Title VII’s Last Harrah: Can Discrimination Be Plausibly Pled?

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Title VII’s Last Hurrah: Can Discrimination Be Plausibly Pledged?

Michael J. Zimmer

INTRODUCTION

The Roberts Supreme Court appears to be somewhat inconsistent in how it approaches antidiscrimination law. One recent opinion involves a potentially expansionist development that makes proof of intent to discriminate, a key element in most antidiscrimination cases, simply a question of whether the employer was aware of the racial (or gender) consequences of its action. Other decisions push Title VII cases out of court into arbitration, which further complicates and diminishes the scope of substantive protections of the law, thereby making Title VII cases that remain in court more difficult to bring as class actions or to advance as even individual cases beyond the pleading stage of litigation. Given the breadth of the onslaught against a robust antidiscrimination jurisprudence, it appears likely that the thrust limiting antidiscrimination law will win out over the alternative expansionist approach. If that is true, the Supreme Court will be bringing to an end the availability of Title VII to

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1 Professor of Law, Loyola University Chicago. My thanks to Barry Sullivan, Charlie Sullivan, and Juan Perea for their comments on earlier drafts. Also, thanks to Charlie Sullivan and Rebecca Hanner White for all they have taught me over the years we have worked together on our casebook. My research assistant, Jessica Ratner, Loyola Chicago Class of 2014, provided significant help, particularly with the social science research. And, as always, Margaret Moses.

2 While this article will focus on intentional disparate treatment discrimination, Title VII also prohibits disparate impact discrimination. The disparate impact theory of discrimination, which is codified in § 703(k) of Title VII, 42 USC § 2000e-2(k), does not include discriminatory intent as an element of a prima facie case. In his concurrence in Ricci v DeStefano, 557 US 557, 594-96 (2009), Justice Scalia appeared to call for a challenge to the constitutionality of § 703(k) on equal protection grounds.

3 See, for example, Wal-Mart Stores, Inc v Dukes, 131 S Ct 2541 (2011).
help redress our society's longstanding and continuing problems of employment discrimination.

The thrust of this paper is that the cutbacks in antidiscrimination jurisprudence are unjustified. Whether or not the new test of what constitutes intent to discriminate prevails as a way to easily establish that the employer discriminated, the Court should retreat from its efforts at diminishing antidiscrimination law. If those reform efforts fail, more substantial measures may be necessary to revive the antidiscrimination project. One that would not require legislation would be for the EEOC to redirect its efforts to enforce the antidiscrimination project through litigation, including assisting the private bar in its enforcement efforts. Another would be to expand legal services to provide counsel for the all too numerous pro se cases in court. A more fundamental change would replace the current assumption that most employment is at-will with some form of presumption of job security. That would require an employer to prove a good reason for any adverse action it took against a worker. More drastic would be a proposal to review all of labor and employment law and construct a new forum for its enforcement that would essentially be independent of the judiciary.

De-escalating the attack on employment discrimination would be justified if discrimination had in fact become an artifact of an increasingly distant past. But, a variety of statistical evidence illustrates that employment discrimination persists. Furthermore, emerging social science research explains how and why discrimination continues, despite the emergence of social norms eschewing expressions of animus and

5 The states could change the general at-will presumption by statute or judicial common law rule. The federal government could enact legislation overriding state at-will law to the extent of Congressional commerce clause power.
6 In some sense, that would only be going back to the beginning when, in the legislative debates leading up to Title VII, there were proposals to create an administrative agency to enforce Title VII based on the National Labor Relations Board model. See Francis J. Vaas, Title VII: Legislative History, 7 BC Indust & Comm L Rev, 431, 433 (1966). Had the opposition to more forceful governmental enforcement been overcome, the state of the antidiscrimination project today would be much different.
7 See generally Ian Ayres, Pervasive Prejudice: Unconventional Evidence of Race and Gender Discrimination (Chicago 2001) (proposing that discrimination persists broadly in society).
discrimination. Part I will first present the evidence that discrimination persists and describe the social science research that helps explain that persistence. Part II will describe the inconsistent development of antidiscrimination law by the Roberts Court. First, it will describe the potentially expansionist development based on the Court’s decision in *Ricci v DeStefano*, a “reverse” discrimination case applying a “color-blind” standard of liability. While the Court makes “reverse” discrimination challenges by white plaintiffs quite easy, the Court has yet to extend that very pro-plaintiff approach to cases brought by women and people of color. Part II shows how that development seems unlikely, as the Roberts Court has cut back the substantive protections of antidiscrimination law while also raising significant procedural barriers to challenges to discrimination. Part III will then sketch out how, in light of all these developments, plaintiffs can plausibly plead discrimination. Part IV concludes by outlining some measures that may be necessary to resuscitate the antidiscrimination project.

I. EMPLOYMENT DISCRIMINATION PERSISTS

A question has arisen about how much discrimination persists now that a general social norm has developed eschewing expressions of racial or gender animus. The question is quite significant for many reasons but, for the purposes of this paper, the answer or answers to that question are necessary to establish the appropriate baseline that the law, and particularly judges, should assume when deciding discrimination claims. The first subpart will explore the question of how much discrimination persists by looking at it from multiple perspectives. From most of those viewpoints, it is clear that discrimination persists. The second subpart will explore some of the social science research, particularly implicit bias research, to show that discrimination is an all too general psychological phenomenon that drives many employment decisions.

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A. The Evidence that Employment Discrimination Continues

There is a perception, held at least by some members of the Supreme Court and perhaps more generally, that there is much less discrimination now than was true in the past. Some commentators claim that the incidence of discrimination has lessened, while others claim that discrimination persists but that the Court just has failed to see it. Professor Suzanna Sherry has argued persuasively that the Roberts Court has changed some fundamental “intuitions about how the world works,” or to use her term, “foundational facts,” resulting in the shifting of some legal doctrine. What is also clear is that background assumptions exist in every case because the judge or factfinder always brings them to the task of evaluating the evidence. Always present, these assumptions are not necessarily always well informed.

A place to start is with the perceptions of workers who believe that they have been discriminated against. According to a 2005 public opinion poll conducted by The Gallup Organization, somewhere between 9 and 15 percent of people employed in the United States reported that they had been discriminated against in the workplace in the prior year. If data from the Bureau of Labor Statistics are to be believed, there were about 155 million individuals in the labor force in 2012, a figure that includes the number of employed and unemployed individuals. Assuming the low percentage and

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14 One reason for this range is that while the upper bound reflects all perceived instances of discrimination, including discrimination for reasons such as favoritism, sexual orientation, and education, the lower bound is adjusted to include only those categories expressly prohibited by federal law, including gender, race, ethnicity, national origin, age, disability, and religion. See id.
assuming that not much has changed in the time between 2005 and 2012, that means that roughly 14 million workers a year at least claim to have been the victim of discrimination.

More recent surveys support the view that a large percentage of workers, particularly certain subgroups, think that they have been discriminated against. A 2008 survey revealed that 76 percent of African American, 44 percent of Hispanics, 31 percent of Asians, and 20 percent of white workers say they have been victims of race discrimination at some point at work.\textsuperscript{16} Forty percent of women and 20 percent of men think that they have been the victims of sex discrimination. Finally, 43 percent of whites, 21 percent of African Americans and 16 percent of Hispanics report age discrimination. Results from a 2011 poll reveal that about one in four women have experienced workplace sexual harassment.\textsuperscript{17}

There are, of course, good reasons to question whether these statistics either overstate or understate the actual level of discrimination. On the one hand, many workers may think they have been discriminated against but have not been. Perceiving of oneself as having been treated unfairly is not the same as being a victim of discrimination. On the other hand, many workers may have been discriminated against but they fail to recognize what happened as discrimination or they might be completely unaware that it happened.\textsuperscript{18} At least for a ballpark figure, the extremely large number of workers who think they have been victimized by employment discrimination supports

\textsuperscript{16} Findlaw.com Employment Discrimination Survey, Opinion Research Corporation Study 717378 (on file with author).
\textsuperscript{18} Of course, discrimination as defined by law is not the same as discrimination as felt by someone.
the conclusion that discrimination persists and remains a serious social issue. A background assumption that the phenomenon of discrimination has been reduced to a few bad-apple employers is unsupportable, even assuming a large percentage of the workers’ perceptions are wrong or, more likely, do not accurately predict how the law might decide whether or not they were victims of discrimination.

About 100,000 workers per year take the difficult step of challenging the treatment they consider discriminatory by filing charges with the Equal Employment Opportunity Commission (EEOC). There are, of course, many reasons why a worker who thinks she has been discriminated against would nevertheless not file an EEOC charge. Those reasons start with ignorance of the availability of remedies for discrimination but also include fear of retribution or blacklisting as a troublemaker. Since the economic value of many discrimination claims does not make bringing a case economically feasible, even workers who know their rights might still decide not to file a charge with the EEOC or with any other forum that is available to resolve employment discrimination disputes. Even if workers know that the law prohibits discrimination and that legal redress is at least theoretically available, many may feel that bringing a claim would do no good but would likely lead to retaliation by the employer and even by coworkers.

While data concerning the number of employment discrimination claims that are brought in state courts is not easily available, about 15,000 federal court cases are filed by workers each year claiming employment discrimination. All of the reasons for not filing an EEOC charge also apply even more powerfully to initiating litigation. Of those cases that are filed in


20 For an extensive discussion of the reasons why workers do not bring claims even though they think they have been the victims of discrimination, see Robert L. Nelson, Ellen Berrey, and Laura Beth Nielsen, Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences, 4 Ann Rev L & Soc Sci 103 (2008).


federal court, 50 percent settle but about 19 percent are dismissed either at the pleading stage or by summary judgment. Of the cases that do not settle early, plaintiffs lose the motion for summary judgment in over half the cases and, of the cases that remain active after disposition of a motion for summary judgment, more than half settle before a trial outcome. In federal court, plaintiffs win about 36 percent of cases tried to a jury and 25 percent of those tried by a judge. In state court, plaintiffs win just over 60 percent of bench trials, compared to about 53 percent of jury trials.

Data concerning the arbitration of employment discrimination claims is even more difficult to find because arbitration is private and confidential. California law requires the American Arbitration Association (AAA), the primary (but not the only) arbitration provider, to publish data concerning its provision of employment arbitration services. Over a four-year period, the AAA nationally administered arbitration in almost 4,000 cases, with 1,213 decided by an award after a hearing. Employees won just over 21 percent of the cases, with a median award amount of $36,500, which was much less than the average award in court decisions.

Finding current and comprehensive statistical evidence of the persistence of discrimination is difficult. But the evidence that is available supports the conclusion that discrimination remains a major problem in employment. The appropriate background assumption for purposes of analyzing antidiscrimination law is that discrimination claims must be taken seriously because discrimination is not an isolated, occasional occurrence. The next subsection will explain why, despite changes in social norms, discrimination persists.

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24 Id at 184–87.
27 See id.
28 See id.
B. The Reasons for the Persistence of Discrimination

This section will discuss formation and impact of stereotyping, research regarding implicit bias, and scholarly and judiciary responses to these areas of research.

Social science research shows that people do not always base their decisions on conscious thinking, such as carefully evaluating the economic consequences of a possible course of action or even by intentionally forming and using prejudices towards certain groups. For example, in *Thinking, Fast and Slow*, Nobel Prize-winning economist Daniel Kahneman demonstrates that people have two basic modes of thinking: thinking fast, which is an initial, intuitive response to sensory input, and thinking slow, a careful analytical review of that input. Research indicates that the organizational, institutional, and unexplained beliefs of people—fast thinking—can result in discrimination, regardless of good intentions or lack of conscious prejudice of the actor. These unquestioned understandings that pervade decision-making processes can be understood through the concept of how stereotyping operates.

Based on fast thinking, humans form stereotypes as part of the necessary categorization of sensory input. Forming stereotypes is essential to our cognitive functioning because it enables the categorization of those perceptions so action can be taken depending on the category into which the perception falls. As actors living in an uncertain world, we are often

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93 Kahneman, *Thinking, Fast and Slow* (cited in note 30). Kahneman posits that human beings think in two very different ways: “fast” or intuitive thinking, which he calls “System 1,” and “slow” or deliberate thinking, which he calls “System 2.” Id at 21–22.
95 See id. For an interesting development about stereotyping and where it should be the basis of legal regulation, see generally Anita Bernstein, *What’s Wrong with Stereotyping?*, 55 Ariz L Rev 655 (2013).
required to make decisions under conditions of less than perfect knowledge. As a result, we often use subconscious shortcuts, known as heuristics, to aid in making decisions when only limited information has been presented. For example, reliance on past experiences and memory cues often guides decision making.

While this works out well most of the time when making the mundane decisions of daily life, it becomes problematic when the samples from these memory cues do not represent the true frequencies of events. This is especially problematic when these decisions relate to group membership, since media coverage, first impressions, and personal relevance often bias memory and therefore bias the information that is more likely to be recalled. Because these stereotypes can be formed absent any conscious intent, stereotypes can operate at an unconscious level. Nevertheless, these stereotypes function as implicit understandings and bias perceptions about people, and therefore impact judgment when decisions about them are made.

The impact of stereotyping in influencing discriminatory behavior is supported by scientific research demonstrating the existence of implicit bias. Based on a careful and full review of

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35 See id.

36 See Mahzarin R. Banaji and Anthony G. Greenwald, *Blindspot: Hidden Biases of Good People* 11–12 (Delacorte 2013), for an explanation of the availability and anchoring heuristics. The availability heuristic, named by psychologists Daniel Kahneman and Amos Tversky, explains that "when instances of one type of event . . . come more easily to mind than those of another type, we tend to assume that the first event must occur more frequently in the world." Id at 11. However, because "greater ease of availability to the mind doesn't mean greater frequency of occurrence in the world," Banaji and Greenwald explain that this heuristic can lead us to overestimate frequencies of events, and cause us to incur great decision costs. Id at 11–12. Another heuristic discovered by Kahneman and Tversky, called anchoring, explains the idea that "the mind doesn't search for information in a vacuum. Rather, it starts by using whatever information is immediately available as a reference point or "anchor" and then adjusting." Id at 12.

37 See generally, Gilovich, Griffin, and Kahneman, *Heuristics and Biases* (explaining that while heuristics work reasonably well and save time and effort, they lead to predictable errors) (cited in note 34).

38 See Banaji and Greenwald, *Blindspot* at 16 (cited in note 36) (discussing how, when making decisions that involve between choosing between two people, "we rely on the social group to which the person belongs as a basis for predicting success. Without recognizing it, we automatically pose and answer questions, such as, 'Are people like him trustworthy or not? Is the group she comes from smart or dumb? Are people of his kind likely to be violent or peace-loving?'").

39 See Krieger, 47 Stan L. Rev at 1214 (cited in note 32).
the social science research, it is clear that “researchers have identified the existence and consequence of implicit bias through well-established methods based upon principles of cognitive psychology that have been developed in nearly a century’s worth of work.”

While based on many other social science research protocols, the Implicit Association Test (IAT) proves that most people exhibit biases toward certain categories of people, regardless of any explicit awareness of these preferences. The IAT, which measures implicit reasoning, is an empirical tool used to measure bias. By measuring the reaction time and accuracy by which respondents categorize information, IATs provide insight into respondents’ cognitive processes. For example, most white Americans respond faster when presented with “African American” and the word “bad” than “African American” and the word “good,” which reflects negative automatic associations with African Americans relative to whites. IATs can measure biases in a variety of different contexts, and some of the more common tests measure biases towards groups of people based on race, gender, age, disability, and weight.

The automatic responses that reflect negative judgments shown by the IAT can have widespread impact in the workplace environment. Such attitudes manifest themselves in the way people who hold implicit biases interact with members of that other group. For example, although unaware of such behaviors, a person might stand further away, use less eye contact, judge facial expressions more negatively, and limit speaking time with individuals from groups against whom

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42 See id at 38–39.
43 See id.
44 See id at 46.
45 See, for example, Project Implicit Social Attitudes (Project Implicit 2011), online at implicit.harvard.edu/implicit/demo/takeatest.html (visited Oct 18, 2014).
implicit bias exists.\textsuperscript{47} Furthermore, research shows that members of groups that people tend to hold negative automatic associations toward are frequent targets of discrimination.\textsuperscript{48}

Professor Samuel Bagenstos summarizes and cites to studies that show how fast thinking results in implicit biases. Research tools such as the IAT have found that “[w]hite Americans, on average, show strong implicit preference for their own group and relative bias against African Americans.”\textsuperscript{49} Studies show that whites have similar biases against “other ethnic minority groups such as Latinos, Jews, Asians, and non-Americans, as well as the elderly, and women.”\textsuperscript{50}

Research also indicates that, in addition to being influenced by automatic yet negative attitudes, people are generally unaware of the impact their biases have on their judgment, and so they cannot bridge the gap between the original stimuli, the intuitive response, and their ultimate actions.\textsuperscript{51} Lack of insight into one’s cognitive processes is evidenced by studies of job candidate evaluations in which decision makers were unable to faithfully reconstruct what drove their decision to hire one candidate rather than another.\textsuperscript{52}

The present hyper level of economic inequality in our society only makes things worse. Economic inequality generates ever-greater levels of individualized, as well as aggregated, social insecurity.\textsuperscript{53} Social science research documents that, as insecurity rises, so does discrimination.\textsuperscript{54}

\begin{footnotesize}
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\item[47] See id.
\item[48] Banaji and Greenwald, \textit{Blindspot: Hidden Biases of Good People} at 49 (cited in note 36).
\item[50] See Bagenstos, 1 Harv L & Pol Rev at 477 (citation omitted) (“Interestingly, the studies also show that minorities and women often harbor the same implicit biases about their own groups that whites and men harbor against them.”).
\item[52] See, for example, John F. Dovidio and Samuel L. Gaertner, \textit{Aversive Racism and Selection Decisions: 1989 and 1999}, 11 Psych Sci 315 (2000) (postulating that a persistent trend of racial bias in employment decisions, despite decreased levels of self-reported racial bias over the 10-year period from 1989–1999, demonstrated that “the development of contemporary forms of prejudice, such as aversive racism, may account . . . for the persistence of racial disparities in society despite significant decreases in expressed racial prejudices in stereotypes.”).
\item[53] See generally Larry Elliot and Dan Atkinson, \textit{The Age of Insecurity} 287 (Verso 1999). See also Michael J. Zimmer, \textit{Inequality, Individualized Risk, and Insecurity}, 2013
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Researchers gave participants information about the state of the economy and a particular corporation, and then asked them to review and rank candidates for a marketing position . . . who were identical in qualifications but different by race and gender. When the participants were told that the economy was in decline, they were more likely to value the “traditional applicant”—i.e., white male—rated him more positively, and rated the Latino female candidate significantly more negatively; when they were told that the economy was in upswing, however, they were more likely to value diverse applicants.\textsuperscript{55}

At least one judge has come to grips with the lack of awareness about implicit bias. United States District Court Judge Mark W. Bennett of the Northern District of Iowa has recognized that implicit bias is such a common phenomenon that he includes a PowerPoint slide about it that he shows jurors in all cases he tries before voir dire by the attorneys representing the parties.\textsuperscript{56} This helps create a realistic background assumption about how implicit bias can impact judgments and decisions even in the absence of any express bias or animus. While Judge Bennett focuses on the pervasive existence of implicit bias generally, it is especially significant for groups to be informed about it in cases dealing with discrimination.

There are, however, skeptics about the scientific validity and usefulness of social science research that addresses issues such as implicit bias.\textsuperscript{57} For example, Mitchell and Tetlock argue that employment managers are not like others who might be

\textsuperscript{54} See Bornstein, 33 Yale L & Pol Rev at *14–15 (cited in note 4) (describing social science studies documenting that relying and acting upon biases increases when people are faced with a perceived threat such as a threat to jobs or resources).

\textsuperscript{55} Id.


\textsuperscript{57} See, for example, Gregory Mitchell and Philip E. Tetlock, \textit{Antidiscrimination Law and the Perils of Mindreading}, 67 Ohio St L J 1023, 1023 (2006); Amy L. Wax, \textit{Discrimination as Accident}, 74 Ind L J 1129, 1132–33 (1999).
affected by the effects of implicit bias, but that conclusion has been rejected because “there is a long and distinguished history of translating conclusions from basic social psychological research ... into managerial and organizational settings.”

Other criticisms are essentially based on differences in perceptions about the persistence of discrimination rather than the validity of the social science research itself. Some, such as Ralph Richard Banks and Richard Thompson Ford, worry that focusing on implicit bias will shift antidiscrimination law away from the real world of actual discrimination toward a utopian goal of eliminating that bias but will leave the world of work unchanged.

The Supreme Court has expressed skepticism about the evidentiary use of some social science research. Without citing to the criticisms of Mitchell and Tetlock but perhaps influenced by them, Justice Scalia, in *Wal-Mart Stores, Inc v Dukes*, criticized so-called “social framework” evidence as insufficient to prove that Wal-Mart’s policy of granting unrestricted discretion to store managers to make pay and promotion decisions discriminated in the way it operated. Implicit bias research can be viewed as a subset of a larger category of social science called “social framework” theory because it shows the psychology driving stereotypical thinking and acting. In employment litigation, an expert offering social framework testimony will explain the general social science research on the operation of stereotyping and bias in decision making and will examine the policies and practices operating in the workplace at issue to identify those that research has shown will tend to increase or

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59 See Bagenstos, 1 Harv L & Pol Rev 477 at 490–92 (cited in note 49).
61 That view has been criticized as undermining efforts to address structural discrimination. See Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 Md L Rev 849, 907–08 (2010) (“Addressing the cognitive pathologies that contribute to biased decisionmaking cannot be the sole objective of antidiscrimination efforts. The problem is that unless these pathologies are accounted for and surmounted, the broader structural reforms they seek ... may never even get off the ground.”).
62 In an earlier era, social science research was considered useful in antidiscrimination cases. See generally Betsy Levin, *School Desegregation Remedies and the Role of Social Science Research*, 42 L & Contemp Probs 1 (1978).
63 131 S Ct 2541 (2011).
64 See id at 2555.
limit the likely impact of these factors.” Justice Scalia dismissed the relevance of social framework testimony because it did not itself prove discrimination:

The only evidence of a “general policy of discrimination” respondents produced was the testimony of Dr. William Bielby, their sociological expert. Relying on “social framework” analysis, Bielby testified that Wal-Mart has a “strong corporate culture,” that makes it “vulnerable” to “gender bias.” He could not, however, “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart.

There was, of course, in the record considerable evidence that Justice Scalia failed to mention—unchallenged statistical evidence that women fell far behind men in pay and promotions—that the policy that was challenged operated in a very discriminatory way that Wal-Mart knew and did nothing about. Since he did not look at the statistical evidence that was most relevant to prove discrimination, Justice Scalia failed to understand that the social framework evidence was relevant to understanding whether or not the raw statistical evidence was sufficient to draw the inference of Wal-Mart’s intent to discriminate. For the purposes of this paper, implicit bias research, other social science research, including “social framework” research, and statistical evidence about the existence of discrimination generally is relevant to establishing an educated background assessment about the persistence of discrimination. All of this social science evidence is relevant to set forth informed, rather than seat-of-the-pants, background assumptions that help the factfinder decide whether or not to draw the inference that the challenged action was because of discrimination.

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66 Wal-Mart, 131 S Ct at 2553 (2011).
67 David L. Faigman, Nilanjana Dasgupta, and Cecilia Ridgeway, A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias, 59 Hastings L J 1389, 1394 (2008) (“[T]he full research literature amply supports expert opinion regarding implicit bias and its potential to effect employment decisions. The research, however, focuses on the phenomenon generally and does not demonstrate that an expert can validly determine whether implicit bias caused a specific employment decision.”).
In sum, discrimination persists in part because of the way most people respond to sensory inputs about race, gender, and other characteristics. The social science research supports the idea that most people much of the time respond intuitively with implicit bias and that actions are taken based on that bias even if the person responding would, perhaps, be able honestly to say that she was not consciously biased. Thus, the general social norm now is that it is improper to discriminate. Conscious discriminators, therefore, remain silent and those who are subject to implicit bias do not readily express anything that can be interpreted as biased. Therefore, notwithstanding the approach of the Court in *Wal-Mart*, the assumption that discrimination is a thing of the past is not supportable. Instead, discrimination persists rather broadly and antidiscrimination law should reflect this reality and seek to address it.

II. THE INCONSISTENT ANTIDISCRIMINATION JURISPRUDENCE OF THE ROBERTS COURT

In order to get a sense of how the Roberts Court has rewritten antidiscrimination law, this section will start with a brief sketch of how the two general theories of discrimination—disparate impact and disparate treatment—developed. Then, the focus will turn to the earlier development of disparate treatment law—cases where the underlying issue is whether the employer acted with an intent to discriminate. Next, this section will describe how the Roberts Court has changed substantive discrimination law and, finally, how the Court has created procedural barriers that diminish the opportunity for discrimination claims to be resolved in court.68

A. The Pre-Existing Theories for Proving Discrimination

The first Title VII theory of discrimination the Supreme Court accepted was disparate impact discrimination. In *Griggs v Duke Power Co*,69 the employer replaced an explicit rule excluding African Americans from any of the better job

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categories with a rule setting two qualifications for transfer to them—having a high school diploma and passing the Wonderlic pen and pencil multiple choice test.\textsuperscript{70} Even though the lower courts had found as fact that these new qualifications had not been adopted with an intent to discriminate, the Supreme Court found that the employer could be liable under a disparate impact theory that did not include an intent to discriminate element for Title VII liability.\textsuperscript{71} To make a long story short, in 1991, Congress eventually codified disparate impact theory by adding § 703(k) to Title VII, which provides:

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.\textsuperscript{72}

In 1973, the Court interpreted Title VII to include another theory, disparate treatment discrimination that did include an intent to discriminate element.\textsuperscript{73} Most federal discrimination cases are claims by individuals that allege intentional disparate treatment.\textsuperscript{74} The law dealing with disparate treatment has always been complex and not very clear-cut.\textsuperscript{75} The underlying

\textsuperscript{70} See id at 427–28.
\textsuperscript{71} See id at 436.
\textsuperscript{72} 42 USC § 2000e-2(k). Even if the employer carries its affirmative defense, the plaintiff can still win by proving the existence of an alternative employment practice and the respondent refuses to adopt such alternative employment practice.” Id.
\textsuperscript{73} See McDonnell Douglas Corp v Green, 411 US 792, 802–04 (1973).
\textsuperscript{74} In 2011, about 65 percent of the almost 100,000 charges filed with the EEOC involved discharge. See Jill D. Weinberg and Laura Beth Nielsen, Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking, 85 S Cal L Rev 313 (2012).
question of material fact should be simple: Based on all the evidence in the record, is it reasonable for the factfinder to draw the inference that the challenged employer action was motivated by race, gender, or other characteristic proscribed by Title VII?

In disparate treatment cases, the issue frequently comes down to a question of fact of whether or not discrimination was “a motivating factor” of the defendant. 76

Litigating a disparate treatment case, whether for the plaintiff or the defendant, is a creative act. The evidence in each case is unique. In every case, it is important for the focus to be on what evidence would convince a factfinder that “a motivating factor” for the employer's action was or was not discrimination. 77 Even though each case is likely to be unique, a number of arguments, singly or in combination, have been made to support or undermine the conclusion that the employer acted with an intent to discriminate. 78

One fundamental argument supporting an inference of discrimination is unequal treatment. 79 As the Court said in *International Brotherhood of Teamsters v United States*: 80

“Disparate treatment” . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some

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76 Section 703(m), 42 USC § 2000e-2(m), provides that liability is established “when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” The general preponderance of evidence standard is applied to this question of fact. See *Hazen Paper Co v Biggins*, 507 US 604, 605 (1993) (“In a disparate treatment case, liability depends on whether the protected trait—under the ADEA, age—actually motivated the employer's decision.”).

77 The “a motivating factor” standard established in § 703(m) is the minimum necessary to establish liability. It is possible, of course, that a more difficult standard, such as but-for or even sole cause, could be established. If the factfinder finds that discrimination was either the but-for or sole cause of the employer's action, then the same decision affirmative defense to full remedies set forth in § 706(g)(2)(B) would not apply.

78 All these arguments, and others that can be made, depend on what the evidence shows. They are not mutually exclusive since the evidence may support drawing the inference of discrimination based on more than one argument.

79 This article will use “race or gender” as a shorthand for all of the bases of employer action prohibited by the antidiscrimination statutes.

situations be inferred from the mere fact of differences in treatment.\textsuperscript{81}

At the level of individual workers, proof that two workers of different races were similarly situated—they are comparators—but were treated differently by the employer supports drawing the inference of discrimination.\textsuperscript{82} At a systemic level, raw statistical evidence—in Teamsters, the “inexorable zero” of African American and Latino over-the-road truck drivers despite their availability—can be sufficient to support drawing the inference of discrimination.\textsuperscript{83} Furthermore, the use of the multiple regression statistical technique can establish “matched pairs” across a significant number of workers by factoring out the individual variables thought to be relevant, leaving race or sex as a factor that has a statistically significant relationship to the job.\textsuperscript{84} Based on that showing and in absence of any other explanation, the factfinder may draw the inference that the difference in treatment among the workers was motivated by race or sex.

A second basic argument is based on evidence that amounts to an admission against interest that the employer discriminated.\textsuperscript{85} For instance, testimony that the employer told the worker, “I won’t promote you because you are a woman,”

\textsuperscript{81} Id at 335 n 15.

\textsuperscript{82} See McDonald v Santa Fe Trail Transportation Co, 427 US 273, 284 (1976) (“It may be that theft of property entrusted to an employer for carriage is a . . . compelling basis for discharge . . . but this does not diminish the illogic in retaining guilty employees of one color while discharging those of another color.”). See generally Charles A. Sullivan, The Phoenix from the Ash: Proving Discrimination by Comparators, 60 Ala L Rev 191 (2009).

\textsuperscript{83} See Teamsters, 431 US at 337–38, 342 n 23 (holding that the “inexorable zero” of minority line drivers where qualified drivers were available and willing to take the job was significant); Hazelwood School District v United States, 433 US 299, 310–13 (1977) (holding that the shortfall of African American school teachers where they are available that is demonstrated to be statistically significant can be the basis for drawing the inference of intentional discrimination).

\textsuperscript{84} See Bazemore v Friday, 478 US 385, 400 (1986); D. James Greiner, Causal Inference in Civil Rights Litigation, 122 Harv L Rev 533, 536–37 (2008) (developing a “potential outcomes” test of statistical evidence as an alternative to binomial distribution or multiple regression).

\textsuperscript{85} See generally Price Waterhouse v Hopkins, 490 US 228 (1989). Until the enactment of the Civil Rights Act of 1991, which amended Title VII to establish the “a motivating factor” standard of liability that was construed by the Court in Desert Palace v Costa, 539 US 90, 98–99 (2003) to not include a requirement that “direct” evidence be shown, the distinction between “direct” and “circumstantial” evidence had been critical to whether a “but-for” versus the “a motivating factor” standard applied.
would be the most clear-cut example. That evidence, if believed to be true, is powerful circumstantial evidence that the challenged action was motivated by discrimination. Although social norms generally now frown on such avowed expressions of discrimination, this type of blatant discrimination still does occur and, when it does, evidence that it happened supports drawing the inference that the employer intended to discriminate whether or not the speaker was conscious of the fact that her statements would be perceived as admitting she discriminated.

One step short of such straightforward admission of animus is testimony that reveals that the employer based its decision on thinking grounded in stereotypes about the race or gender of the worker. Here, it may not be possible to draw the inference that the employer was conscious of the fact that it was discriminating, yet stereotypical thinking can be powerful evidence that in fact the challenged decision was discriminatory. Statements that reveal stereotypical thinking are especially powerful precisely because they are unguarded. Not understanding that these statements reflect stereotypes that show the influence of race or sex means that the speaker does not think that she is violating the social norm against expressions of discrimination. Thus, the speaker is unaware that what is being said will be perceived as indicating a discriminatory intent. Nevertheless, while an action may not always be consciously discriminatory, it is possible to conclude

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86 Admission against interest evidence may be the best way for a white male "reverse" discrimination plaintiff to prove his case because the admission, if believed, overcomes the background assumption that white males are rarely the victims of discrimination.

87 See Sidhu, 17 U Pa J Const L at *20-23 (cited in note 9) (noting that "[s]uch negative stereotypes are no longer tolerated.").


89 See Price Waterhouse, 490 US 228 (1989). Stereotypes are shorthand mental devices that attribute characteristics to individuals based on their identity. See Margaret Wetherell, Group Conflict and the Social Psychology of Racism, in Social Psychology: Identities, Groups, and Social Issues 189 (SAGE 1996) (Wetherell, ed); Gordon W. Allport, The Nature of Prejudice 192 (Addison-Wesley 1954) (A "stereotype acts both as a justificatory device for categorical acceptance or rejection of a group, and as a screening or selective device to maintain simplicity in perception and in thinking.").
from that evidence, if believed, that the decision was motivated by race or gender.\textsuperscript{90}

A third argument that may be the one most often made to support drawing the inference of discrimination—based on \textit{McDonnell Douglas Corp v Green}\textsuperscript{91}—is a process of elimination of the possible non-discriminatory reasons for an action, leaving discrimination more likely than not as the explanation.\textsuperscript{92} When the usual non-discriminatory explanations for an adverse employment decision are shown not to apply, it becomes reasonable for the factfinder to draw the inference that discrimination was a motivating factor for action that was taken.\textsuperscript{93} Where the plaintiff introduces evidence upon which the factfinder could conclude that the employer’s non-discriminatory explanation for a challenged decision is not the actual explanation, “\[p\]roof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination.”\textsuperscript{94}

\textsuperscript{90} A classic example was when 1992 Presidential candidate Ross Perot spoke at the NAACP national convention. He repeatedly called the audience “you people,” and so it was unmistakable that he viewed African Americans quite differently than the population generally. See John Broder, \textit{NAACP Offers a Chilly Response to Perot Speech} (LA Times July 12, 1992), online at http://articles.latimes.com/1992-07-12/news/mn-4266_1_ross-perot (visited Oct 18, 2014).

\textsuperscript{91} 411 US 792 (1972).

\textsuperscript{92} Given the almost universal reference to \textit{McDonnell Douglas} in antidiscrimination literature, it may seem surprising that little is said about why making out a \textit{McDonnell Douglas} case supports drawing the inference of discrimination. This may be a consequence of treating it and antidiscrimination law generally as being formalistic.

\textsuperscript{93} See \textit{McDonnell Douglas}, 411 US at 802. Establishing a prima facie case supports drawing the inference of discrimination because it eliminates the usual reasons for an action that are not discriminatory, giving the employer the opportunity to introduce evidence of some additional nondiscriminatory explanations and then allowing the factfinder to decide whether the action that was challenged was “because of” discrimination.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.

\textsuperscript{94} \textit{Reeves v Sanderson Plumbing Products, Inc}, 530 US 133, 137 (2000).
Fundamentally and based on whatever the arguments have been made analyzing the evidence in the record, the factfinder must decide how likely it is that discrimination occurred when deciding whether discrimination, or some other explanation, is the more likely explanation for a challenged action. In making that determination, the factfinder’s assessment of the background rate of discrimination is important in deciding whether discrimination occurred in the case to be decided. Background assumptions always exist in the mental frame of mind factfinders bring to the job of deciding whether or not discrimination has occurred. A good example of the apparent influence of a background assumption is the statement by Justice Scalia in his opinion for the Court in Wal-Mart Stores, Inc v Dukes, that most managers would not discriminate in making pay or promotion decisions: “[L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.” There was no evidence in the record to support his particular background empirical assumption that discrimination was uncommon, yet Justice Scalia obviously relied upon it when deciding a case that

95 While the general at-will rule of contract law is phrased to include the possibility that the employer lacks any reason for taking an action, that would seem to be an exceptionally rare occurrence since most employment actions are done for a reason. While the plaintiff has the burden to prove the challenged action was because of race or gender, an employer would lack a very compelling non-discriminatory explanation by claiming the act was for whimsy or for no reason at all.

96 See Weiss, 4 Utah L Rev at 1682 (cited in note 12): In the overwhelming majority of Title VII discrimination cases, the plaintiff’s evidence does not unambiguously establish differential treatment based on protected class membership. Instead, the plaintiff produces statistical evidence; comparisons to the employer’s treatment of other employees; evidence that the employer’s stated reason was false; statements evincing improper attitudes; and other evidence that may be strong but that does not completely foreclose the possibility of non-discrimination.

97 See id at 1678 (“T]he elimination of background assumptions is not an option. Not only when subjective practices are challenged but whenever the factual occurrence of differential treatment is at issue, triers of fact must make background assumptions about the societal pattern of discrimination.”).

98 131 S Ct 2541 (2011).

99 Id at 2554. Social science research suggests that managers, like most others, are susceptible to implicit bias. See Jost, et al, 29 Rsrch Organizational Beh at 39 (cited in note 40).
makes class actions more difficult for employment discrimination plaintiffs. Evidence regarding the background rate of discrimination is therefore relevant in informing the factfinder in deciding whether or not discrimination occurred.

B. Changing the Substantive Scope of Antidiscrimination Law

This section begins with what appears to be a surprising possibility based on a “reverse” discrimination case, Ricci v DeStefano,100 that the white plaintiffs won. Ricci could become the basis for rejuvenating antidiscrimination law. Following that optimistic possibility, this section then looks at decisions of the Roberts Court that cut back on the substantive protections of Title VII and the other antidiscrimination statutes.

1. Using Ricci’s “color-blind” test to expand the scope of Title VII.

Extending Ricci to all disparate treatment cases would dramatically advance the underlying reason Title VII was enacted, which was to protect those who are the historic victims of employment discrimination. Ricci’s full potential, if realized, would revolutionize Title VII law by reducing proof of discriminatory intent in many cases to a simple factual question of whether the employer knew the racial or gender consequences of the action it was taking.101 While expanding the reach of antidiscrimination law would be very useful given the persistence of discrimination and would help to rejuvenate the antidiscrimination project, such a development appears unlikely, given the direction the Roberts Court has taken in most of its other decisions dealing with discrimination. Further, the opinion of the Court in Ricci is so deficient that it might easily be set aside as simply a product of judicial politics, not law, similar to the Rehnquist Court’s decision in Bush v Gore.102

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100 557 US 557 (2009).
101 See generally Michael J. Zimmer, Ricci’s Color-Blind Standard in a Race Conscious Society: A Case of Unintended Consequences?, 2010 BYU L. Rev 1257 (developing the point that Ricci could revolutionize Title VII law by reducing proof of discriminatory intent to a factual question of whether the employer knew the racial or gender consequences of the action it was taking).
102 531 US 98, 100-11 (2000). In Bush v Gore, the Court acknowledged that its decision was political by indicating it was not to be viewed as precedent: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” Id at 100. Similarly, the
In Ricci, the Supreme Court, in an opinion by Justice Kennedy, ruled as a matter of law, that the City of New Haven had committed intentional disparate treatment discrimination. According to the Court, the City violated Title VII when it decided not to use the results of a written pen and paper employment test given to firefighters who sought promotion to lieutenant and captain positions as those positions became open. The plaintiffs were seventeen whites and one Latino who would have been promoted immediately if the test results were used. The City defended its decision by claiming that its purpose in deciding not to use the test results was to avoid Title VII disparate impact liability. If the test scores were used, the City knew that a significantly lower percentage of African American and Latino test takers would be promoted than white test takers. Conversely, if the test scores were not used, a higher percentage of white than African American and Latino test takers would not be promoted. Some members of all three groups would be affected positively, others negatively,

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103 Court in Ricci suggested that it was not a normal case by announcing in advance that any subsequent disparate impact claim against the City based on the same test must fail:

If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.


105 The Court reversed summary judgment for the defendants and, in an unusual move, granted summary judgment for the plaintiffs. See Ricci, 557 US at 592. To do that, it had to find that there were no material questions of fact and so plaintiffs were entitled to judgment as a matter of law. That makes the careful analysis of the opinion in light of facts the Court found indisputably true and sufficient to support its decision extremely important.

106 See id at 574.

107 See id at 575. More precisely, in face of the dispute over whether or not the test scores should be used because of the disparate impact on African American and Latino test takers, the City's Civil Service Board voted 2-2, which meant that no action was taken and the proposal to make promotions based on the test scores failed.
whether or not promotions were made based on the test scores.\textsuperscript{108}

New Haven had a policy prohibiting discrimination, and there was no evidence that City officials had admitted by statements against interests or otherwise that it intended to discriminate against anyone because of their race.\textsuperscript{109} Despite several days of hearings before the City Civil Service Board, in which various individuals made a number of different arguments about whether the test scores should be used, all the evidence that was relevant to the question of intent to discriminate was that the test had a clear racial impact whether it was used or not.\textsuperscript{110}

The first step in the decision was that the Court found a conflict between disparate treatment law and disparate impact law, a conflict that had not previously been seen to exist.\textsuperscript{111} Having created the conflict, the next step required the Court to construct a way to resolve it. By looking directly to equal protection law and only indirectly to the statutory defenses in § 703(k) of Title VII to a prima facie case of disparate impact discrimination, the Court articulated a “strong basis in evidence” test.\textsuperscript{112} Since a prima facie case of disparate impact discrimination against minorities had been conceded, the existence of a defense based on disparate impact law depended on whether the City had “a strong basis in evidence” to conclude that it would be liable under the disparate impact theory if it used the test scores.\textsuperscript{113} Title VII’s § 703(k) sets forth the basic

\textsuperscript{108} See id at 566.

\textsuperscript{109} Ricci v Destefano, 554 F Supp 2d 142, 162 (D Conn 2006).

\textsuperscript{110} Initial Brief of Appellee-Respondent, Ricci v Destefano No 07-1428 & 08-328, *6-8 (D Conn filed Apr 22, 2009).

\textsuperscript{111} In granting summary judgment for the City, the Second Circuit followed precedent that there was no conflict between the obligations of an employer not to discriminate intentionally and to decide not to use a practice that caused a disparate impact unless that practice had been justified as job related and consistent with business necessity. See generally Michael J. Zimmer, Charles A. Sullivan, and Rebecca Hanner White, \textit{Cases and Materials on Employment Discrimination} 292 (Aspen 8th ed 2013).

\textsuperscript{112} See Ricci, 557 US at 563.

\textsuperscript{113} This inverts the normal order of a disparate impact case where the defendant first resists a finding that the challenged practice resulted in a disparate impact but, if it did, it would carry the burden of proving that the practice was justified because it was job related and consistent with business necessity. In this disparate treatment case, the City would not have to prove that its practice was \textit{not} job related or was \textit{not} consistent with business necessity, but it would have to show that it had “a strong basis in evidence” that its practice was not defensible.
defense standard requiring the employer to prove that the
callenged practice was “job related and consistent with
business necessity.” 114 Even if the challenged practice was found
to be job related and consistent with business necessity, the
practice would still be illegal if the plaintiff could demonstrate
that an “alternative employment practice” existed that served
the interest of the employer but had less adverse impact. 115 But
in the context of defending against a disparate treatment claim
by whites, the City had to prove that it would most likely lose
the disparate impact case. In other words, to win the disparate
treatment case, the City would have to prove it had a “strong
basis in evidence” that the test was not job related or was not
consistent with business necessity. Even if the test was not job
related and was not consistent with business necessity, the City
could still win the disparate treatment case if it could
demonstrate that it would likely lose the disparate impact test
because there was an alternative available that it had not used.

Despite an uncontested showing of a prima facie case of
disparate impact discrimination that would support a finding of
disparate impact liability and therefore a defense to the
disparate treatment claim, the Court found that there was “no
genuine dispute that the examinations were job-related and
consistent with business necessity.” 116 This is quite an
interesting use of language and seems radically at odds with
standard notions of what constitutes a dispute as that term is
used in normal litigation practice. There was no trial in the case,

114 42 USC § 2000e-2(k). In a case such as this that involves a pen-and-pencil test,
the issue of job-relatedness and consistency with business necessity resolves down to
whether the test has been properly validated using the techniques of validation
established by Organizational Psychologists. See Uniform Guidelines on Employee
Selection Features (Biddle Consulting Group 2013), online at http://www.

115 See 42 USC § 2000e-2(k). Thus, in this inverted setting, the City could concede
that the tests was job related and consistent with business necessity but still assert that
it has “a strong basis in evidence” that an alternative that served its interests but with
lesser impact was available, but it had failed to use it instead of the test it adopted and
administered to make the promotions.

116 Ricci, 557 US at 587. See also George Rutherglen, Major Issues in the Federal
standard worked to the disadvantage of the City in Ricci where it decided not to use the
test results for fear of disparate impact liability, it would generally work “to the
advantage of employers faced with actual claims of disparate impact. If the employer’s
burden is higher to show the absence of a business justification in cases like Ricci, it
must necessarily be lower to show the presence of such a justification in response to a
disparate impact claim.”).
but instead it was decided on the motion for summary judgment based on documents that might or might not have been admitted as evidence at a trial. Certainly that record did not include all of the evidence that would have been introduced into evidence if a trial had been held. What was in the record was the testimony of various individuals who spoke at a number of hearings before the City Civil Service Board when it was trying to decide whether or not to use the test scores. And that testimony was quite contested as to whether the test was job related or consistent with business necessity. Further, there was testimony that alternatives were available—proposals to change the weight between the oral and written scores on the test or to replace it with a job assessment system—that would work well but with less racial impact.117 In the face of this contested testimony and claims, the Board did not make a decision; instead, the proposal to use the test scores failed by a 2–2 split vote.118 In face of the failure of the lower courts to sort through the contested testimony and claims and to decide questions of fact pursuant to the new law the Court had just created, the Court should have reversed and remanded the case so an actual trial could be held with findings of fact and conclusions of law or jury findings. Instead, the Court reversed the summary judgment for the City and peremptorily granted summary judgment for the plaintiffs.

While Ricci has been subject to significant and well-deserved critical commentary,119 this article will take a different

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117 The Civil Service Board voted 2 to 2, which resulted in the proposal to use the test scores failing to pass. See Ricci, 557 US at 618.

118 So the Supreme Court, reviewing a record that was not made in a litigation context with only the default outcome of a split vote decision, essentially acted de novo as if it were the Civil Service Board. This is not consistent with the Court’s role in the judicial process. Treating the testimony before the Civil Service Board as if it constituted a trial, including presumably the right to cross examine and impeach and to contest the admissibility of evidence, seems comparable to treating episodes of the TV show Judge Judy as real trials.

tack, to try to make lemonade out of the Ricci lemon. It will attempt to show how the approach the Court took in this “reverse” discrimination case—that establishing intentional discrimination is a simple question of whether the employer knew the racial consequences of its action—establishes a new and potentially quite pro-plaintiff method for proving intentional discrimination in Title VII cases. The Ricci approach would add a new, simpler method for determining whether an action was motivated by race or gender. If this new approach makes the failure to be blind to race or gender a basis for deciding whether the employer acted with an intent to discriminate, that reduces many questions of intent to discriminate to a simple factual question of whether the employer knew the plaintiff was a woman or a member of a minority group when it took the challenged action.

The basic insight from Ricci, if applied to disparate treatment cases in general, could lead to a much broader substantive application of Title VII in cases where intent to discriminate is at issue. In short, the Court appears to have established essentially a “color-blind” standard of disparate treatment liability for Title VII. As the term suggests, this

Impact Road?, 104 NW U L Rev 411 (2010) (analyzing the effect Ricci has on the disparate impact doctrine and the relationship between disparate impact and disparate treatment and suggesting the need for Congressional amendments to Title VII to overturn Ricci); Melissa Hart, Procedural Extremism: The Supreme Court’s 2008-2009 Labor and Employment Cases, 13 Employee Rts & Empl Pol’i 253 (2009) (using Ricci as a prime example of the “procedural extremism” of the Court by reversing summary judgment for defendant and granting it to the plaintiffs); Susan D. Carle, A Social Movement History of Title VII Disparate Impact Analysis, 63 U Fla L Rev 251 (2011) (putting Ricci in context with the background development of the disparate impact doctrine); Joseph A. Soner and Benjamin N. Gutman, Does Ricci Herald A New Disparate Impact?, 90 BU L Rev 2181 (2010) (developing what they see as an emerging employer affirmative defense to a disparate impact case based on its good faith when it took an action that has been challenged).

120 Dale Carnegie apparently is the source of this aphorism. See Lemonade Quotes (BrainyQuote 2014), online at http://www.brainyquote.com/quotes/keywords/lemonade.html (visited Oct 18, 2014).

121 See Zimmer, BYU L Rev at 1257 (cited in note 101).

122 Justice Kennedy, however, has not yet held that this “color-blind” approach is uniformly applicable. In Ricci, he indicated that it does not apply when the employer is considering what employment practice to use, but the color-blind standard does apply once it has been adopted and is being administered: “Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.” Ricci, 557 US at 585. Similarly, in his concurring opinion in Parents Involved in Community Schools v Seattle School District No 1, he held back from adopting the across-the-board “color-blind” standard that Chief Justice Roberts would have adopted in
"color-blind" standard requires that an employer literally be blind to race, to not know the racial consequences of the individuals adversely affected by employer action. The argument for applying the "color-or gender-blind" approach generally to cases not involving white male plaintiffs is simple and straightforward: If a prima facie case of intentional discrimination was established in Ricci only because the City knew that its decision would be adverse to white workers violates the "color-blind" standard in "reverse" discrimination cases, a prima facie case would be established if the employer knew that those adversely affected were workers of color (or women) in race (or gender) discrimination cases brought by them.

While much of the rhetoric about a "color-blind" standard emerged in affirmative action cases, Ricci did not involve affirmative action as that term is usually understood, and it is that fact that expands the potential of the "color-blind" standard to be applicable in intentional discrimination cases generally. There was no express policy using race as was true in the affirmative action cases, and there was no admission by the City or its officials that it was expressly using race in the sense that it was used in those cases. The Civil Service Board simply failed to take any action on the proposal to use the test scores once it was known that using the test scores would result in an adverse impact on the groups of African American and Latino test takers. Correspondingly, it knew that not using the test would result in a greater impact on the group of white test takers than Latinos and African Americans, but the action the plaintiffs brought claimed intentional, not unintentional, disparate impact discrimination.

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123 See Parents Involved, 551 US at 748, in which Chief Justice Roberts, closed the plurality portion of his opinion with a ringing call for a "color-blind" standard: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

In *Ricci*, the lower courts had granted summary judgment for the City, finding that there was no material question of fact that would support a finding that the City had engaged in intentional discrimination against the white and Latino plaintiffs. Just knowing that using the test scores would cause a disparate impact against the groups of African American and Latino test takers was not a basis to find that deciding not to use them constituted discrimination against the white test takers. The lower court’s decision was consistent with prior understandings that simple knowledge of the racial consequences of one’s actions did not establish that the action was taken because of, rather than despite, race, and there was no other evidence suggested in the summary judgment papers that would support drawing the inference that the City intended to discriminate against the plaintiffs. The Supreme Court reversed the summary judgment for the City. Rather than remanding the case for further proceedings to determine whether or not the City intentionally discriminated, the Supreme Court decided instead to grant the plaintiffs’ summary judgment. So, based on the same record that was before the lower courts, the Supreme Court determined that the City, as a matter of law, had intentionally discriminated, but only against the white firefighters who were adversely affected, and not against their co-plaintiff who was a Latino as well as another Latino who would be promoted immediately if the test results were used and who were exactly similarly situated to the white plaintiffs but for their race. “The City rejected the test results

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125 *Ricci*, 554 F Supp 2d at 162-63.
126 See Personnel Administrator v Feeney, 442 US 256, 279 (1979):

“Discriminatory purpose,” . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.

Id.

127 In contrast, in *Fisher v University of Texas*, 133 S Ct 2411 (2013), the affirmative action decision, the Court, in an opinion by Justice Kennedy, reversed the grant of summary judgment for the University and remanded to the lower court.
128 Just because the defendant was found not to be entitled to summary judgment does not mean that the plaintiffs are entitled to it. When summary judgment is denied, that typically means that there are material questions of fact that foreclose summary judgment but instead lead to trial.
129 The holding that the white plaintiffs were victims of discrimination would mean that those adversely affected by a discriminatory action would benefit from an order to
solely because the higher scoring candidates were white."

Absent any evidence other than the City's knowledge that not using the test would adversely affect some test takers, some of whom were white and others who were African American or Latino, the finding is incredible, unless the Court now means that knowledge of racial consequences of an action that is taken establishes intent to discriminate. The step Ricci takes is to extend the "color-blind" standard beyond its prior application that involved express policies using race positively to benefit people of color in the Court's affirmative action cases.

The record clearly established that, in addition to the white plaintiffs, there were two Latino test takers, including one of the plaintiffs in the action, who would not be promoted and were exactly similarly situated to the white plaintiffs. There also were a number of white, Latino, and African American test takers who were adversely affected because they would have had a chance for promotion if there were openings in the future while the test scores would still be used. Given that members of all racial groups:

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 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 at 566. The "rule of three" means that the employer is limited to selecting one of the top three scorers on the test and cannot move down the rank order list of the test takers to take someone with a lower score. For the New Haven rule, see City of New Haven Civil Service Rules *18, online at http://www.cityofnewhaven.com/HumanResources/CivilService.asp (visited Oct 18, 2014).
three racial groups were adversely affected by the City’s decision and that some members of those same groups would be positively affected if the test scores were used, a finding of intentional discrimination against anyone would need to be based on other evidence. However, there was no evidence to support a finding of an intent to discriminate against anyone or especially against only the white test takers unless the evidence that knowledge of the racial consequences suffices. The Court accepted as a fact that there was no evidence supporting a finding of intent to discriminate against anyone other than the fact that the City knew some of the white test takers would not be promoted: “Whatever the City's ultimate aim—however well-intentioned or benevolent it might have seemed—the City made its employment decision because of race.” Since some members of all three racial groups were both adversely and positively affected by the decision not to make promotions and because the record contains no other evidence of animus or an intent to discriminate against only the white test takers, the Court could only base its finding of discriminatory intent as a matter of law solely on the fact that the City knew the racial impact of its decision as to the members of all three racial groups. “[A]fter the tests were completed, the raw racial results became the predominant rationale for the City’s refusal to certify the results.” The City violated a “color-blind” standard since it was not blind to the color of all the test takers. Therefore, it became liable for intentional discrimination.

The Court’s decision was not consistent with the evidence even using its own newly minted “color-blind” standard, since the Court did not find that all the test takers who were adversely affected were victims of race discrimination. Given that there were whites, African Americans, and Latinos who would be adversely affected if the test scores were not used, it

132 With members of all three racial groups advantaged and disadvantaged by whatever decision the City made about using the test scores, it would be difficult to conclude that there was discrimination against any group absent other evidence that would support drawing the inference of discrimination against any of the groups or against any individual members of any of the three racial groups.


134 Id at 593.

135 Presumably, all the test takers who would have been better off if the test scores had been used to make promotions would be victims of that intentional discrimination who would be able to sue using Title VII.
would be a challenge to find intentional race discrimination against some members of all three racial groups who took the test without at least knowing who those successful test takers were and why the City discriminated against them. Evidence over and above the fact that the City knew the overall racial impact would seem to be necessary to be able to find that the City intended to discriminate against the members of one racial group but not the other two. That evidence was, as the Court acknowledged, lacking. Avoiding the dilemma of finding race discrimination against members in all three racial groups, the Court instead took an unprecedented leap from reviewing evidence in the record that showed that the intent of the City was to avoid an adverse impact on the group of Latino and African American test takers to a finding as a matter of law that the decision not to use the test scores was intentional discrimination but only against those white test takers who would be promoted if the test scores were not used. Before Ricci, proof that an actor was simply conscious of the race or gender of the affected individuals would not by itself support drawing an inference of the intent to discriminate. For example, in Personnel Administrator v Feeney, an equal protection case, the Court rejected the claim that knowledge of the consequences equaled intent to discriminate:

“Discriminatory purpose,”... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker... selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of” the adverse affects upon an identifiable group.

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136 Id at 587.
137 It would seem that the most logical conclusion to be drawn from the fact that some members of all three racial groups were adversely affected, and the fact that there was no other evidence that the City intended specifically to discriminate against any individuals or members of one group, is that there was no intentional discrimination against anyone. That is what the lower courts had held in Ricci.
138 The leap is from the finding that the decision not to use the scores would have an adverse impact on all the test takers—white, African American, and Latino—who would have been either promoted or promotable if the test were used to a finding that the City committed intentional disparate treatment discrimination to a subset of that group, the white test takers.
140 Id at 279. In Village of Arlington Heights v Metropolitan, a case involving the
Justice O'Connor, in her concurring opinion in *Price Waterhouse v Hopkins*, a Title VII case, made the same point by making it clear that intent to discriminate could not be based solely on the fact that the race or gender of the person affected by the decision is known to the decisionmaker: "Race and gender always 'play a role' in . . . the benign sense that these are human characteristics of which decisionmakers are aware. . . . but by no means could support a rational factfinder's inference that the decision was made 'because of' sex." In other words, the employer may have to know the race or gender of an adversely affected worker for that worker to prove discrimination but that knowledge, while necessary, is not sufficient to establish disparate treatment liability.

Since *Ricci*, knowledge of the racial consequences of a potential action is no longer benign. Action taken with that knowledge is enough to establish an intent to discriminate, since there was no other basis upon which the *Ricci* Court could have made its finding that the City engaged in disparate treatment discrimination. Because the vote of the Civil Service Board was two to two, the result was that the resolution to use the test failed, so no affirmative finding was made by the Board. If Justice Kennedy's words are taken at face value, the decision was "because of race" for some of the white test takers, but not the Latino plaintiff nor the other Latino and African American applicants who also lost a chance for promotion when the test was not used. "The City rejected the test results solely because the higher scoring candidates were white." A problem for reading *Ricci* broadly is that the Court limited its holding to the white firefighters and did not explain why the similarly situated Latino plaintiff was not also the decision by a zoning board to deny a variance to a project to build low income and racially diverse housing. Justice Powell made clear that adverse impact by itself would not establish intent to discriminate. See *Village of Arlington Heights v Metropolitan*, 429 US 252, 264–65 (1977) ("Official action will not be held unconstitutional solely because it results in a racially disproportionate impact.").

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141 490 US 228 (1989).
142 Id at 277 (O'Connor concurring).
143 The Court does not take account of the one Latino, who would be promoted if the test scores were used, but who did not join the *Ricci* suit, nor the other Latino or six African American test takers who might be promoted if lieutenant or captain positions opened up during the time period in which the results of this test would be used. *Ricci*, 557 US 579–80.
victim of the City’s intentional discrimination. Finding that the Ricci approach to proof of disparate treatment applied only to claims of “reverse” discrimination brought by whites would be unequal enforcement in violation of equal protection. Favoring whites over members of other racial groups could not possibly be accepted as a compelling governmental interest that would justify such unequal treatment. On remand, the district court avoided the most profoundly racist outcome that might have resulted from the Supreme Court’s decision by ordering that the test results were to be used, rather than just promoting the white plaintiffs because they were the only victims of intentional discrimination. As a result, thirteen whites, three African Americans, and three Latinos were promoted into the openings that existed at the time the court order was implemented by the City. This confirms that members of all three racial groups were adversely affected by the decision not to use the test, but it also makes suspect the conclusion that the only discrimination was against the whites.

The exception to the “color-blind” standard that Justice Kennedy claims to allow for the use of race when planning for the adoption of new employment practices would not seem to apply where, as in Ricci, the knowledge of the racial consequences came well beyond the planning stage after the test had been administered. Given that the Court emphasized the effort the test takers took to prepare for the test, there might be some type of detrimental reliance limit applied to the “color-

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144 Though not based on any evidence in the record, the majority of the Court is so convinced that the City was intending to favor minorities, the Latino plaintiff who is by inference not the victim of discrimination is simply collateral damage to the intensity of the belief that this case was only about race discrimination favoring minorities.

145 This result would be extraordinarily disquieting since it raises the specter of intentional discrimination.

146 See Brodin, 20 S Cal Rev L & Soc Just at 187 (cited in note 119). The district court simply ordered that the test scores should be used to make promotions and did not actually look to directly provide remedies to any of the plaintiffs. As it turned out, ten of the whites promoted were not original plaintiffs in Ricci, but they got the promotions because of their scores on the test. The white plaintiffs who were not promoted received no remedy because their scores were too low to make them promotable.

147 See discussion in note 122.

148 It may be that the dividing line between the planning and administering stage is when those affected have taken action so that they can claim some sort of detrimental reliance. It is not clear how this would apply in general employment decisionmaking because the workers should be able to rely on the employer not to discriminate in any action affecting the workers.
blind" standard. But Title VII provides that workers generally should be able to rely on their employers to not discriminate and so the border between reliance based on the continued work of those employees and some special reliance taken such as buying books and studying to prepare for the test might be difficult to draw. Perhaps if there had been the upfront commitment to use the test results no matter what, that might help draw that line, but that was not the case in Ricci.

The intention of alternative explanations justifying the restriction of Ricci to claims by whites might be to somehow limit the case to being a one-off decision with no precedential effect as the Court claimed to do in Bush v. Gore. In a clumsy way, Justice Kennedy may have been suggesting such a distinction when he pronounced, in the fashion of an advisory opinion, that any subsequent disparate impact action based on the same test would be futile:

If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

As it happens, another firefighter, an African American who took the test challenged in Ricci, sued on disparate impact grounds after the test scores were used, claiming that the way the oral and written scores were weighted, 60 percent written and 40 percent oral, caused disparate impact and that he would have been immediately promoted if they were weighted more evenly since he had the highest oral score of any test takers.

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149 Applicants that go to the trouble to apply should be able to have with the expectation that they will not be discriminated against and incumbent workers do their jobs also with that expectation.

150 531 US 98 (2000). Or, since the Court in Ricci acted more like an administrative agency deciding a question of public policy by majority vote rather than an appellate court deciding a case or controversy, it might be possible to distinguish it as not being a judicial proceeding so that it has no significance as precedent as judicial decisions.

151 Ricci, 557 US at 593.

152 It is not clear why Briscoe did not rely on disparate treatment for his claim since it was clear that the City knew the racial consequences of the test when it finally implemented and Briscoe was adversely affected by that action.
In *Briscoe v New Haven*, the district court followed Justice Kennedy's advisory opinion and dismissed the case. The Second Circuit reversed, applying the general legal principle that someone who is not party to a decision is not estopped from bringing a separate claim.

It might be possible to explain Justice Kennedy’s decision that only white firefighters were the victims of discrimination as a slip of the pen. That when he wrote “white” he meant to include at least the one Latino plaintiff. Accepting that as a slip of the pen would still leave open the problem of the other Latino, who would be promoted immediately if the test results were used but who did not join the lawsuit, as well as the other white, Latino, and African American test takers who did well enough that they would have a chance for promotion during the time period when the test scores would still be used. Given the lack of any explanation, the slip may not have been of the pen, but it could well have been the result of implicit bias based on the stereotype that is not negative to minority firefighters but instead is positive, that firefighting lieutenants and captains are white.

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153 654 F.3d 200 (2d Cir 2011).
156 Even without bringing an action, this firefighter was a beneficiary of the way the district court handled the remand from the Supreme Court by simply ordering that the test results be used, without regard to whether or not those benefitted had been parties to the lawsuit or not.
157 Justice Alito’s concurring opinion in *Ricci* seems even more open to being understood as reflecting implicit bias than the opinion of Justice Kennedy. *Ricci*, 557 at 596-608 (Alito concurring). He was convinced that the reason the City did not use the test is that it caved into political pressure by a local community leader who happened to be an African American. See id at 604-05 (Alito concurring). Justice Alito was convinced that this made the decision because of race while preexisting precedent would treat caving into political pressure to be the motivating intent, not race discrimination. See id at 607-08 (Alito concurring). If Justice Alito could command the majority to take this extremely radical expansion of what constitutes intent to discriminate, the worst fears of
At first blush, it might appear that under Ricci employers would be liable for every adverse employment action they take because they almost always know the race and gender of the affected workers. That would seem to be the result of Ricci if employers fail to take action to blind themselves to the race or gender of applicants or workers who will be subjected to an adverse employment action. To avoid disparate treatment liability pursuant to the “color-blind” standard, employers would be required to blind themselves to the race or gender consequences of the decisions they make: Knowledge of the unequal racial impact of a challenged action affecting individuals would, without more, trigger liability by establishing that race was “a motivating factor” for the employer’s decision unless the employer had “a strong basis of evidence” that it would violate the law if it did not act in light of that knowledge. Hiring blind to race or sex is at least possible in many situations. For example, symphony orchestras increased the chances that women would be hired as members when the auditions were blind as to the identity of the candidates when they auditioned.\footnote{See generally Claudia Goldin and Cecilia Rouse, Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians, 90 Am Econ Rev 715 (2000).} Even if the initial stages of employee selection were not blind as to race or sex,\footnote{According to Justice Kennedy, at a planning stage, the likely racial consequences of a proposed employment policy or practice can be taken account of by the employer without triggering disparate treatment liability. See Ricci, 557 US at 585.} a hierarchical system where the person actually making the employment decision was blind to the race or gender of the affected individuals might shelter the employer from liability under the “color-blind” standard.\footnote{See Staub v Proctor Hospital, 131 S Ct 1186, 1193-94 (2011) (addressing “cat’s paw” liability in an employer hierarchy). While implicit bias may well influence actions early in the process, splitting that step from the final decision making step might insulate the conduct from attack, except, perhaps, by relying on a disparate impact theory attacking the process as having an adverse impact. 42 USC § 2000e-2(k).}

Taking the “color-blind” standard beyond challenges to affirmative action plans means that Ricci can apply in most disparate treatment discrimination claims since the employer knows the race or gender of workers when it makes adverse employment decisions. Making this argument successfully in cases other than those brought by whites would resuscitate Title
II law. The direction of some other cases by the Roberts Court, however, makes it unlikely that the Court would consistently apply this new and powerful “color- or gender-blind” standard in antidiscrimination cases. The next subsection deals with those decisions.

2. Roberts Court decisions diminishing Title VII’s substantive protections.

While exploring Ricci’s implications could expand the rights protected by Title VII, other decisions by the Roberts Court have weakened those protections. This section will review recent decisions that have a negative impact on antidiscrimination enforcement dealing with systemic disparate treatment, systemic disparate impact, and the causation standard to prove intentional discrimination.

As mentioned above, Wal-Mart involved a putative class action of over one and a half million women workers claiming sex discrimination in terms of pay and promotions. Although the Court refused to certify this suit as a class action under Rule 23 of the Federal Rules of Civil Procedure and so it would properly be read as “only” involving class action procedure, this decision is also significant because it may signal that the long-established systemic disparate treatment discrimination precedent may be in jeopardy.

In Wal-Mart, there was stark statistical evidence in the record of the failure of women to be rewarded with pay or promotion as compared to men. The majority opinion does not even mention these facts. The evidence showed that women filled 70 percent of the hourly jobs but only 33 percent of

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161 For a court not to accept this new approach in cases brought by the historic victims of discrimination would require an interesting legal analysis.
162 131 S Ct 2541 (2011). The possible substantive implications of Wal-Mart will be discussed here. Later, its implications for class action law will be developed.
163 Deciding whether or not to certify the class, the Court said:

[O]f course, the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action. . . . In this case, proof of commonality necessarily overlaps with respondents’ contentions that Wal-Mart engages in a pattern or practice of discrimination.

management jobs, with most promotions coming from the pool of hourly workers. Furthermore, it took women longer than men to rise into the management ranks, and the higher one looked in the management hierarchy the fewer the jobs filled by women. Finally, women were paid less than men in every region and that salary gap widened over time, even for men and women hired into the same jobs at the same time. Thus, women employees were adversely affected by the way in which the Wal-Mart policy allowed store managers relatively free discretion. Whether or not any individual woman was a victim of pay or promotion discrimination because of decisions made by her store manager, all women working at the local stores faced the risk that their managers would discriminate against them because of their sex, and Wal-Mart would do nothing about the actions of its agents. A data driven company, Wal-Mart collected all of this information about pay and promotion and aggregated it; so Wal-Mart knew the adverse impact its policy of granting discretion had on the women working in its stores.

In Wal-Mart’s systemic disparate treatment claim, as in an individual disparate treatment case, the ultimate question was whether the adverse action being challenged—the shortfall of women in terms of their pay, promotion and positions—was “because of” sex discrimination. The first step toward answering that question is to decide whether there are any policies of the employer that are express statements of discrimination. The Court discussed two Wal-Mart policies. One expressly prohibited discrimination, and the other was Wal-Mart’s policy of giving unstructured discretion to the managers of individual stores to set pay within certain ranges and to make promotions. While both policies were express, neither was discriminatory on its

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164 The opinion of the Court in Wal-Mart did not mention these statistics that start the analysis of a systemic disparate treatment challenging an employer’s pattern or practice of discrimination, but Justice Ginsburg did quote the district court’s finding of facts. See Wal-Mart, 131 S Ct 2541, 2562–64 (2011) (Ginsburg dissenting).

165 For an example of an employment policy that was expressly discriminatory, see Automobile Workers v Johnson Controls, Inc, 499 US 187, 211 (1991) (holding that excluding fertile women but not men from jobs involving exposure to lead is an express policy of sex discrimination).

166 Wal-Mart, 131 S Ct at 2553 (“Wal-Mart’s announced policy forbids sex discrimination.”) (emphasis in original).

167 See id at 2554 (“The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s ‘policy of allowing discretion’ by local supervisors over employment matters.”).
face, which, according to Judge Ikuta in her dissent below, would all but end the matter. Although not expressly adopting Judge Ikuta’s elimination of an employer’s liability for pattern or practice cases of disparate treatment, Justice Scalia did quote her opinion favorably, which might foreshadow a future direction of the Court to eliminate pattern or practice cases of disparate treatment discrimination.

Absent a policy that discriminates on its face, the second step in analyzing a systemic disparate treatment claim is to look, not at the express policies of the employer, but at how those policies are implemented or administered. A policy of unstructured decision making as alleged in Wal-Mart is the type of subjective decision making the Court, in Watson v Fort Worth Bank & Trust, had found to be subject to potential disparate impact liability. While the pay and promotion decisions were made by the local store managers, the systemic disparate treatment claim was against Wal-Mart itself because it created and continued a policy even after knowing of the result of the operation of the policy to be a dramatic difference between the pay and promotions of men and women workers in its stores. It was clear that Wal-Mart had collected and aggregated that information from all the decisions made in all its stores. While not all women had received lower pay or had been denied promotions because of their sex, all the women workers were adversely affected by the policy’s pattern of operation. All the

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168 Judge Ikuta, in her dissent below, would narrow systemic disparate treatment claims to express policies of discrimination and to situations where a policy neutral on its face was shown to have been adopted by top management with an intent to discriminate. See Dukes v Wal-Mart Stores, Inc, 603 F3d 571, 632–33 (9th Cir 2010) (Ikuta dissenting), revd 131 S Ct 2547 (2011). See also Tristin K. Green, The Future of Systemic Disparate Treatment Law, 32 Berkeley J Employ & Labor L 395 (2011) (criticizing the reliance on the mere existence of a formal employer nondiscrimination policy to rebut statistical evidence of a pattern or practice of disparate treatment discrimination).

169 Wal-Mart, 131 S Ct at 2555.


171 487 US 977, 990 (1988) ("An employer’s policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct.").

172 While Watson was a disparate impact case, presumably the policy of using discretion can also be the focus of a disparate treatment claim if it could be shown that its operation or administration was the product of an intent to discriminate. Even if the evidence in the record would not support drawing the inference that the practice was intentional discrimination, the practice could be challenged using the separate disparate impact theory set forth in § 703(k), 42 USC § 2000e-2(k).
women working at all the local stores faced an identical risk: that their managers would discriminate against them and that Wal-Mart would do nothing about it despite knowing the disadvantaged position of women overall.

Enduring the risk of discrimination is itself discrimination. In *International Union, UAW v Johnson Controls, Inc.*, the employer, a manufacturer of car batteries, excluded all fertile women workers from any jobs that involved exposure to lead or that could lead to jobs with lead exposure. Some women workers lost their jobs because of the policy (or they got themselves sterilized in order to keep the job they had); others would have their opportunities limited because the rule would prevent them from transferring into jobs that involved exposure or that would involve a progression leading to lead exposure jobs. All the women in the class were exposed to the risk that they would be victims of discrimination just as all the Wal-Mart women faced the risk that their store manager would discriminate against them in pay and promotions. Nevertheless, the Court in *Wal-Mart* refused to accept the class claim based on the precedent from *Johnson Controls*. That might mean that in the future the *Wal-Mart* holding as to procedural class action law might be claimed to undermine the substantive precedent for challenging pattern or practice liability based on a showing of such substantial unequal treatment of women workers.

Although *Ricci* involved race and *Wal-Mart* involved claims of gender discrimination, there are strong similarities that would support finding that Wal-Mart engaged in intentional disparate treatment discrimination. Neither case involved an express policy that discriminated, and both had express non-discriminatory policies. So, both involved employment practices neutral on their face as to race or gender that nevertheless had adverse effects, on African American and Latinos in *Ricci* and on women in *Wal-Mart*. Both involved promotions and both

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174 See id at 192.
175 Id.
176 One difference in the two cases is that *Johnson Controls* involved an express policy of discrimination, while *Wal-Mart* involved the discriminatory operation of a policy that on its face was neutral as to gender, and Wal-Mart had an express policy prohibiting discrimination.
involved the employers knowing of the adverse impact.\textsuperscript{177} Both involved disparate treatment claims requiring proof of the employer’s intent to discriminate. The difference in outcome is stark. In \textit{Ricci}, the employer is liable for intentional disparate treatment discrimination as a matter of law to all but one of the plaintiffs because it failed to use test scores that would have led to their promotion.\textsuperscript{178} In \textit{Wal-Mart}, the plaintiffs were found to have failed to even raise a common question of fact as to whether the operation of the challenged policy constituted intentional disparate treatment discrimination, even though the knowledge of the gender impact of the way the policy worked was known to the employer.\textsuperscript{179}

The failure of the Court to carry over the learning from \textit{Ricci} to \textit{Wal-Mart} may be because the majority in \textit{Wal-Mart} did not have the same kind of empathy toward the women class members that it exhibited toward the test takers in \textit{Ricci}.\textsuperscript{180}

\textsuperscript{177} When the issue of the use of the test arose in \textit{Ricci}, the City did not know the scores of the individual test takers while there was no indication that the identity of the individual women who were adversely affected by the operation of the challenged policy could be attributed to Wal-Mart itself.

\textsuperscript{178} As it turned out in \textit{Ricci}, when the City was ordered to use the test scores, six of the original plaintiffs had failed the test or had scored too low to be promoted. Their claims for promotion in the remand proceedings were rejected. See Brodin, 29 S Cal Rev L \& Soc Just at 187 (cited in note 119).

\textsuperscript{179} The slippery slope that is \textit{Ricci} can be seen by thinking what would have happened if Wal-Mart had taken action to reduce the impact of its policy of discretion. Would that mean that men who would be comparatively adversely affected by those actions have a \textit{Ricci} disparate treatment case because Wal-Mart would know the gender consequences of that action?

\textsuperscript{180} The description that appears empathetic could be viewed as being directed toward all the test takers. While that may be so, the result of the case—claiming that only some white test takers were discriminated against—suggests that the empathy was meant for only those whites.

The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. 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 process was all the more severe.

\textit{Ricci}, 557 US at 593. At least some members of the Senate think that Justices on the Supreme Court should not be empathetic. See John Paul Rollert, \textit{Justice Sotomayor – not guilty of empathy} (Christian Science Monitor Aug 29, 2011), online at http://www.csmonitor.com/Commentary/Opinion/2011/0829/Justice-Sotomayor-not-guilty-of-empathy (visited Oct 18, 2014). So any further expression of empathy on behalf of anyone by any member of the Court may be unlikely. One would hope, however, that, whether expressed or not, all the members of the Court should be empathetic with all the parties to every case before the court. See generally Michael J. Zimmer, \textit{Systemic Empathy}, 34
Even in absence of any discernible empathy for the Wal-Mart plaintiffs, however, it is long accepted that an unexplained violation of equal treatment is prohibited intentional discrimination. Despite unequal treatment being claimed as the essence of disparate treatment discrimination, the Court nevertheless failed to analyze the case in terms of existing precedent even though in the procedural posture of its decision it had to assume the claim of unequal treatment by the women workers was true. In sum, Wal-Mart v Dukes is a class action case, but it appears to be based on assumptions about substantive systemic disparate treatment law that narrow that law to make it more difficult to prove intentional discrimination when the operation of an employer policy is challenged as discriminatory, at least when women claim discrimination.

Other substantive decisions by the Roberts Supreme Court make it clear that it has made discrimination claims by those for whom the antidiscrimination statutes were primarily enacted more difficult. In 2009, in Gross v FBL Financial Services, Inc, an individual disparate treatment age discrimination case, the Court made all claims of intentional age discrimination more difficult to prove. It required that age discrimination must be proved by the “but-for” test of linkage between the adverse action plaintiff suffered and the defendant’s intent to


181 Lurking beneath the differences in expressions of empathy may be stereotypes based on implicit bias about the proper roles for men as managers and women as subordinate workers.

182 See Teamsters, 431 US at 335 n 15:

“Disparate treatment” . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Id.

183 See McDonald, 427 US at 283 (stating that the employer may decide “that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be ‘applied, alike to members of all races,’ and Title VII is violated if . . . it was not.”).

184 The plaintiffs in Wal-Mart claimed only intentional discrimination. But the challenge could have been based on disparate impact claim, though Justice Scalia in his concurrence in Ricci suggests that the disparate impact provision in Title VII, § 703(k), violates equal protection.


186 See id at 177–78.
discriminate and not the more pro-plaintiff “a motivating factor” standard.\textsuperscript{187} It took two steps to reach that result, the first of which was not a surprise but the second one was. First, the Court rejected the use in Age Discrimination in Employment Act (ADEA) cases of the “a motivating factor” test of liability and the same-decision defense to full remedies that Congress had added to Title VII in the Civil Rights Act of 1991.\textsuperscript{188} Applying a plain meaning approach, the Court held that since the 1991 Act amended the Age Discrimination Act in some ways but did not include the ADEA in its adoption of the “a motivating factor” standard for Title VII, that standard did not apply to ADEA cases.\textsuperscript{189} The second, surprising step was to reject the burden-shifting approach the Supreme Court had found to apply to Title VII cases in its 1989 decision in \textit{Price Waterhouse}.\textsuperscript{190} Taking that second step undermined the longstanding interpretation of antidiscrimination statutes in a uniform way so as to maximize the protection available to the classes protected by those laws.\textsuperscript{191}

As a result, discrimination because of race, color, religion, sex, national origin, and disability can be established using the “a motivating factor” standard of liability, while in cases claiming age discrimination, the plaintiff must prove that age was the “but-for” cause of the adverse action of employer vis-à-vis the plaintiff. Given the failure of the Court to justify its result in face of precedent, it appears that the Court simply devalued claims of age discrimination, assuming that age discrimination had dissipated or that it was a less significant problem than

\textsuperscript{187} See id.

\textsuperscript{188} \$ 703(m), 42 USC \$ 2000e-2(m), establishes the “a motivating factor” test of liability, while \$ 706(g)(2)(B), 42 USC \$ 2000e-5(g)(2)(B), provides an affirmative defense to full remedies if the defendant can prove that it “would have taken the same action in the absence of the impermissible motivating factor.”

\textsuperscript{189} See \textit{Gross}, 557 US at 179 n 5. The Rehnquist Court had earlier treated systemic disparate impact law differently in Title VII and the ADEA in part because the Civil Rights Act of 1991 had codified disparate impact law for Title VII by adding \$ 703(k), 42 USC \$ 2000e-2(k), but had not included the ADEA in that codification. See \textit{Smith v. City of Jackson}, 544 US 228, 240–41 (2005).

\textsuperscript{190} See \textit{Price Waterhouse}, 490 US 228, 291–92 (1989). The essential difference between \textit{Price Waterhouse}'s interpretation of \$ 703(a)'s “because of” language and \$ 703(m) and \$ 706(g)(2)(B) is that the same-decision affirmative defense in \textit{Price Waterhouse} was a defense to liability while under the new statute it would only be a defense to full remedies. See 42 USC \$\$ 2000e-2(m), 2000e-5(g)(2)(B).

\textsuperscript{191} Since the Court in \textit{Price Waterhouse} had interpreted “because of” in Title VII to mean the motivating factor/same decision defense to liability, the argument is that the same approach would apply to the term “because of” in the ADEA.
other bases of discrimination such as race or gender.\textsuperscript{192} It now can be seen as foreshadowing the further cutback of antidiscrimination law.

The next case involving the interpretation of “because of” reached a similar result as in Gross—“because of” means “but-for.” To reach that result, however, the Court had to run roughshod over the interpretive techniques it had claimed to have relied on in Gross. In 2013, in University of Texas Southwestern Medical Center v Nassar,\textsuperscript{193} the Court held that the “a motivating factor” level of proof to establish liability set forth in § 703(m)\textsuperscript{194} and the same-decision defense to full remedies of § 706(g)(2)(B)\textsuperscript{195} do not apply to claims of retaliation brought pursuant to § 704(a) of Title VII.\textsuperscript{196} Instead, Title VII retaliation, like all claims of age discrimination after Gross, now must be proven to be the “but-for” cause of the adverse action the plaintiff challenges. That means that only Title VII claims of intentional discrimination in hiring, promotion, discharge, etc., that are prohibited by § 703(a) can utilize the more plaintiff-friendly “a motivating factor” test of § 703(m).\textsuperscript{197} To reach the result it wanted, which was to narrow antidiscrimination law, the Court could not rely on the plain meaning approach it had claimed to use in Gross and in Desert Palace, Inc v Costa,\textsuperscript{198} an

\textsuperscript{192} Looking back at Price Waterhouse, Justice Thomas declared that “it is far from clear that the Court would have the same approach were it to consider the question today in the first instance.” Gross, 570 US at 168.
\textsuperscript{193} 133 S Ct 2517, 2531–34 (2013). Another case decided the same day as Nassar is another example of the Court pruning back the substantive scope of Title VII. In Vance v Ball State University, 133 S Ct 2434 (2013), the Court cut back the definition it earlier had created in Burlington Industries, Inc v Ellerth, 524 US 742 (1998) and Faragher v City of Boca Raton, 524 US 775 (1998), of the term “supervisor” for purposes of determining whether the employer was directly liable for that worker’s harassment of the plaintiff. A supervisor is now an individual authorized to undertake or recommend tangible employment decisions affecting the employee, including hiring, firing, promoting, demoting, and reassigning the employee but not merely if the individual is authorized to direct the employee’s daily work activities. An employer is only liable for its negligence in allowing a harassing worker with authority to direct the work of the plaintiff actual work. That authority provided by the employer does not sufficiently aid the employee in his harassment.
\textsuperscript{194} 42 USC § 2000e-2(m).
\textsuperscript{195} 42 USC § 2000e-5(g)(2)(B).
\textsuperscript{196} 42 USC § 2000e-3(a).
\textsuperscript{197} For a critique of Nassar, see generally Michael J. Zimmer, Hiding the Statute in Plain View: University of Texas Southwestern Medical Center v. Nassar, 14 Nev L J (forthcoming 2014) (on filed with author).
\textsuperscript{198} 539 US at 98–101 (holding that the plain meaning of § 703(m) makes clear that there is no direct evidence threshold to use of its “a motivating factor” standard).
earlier Title VII case also interpreting §§ 703(m) and 704(g)(2)(B). The plain meaning approach would be that retaliation is an “unlawful employment practice” as described and prohibited by § 704(a), which can be proved using the “a motivating factor” standard. That is because § 703(m) applies to all of Title VII’s “unlawful employment practices” with no suggestion that it makes a difference whether they are included in § 703(a) or § 704(a). Perhaps even more significant, the Court had to make a tortured interpretation of a well-established string of precedents that all had viewed retaliation as one form of discrimination just like other forms of discrimination, such as hiring or firing discrimination, and thus subject to the same methods of proof.199 By undermining those decisions, which were based on the interpretation of a number of different statutes, the Court further undermined what had been a long standing approach of reading antidiscrimination statutes uniformly to provide expansive protection for those for whom the statutes were enacted.

Justice Kennedy, writing for the Court in Nassar, appears to acknowledge that the decision to make § 704(a) violations harder to prove was the Court’s policy judgment that too many retaliation claims are being brought: “[C]laims of retaliation are being made with ever-increasing frequency.”200 That increase in claims would be exacerbated because “lessening the causation standard [by applying the “a motivating factor” test] could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment.”201 While the number of claims of retaliation had been increasing, there was no evidence in the record or elsewhere that the number or the rate of frivolous retaliation cases had increased.202

200 Nassar, 133 S Ct at 2531.
201 Id at 2531–32.
202 In absence of evidence of an increase in the rate of frivolous cases, the fact that more retaliation cases are filed says nothing about the rate of those cases. At any rate, issues arising out of data concerning the rate of retaliation cases or of frivolous cases would be for Congress to address, not for the Court to simply rewrite the legislation by judicial fiat.
In absence of any evidence in the record to support its policy judgment, the Court appeared to rely on a clever hypothetical situation posed by the employer’s counsel during oral argument suggesting that workers will game their employers to avoid adverse but not discriminatory employment actions by strategically filing unfounded discrimination claims followed by retaliation claims:

Consider in this regard the case of an employee who knows that he or she is about to be fired for poor performance, given a lower pay grade, or even just transferred to a different assignment or location. To forestall that lawful action, he or she might be tempted to make an unfounded charge of racial, sexual, or religious discrimination; then, when the unrelated employment action comes, the employee could allege that it is retaliation.203

That this hypothetical was so effective and yet was not based on any empirical evidence of such gaming suggests the importance of the background assumptions that decision makers bring to their decisions.204 In dissent, Justice Ginsburg confirmed that the majority in *Nassar* made a policy decision to restrict the scope of the protections provided by antidiscrimination law: “[T]he Court appears driven by its zeal to reduce the number of retaliation claims filed against employers. Congress had no such goal in mind when it added § 703(m) to Title VII.”205

In sum, the Roberts Court has expanded the interpretation of Title VII from affirmative action cases to “reverse” discrimination cases so that an employer is at least liable for disparate treatment discrimination simply because it knows

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203 *Nassar*, 133 S Ct at 2532. Counsel raised this hypothetical in his oral argument. See Oral Argument Transcript, *University of Texas Southwestern Medical Center v Nassar*, No 12-484, *22–23 (US Apr 24, 2013) (“Transcript”). Justice Alito did the same. See Transcript at *30–31 (cited in note 203). Justice Scalia opined that the employee would win the retaliation case if this hypothetical were a real case. Id at *32. But this appears to be strictly a hypothetical possibility since there was no record before the Court of such a fact pattern in any reported cases. See generally Zimmer, 14 Nev L J (cited in note 197).

204 The assumption that workers know their rights and manipulate claims strategically may be a product of stereotyping since it is at odds with reality. See Pauline T. Kim, *Norms, Learning and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 U Ill L Rev 447, 448–53 (1999).

205 *Nassar*, 133 S Ct at 2547 (Ginsburg dissenting).
that white workers will be adversely affected by its action. But the Court has yet to apply that same simple and straightforward “color-blind” standard for determining what constitutes intent to discriminate when the plaintiffs are women complaining of sex discrimination, even though it could have done so in *Wal-Mart*. Further, the Court appears to have decided that, as a policy matter and in the context of cases brought by the historic victims of discrimination, enforcement of the antidiscrimination statutes has been too broad. In short, Title VII and other antidiscrimination statutes have been narrowed by the Court’s substantive interpretations that reduce the possible scope of enforcement of these statutes, even if that narrowing could not be achieved through the consistent application of the canons of statutory interpretation that it claimed to be applying earlier. Unless the courts decide to revive antidiscrimination law by, for example, using the pro-plaintiff potential of *Ricci*, the antidiscrimination project is being winnowed away toward nothing. If that is not clear based on the restrictions of the substantive scope of these laws, the next section will show how the Court is acting to end the antidiscrimination project through its interpretation of procedural rules as they apply to statutory discrimination claims.

C. Procedural Bars to the Enforcement of Title VII

The Supreme Court has recently promulgated new procedural rules that, as a practical matter, severely limit the ability of employees to challenge the employment discrimination they suffer. The Roberts Court got off to an inauspicious beginning with its decision in *Ledbetter v Goodyear Tire & Rubber Co, Inc.* In *Ledbetter*, the Court time-barred the

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207 For an empirical study demonstrating the retrenchment of regulation through private litigation since the era of President Reagan, see Burbank and Farhang, 162 U Pa L Rev at *59 (cited in note 68):

Litigation seeking to narrow private rights of action, attorney’s fees, and standing, and to expand arbitration, achieved growing rates of voting support from an increasingly conservative Supreme Court, particularly once the Republicans gained control of Congress and there was no longer, as in 1969, a credible threat of statutory override.

Id.

208 550 US 618, 642 (2007) (holding that the filing period for EEOC claim runs even
plaintiff’s claim even though the discriminatory acts that started the running of the filing period had occurred long before plaintiff had any notice of the discrimination.\textsuperscript{209} Given that only the most cynical view of Congressional intent would think such an interpretation was possible, it may not be surprising, but it is fortunate that Congress overturned \textit{Ledbetter}.\textsuperscript{210} Nevertheless, the \textit{Ledbetter} decision did not bode well for subsequent procedural issues arising in discrimination cases decided by the Roberts Court.

This section will trace three subsequent developments in procedural law involved in discrimination cases. First, the Court has created a new arbitration law out of whole cloth that diverts workers’ claims of discrimination from the courts to arbitration even in absence of any consent by the worker or in absence of a truly voluntary decision by the employee to choose arbitration. Second, for any statutory case that escapes arbitration, the Court has heightened pleading standards to allow for the dismissal of cases before discovery has occurred rather than by summary judgment after discovery is complete. Third, the Court has substantially narrowed the availability of class actions in discrimination cases in court while presuming that arbitration agreements cut off the ability to bring collective actions in arbitration or court.

1. Enforcing “arbitration” that is non-consensual.

Arbitration is an agreement by parties to a dispute or to a potential dispute that might arise in the future to resolve it outside court and in a private forum decided by a private arbitrator or arbitrators. It is justified because, as with any other contract, arbitration is based on the notion of mutual consent.\textsuperscript{211} By forcing statutory disputes into arbitration, the

\textsuperscript{209} See id at 642.

\textsuperscript{210} Congress overturned \textit{Ledbetter} with the Lilly Ledbetter Fair Pay Act, Pub L No 111-2, 123 Stat 5 (2009), codified at 29 USC §§ 626, 794a and 42 USC § 2000e-5(e)(3).

\textsuperscript{211} A section of the Federal Arbitration Act, 9 USC § 2, describes arbitration as contracts:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction,
Supreme Court has taken major steps to "privatize" the resolution of statutory employment disputes, including Title VII claims. The Court’s policy preference for keeping statutory discrimination cases out of court is so strong that it has now taken to forcing cases into arbitration even in absence of any consent of the claimants or of their actual voluntary consent. That policy, which favors pouring claims out of court and into arbitration, has now gone so far as to force statutory claimants into arbitration even if they are not parties to any arbitration agreement. In *14 Penn Plaza v Pyett*, the Court held that union and management could, based on the terms of a collective bargaining agreement between those two parties, require individuals represented by the union to arbitrate their statutory antidiscrimination claims, even though the employees were not party to the collective bargaining agreement and had never agreed to any arbitration agreement of any kind with the employer or the union. Because membership in a collective bargaining unit is based on majority rule, some members of the unit may have not consented to any union representation. While the union has a right to advance claims based on the collective

or refusal, shall be valid, irrevocable, and enforceable. save upon such grounds as exist at law or in equity for the revocation of any contract.

See also Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration: International Commercial Arbitration* 2 (Cambridge 2d ed 2012) (establishing that the defining characteristics of arbitration include consent: "The parties consent provides the underpinning for the power of the arbitrators to decide the dispute.").

Another characteristic of arbitration is that the arbitrators are not state actors but act as private members of the community. See Moses, *The Principles and Practice of International Commercial Arbitration* at 2 (cited in note 211).

It has been argued that the FAA is a "super-statute" where the normal rules of statutory interpretation do not apply. See William N. Eskridge Jr. and John Ferejohn, *Super-Statutes*, 50 Duke L J 1215, 1260 (2001) ("[T]he Supreme Court has construed the FAA broadly, with a breadth sweeping well beyond the statute's plain meaning and the probable expectation of its framers in 1925.").


Pyett, *556 US* at 274. Since the *Steelworkers Trilogy* cases that were decided in 1990, pre-dispute agreements to arbitrate contained in collective bargaining agreements have been enforceable because it is assumed that the union and the employer each possess sufficient bargaining power so that the agreement to arbitrate is actually consensual. See Katherine V.W. Stone, *The Steelworkers Trilogy and the Evolution of Labor Arbitration*, Labor Law Stories (Foundation 2005) (Laura Cooper and Catherine Fisk, eds). Given its exclusive bargaining representation status, unions can waive some, but not all, NLRA rights of the workers it represents but certainly not Title VII claims since the union could be a defendant in those claims.
agreement for all workers in the unit, the claims of discrimination that violate workers' rights are personal to them.\footnote{Unions can waive some economic and labor-related rights of the workers they represent. See, for example, \textit{Alexander v Gardner-Denver Co}, 415 US 36, 51–52 (1974) (stating that "a union may waive certain statutory rights related to collective activity, such as the right to strike); \textit{Metro Edison Co v NLRB}, 460 US 693, 705–06 (1983) ("[A] union may bargain away its members economic rights.").}

The consensual basis for arbitration no longer seems to matter to a Court intent on finding ways to dump discrimination cases out of court. Now that the Court has stripped arbitration from its source in contract law, it is not clear what the basis is for its new, non-contractual and non-public forum for resolving statutory claims. It is certainly not grounded in the antidiscrimination statutes, the Federal Arbitration Act, or the National Labor Relations Act.\footnote{Without a real basis in Congressional action and the powers granted to Congress in the Constitution and without any power given by Article III of the Constitution to the Supreme Court to legislate, the arbitration agreement in \textit{Pyett} is simply not enforceable without the consent of the employees who are parties to a dispute with the employer but who are not parties to any agreement to arbitrate the dispute.} Because of its desire to strip employees of their choice to litigate a Title VII or ADEA claim in court, the Court has abrogated one of the defining characteristics of arbitration, the idea that it is based on the consent of both parties. The Constitution does not empower the Supreme Court to create forums to resolve disputes since that power is granted to Congress.\footnote{US Const Art III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").} Because arbitrators are private actors, the delegation of power to them by the Supreme Court appears to raise issues of non-delegation of governmental power that have not been at issue since before the New Deal.\footnote{It is ironic that this issue of unauthorized delegation of government power to private actors is the one part of \textit{Schecter Poultry Corp v United States}, 295 US 405 (1935), that survives. There the delegation was to participants in the poultry industry, while in \textit{Pyett}, the delegation of power enforced by the courts is to private arbitrators.}

The Court has upheld the application of arbitration provisions that eviscerate the enforceability of statutory claims. \textit{AT&T Mobility v Concepción}\footnote{131 S Ct 1740 (2011).} held that arbitration agreements that expressly cut off all class or collective claims in arbitration or litigation are enforceable even though they also cut off the ability to bring those claims in court.\footnote{See id at 1753.} Even more recently, the
Court in *American Express Co v Italian Colors Restaurant*\(^{222}\) held that a waiver of a class or collective claim in an arbitration agreement is enforceable even when the claimants have shown that the cost of individually arbitrating the statutory claim exceeds the potential recovery.\(^{223}\) That means that the statutes at issue in *Italian Colors Restaurant*—the Sherman and Clayton Antitrust Acts—are left unenforced and unenforceable by the victims of unlawful conduct. Claims that would be upheld in a context where enforcement was cost free are nevertheless not brought since the cost of enforcement exceeds the potential recovery. Allowing arbitration agreements to cut off class claims in arbitration is questionable enough, but also allowing that agreement to cut off the ability of those claimants to bring class actions in court by forcing the whole dispute into arbitration is simply unsupportable judicial activism.

Further, the Court has modified all arbitration agreements by imposing on them a strong presumption that class or collective claims are not arbitrable.\(^{224}\) Thus, in *Stolts-Nielsen S.A. v AnimalFeeds International Corp*,\(^{225}\) the Court held that, in absence of express language providing for collective claims to be decided in arbitration, arbitration agreements are necessarily bilateral, so only disputes between the parties to the agreement are arbitrable.\(^{226}\) Since class members are not parties to the arbitration agreement, there is no right to arbitrate collective claims on their behalf.

*Pyett* and *Stolts-Nielsen* contradict one another. In *Stolts-Nielsen*, the Court presumes arbitration is limited to the actual

\(^{222}\) 133 S Ct 2304 (2013).

\(^{223}\) See id at 2312.

\(^{224}\) Having gone down the path of creating a powerful presumption in favor of the enforceability of arbitration agreements, the Court has now rebutted that presumption with a strong presumption against the arbitration of collective or class claims. Both presumptions operate to interfere with the actual intent of the parties, an issue that generally is at the heart of the enforceability of all contracts. *Stolts-Nielsen* appears at odds with the text of the Federal Arbitration Act that provides that arbitration agreements are to be enforced upon the same “grounds as exist at law or in equity for the revocation of any contract.” 9 USC § 2, since such a presumption appears to apply only to arbitration agreements and not to contracts generally.

\(^{225}\) 130 S Ct 1758 (2011).

\(^{226}\) Id at 682–83. See Charles A. Sullivan and Timothy P. Glynn, Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution, 64 Ala L Rev 1013, 1038 (2013) (“Taken together, these decision indicate that an (unqualified) mandatory arbitration clause in an otherwise enforceable contract will preclude joint, collective, or class enforcement in both arbitral and judicial forums.”).
parties to the agreement, but *Pyett* forces claimants who are not parties to the arbitration agreement to take their claims to arbitration. The rationale for *Stolts-Nielsen*—that collective claims are not arbitrable because class members are not parties to the arbitration agreement—is confounded by *Pyett*, which forces into arbitration claimants who are not parties to any agreement to arbitrate.

What is consistent is that all these decisions diminish the statutory rights of claimants, thereby furthering the larger policy objectives of the Roberts Court to shrink the enforcement possibilities of statutes like Title VII and the other antidiscrimination statutes.227

Pouring Title VII cases out of court and into arbitration does not necessarily mean that these cases will be wrongly decided or that Title VII will never be enforced. But since the arbitration is forced on employees, it seems likely that the number of Title VII claims that actually get decided is likely to be lower if employees are required to go to arbitration than if they could take advantage of their statutory right to enforce those claims in state or federal court or to agree to arbitrate once the dispute has arisen. Even as to those claims that go to arbitration and even if they are decided fairly, there is a significant global loss in enforcement of Title VII because the proceedings are confidential. No one but the parties and the arbitrator know the results, and no one else knows whether or not those decisions are consistent with the law.

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227 Even where employees have signed boilerplate arbitration agreements, their consent typically is extremely shallow. See generally Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton 2012) (demonstrating how the use of boilerplate has degraded traditional notions of consent, agreement, and contract, and sacrificed core rights whose loss threatens the democratic order). Employers can now force their workers to sign agreements as a condition of getting or keeping their jobs, and thereby compel them to consent to arbitration, with consent thereby shriveled to a tiny formalism. About one-fifth of all employees are subject to employer imposed forced arbitration—a greater proportion of the workforce than is protected by union contracts. These arbitration clauses are typically written solely by employers’ lawyers, and employees have no choice but to accept them or lose their jobs. See *Forced Arbitration* (Employee Rights Advocacy Institute for Law & Policy), online at http://www.employeerightsadvocacy.org/article.php/binding (visited Oct 18, 2014). Such “agreements” are enforceable even if the employee is at-will and the arbitration agreement stands as the sole written term of the contract. See, for example, *In re Halliburton Co.*, 80 SW3d 566, 573 (Tex 2002) (holding that an arbitration agreement between an employer and an at-will employee is enforceable). To save the enforcement of antidiscrimination statutes and to sustain the integrity of arbitration as a consensually based system of dispute resolution, agreements for pre-dispute arbitration of statutory claims should not be enforced.
The Federal Arbitration Act, which the Supreme Court has rewritten to preempt state arbitration law, makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Since contract law generally provides that contracts can be declared unenforceable if they are unconscionable, arbitration agreements can be held to be unconscionable, but that is a difficult test to meet. Unlike determinations by judges or juries, the awards rendered by arbitrators cannot be overturned for mistakes of either law or fact since the grounds to vacate an award are limited to process issues. Further, arbitrators do not need to know the law and many do not. The EEOC does not know the level of enforcement that arbitration provides for statutory rights or

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228 9 USC §§ 1-16.
230 9 USC § 2.
231 Some arbitration agreements have been held to be unenforceable because they are unconscionable under traditional contract law. For example, in Chavarria v Ralphs Grocery Co, 733 F3d 916, 924-26 (9th Cir 2013), the Ninth Circuit held that an arbitration agreement was unconscionable because it effectively gave Ralphs the ability to select the arbitrator in almost all cases and required employees to pay at least half the arbitration fees.
232 See 9 USC § 10:

   (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration

   (1) where the award was procured by corruption, fraud, or undue means;

   (2) where there was evident partiality or corruption in the arbitrators, or either of them;

   (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

   (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

   (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

even what law is being applied in these private proceedings. Congress is also denied its ability to monitor compliance and the development of antidiscrimination law. Further, confidentiality deprives the potential educational benefits to workers being able to better know and therefore better able to protect their rights and to employers to know their obligations under the law. All of this leaves Title VII law static because there is no place for its development in light of new circumstances. This helps to kill off its enforcement.

Arbitration can be a useful and an efficient way to resolve disputes if, in fact, the agreement is consensual and is structured by the parties to provide a fair and just way to resolve the dispute. In the employment context, as in many other kinds of situations, agreements to arbitrate disputes once they have arisen give the parties the option of customizing the way their dispute will be resolved. In commercial and collective bargaining agreement arbitration, pre-dispute arbitration can also be valuable because both parties are likely to have real bargaining power, and arbitrators have an incentive to be neutral since both parties are likely to be repeat players in the arbitration of subsequent disputes. With employers much more likely than employees to be repeat players in employment

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234 The history of the relationship between Congress and the Supreme Court over the meaning of the antidiscrimination statutes has largely been one of the Court making restrictive interpretations that are then overturned by Congress. Subsequently, the Court often appears to continue to thwart Congress. See Kate Webber, Correcting the Supreme Court – Will it Listen? Using the Models of Judicial Decision-Making To Predict the Future of the ADA Amendments Act, 23 S Cal Interdisc L J 305, 316-17 (2014).

235 See Fred Alvarez, et al, Class Actions and Pattern and Practice Claims: Overview of Theories, Settlements and the Government’s Activist Role, 591 PLI/Lit 275 (asserting that the public is educated about employment discrimination laws by “headlines over the last several years [that] have been filled with stories of record settlements reached in various race and gender discrimination class actions lawsuits”).

236 The Arbitration Fairness Act of 2013, HR 1844, 113 Cong, 1st Sess (May 7, 2013), which would overturn the Supreme Court’s rewriting of the FAA, has been introduced and sent to committee but has not been acted upon. SeeGovtrack.us, Arbitration Fairness Act of 2013, online at https://www.govtrack.us/congress/bills/113/hr1844 (visited Oct 18, 2014). The bill would revive the FAA as it was originally enacted to overcome the common law resistance to arbitration in straightforward commercial contracts and would overturn the Supreme Court decisions applying the FAA to employment and consumer claims and preempting state law protecting consumers and workers.

237 In both Concepcion, 131 S Ct at 1751–52, and in Stotts-Nielsen, 131 S Ct at 117, the Court gave such substantial priority to arbitration that it trumped class action claims because class actions sacrifice “the principal benefits of private dispute resolution, including procedural informality, cost, and other efficiencies.” Sullivan and Glynn, 64 Ala L Rev at 1027 (cited in note 226).
arbitration, there is reason to believe that arbitrators will lean in favor of employers. Pre-dispute agreements to arbitrate employment disputes, especially if arbitration is the sole term of the contract,\textsuperscript{238} are almost always contracts of adhesion. It is generally a take-it-or-leave-it situation because of the unequal bargaining power between the parties. It is counterfactual to describe these agreements as consensual in any meaningful sense. Thus, the arbitration law the Supreme Court has created undermines the notion that arbitration can be justified because the parties have voluntarily agreed to it.\textsuperscript{239}

An employee whose statutory claim is diverted to arbitration loses her statutory right to her day in court as well as the right to a jury trial provided by antidiscrimination statutes and the Constitution. While class actions can be brought to enforce employment discrimination statutes,\textsuperscript{240} such as Title VII of the Civil Rights Act of 1964,\textsuperscript{241} arbitration provisions redirecting all statutory claims of employees to arbitration are enforced even if the agreement cuts off all statutory class or collective actions.\textsuperscript{242} The Court claims that the arbitration law it has created out of whole cloth is not inconsistent with the provisions of these antidiscrimination statutes that provide access to the courts because the rights to go to court, to get a jury trial, and to bring class actions are, as determined by the Court, “only” procedural and not substantive.\textsuperscript{243} Why that should make a difference is not so clear. In any event, although the right to a jury trial may be procedural, it is certainly a long cherished right that has been

\textsuperscript{238} There is some authority that the agreement to arbitrate must be supported by consideration. Compare \textit{Bailey v Federal National Mortgage Association}, 209 F3d 740, 746 (DC Cir 2000) (holding that the employee did not agree to arbitrate simply by continuing to work), with \textit{Michalski v Circuit City Stores, Inc}, 177 F3d 634, 637 (7th Cir 1999) (holding that arbitration is binding because the employer promised to abide by the arbitration award).

\textsuperscript{239} See Moses, \textit{The Principles and Practices of International Commercial Arbitration} at 537 (cited in note 2120). Concepción and Stolls-Nielson make it clear that the reason driving arbitration jurisprudence is not some strong valuation of consent.

\textsuperscript{240} See, for example, \textit{Wal-Mart Stores, Inc v Dukes}, 131 S Ct 2541 (2011).

\textsuperscript{241} 42 USC §§ 2000e–2000e-17.

\textsuperscript{242} Concepción, 131 S Ct at 1753. Since workers are consumers, this decision cuts off their claims that would only be economically viable if aggregated with the claims of other consumers with the same claims.

\textsuperscript{243} Title VII did not, as originally enacted, include a right to a jury trial. When Congress added that right in its 1991 amendments, it presumably thought that the right was significant to the full enforcement of Title VII.
shown to be more accurate than other forms of dispute resolution. Furthermore, denying the right to bring a class action means that some good claims will never be brought because their small economic value undermine the economic ability of bringing them. Workers with small claims, who had no real option other than to sign arbitration agreements, will be completely denied any chance to have their substantive rights vindicated because they have no choice but to take their claims to arbitration, since the agreements will be enforceable and will moreover effectively cut off the possibility of collective claims. Without the possibility of bringing a class or collective proceeding in either court or arbitration, many otherwise meritorious claims will not be brought anywhere.

2. Barriers to litigation.

Those employees with federal statutory claims, who somehow escape arbitration and who can file actions in federal court, are now faced with new and difficult procedural barriers that the Supreme Court has erected that substantially reduce their chances to bring class actions or to take any discrimination case to trial.

Class actions can be an effective way to challenge employment discrimination since many otherwise good claims are of such low economic value that litigating them individually is prohibitively expensive. These collective actions aggregate a group of individual claims so that the underlying claims are resolved and not just left unenforced for reasons unconnected with their merits. The Supreme Court, however, has made bringing federal court class actions claiming discrimination much more difficult because of its decision in Wal-Mart. In

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244 See generally Margaret L. Moses, What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence, 68 Geo Wash L Rev 183 (2000).

245 While employers now have a strong incentive to force their workers to arbitrate all employment related disputes including their statutory claims, there now exists authority to give them pause to force agreements to forego all class claims since those violate the Norris-LaGuardia Act, 29 USC §§ 101–114, and National Labor Relations Act, 29 USC §§ 151–169. See Sullivan and Glynn, 64 Ala L Rev at 1066 (cited in note 226) (asserting that arbitration agreements foregoing class or other collective actions are illegal versions of “yellow-dog contracts”).

246 It is especially true that workers at the bottom of the compensation scale are disproportionately impacted by cutting of class actions. It is also true that women and people of color are likely to be near the bottom of the wage scale.

247 131 S Ct 2541 (2011) (holding that a nationwide class action by women employees
Wal-Mart, the Court narrowed the availability of class actions by its interpretation of Rule 23(a)(2) of the Federal Rules of Civil Procedure. Rule 23(a)(2) requires a party seeking class certification to prove that there are “questions of law or fact common to the class.” As was discussed earlier, the issue underlying the claims of all members of the class was whether Wal-Mart’s policy of granting each store manager unstructured and unreviewed discretion to make pay and promotion decisions created a substantial risk of discrimination for all the women working in all the stores, a risk that appeared to have been realized because women workers were so much worse off than their similarly situated male counterparts. While never directly addressing that underlying substantive issue, the Court, nevertheless, held that there was no common question of “law or fact” and so the class could not be certified.

While the Court claimed to rely on precedent, specifically General Telephone Co of Southwest v Falcon, the Wal-Mart decision extended Falcon well beyond the issues in that case. In Falcon, the Court had rejected “across the board” class actions where a plaintiff with, for example, a claim of discrimination in promotions could bring a class action against the employer’s hiring discrimination and every other employment practice that might discriminate. In contrast, in Wal-Mart, plaintiffs challenged pay and promotion decisions that were not “across the board.” The pay and promotion decisions were closely related since promotions strongly influenced pay and the same store manager made both decisions. Denying that these pay and promotion decisions made pursuant to a single employer-wide

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248 FRCP 23.
249 FRCP 23(a)(2).
250 Wal-Mart, 131 S Ct at 2547. Where a policy of discrimination is alleged, the plaintiff need not show that she was actually adversely affected. See Northeastern Florida Chapter of Associated General Contractors of America v Jacksonville, 508 US 656, 666 (1993) (holding that contractors who could not show that they would have won contracts if the defendant had relied on an affirmative action plan nevertheless can bring a constitutional equal protection challenge the plan because of their risk of being discriminated against).
251 Wal-Mart, 131 S Ct at 2554–58.
252 Id at 2550; Falcon, 457 US at 156–160 (holding that a class action for hiring discrimination cannot extend to promotion discrimination).
253 Wal-Mart is an example of an instance where the ability to pursue a class action would be particularly important because plaintiffs were all low-wage workers whose individual claims were too expensive to litigate individually.
policy raised common questions of law or fact is much more restrictive than interpretations in earlier law. Since the opinion by Justice Scalia fails to discuss the real issues in the case, the extent of Wal-Mart’s impact is as yet unclear.

The Court has also imposed new and heightened pleading standards for Title VII and other civil rights cases. Under the longstanding “notice pleading” rules of Rule 8(a)(2) of the Federal Rules of Civil Procedure—a complaint need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief”—Rule 12(b)(6) motions to dismiss based on the complaint alone were difficult to achieve in Title VII cases because notice pleading would typically provide the defendant with sufficient information of what the claim was about. Generally, if cases were disposed of without settlement before trial, it would be after an answer was filed and discovery was complete. If the case were dismissed short of trial, it normally would be by Rule 56 summary judgment motion after at least some discovery had occurred. In Ashcroft v Iqbal, however, the Court moved the real possibility of dismissal to the earlier pleading stage before discovery. The Court now requires a plaintiff to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content, which is to be assumed to be true, allowing the court plausibly to draw the inference that the defendant is liable


255 In light of Wal-Mart, the Ninth Circuit subsequently denied certification of a class in a case similar to Wal-Mart. See Ellis v Costco Wholesale Corp, 657 F3d 970, 975 (9th Cir 2011). But, the Seventh Circuit has upheld a large class action claiming race discrimination. See McReynolds v Merrill Lynch, Pierce, Fenner & Smith, Inc, 672 F3d 482, 492 (7th Cir 2012), which subsequently settled for $160 million. See Merrill Lynch settles US race discrimination suit for $160m, (BBC Aug 28, 2013), online at http://www.bbc.co.uk/news/technology-23870879 (visited Oct 18, 2014).


258 See Iqbal, 556 US at 678 (emphasis added), quoting Bell Atlantic Corp, 550 US at 556.
for the misconduct alleged. Deciding plausibility, the Court said, involves “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”

A key question of fact in most statutory claims of discrimination is whether the employer acted with an intent to discriminate. Whatever “intent to discriminate” means legally, the actual reason for why the employer acted is generally only known by the employer and need not be shared with the adversely affected at-will employee before discovery. While the employer may have given the worker a reason it claims was the basis for its decision, discovery is useful and typically necessary to probe for explanations other than that “official” reason. Thus, dismissing a discrimination case before discovery can foreclose the right of employees who have been discriminated against to have any real chance to prove it. Iqbal is not merely a theoretical threat to the antidiscrimination project. Some preliminary evidence shows that plaintiffs’ cases have been increasingly dismissed at the pleading stage.

250 Iqbal, 556 US at 678.

260 Id at 679. Given the skepticism of the federal judiciary about the continuing existence of discrimination, what is plausible to many, may not be necessarily plausible to many federal judges. If nothing else, by moving the risk of dismissal earlier in the case, the Court has reduced the settlement value of the claims from what that value would be at the summary judgment stage, thereby making it more difficult for workers to bring their cases in the first instance and to have their rights vindicated. See Yasutora Watanabe, Learning and Bargaining in Dispute Resolution: Theory and Evidence from Medical Malpractice Litigation 3 (Nw U 2009): As new information is revealed during bargaining, learning takes place and the negotiating parties update their expectations of obtaining a favorable verdict. I allow the rate of arrival of information to differ in the pre-litigation and the litigation phases, for example because of the “discovery process” which follows the filing of a lawsuit. Learning has the effect of drawing the plaintiff and defendant’s expectations of the trial results closer to each other, which in turn increases the probability of agreement.

261 See Part II.A.

262 See Patricia Hatamyar Moore, An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions, 46 U Richmond L Rev 603, 632–51 (2012) (proving significant impact and contesting study of Federal Judicial Center that minimized Iqbal’s impact). See also Jonah B. Gelbach, Note, Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery, 121 Yale L J 2270 (2012). No doubt a good number of the dismissed cases were not likely to advance to trial after discovery because they would be disposed of at the summary judgment stage. But, presumably, some of these would prove to be good plaintiffs’ cases if they had been allowed to advance to discovery and trial.
Iqbal heightens the already substantial barriers that litigation imposes on Title VII plaintiffs. Claims that ultimately could be the basis for a finding of discrimination may not make it past the pleading stage because of the barrier Iqbal has created. Many claims that may well be good ones on the merits but have only the potential of a small recovery will never be brought because the expense of litigation makes them prohibitive to litigate individually. While plaintiffs can reduce their costs of litigating by bringing their individual claims pro se, the success rate of pro se cases is very poor, especially given the complexity of the law and the lack of sophistication of all but the rarest claimants.

See, for example, Ellen Berrey, Steve G. Hoffman, and Laura Beth Nielsen, Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation, 46 L & Soc Rev 1 (2012). This article illuminates the way in which neutral legal rules and cultural frameworks based on the assumption that the parties are equally-endowed obscures the structural disadvantages plaintiffs face. Moreover, whatever burdens employers have in litigation are considered simply a cost of doing business while employees shoulder these burdens in ways that are expensive but also emotionally crushing. The study is based on 100 in-depth interviews with defendant’s representatives, plaintiffs, and lawyers based on 1,788 cases filed between 1988–2003. See id.

This is true even though a prevailing party can recover attorney fees in discrimination cases. See, for example, Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-5(k).

Of course, many pro se cases may be without merit. There no doubt are, however, cases that would be successful if the plaintiff was represented by counsel but that have virtually no chance of success when attempted to be litigated by someone without legal expertise. See, for example, Alan Feuer, Lawyering by Laymen: More Litigants Are Taking a Do-It-Yourself Tack (NY Times Jan 22, 2001), online at http://www.nytimes.com/2001/01/22/nyregion/lawyering-by-laymen-more-litigants-are-taking-a-do-it-yourself-tack.html?pagewanted=all&sec=pm (visited Oct 18, 2014): Most courts in the city and across the country do not keep statistics on pro se litigation, though court watchers say there is plenty of anecdotal evidence that they are on an upswing. The increase has been attributed to the abundance of court programs on television and to the popularity of the do-it-yourself movement as a whole. But the most prevalent reason still is not being able to afford hundreds to thousands of dollars in lawyers’ fees.

See also Jonathan D. Rosenblom, Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York, 30 Fordham Urban L J 305, 305–96, (2002): Lost in the world of legal procedure and substantive case law, the pro se litigant often finds herself confused and overwhelmed, if not frustrated and bitter. Throughout their litigation, pro se litigants are confronted with numerous difficulties including complying with procedural rules, understanding substantive legal concepts, articulating relevant factual allegations, and simply knowing how to proceed with their action. Despite the liberal reading granted to pro se litigant pleadings, pro se litigants are almost unanimously ill equipped to encounter the complexities of the judicial system.
In sum, the contraction of the substantive protections provided by antidiscrimination statutes and the erection of significant procedural barriers diminishing access to fair dispute resolution systems is a fundamental failure to provide legal services to low- and middle-income claimants. These workers who are most in need of protection and most likely to be victims of discrimination are being denied a chance to have their cases decided on the merits in federal court or by arbitration if that is their choice. These maneuvers by the Supreme Court substantially diminish but do not absolutely prevent discrimination cases from being fairly decided. Their net result is to narrow dramatically the ability of the victims of employment discrimination to have their day in court or in arbitration.

III. PLAUSIBLY PLEADING DISCRIMINATION

This section will look at what the Roberts Court has left of the enforcement of Title VII and the other antidiscrimination statutes. The first part will look at the potential of reviving antidiscrimination doctrine by applying the Ricci “color-blind” approach to all claims brought claiming intentional discrimination. The second part will explore the use of social science research and general statistical evidence to establish more accurate background assumptions that make discrimination claims plausible. What judges need to

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266 Congress structured Title VII so that it was to be primarily enforced by workers bringing their own claims. The Court has frustrated that purpose of Congress by its procedural decisions.

267 One consequence of diminishing federal protections for workers is that workers are left to their remedies under state laws and state court.

268 Forcing discrimination claims into arbitration does deny the worker her day in court, her right to a jury trial, and her right to bring a class action where appropriate. Even “mandatory” arbitration is a venue where workers’ claims of discrimination will be decided. It is, as of yet, not clear whether “mandatory” arbitration gives the worker as good a chance or a worse chance of winning as does a court action. See Paul B. Marrow, Determining if Mandatory Arbitration is “Fair”: Asymmetrically Held Information and the Role of Mandatory Arbitration in Modulating Uninsurable Contract Risks, 54 NY L Sch L Rev 187, 227 (2009–2010) (comparing 125 litigated cases with 186 securities industry arbitration cases, showing that, “while the win rates in arbitration exceed those realized in the courthouse, the amounts (on average) awarded by arbitrators were significantly lower than the amounts awarded in court”). See also Michael Z. Green, Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims, 31 Rutgers L. J 399, 400–01 (2000) (“[T]he use of mandatory arbitration as a dispute resolution mechanism for employment discrimination claims has failed to give employers an overall advantage.”).
understand is that discrimination is not the very occasional action by some rogue bad actor—the proverbial bad apple in the barrel—but that it is very common and persists because it is built into how most people respond to sensory stimuli most of the time.

A. Plausibly Pleading the Ricci “Color-Blind” Standard of What Constitutes Evidence of Intent to Discriminate

Following Ricci, plaintiffs should plead that the intent element of claims of disparate treatment is satisfied if the defendant knew the race or gender consequences when the action that is challenged took place. That is all that the plaintiffs pled and the Court approved in Ricci and that simple approach should apply in all intentional discrimination cases. White plaintiffs bringing “reverse” discrimination claims have the easiest path toward judicial acceptance of this new test of what constitutes evidence of intent to discriminate by relying simply on Ricci. Women and people of color would have to get the courts to take a step the Supreme Court has yet to take, which is to apply the Ricci way of proving discrimination claims to their claims.

As indicated earlier, a question that needs to be answered before the Ricci color- and gender-blind standard can be used generally is why the Court held that the City discriminated against the white plaintiffs but did not find that it had discriminated against their co-plaintiff who was exactly similarly situated but who was Latino. The Court gave no explanation for differentiating between the white and Latino plaintiffs who all would be promoted immediately if the test scores were used. There is nothing in the case suggesting that the Latino plaintiff did not work as hard preparing for the test as the white plaintiffs. The Latino plaintiff relied to his detriment on the expectation that the test scores would be used just like everyone else. In implementing the Court’s decision, the district court avoided discriminating against the Latino and

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269 Plaintiffs in court can make this argument but so can claimants in arbitration in those instances where the claim is brought in arbitration. Given the confidential nature of arbitration, outsiders to the arbitration would not know whether or not the arbitrator accepted and applied this new approach to proving intent to discriminate. Arbitrators’ awards would also be sheltered from judicial review because questions of fact or law cannot be the basis for judicial review.
African Americans by promoting them along with the whites with scores high enough to be promoted to open positions as lieutenants and captains. The inexplicable differentiation the Court made between the white and Latino plaintiffs should not be a basis for refusing to develop the full potential of the Ricci color-blind standard.

The practical argument against the Ricci color- and gender-blind standard is that an employer would be liable whenever it knew the race or gender of a worker at the time it took an adverse action. While blinding themselves to the race or gender of workers when making adverse decisions would require employers to undertake substantial and careful changes to how they made employment decisions, it does not seem impossible for them to do so. Should the Court fear that such change would be too difficult, it could always reconsider Ricci. The Court extended its "color-blind" approach from affirmative action cases to "reverse" discrimination cases in Ricci in a manner that makes that approach very attractive to all plaintiffs claiming intentional disparate treatment discrimination. Given that the fundamental approach that it took in Ricci was so out of line with normal judicial procedure, the Court could limit it as a one-off decision that has no precedential value even in future "reverse" discrimination cases. That might cause the Court to rethink its use of "color-blind" rhetoric in affirmative action cases. If Congress would amend Title VII to return to the pre-existing and more difficult to prove standards of what constitutes intentional discrimination, the Court might be presented with an interesting challenge as to how to apply its equal protection jurisprudence to a statute finding that a failure to be color-blind was not discrimination.

B. The Plausibility of Discrimination Informed by Evidence of Stereotyping

As was explained earlier, background assumptions of a judge or factfinder about the prevalence of discrimination are inextricably connected to decisions about whether or not discrimination has occurred in a particular case.\textsuperscript{270} A

\textsuperscript{270} See Weiss, 4 Utah L Rev at 1678 (cited in note 12) ("[W]herever the factual occurrence of differential treatment is at issue, triers of fact must make background assumptions about the societal pattern of discrimination.").
background fact that courts have long recognized is the existence of stereotypical thinking, and that has been taken into account in developing antidiscrimination law. This section will first describe how evidence of stereotypical thinking has informed the interpretation of antidiscrimination law. Second, it will show how the acknowledgement by the Court of the prevalence of stereotyping has informed antidiscrimination law as it has developed. Finally, this section describes how social science research, including research demonstrating the extensive existence of implicit bias, demonstrates stereotyping.

1. Acting on stereotypes is intentional discrimination.

An early and classic Title VII case, *Slack v Havens*, involved evidence that an adverse employment decision was based on stereotypical thinking. In *Slack*, a supervisor ordered some African American workers to undertake a difficult cleanup of the workplace and, in response to the complaint that not just the African Americans should do the cleanup, justified that decision with expressions that revealed his stereotypical reasoning: “Colored people should stay in their places,” and “Colored folks are hired to clean because they clean better.”

These statements reflected stereotypes about African Americans and, given that white workers were also available to do the cleaning, amounted to admissions that the cleaning assignment was made based on the race of the workers. While it is clear that these statements exhibited bias on the part of the supervisor, what is not clear is whether the speaker was conscious of his bias or whether his bias was unconscious.

The Supreme Court has relied on the phenomenon of stereotypical thinking in developing antidiscrimination law. In 1982, in *Mississippi University for Women v Hogan*, the university tried to argue that its exclusion of men from the nursing school was justified because its policy “compensates for
discrimination against women.”

The Court, however, viewed the admission of only women to a nursing school as simply reinforcing stereotypical views that the proper role for women is to be nurses rather than doctors. “Rather than compensate for discriminatory barriers faced by women, the policy of excluding males from admission ... tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job.”

In 1989, in Price Waterhouse, the Court held that adverse employment actions based on sex stereotyping constituted sex discrimination. Ann Hopkins challenged the decision by her employer to put her bid for partnership on hold. Some of the evidence supporting her claim was what the partner who told her the bad news had said. He suggested she would have a better chance to be made partner the following year if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” Accepting the lower court’s finding that “a number of the partners’ comments [made during the partnership decision-making process] showed sex stereotyping at work,” Justice Brennan, writing for the plurality, concluded that:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against

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275 See id at 727.
276 Id at 729.
277 490 US 228 (1989) (plurality opinion).
278 See generally Kimberly A. Yuracko, Soul of a Woman: The Sex Stereotyping Prohibition at Work, 161 U Pa L Rev 757 (2013). For an exposition about Price Waterhouse, see Bernstein, 55 Ari L Rev at 681–719 (cited in note 33) (“Stereotyping curbed Ann Hopkins’ movements, consumed her time, limited what she could say, reduced her opportunities to get credit for what she achieved, and locked her out of the Price Waterhouse partnership.”).
279 See Price Waterhouse, 490 US at 231–32.
280 See id at 235, quoting the district court, Hopkins v Price Waterhouse, 618 F Supp 1109, 1117 (1985). Some of the statements of partners that were solicited during the process of making the partnership decisions also referred to her gender as a negative:

One partner described her as “macho”; another suggested that she “overcompensated for being a woman”; a third advised her to take “a course at charm school.” Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only “because it’s a lady using foul language.”

Id.
individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." . . . An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.  

One side of the Catch-22 was that the partners appeared to expect her to exhibit traditional "feminine" characteristics and decided against her partnership bid because she failed to conform to their expectations of what women should look like, what they should wear, and how they should act. The other side of the catch was that only aggressive, driven people—those who conform to the stereotypical expectation for men—are qualified to be partners. While she exhibited those characteristics, she was not a man and so she did not present as partnership material.

In 1996, in *United States v Virginia*, the Court rejected the Virginia Military Institute’s (VMI) argument that the bar to women’s admission should be upheld because women would be unable and unwilling to undergo the school’s “adversative approach” to education because that would be acting on stereotypes about women: the VMI “may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females’ or ‘rel[y] on ‘overbroad’ generalizations to make ‘judgments about people that are likely to... perpetuate historical patterns of discrimination.’”

In all of these cases, the existence of evidence of or arguments based on what the courts viewed to be stereotyping determined the outcome that an antidiscrimination law had been violated.

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282 Id at 250 (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).
284 Id at 535.
285 Id at 541.
286 Id at 542.
2. Examples of stereotyping that inform antidiscrimination law.

In 1978, in *Los Angeles Department of Water and Power v Manhart*, the employer pension rule expressly required greater monthly contributions from women than men so that women would get equal monthly benefits when they retired. That was systemic disparate treatment:

It is well recognized that employment decisions cannot be predicated on mere “stereotyped” impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman’s inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.

Thus, that began the authority for the proposition that employer action based on racial or gender stereotypes violates Title VII.

In 1983, in *EEOC v Wyoming*, the Court held that Congress enacted the ADEA because older workers were being discriminated against in employment on the basis of inaccurate and stigmatizing stereotypes:

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

In 1984, in *Palmore v Sidotti*, the lower courts had justified granting custody of a child to her white father because

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288 Id at 705.
289 Id at 707.
290 460 US 226 (1983) (holding that the ADEA is within the constitutional power of Congress to impose on the states).
291 Id at 231.
the child’s mother had married an African American. The basis for removing the child from the mother’s custody was the court’s determination that the child would face discrimination if she lived in a mixed-race family. The Court rejected that argument. While racial stereotypes exist and the child might be stigmatized, “The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” Therefore, the stereotypes that some members of the general public had about mixed-race families did not justify government discrimination by its reliance on those stereotypes to decide child custody questions.

In 1993, in *Hazen Paper Co v Biggins*, the Court again cited the existence of stereotypes as an important driving force for the prohibition of age discrimination.

It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. Thus the ADEA commands that “employers are to evaluate [older] employees on their merits and not their age.” The employer cannot rely on age as a proxy for an employee’s remaining characteristics, such as productivity, but must instead focus on those factors directly.

Thus, as in *Manhart*, the employer in *Hazen Paper* could not justify how it treated an individual who was an older worker by relying on stereotypes about older workers. In sum, the Court has relied on stereotypes to support drawing the inference of discrimination, to explain why discrimination is prohibited, and to reject arguments that justify express discrimination based on stereotypes.

3. Implicit bias explains stereotyping.

While some stereotyping is simply blatant, conscious animus, social science research demonstrates that implicit bias

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293 Id at 431–32.
294 Id at 433.
296 Id at 610–11.
is widespread and frequently is what drives stereotyping. As was shown in Part I, the existence of implicit bias is one important way to understand the persistence of discrimination. That demonstration should be useful in pleading cases to satisfy the *Iqbal* plausibility standard in response to motions to dismiss antidiscrimination complaints. At the pleading stage in litigation, the trial court is asked to determine whether the factual allegations in the complaint, which must be assumed to be true, would lead a factfinder at trial to determine that such facts would plausibly support a finding that the adverse action the plaintiff challenges had “a motivating factor” of discrimination or, where the “but-for” test applies, discrimination was the but-for cause for an adverse action. In making that determination, the trial judge is inevitably putting the facts that are alleged into the larger context of the prevalence of discrimination. Take an example. Suppose a white male professor who is substantially over age sixty-five, who is employed at-will, and whose teaching, scholarship, and service have never been challenged. Nevertheless he is terminated with no reason given. A trial judge deciding an *Iqbal* motion to dismiss his claim would be called upon to decide plausibility based on the judges “judicial experience and common sense.”

As is clear from the “reverse” discrimination cases brought by white males, the trial judge might be hard pressed to find race or sex discrimination to be plausible absent some special circumstances. The claim of age discrimination, however, should suggest to the judge a much greater possibility that age discrimination is plausible because implicit bias concerning the ability of older workers is common and the claimant is an older worker.

As was established in Part I, there is considerable evidence, looking at the question from a number of sources, that discrimination persists. Further, Part I also develops the social science support for the idea that implicit bias triggers much of that discrimination. In deciding whether discrimination is plausible, trial judges would not be asked to look to what

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298 See, for example, *Good v University of Chicago Medical Center*, 673 F3d 670, 678 (7th Cir 2012) (even assuming a white plaintiff was treated worse than three non-white comparators, the court ruled that it could not "conclude that Good's disparate treatment was racially motivated without evidence pointing more directly to a discriminatory motive without reliance on speculation").
historically has been called “legislative facts”—facts used to create or modify law—and would not be using social science research as “adjudicative facts”—facts that occurred in the case at hand. To say this another way, the judge would not be required to view evidence of implicit bias as applied to decide the motion at hand but instead should find relevant this social science research as establishing “pure” background assumptions about the prevalence of discrimination. The research showing the persistence of discrimination and how implicit bias is a cause of that persistence would be used to inform the “judicial experience and common sense” of the judge in determining whether the facts set forth in the complaint plausibly plead discrimination.

In Wal-Mart, the Supreme Court rejected so-called “social framework” social science evidence as proving as a fact that Wal-Mart had a general policy of discrimination. “Dr. William Bielby, their sociological expert... testified that Wal-Mart has a ‘strong corporate culture,’ that makes it ‘vulnerable’ to ‘gender bias.’ He could not, however, ‘determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart.’ That does not mean that this testimony would not be useful to a judge in determining the background plausibility that a policy neutral on its face, such as granting unreviewed discretion to store managers to make pay and promotion decisions, could be discriminatory in its operation. It would seem wrong-headed to exclude information that would educate judges; they must be assumed to be educable.

See Kenneth Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv L Rev 364, 404-07 (1942) (originating the use of these terms for administrative law but they have proved useful in litigation as well); John Monahan and Laurens Walker, A Judge’s Guide to Using Social Science, 43 Court Review: The Journal of the American Judges Association 156, 163 (2007) (“[T]here is a trend rapidly gaining credibility in American courts to use social science... as a social framework providing a general empirical context within which to determine specific facts at issue in a case.”). The use proposed here gives an empirical context to the persistence of discrimination and the sources for that discrimination but does not propose using this evidence that there was discrimination in the particular case at issue. Instead, its proposed use is to help educate the judge and to enhance her judicial experience in making a plausibility determination.

See Weiss, 4 Utah L Rev at 1679 (cited in note 12).

Wal-Mart, 131 S Ct at 2553-54.

In the face of the considerable evidence supporting the existence and operation of implicit bias, trial judges should be asked to take the IAT test as part of educating
Even judges can appear to be victims of implicit bias if they act on the basis of background assumptions that reflect stereotypes. In *Ricci*, the Court expressed empathy for the white test takers, despite the evidence that members of all three racial groups would be either helped or hurt by using or not using the test. That empathy supported the Court's judgment that the discrimination was solely against those white test takers who would not be promoted if the test results were not used. It is possible that implicit bias was at work to explain a result that is not consistent with the evidence in the record. Stereotypes can be positive as well as negative. The positive stereotype that might be reflected in the *Ricci* decision was that whites were the lieutenants and captains in the fire department. Lacking that positive stereotype, the two Latino firefighters, who were otherwise similarly situated to the white plaintiffs who would be promoted if the tests scores were used, were simply treated as if they were not victims of discrimination. In *Wal-Mart*, Justice Scalia’s background assumption that most store managers would not discriminate is another example of a positive stereotype since there was nothing in the record to support that assumption. This background assumption contributed to the Court’s decision to deny class certification but it is contestable because of the considerable evidence that discrimination persists among managers. More recently, in *Nassar*, the Supreme Court appears to have relied on a stereotype in deciding to make proof of Title VII retaliation cases harder. Counsel for the employer presented a hypothetical fact pattern of employees gaming the retaliation provisions of Title VII to protect themselves from adverse employment actions that had nothing to do with discrimination. The image of the worker gaming the employer through the calculated misuse of the law brings to mind the powerful stereotype that Ronald Reagan evoked of “welfare queens,” driving around in “welfare Cadillacs.”

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303 See Sidhu, 17 U Pa J Const L at *65 (cited in note 9). A positive stereotype would be that women are emotionally sensitive but a negative one would be that men are not.

304 133 S Ct 2517 (2013).

stereotype, held by many, proved to be powerful politically when it was evoked by candidate Reagan, yet it was not based on fact. Nor is the existence of gaming workers reflected in the record in Nassar.

At the pleading stage, it is important to attempt to establish realistic background assumptions about the persistence of discrimination and how implicit bias can trigger actions based on stereotypes that help cause that persistence in general. With more realistic background assumptions, trial judges can make better decisions about the plausibility of what the plaintiff has pled in the complaint when the judge decides whether to grant a motion to dismiss based on Iqbal.

IV. CONCLUSION

It will take some time before it can be assessed whether the enforcement of Title VII and the other antidiscrimination statutes will be resuscitated. If the attempt to use the Ricci "color-blind" approach in disparate treatment claims generally fails and if judges are not receptive to the use of the general statistical evidence of continuing discrimination to inform their decisions on whether a complaint is plausible, then the present policy of the Supreme Court to radically constrict if not end the antidiscrimination project will have achieved its goal of ending the antidiscrimination project. Should that be so unfortunate as to happen, then some alternative approaches need to be considered. It has been suggested that the EEOC be more active in litigation because it is not barred from court by arbitration agreements to which they are not party or by the

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306 Given that many statutory claims will be precluded from being brought in court because the only forum for their resolution is arbitration, the level of Title VII enforcement will be extremely hard to establish. Thus, the assessment can realistically only be made by what happens in the courts.

307 Rahm Emanuel is famous for saying, “You never let a serious crisis go to waste. And what I mean by that it’s an opportunity to do things you think you could not do before.” See Rahm Emanuel quote (BrainyQuote 2014), online at http://www.brainyquote.com/quotes/quotes/r/rahmemanue409l99.html#kW8sRLbKuYb5gdj.99 (visited Oct 18, 2014). Congress has responded rather regularly to unfortunate Supreme Court decisions but, even in a broad statute like the Civil Rights Act of 1991 and the recent amendments to the Americans with Disabilities Act, these amendments have been piecemeal and that leads to subsequent under-enforcement by the recalcitrant federal courts. See generally Deborah Widiss, Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides, 84 Notre Dame L Rev 511 (2009).
requirements of Rule 23 when bringing collective actions. Another alternative would be to expand legal services for discrimination claimants whose claims are valid but where the economic value makes them too expensive to litigate privately. This would do much to alleviate the extensive amount of pro se plaintiffs in Title VII claims brought in federal court and would probably reduce the number of these claims where counsel determines there is little or no chance for success.

This might, in fact, be an opportune time more generally to take a fresh look at how labor and employment law is enforced. Among the drastic things that could be done would be to replace the at-will presumption with a presumption of some sort of job security. Even more dramatic would be to create a new forum to decide all discrimination claims or even all labor and employment disputes, which would be as independent of the judiciary as possible. Since the Court has approved of what it calls “arbitration” even in absence of any consent on the part of statutory claimants, it might be prudent to call this new public forum to resolve employment disputes “arbitration.” Some other countries, such as Mexico, call their public systems of labor and employment law “Conciliation & Arbitration Boards,” something along those lines would be appropriate. Unlike our present systems of private arbitration, this new forum could be organized in a number of different ways as a public body including the kind of tripartite representation that is used in some other countries. Assuming this new forum would be

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308 See Bornstein, 33 Yale L. & Pol Rev at *40–45 (cited in note 4).

309 See generally William R. Corbett, Calling on Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law, 66 Vand L. Rev 135 (2013) (calling for Congress to reform American employment law by looking at new UK legislation). When the American Law Institute decided to undertake a Restatement of the common law of employment, I suggested that a better project would be to undertake a review of the entire area of labor and employment law. The time may now be ripe to do exactly that. See generally Michael J. Zimmer, The Restatement is the Wrong Project, 13 Employee Rts & Employ Pol J 205 (2009).


311 See Blanpain, et al, Global Workplace at 310–18 (cited in note 310). The government, employer, and worker representatives decide the cases in tripartite
created by Congress, it should include provisions that allow claimants in labor and employment disputes to opt to take their disputes to it without regard to any claim that the disputes were subject to private, contract-based arbitration but also to continue to allow post-dispute private arbitration. Given that the Supreme Court seems intent on not hearing statutory discrimination disputes and since judicial review of the present arbitration system is quite limited because there is no review for mistakes of law or fact, perhaps the new forum could operate with judicial review that was limited to due process issues.\textsuperscript{312}