights Act. Today that answer no longer carries the same force, and there is little question that the inferences one can draw from statistical workforce imbalances are now diminished.

This is not to suggest that statistics are no longer relevant to proving systemic discrimination; on the contrary, statistics will always be an integral part of the proof. In employment discrimination claims and elsewhere, statistics reveal patterns that would not be apparent if the decisions were viewed in isolation. These statistics, however, are no longer sufficient on their own, other than in the rare case when the statistical proof is so strong as to leave no real doubt but that discrimination caused the disparities. Of course, such definitive proof will only be present in the very strongest claims, leaving out the more difficult or subtle cases. In any event, these two circumstances simply represent the poles on the discrimination scale—a clear discriminatory policy on the one hand and proof of a statistical imbalance on the other—and neither substantially advances our understanding of what the Court is likely to accept as proof of discrimination.

Building on the *Wal-Mart* decision, it also seems clear that the argument that discretion invested in supervisors invariably leads to discrimination no longer holds true, and in fact, it has not been a viable argument for many years.[244] At one time, several lower courts identified discretion as a primary vehicle for discrimination and were willing to draw a strong inference of discrimination based solely on the presence of discretion in an employment system.[245] Today, this is simply not plausible. Discretion is part of most private and, to a lesser extent, public employment systems, and it would be a serious constraint if an employer could be held liable simply for relying on a system that might lead to discrimination or, to borrow from the *Wal-Mart* decision, one that is "vulnerable" to discrimination.

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244. The Supreme Court said as much in the mid-1980s. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) ("It is true, to be sure, that an employer's policy of leaving promotion decisions to unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct.").

245. *See, e.g.*, *Bell v. Bolger*, 708 F.2d 1312, 1319–20 (8th Cir. 1983) (agreeing with plaintiff's position that "subjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse"); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981) (concluding that although subjective decision making is not discriminatory per se, "obviously subjective decision making provides an opportunity for unlawful discrimination").

The notion that discretion is not automatically associated with discrimination is also consistent with the idea that discrimination has receded. Identifying discretion with discrimination makes sense only if we assume that most or many individuals harbor discriminatory impulses, but that assumption seems misplaced today. Indeed, this again highlights one of the central problems with relying on the IAT to establish the pervasive influence of discrimination. If we all harbor biases that we are neither aware of nor can control, we might be apt to see discrimination everywhere we look, and a system that is "vulnerable" to discrimination because of the presence of discretion will likely be treated as discriminatory in fact. That is a leap that a contemporary court is unlikely to make and, I would suggest, should not make. It simply seems implausible to suggest that discrimination explains all statistical workplace imbalances or even all disparities that we observe. At best, the IAT demonstrates that many individuals have a proclivity toward making discriminatory snap judgments, but that is a long way from showing that those individuals did actually make snap discriminatory judgments in a particular circumstance, just as there is a substantial gulf between identifying a system as vulnerable to discrimination and one that is discriminatory. What is needed, instead, is a narrative that ties an employer's actual practices to a pattern of discrimination.

As a practical matter, this will lead to cases in which the employer either has a demonstrated history of discrimination—much like in the early days of Title VII—or there is clear evidence of a culture of discrimination. This was true in the series of cases involving the securities industry where the plaintiffs were able to demonstrate that the companies treated women differently and disparagingly.[246] Indeed, many of the cases involved graphic and extreme examples of sexist behavior, including trips to strip clubs and the appearance of strippers in the office.[247] These cases also involved statistical presentations, but the anecdotal evidence bolstered the statistical case.[248] The recent class action case against Novartis likewise included evidence that the company tolerated harassment by doctors on the female sales assistants, including

246. *See, e.g.*, *Martens v. Smith Barney Inc.*, No. 96 Civ. 3779(CBM), 1998 WL 1661385 (S.D.N.Y. July 28, 1998) (approving class settlement); *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1464 (N.D. Ill. 1997) (discussing assignment of clients that disadvantaged women); *see also* Patrick McGeehan, *Wall Street Highflier to Outcast: A Woman's Story*, N.Y. TIMES, Feb. 10, 2002, at C1 (describing one woman's plight and the industry's reputation for sex discrimination). During the 1990s, many, if not most, of the major securities firms were sued for sex discrimination; however, most of the cases settled and only a few produced written opinions. *See, e.g.*, *Martens*, 1998 WL 1661385, at *1; *Cremin*, 957 F. Supp. at 1462–65.

247. Many of the unsavory exploits were captured in SUSAN ANTILLA, TALES FROM THE BOOM-BOOM ROOM: WOMEN VS. WALL STREET 10 (2002).

248. *See id.* at 174–75, 186–88, 236, 239–40.

one case of assault.[249] Again, the plaintiffs presented impressive and detailed statistical analyses, but the statistics did not do all of the work and there was no need to introduce evidence about a hypothetical workplace because the real workplace was replete with discrimination.[250] These cases succeeded because they offered a narrative that provided context for why the statistics represented proof of discrimination.

The downside to this emphasis on a culture of discrimination is that many cases of actual discrimination will not fit the model and thus will go unremedied, at least through litigation. This is undeniably unfortunate but it is also a litigation reality—litigation is a blunt tool that is not particularly adept at ferreting out complex or subtle claims of discrimination. The kind of discrimination that is often labeled as institutional or systemic in nature, where a discriminatory pattern arises as the result of aggregate decisions by multiple decision makers, may avoid liability even though if we were to collect a group of discrimination experts they would likely conclude that the employer's practices represent a pattern of discrimination. As a result, there will, it seems, generally be a gap between what might be defined as discrimination by those who are committed to rooting it out and what the courts will consider discrimination. The first group would likely conclude it is better to define discrimination expansively so as to ensure maximum efficacy while courts seem to move in the opposite direction, choosing to under-define discrimination, most likely based on a belief that discrimination no longer plays a defining role in social and economic life.

Litigation, however, is just one tool available to root out systemic discrimination. The federal government can use its spending power to ensure that employers are not just hiring in a nondiscriminatory way but also implementing affirmative action goals.[251] This has long been a requirement under the federal contracting guidelines, though it is no understatement to suggest that the guidelines have typically been seriously neglected.[252] Even so, eminent sociologist Frank Dobbin has

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249. *See Velez v. Novartis Pharm.*, No. 04 Civ. 09194(CM), 2010 U.S. Dist. LEXIS 125945, at *10–11 (S.D.N.Y. Nov. 30, 2010) (approving settlement of class claims). The case resulted in widespread publicity. *See, e.g.*, Colleen McClarty, *Breathtaking Novartis Award, A Wake-up Call*, BUS. INS., May 24, 2010, at 3; Duff Wilson, *Novartis Bias Suit to Begin*, N.Y. TIMES, April 7, 2010, at B1.

250. *See Novartis Pharm.*, 2010 U.S. Dist. LEXIS 125945, at *10–11, 42.

251. *See* Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575, 1578 (2002) (advocating for use of the spending power to address societal discrimination)

252. Under a long-standing executive order, federal contractors with contracts in excess of $50,000 have affirmative action obligations, a mandate that is enforced by the Office of Federal Contract Compliance Programs (OFCCP). *See* Exec. Order 11,246, 3 C.F.R. 339 (1964–65); 41 C.F.R. § 60-50-1 (2009). Enforcement of the executive order

found that those guidelines have played a role in moving employers to diversify their workforces.[253] Others have suggested carving out a safe harbor from liability for those employers who engage in meaningful efforts to address or close off discriminatory channels in their hiring or promotion processes.[254] Both of these approaches can lead employers through a soft stick to take measures to address inequities in the workforce, and a credible threat of litigation can reinforce the importance of self-assessments.

Indeed, it may be that the Supreme Court has been persuaded that employers now have strong incentives to diversify their workforces, thus reducing the need for litigation to target subtle forms of discrimination. In the affirmative action cases that have recently proceeded before the Court, the business community supported the various programs that were at issue and were generally seen as having substantial influence on the Court's decisions to uphold the programs.[255] This is also consistent with the individualistic focus of the Court's doctrine—discrimination is typically perpetrated by rogue actors that, if given a chance, the company will discipline or counteract. The affirmative defense that was created within sexual harassment law proceeds along these lines: the employer should have a first opportunity to remedy the situation—a defense premised on a strong belief that employers will address isolated acts of discrimination when they occur.[256] Although there is no particular reason employer self-interests would be seen as a substitute for litigation, there

has long been considered lax beginning with a conscious effort in the 1980s to minimize the burdens placed on contractors. *See* Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855, 857 (2006) (noting that compliance reviews can be effective enforcement tools but commenting on the decline beginning in the 1980s). A recent government report was critical of the efforts of the OFCCP in terms of combating wage discrimination for women. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-799, WOMEN'S EARNINGS: FEDERAL AGENCIES SHOULD BETTE MONITOR THEIR PERFORMANCE IN ENFORCING ANTI-DISCRIMINATION LAWS 21–28 (2008).

253. *See* FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 38–40 (2009).

254. *See, e.g.*, Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1638–41, 1644 (2007).

255. In the University of Michigan Law School case, the Supreme Court specifically acknowledged the importance of the military's need for diverse graduates. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (highlighting the military's dependence on graduates of institutions of higher education for pool of talented officers); *see also* Angelo N. Ancheta, *Science and Constitutional Fact Finding in Equal Protection Analysis*, 69 OHIO ST. L.J. 1115, 1134–36 (2008) (discussing influence of amicus briefs in the Court's decisions).

256. *See* cases cited *supra* note 228.

is little question that many employers see economic benefits to a diversified workplace, including a reduced threat of litigation.[257]

The other side of the systemic coin involves disparate impact claims. The traditional disparate impact claims challenging the use of written examinations have dramatically declined, and properly so. There is little reason to believe these tests are substantively discriminatory, and it is also not so clear that employers today should be held responsible if the tests produce a disparate impact. Ideally, employers would move away from written examinations given that they typically produce disparate results and are not well structured to provide valuable predictive information regarding the abilities of the test takers. Yet, administratively, when there are thousands of applicants, written tests will continue to be the most efficient means of screening out individuals, even though the predictive ability is weak.[258] There will still be cases involving the use of written tests, but increasingly they are likely to focus on those employers who have a demonstrated history of indifference to the disparate test results. Such a history was at the core of litigation involving the New York City Fire Department's lengthy history of discriminatory tests, which the litigation sought to treat as involving intentional discrimination.[259]

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257. In a recent book, Professor John D. Skrentny, an astute observer of developments in civil rights, documents the ways employers have sought to diversify their workplaces even when such efforts might be inconsistent with governing legal principles. *See* JOHN D. SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE 1–88 (2014). For an excellent historical look with a particular focus on public accommodations and schools, see GAVIN WRIGHT, SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION IN THE AMERICAN SOUTH (2013).

258. Even a well-constructed test like the LSAT has a correlation coefficient of .36, which roughly explains about 13 percent of the variance one observes in predicted grades. LISA ANTHONY STILWELL, SUSAN P. DALESSANDRO & LYNDA M. REESE, PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 2009 AND 2010 LSAT CORRELATION STUDIES 8 (2011), *available at* http://www.lsac.org/docs/default-source/research-(lsac-resources)/tr-11-02.pdf.

259. *See United States v. City of N.Y.*, 637 F. Supp. 2d 77, 79 (E.D.N.Y. 2009). In a lengthy and contentious litigation brought originally by the Bush Justice Department, the city of New York was found liable for the use of discriminatory written tests in the fire department. *See id.* at 80–83. In a subsequent decision the court held the city liable for intentional discrimination concluding:

> [T]he City's use of written exams with discriminatory impacts and little relation to the job of firefighter was not a one-time mistake or the product of benign neglect. It was part of a pattern, practice, and policy of intentional discrimination against black applicants that has deep historical antecedents and uniquely disabling effects.

United States v. City of N.Y., 683 F. Supp. 2d 225, 273 (E.D.N.Y. 2010). That decision was reversed and remanded for trial with reassignment to a different judge. *See United States v. City of N.Y.*, 717 F.3d 72, 77 (2d Cir. 2013). Shortly after Mayor Bill de Blasio took office, the city settled the litigation for $98 million in backpay and various reforms

There has also been a modest revival of novel claims pursued under the disparate impact theory with the EEOC taking a leading role. These cases have challenged the use of credit scores in the employment process, the use of arrest and conviction records, and there has also been interest in challenging employers that refuse to hire individuals who are currently unemployed.[260] These claims all move the disparate impact theory in a different direction and raise the issue of whether these practices should be seen as discriminatory or require justification. Should, for example, an employer be required to justify the use of credit scores, or is that a practice that employers should be free to use regardless of the effect on protected groups? Should an employer who refuses to hire those who are unemployed be required to provide a meaningful justification? One distinct advantage to these questions and cases is that they require courts to consider the purpose behind the disparate impact theory rather than ritualistically replaying old debates, and they also bring to the forefront the critical question of how as a society we want to define discrimination.

Another potential area for systemic litigation would involve bringing some of the best academic research into the courtroom. Over the last two decades, academics have conducted what are known as résumé studies to test for discrimination in the labor market.[261] One of the most famous of the studies sent out résumés to employers who had advertised open positions that were identical in substance other than the names of

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of department practices. *See* Marc Santora & Michael Schwirtz, *New York City Settles Lawsuit Accusing Fire Dept. of Racial Bias*, N.Y. TIMES, Mar. 18, 2014, at A18.

260. *See, e.g.*, *EEOC v. Kaplan Higher Learning Educ. Corp.*, No. 1:10 CV2882, 2013 U.S. Dist. LEXIS 11722, at *2–3 (N.D. Ohio Jan. 28, 2013) (granting summary judgment to defendants); *EEOC v. Freeman*, 961 F. Supp. 2d 783, 785–87 (2013) (same). To date the cases involving credit scores have been unsuccessful in part due to the difficulty of determining what the proper measure of disparate impact is—whether the focus should be on applicants or a broader labor market measure. *See* cases cited *supra*. The EEOC has also sued BMW and Dollar General for their use of criminal convictions in the hiring process. *See* Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks (June 11, 2013), http: //www/eeoc.gov/eeoc/newsroom/release/6-11-13.cfm. This is not a new issue, but it has been recently revived in a poor economy where African Americans are more likely to have disabling criminal convictions, particularly for relatively minor crimes like drug possession. *Green v. Missouri Pacific Railroad* is the leading older case that invalidated a policy that prohibited hiring anyone with a conviction other than a traffic offense. 523 F.2d 1290, 1292, 1298–99 (8th Cir. 1975). The EEOC has yet to file a case challenging a policy that excludes the unemployed from eligibility to be hired but it has expressed an interest in the area. *See* Meeting Transcript, U.S. Equal Emp't Opportunity Comm'n, EEOC to Examine Treatment of Unemployed Job Seekers (Feb. 16, 2011), http://www.eeoc.gov/eeoc/meetings/2-16-11/transcript.cfm.

261. *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AMER. ECON. REV. 991 (2004).

the applicants.[262] Some of the résumés included names that were identifiably racial while others appeared to be what the authors referred to as "white sounding."[263] The study documented that those with identifiably racial names were substantially less likely to receive calls for interviews than the résumés with white-sounding names.[264] Similar studies have documented discrimination towards women with children, women applying for jobs in elite restaurants, and more recently among women applying for positions in academic science labs.[265] A number of scholars have advocated for the use of testers or audit studies as a basis for workplace litigation,[266] and these studies have the distinct advantage that the evidence of discrimination is clean rather than complex, though the studies are not without their critics.[267] Discrimination skeptics may still be reluctant to find discrimination in these audit studies because an inference of discrimination will still need to be drawn, but they represent an innovative way to address contemporary discrimination that works in subtle ways, and they also can move the focus beyond individual actors to the company and possibly even an entire industry. Similarly, the EEOC efforts challenging the use of credit scores, arrest and conviction records, and prohibitions on hiring the unemployed bring new issues and new questions to the forefront—issues and questions that can help redefine discrimination for the next generation.

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262. *See id.* at 991–92.

263. *See id.*

264. *See id.* at 992.

265. Shelly J. Correll, Stephen Benard & In Paik, *Getting A Job: Is There A Motherhood Penalty?*, 112 AMER. J. SOC. 1297, 1297–98 (2007) (audit study of employers found women discriminated against in job callbacks); Moss-Racusin et al., *supra* note 185, at 16474 (finding both male and female scientists discriminated against female students applying for lab jobs); David Neumark, Roy J. Bank & Kyle D. Van Nort, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q. J. ECON. 915, 915–18 (1996) (finding women were discriminated against in fine-dining restaurant hiring).

266. *See* Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques and Directions for the Future*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 114 (2007) (noting that the studies "come to the conclusion that race has large effects on employment opportunities with a black job seeker anywhere between 50 and 500 percent less likely to be considered by employers as an equally qualified white applicant"); Michael J. Yelnosky, *Filling An Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Low-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REF. 403 (1993).

267. *See, e.g.*, James Heckman, *Detecting Discrimination*, 12 J. ECON. PERSP. 101, no. 2, Spring 1988, at 101, 102.

CONCLUSION

Employment discrimination law was ripe for updating, and the Supreme Court was right to resist efforts to mindlessly apply the old case law to define discrimination in the contemporary workplace. We can do better, but the Supreme Court can also do better by coming to terms with the way discrimination has changed rather than concentrating solely on how discrimination has declined. What that will mean for the future is hard to know, but what is needed is a deeper education regarding the complex ways discrimination continues to influence labor-market outcomes. It is not yet time to forego litigation that is designed to uncover systemic discrimination that is the product of many decisions and influences, nor is it time to turn a blind eye to how subtle discrimination emerges in individual cases. Implicit bias will be one part of that educational mission, but it is also important to accept the limits of that concept and instead focus on what steps individuals and employers can take to keep whatever hidden biases might exist in check. It is a time to reset the doctrine by foregoing the old models of proof in favor of identifying new claims—new narratives—that will better capture the complexities of modern discrimination.