

THE EMERGING CRONYISM DEFENSE AND AFFIRMATIVE ACTION: A CRITICAL PERSPECTIVE ON THE DISTINCTION BETWEEN COLORBLIND AND RACE- CONSCIOUS DECISION MAKING UNDER TITLE VII

Ann C. McGinley*

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INTRODUCTION: CASE STUDIES IN THE "NEUTRALITY PRINCIPLE": A TALE OF TWO SHARONS

Sharon Foster,¹ an African-American civilian employee at the Naval War College in Newport, Rhode Island, wanted to advance her career.² She "assiduously applied" for more attractive jobs in the Newport Naval Base,³ but her applications were unsuccessful because most of the offices on the base followed a policy of granting preference to internal candidates when promotional opportunities arose.⁴ Finally, Foster was hired in 1990 as the Professional Affairs Coordinator at the Naval Hospital.⁵

Shortly after Foster's arrival at the hospital, a new position for a management analyst was created at the hospital.⁶ Fearful that he could lose the funding for the new position if a protracted applicant search took place, the hospital's Director of Administration, Commander William Travis, decided to undertake a noncompetitive search rather than go through the usual method of recruiting civilian staff.⁷ Travis directed his staff to cull names from existing files and to make up a list of potential candidates for the new position.⁸ His staff compiled a list of five candidates, one of whom was Sharon Foster.⁹ Foster, who was clearly qualified for the position, was the only non-Caucasian on the list and was the only person who was already employed by the hospital.¹⁰ Had Travis followed the usual navy yard policy of preferring in-house applicants for promotion—the same policy that had worked against Foster when she had previously submitted applications to other facilities—Foster would have gotten the job.¹¹ But Travis did not follow the hospital's policy.

* Assistant Professor of Law, Florida State University College of Law; J.D. 1982, University of Pennsylvania Law School. I want to express my gratitude to former Dean Donald Weidner and current Dean Paul Lebel for their support and to my colleagues at Florida State University College of Law who discussed my ideas with me at a faculty forum. Particular thanks go to Jeff Stempel for comments made on an earlier draft, to Jean Sternlight and Sylvia Lazos for endless recommendations of books and articles to read, and to Meg Baldwin for our discussions about institutional racism. Alice Ballard discussed "unconscious intent" with me. Tiffany Lorry provided valuable research assistance. This Article is dedicated to the Florida State University College of Law Library staff, in particular, Mary McCormick and Trish Simonds, whose intelligence and hard work made this Article possible. This project was supported by a Florida State University College of Law research grant.

1. See *Foster v. Dalton*, 71 F.3d 52 (1st Cir. 1995).
2. See *id.* at 54.
3. *Id.*
4. See *id.*
5. See *id.*
6. See *id.*
7. See *id.*
8. See *id.*
9. See *id.*
10. See *id.*
11. See *id.*

George Warch, the hospital's civilian program specialist, presented Travis with the list of potential candidates. Travis asked why James Berry's name had been omitted.¹² James Berry was Warch's "fishing buddy" and an acquaintance of Travis.¹³ Warch told Travis that Berry was not eligible for the job because of the grade specified for the position.¹⁴ Travis directed Warch to rewrite the job description, assigning a lower grade to the job, for which Berry was eligible, and to generate a new list.¹⁵ Travis also added computer expertise as a job requirement, a capability that Berry possessed.¹⁶ Travis intimated to Warch that, if necessary, he would invoke the Veterans Readjustment Act, which gives veterans preference in certain governmental employment.¹⁷ Berry had served in the Navy.

With the modified job description, there was only one person on the list—Berry. Travis named him to the position even though Warch expressed concerns about whether it would look as though they had rigged the result.¹⁸

Foster sued the Navy, alleging race discrimination under Title VII of the Civil Rights Act of 1964.¹⁹ At trial, the defendants denied that they had discriminated against her; Travis and Warch gave the court "pious assurances that cronyism played no role in Berry's recruitment."²⁰ The lower court rejected these assurances, concluding that the selection of Berry, in the words of the court of appeals, was a "near-classic case of an old boy network in operation, but not a situation in which the employment decision was motivated by racial animus."²¹

On appeal, the First Circuit panel, which took every opportunity to demonstrate its disapproval of the Navy's actions, affirmed the lower court's judgment. The court of appeals held that it could not overturn the lower court's findings of fact because they were not clearly erroneous.²² Judge Selya concluded that although a fact finder could conclude that Warch and Travis acted out of racially discriminatory animus, the lower court's finding that they were motivated by cronyism rather than discrimination was another permissible inference to be drawn from the evidence.²³ Therefore, Sharon Foster, a more qualified black female, lost her employment discrimination suit even though a less qualified white male, who was a friend of the decision maker, got the job.

Compare Sharon Foster's case with that of Sharon Taxman,²⁴ a white

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. 42 U.S.C. §§ 2000e to 2000e-17 (1994). The original federal employment discrimination law was passed as Title VII of the Civil Rights Act of 1964. For the text of Title VII as amended, see *infra* note 80.

20. *Dalton*, 71 F.3d at 55.

21. *Id.*

22. *See id.* at 56-57.

23. *Id.* at 55.

24. *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert.*

teacher in the Piscataway School District in New Jersey. In 1989, the Piscataway School Board accepted the recommendation from the superintendent of schools that it should lay off one of the teachers in the business department at Piscataway High School.²⁵ Normally, the board has no discretion in choosing which employee to lay off because layoff decisions are governed by seniority in accordance with state law.²⁶ In this case, however, there were two employees with equal seniority—they had both started to work on the same day nine years before the layoff.²⁷ One of the teachers, Debra Williams, was black; the other, Sharon Taxman, was white.²⁸

Concluding that Taxman and Williams were equally qualified, the superintendent of schools recommended that the board invoke the district's affirmative action policy in order to make the layoff decision.²⁹ The relevant portion of the affirmative action policy stated: "In all cases, the most qualified candidate will be recommended for appointment. However, when candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program³⁰ will be recommended."³¹

The superintendent of schools made this recommendation because Williams was the only black teacher in the business education department.³² In response, the board independently assessed the classroom performance, evaluations, volunteerism, and certifications of the two teachers and determined that they had equal abilities and qualifications.³³ Given this assessment, the board invoked the affirmative action policy to break the tie between the two teachers. Sharon Taxman, the white employee, was laid off.³⁴

Taxman filed a charge with the Equal Employment Opportunity Commission, which in turn brought a Title VII action against the school board. At his deposition, the board president testified that the board had invoked the affirmative action policy in order to provide role models for the students and to

granted, 117 S. Ct. 2506 (1997).

25. *See id.* at 1551.

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

30. Candidates meeting the criteria of the affirmative action program are members of "racial, national origin or gender groups identified as minorities for statistical reporting purposes by the New Jersey State Department of Education." *Id.* at 1550.

31. *Id.* In 1975, the Board of Education of Piscataway, New Jersey, had developed an affirmative action policy to assure "equal educational opportunity for students and equal employment opportunity for employees and prospective employees." *Id.* An additional statement on affirmative action, adopted in 1983, stated that its purpose was to "ensure[] equal employment opportunity...and prohibit discrimination in employment because of [, inter alia,] race." *Id.* (alteration in original). In both documents the policies use identical language to describe the means by which the board will further its affirmative action goals. *See id.*

32. *See id.* at 1551.

33. *See id.*

34. *See id.*

promote understanding and tolerance of persons of different backgrounds.³⁵ The federal district court granted Taxman's motion for summary judgment, a judgment that the Third Circuit, sitting en banc, affirmed on appeal.³⁶

The above two cases stand in stark contrast to one another. In *Foster v. Dalton*, the court approved of the promotion of a less-qualified white male over a better-qualified black female under very suspicious circumstances; in *Taxman v. Board of Education*, the court invalidated the retention of an equally qualified black female over her white counterpart.

Taxman and *Foster* are troubling cases. Our instincts tell us that the decision made by the Piscataway School Board in *Taxman* is far less objectionable than that made by Commander Travis in *Foster*—yet Piscataway's conduct was considered illegal while the Navy's blatant cronyism was immunized. The most obvious reason for the discomfort is the knowledge that in *Taxman*, the person retained in the position was as qualified as the person who was laid off. The board had to lay off one of the two teachers; educators made the decision that because there were no other blacks in the business department and the students needed role models in all areas, it would be better pedagogically to retain the black teacher. Moreover, the school board did not reach this decision until it had made an exhaustive inquiry, resulting in the board's conclusion that the two teachers were equally qualified. The school board acted cautiously, reasonably, responsibly, and with the educational interests of the students in mind.

Our reaction to Commander Travis' decision to promote a "fishing buddy" over Sharon Foster is much more negative. We know that Foster was much better qualified for the position than Berry. In fact, Berry's name did not even appear on the original list; Commander Travis ordered his assistant to rewrite the job description so that Berry's name would appear. Additionally, Foster had applied for other positions at the naval yard but had lost out to internal candidates. This policy of favoring in-house applicants that other departments at the navy yard had invoked against Foster, and to which the hospital usually adhered, was abandoned in order to permit the selection of Berry—a white male.³⁷

The law justifies the disparate results in *Foster* and *Taxman* by invoking the principle of race and gender "neutrality" in the decision making process. Under this principle, the law generally prohibits employment determinations based consciously on a person's race or gender. An exception to the "neutrality principle" of Title VII is the doctrine set forth in *United Steelworkers of America v. Weber*³⁸ and reaffirmed in *Johnson v. Transportation Agency of Santa Clara*³⁹ permitting race- or gender-based decisions made pursuant to valid voluntary affirmative action plans.⁴⁰ A valid plan, according to *Weber* and *Johnson*, has a purpose that mirrors

35. See *id.* at 1551–52.

36. See *id.* at 1550.

37. See *Foster v. Dalton*, 71 F.3d 52, 54 (1st Cir. 1995).

38. 443 U.S. 193 (1979).

39. 480 U.S. 616 (1987).

40. The other "exception" occurs when an employee or group of employees demonstrate that a race- or gender-neutral policy has a disparate impact on a protected

Title VII's purposes⁴¹ and does not unnecessarily trammel the interests of white male employees. Conversely, employment decisions made absent an intent to discriminate because of the employee's protected characteristic are legal.

In *Taxman*, since the board consciously took race into account in making its decision, the court evaluated the Piscataway affirmative action plan under the two prong *Weber* test and found the plan lacking because it did not have a remedial purpose.⁴² In *Foster*, the lower court found that Travis did not consciously consider

group. See generally 42 U.S.C. § 2000e-2(k)(1)(A)-(B) (1994); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For a discussion of the disparate impact model of proof, see *infra* note 142.

41. See *Johnson*, 480 U.S. at 631-40; *Weber*, 443 U.S. at 202-08. The purposes of Title VII are to deter discriminatory behavior in order to provide equal work opportunities for all Americans and to compensate victims of discrimination. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 526 (1993) (Souter, J., dissenting).

42. See *Taxman v. Board of Educ.*, 91 F.3d 1547, 1557 (3d Cir. 1996) (en banc), cert. granted, 117 S. Ct. 2506 (1997). According to the court, the purpose of the Piscataway plan, unlike the plans in *Weber* and *Johnson*, was to achieve and maintain diversity rather than to eliminate the present effects of past discrimination. See *id.* at 1558. According to the majority, because this specific goal did not appear in the legislative history of Title VII as an objective of the statute, it could not justify a conscious race-based decision under Title VII. See *id.* The court noted that the affirmative action policy in Piscataway had no remedial purpose. In fact, black teachers were not underutilized in the Piscataway School District. See *id.* at 1550-51.

The court also found that the Piscataway policy failed to meet the second prong of the test applied in *Weber* and *Johnson*: the invocation of the policy unnecessarily trammelled the interests of whites. See *id.* at 1564. The court criticized the policy for its "utter lack of definition and structure," noting that the Piscataway School Board "cannot abdicate its responsibility to define 'racial diversity'" in its policy. *Id.*

The court further distinguished the *Weber* and *Johnson* policies because they were temporary measures seeking to attain, rather than maintain, racial balance. See *id.* The Piscataway plan was "an established fixture of unlimited duration, to be resurrected from time to time whenever the Board believe[d] that the ratio between Blacks and Whites in any Piscataway School was skewed." *Id.* According to the court, this characteristic alone would doom the policy. See *id.*

Finally, the court looked at the harm suffered by Sharon Taxman. It concluded that the board's goal of racial diversity, even if it were a legitimate reason for a conscious race-based decision, could not justify the layoff of a tenured nonminority employee, because the harm imposed on the nonminority employee was too substantial and the cost too severe. See *id.*

Four judges dissented. The first dissent, authored by Chief Judge Sloviter, criticized the majority for its wooden interpretation of *Weber's* and *Johnson's* two-prong test, and the close fit required by the majority in *Taxman*, to demonstrate that the purposes of the plan mirror the purposes of the Act. See *id.* at 1570-72. The dissent noted that in determining whether the purposes for the *Weber* plan were consistent with those of the statute, the *Weber* Court looked not only at the language of the legislative history but also at the historical context from which Title VII arose. See *id.* at 1571. The dissent also noted that the *Johnson* Court "made no attempt at all to identify language in the legislative history paralleling the particular objectives of the plan it sustained." *Id.* The dissent opined that *Weber* and *Johnson* do not require language in the legislative history to support the validity of the purpose of the affirmative action plan. Rather, it was necessary to look at the broad

race or gender;⁴³ for this reason, the necessary element of intent to discriminate was absent. Under the “neutrality principle,” as framed by the courts, the Navy did not make an illegal discriminatory decision.

But does this form of “neutrality” provide an adequate theoretical basis for the differentiation of these cases? Is there something so inherently wrong with a conscious consideration of race in *Taxman* that it should determine the outcome of the case? In contrast, why does the absence of a conscious intent to discriminate in *Foster* automatically relieve the actor of liability? Has discrimination law been misled by a false concept of neutrality and a misshapen notion of preference? Is there an alternative framework that will more appropriately lead to a just resolution of these cases?

This Article analyzes these questions and provides a new conceptual framework for approaching the question of race-based and race-neutral decision making. Instead of relying on the simplistic difference between a race-based and race-neutral decision to distinguish between legal and illegal actions, this new framework considers a complex array of issues raised by the decision making process.

Part I analyzes the legislative history of Title VII of the Civil Rights Act of 1964 (“Act”), the avowed purposes of the statute, and the tension between

purposes of the statute as evidenced by its language, legislative history, and the historical context of its passage. *See id.* The dissent concluded that the Act’s purposes were not limited to remedying the effects of past discrimination. Such a limitation would have the effect of ignoring social forces giving rise to future discrimination. *See id.*

The dissent also disagreed with the majority’s application of *Weber’s* and *Johnson’s* second prong to the Piscataway plan. Acknowledging that a layoff in the abstract imposes a far greater burden on an employee than a failure to hire or a denial of promotion, the dissent noted that Sharon Taxman would not necessarily have escaped a layoff but for the affirmative action policy. *See id.* at 1574.

The dissent’s position seems correct. *Weber* made clear that it did not establish the parameters of permissible race-based affirmative action programs. It merely held that the Kaiser program fell on the permissible side of the line because it mirrored the purposes of the statute and did not unnecessarily trammel on the interests of white employees. *See Weber*, 443 U.S. at 208. The program in *Taxman* had the purpose of assuring equal opportunity. In fulfilling this purpose, the program would not permit selection of any candidate for layoff, black or white, male or female, who was better qualified than the employees who were retained. *See Taxman*, 91 F.3d at 1550. It was a very narrowly circumscribed policy that permitted race as a tiebreaker once the candidates were otherwise found to be equal. It operated to give much less of a boost to members of the protected class at the expense of nonminorities and its avowed purpose—equal opportunity for all—was clearly one of the primary purposes of Title VII. The court seemed to ignore this purpose when it struck down this policy as illegal under Title VII, focusing on the narrower purpose voiced by the decision makers in this case of achieving diversity and providing role models for students. Thus, *Taxman* seems to have been decided improperly under established affirmative action doctrine.

43. *See Foster v. Dalton*, 71 F.3d 52, 55 (1st Cir. 1995). The court of appeals held that this finding of fact was not clear error. *See id.* This Article assumes, for the sake of argument, that this finding is correct. I wonder, however, given the facts, whether this is not an overly generous view of the lower court’s fact finding.

concepts of liberty and equality that emerged during the legislative process. This part defines "equality" as the use of merit in making employment decisions; it defines "liberty" as the employer's right to control his workforce by hiring, promoting, and firing whomever he desires. Part I argues that the legislative history, when read in light of the avowed purposes of the Act, is more consistent with a requirement that employers use merit as a basis for making employment decisions, at least when those decisions affect the persons the statute was originally designed to protect: African Americans, other persons of color, and women.

Part II demonstrates that recent Supreme Court precedent has unreasonably narrowed the intent requirement in Title VII law, permitting the emergence of the cronyism defense. It shows that the cronyism defense is an exaltation of the employer's liberty interest over an employee's equality right to hiring by merit; it argues that although this narrowing restriction on employers' liberty⁴⁴ is arguably consistent with the legislative debate, its strict focus and cramped definition of discriminatory intent ignore the extent and type of injury suffered by intended beneficiaries of the Act.

This Part shows that recognition of the "merit principle" enunciated in Part I would broaden the definition of intent in discriminatory treatment cases to permit nullification of decisions like those in most of the cronyism cases. It would require an employer who hires on the basis of cronyism to the detriment of one of the intended beneficiaries of the Act to justify the hiring decision on the basis of merit.⁴⁵

Part III examines the current debate over affirmative action and argues that the perceived dichotomy between affirmative action and merit is false. This Part analyzes the sources of the "antimerit myth" in the case law and popular culture and concludes that the merit principle is consistent with voluntary affirmative action plans as well as with an employer's liberty interests. It links the presence of an invisible white privilege and a precept of black inferiority to an exceedingly narrow definition of merit that judges persons of color and women on the basis of crabbed and rigid criteria defined by the white male norm that fail to consider the overall value of workers. This Part demonstrates merit must be redefined in a broader fashion in order to further the most important goals of the statute. It argues that contrary to popular belief, voluntary affirmative action policies play the vital role of combating current and ongoing discrimination that often results from invisible privilege and unconscious bias. Thus, the antidiscrimination principle is an important justification for voluntary affirmative action and not merely a remedy for egregious wrongs of the past.

Part IV demonstrates that the neutrality principle masks the relative harm

44. See *infra* notes 80–123 and accompanying text.

45. My paper falls short of arguing that all employees, even white males, have the right to merit hiring vis à vis one another because the statute does not support this interpretation. As a matter of policy, however, a merit approach to employment for all may encourage more unity. I have made a similar point with reference to discharge policies. See generally Ann C. McGinley, *Rethinking Civil Rights and Employment at Will*, 57 OHIO ST. L.J. 1443 (1996).

suffered by victims of discrimination due to “color evasion”⁴⁶ and “power evasion.”⁴⁷ Using a set of five hypothetical situations, it illustrates the types and qualities of injuries suffered by unsuccessful job applicants in different historical and social contexts. These hypotheticals demonstrate that although the existence of a race-based or neutral decision making process may affect the victim’s injury, the extent and type of injury is much more inextricably related to the historical, social, and economic context in which the employment decision is made. Part IV concludes that the Act’s focus on discriminatory intent as a measure of liability is simultaneously underinclusive and overbroad because it ignores the very real differences between the types of injuries suffered by employees in different historical, social, and economic contexts.

Part V proposes a conceptual framework to decide Title VII cases that takes into account a complex array of issues. These issues include the historical legacy of slavery and discrimination against African Americans; the presence of invisible white privilege; the precept of black inferiority; the existence of stereotypes; conscious and unconscious biases; the tension between the law’s approach to the values of equality (a right to merit-based job decisions) and liberty; and the types of injuries suffered by different “victims” of discrimination.

I. THE MERIT PRINCIPLE: INTERPRETING TITLE VII’S LEGISLATIVE HISTORY

The legislative history of Title VII of the 1964 Civil Rights Act reveals a tension between concepts of equality and liberty, a tension that has repeatedly appeared in the cases decided under the Act since its passage.⁴⁸ Only after studying the interaction of these concepts can we articulate a theoretical basis for a new approach to Title VII cases.

When I speak of “equality,” I am not reviving the tired debate of equality of opportunity versus equality of results; this debate tends to create unresolvable definitional problems. Instead, the legislative debate reveals a slightly different definition of equality: equal treatment, defined by opponents and proponents of the bill as the use of merit as a criterion for hiring. Their reasoning appears to be that an Act that promotes equality would require merit hiring, or in the very least, would prohibit the government from requiring preferential treatment of any individual based on group identity.

The bill’s opponents stressed their fears that the Act would require employers to ignore competence and experience, to use quotas, and to base

46. RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF GENDER* 142–49 (1993).

47. *Id.* at 14.

48. *See generally, e.g.,* *St. Mary’s Honor Ctr.*, 509 U.S. 502 (1993) (elevating liberty over equality); *Teamsters v. United States*, 431 U.S. 324 (1977) (implicitly recognizing the value of merit hiring by condoning use of statistics in proving a pattern and practice of discrimination).

employment decisions on only one criterion for employment—race.⁴⁹ They argued that the bill would establish a “not too subtle system of racism-in-reverse.”⁵⁰ They objected that the law would encourage employers to bend over backwards to avoid discrimination, resulting in discrimination against whites.⁵¹ The law would bar usage of qualification tests based upon verbal skills, they argued, and it would prohibit employers from hiring or promoting on the basis of merit or performance.⁵²

These arguments closely mirror those made by opponents of affirmative action today. Those opposed to the use of race or gender as a factor in making hiring decisions focus on merit. They argue that less-qualified blacks (or women) are hired and promoted over better-qualified white males. For example, in his dissent in *Johnson v. Transportation Agency of Santa Clara*,⁵³ Justice Scalia bemoaned the plight of more qualified white males from the lower middle class who lose positions to less-qualified females.⁵⁴

These arguments rest on the inaccurate assumption that in the absence of the Act's prohibitions, employers had traditionally hired on the basis of merit.⁵⁵ This assumption cannot be true. The mere fact that women and persons of color were virtually excluded from the labor pool from which many employers hired demonstrates its falsity. Moreover, the prevalence of nepotism and cronyism in hiring decisions belies the notion that employers were searching for and hiring the most qualified candidate for the position. Finally, in the union context, and to a lesser extent in other employment contexts, decisions to promote or to lay off personnel depended largely on seniority. Although there are important policy justifications for using seniority as a basis for making layoff and promotion decisions, it certainly cannot be argued that seniority-based decision making is merit-based decision making.⁵⁶ Thus it seems that merit-based hiring was not the

49. See LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2071 (United States Equal Employment Opportunity Comm'n ed., 1968) [hereinafter LEGISLATIVE HISTORY]. The House Bill, when it moved to the Senate, did not go through the usual committee procedure. A substitute bill with amendments was worked out instead in informal bipartisan conferences with Majority Leader Mansfield, Minority Leader Dirksen, and Senators Humphrey and Kuchel as the principals. See *id.* at 3001. The Substitute Bill, No. 656, was voted on in the Senate and sent directly to the House floor to vote on the bill without going to Conference Committee. The authors of the bill agreed on this procedure in order to avoid a filibuster. See *id.* at 3001, 3010. For this reason, there is no Senate Committee Report. Instead, there is a record of the floor debates in the Senate and of the statements of the major authors of the bill in the Senate. These statements, because of the unusual procedure, are considered the most authoritative statements of legislative intent. See *id.* at 3001.

50. *Id.* at 2073.

51. See *id.* at 3015 (Senator Clark's response to Senator Dirksen's questions on Title VII).

52. See *id.*

53. 480 U.S. 616 (1987).

54. *Id.* at 675-76 (Scalia, J., dissenting).

55. See discussion *infra* notes 56-71.

56. See Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV.

norm before passage of the Act.⁵⁷ The merit argument made by opponents of the bill relied on another faulty assumption—African Americans are inferior to whites and cannot compete with them on the basis of merit.⁵⁸ Thus, the argument goes, a bill that prohibits discrimination will necessarily require discrimination against whites.

Besides the merit/equality arguments for opposing the bill, opponents also made strong libertarian arguments against the Act that contradicted the premises of their merit-based argument. They argued that the bill deprived employers of the constitutional right rooted in the First Amendment right of association to hire or discharge whomever they pleased.⁵⁹ In essence, opponents of the bill argued that private individuals had the right to discriminate against others on the basis of race. This liberty argument conflicts with the merit argument because it advocates permitting an employer to favor less qualified individuals over more qualified ones because of the employer's "tastes."⁶⁰

The response to these arguments is telling. Proponents of the bill attacked the premise that the bill was antiegalitarian and antimerit. In fact, proponents argued that it was a bill that granted equality to persons of all races: it would not establish quotas or give a higher right to employment on the basis of race or

235, 301, 305 (1971).

57. Even so, the rhetoric of merit continues to dominate discussions about hiring today. The general public believes that employers are under legal obligations to make hiring, promotion, and discharge decisions based on merit. The law, however, has never overtly granted these basic protections to workers. See McGinley, *supra* note 45, at 1492–93 & n.320.

As an experiment in my employment discrimination class, I asked each of my fifty-five students to interview five people who had not had any legal training. I gave my students short hypothetical situations. After listening to the hypotheticals, the interviewees were asked whether it was legally permissible for the employer to take a particular action. The actions ranged from firing employees because they did not like them to hiring friends over better-qualified employees. Close to 90% of the persons interviewed believed that employees and prospective employees enjoyed far greater legal protection than they do. Most of the interviewees believed that employers were prohibited from making arbitrary decisions with reference to their employees and prospective employees. The underlying belief was that employers must hire, fire, and promote on the basis of merit.

58. See *infra* notes 239–57 and accompanying text for a discussion of the precept of black inferiority.

59. See LEGISLATIVE HISTORY, *supra* note 49, at 2064–65 (Minority Report upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152).

60. These are the same arguments made 25 years later by Richard Epstein. See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS (1992). Without noting the contradiction in his arguments, Epstein argues that private employers should have the right to indulge their "taste for discrimination" in order to create a more efficient workplace. *Id.* at 60–68. Presumably, this right to indulge one's tastes would include the right to hire less-qualified white males over better-qualified white women and minorities. But he later complains about the antidiscrimination laws because they lead to the destruction of meritocracy. See *id.* at 104. He also argues that reverse discrimination takes place regularly as a result of the antidiscrimination laws. See *id.* at 165. For an excellent critique of Epstein's book, see generally Nancy E. Dowd, *Liberty vs. Equality*, 34 WM. & MARY L. REV. 429 (1993).

gender.⁶¹

Under Title VII, employment will be on the basis of merit, not race. This means that no quota system will be set up, no one will be forced to hire incompetent help because of race or religion, and no one will be given a vested right to demand employment for a certain job. The title is designed to utilize to the fullest our potential workforce, to permit every worker to hold the best job for which he [or she] is qualified. This can be done by removing the hurdles that have too long been placed in the path of minority groups who seek to realize their rights and to contribute to a full society.⁶²

Proponents of the bill also rejected opponents' libertarian arguments. Instead of denying that the bill would limit the employers' perceived right to hire whomever they wanted, proponents disputed that employers had such a right. The bill's proponents took the moral high ground, evoking the Founding Fathers and the Constitution, moral conscience, and religion. They argued that no one had a constitutional right to discriminate against another because of his or her skin color or national origin.⁶³

This moral argument, along with the proponents' reassurances that the Act did not require antimerit hiring, led to passage of the Act. Because the bill's proponents did not dispute the factual basis underlying the libertarian arguments—that the Act would place a restriction on the employer's perceived right to associate with whomever he chose—but met the libertarian arguments with moral arguments, passage of the Act indicated a defeat for the libertarian notion that employers have the right of association to hire whomever they desire—at least to the extent that preferences are shaped by factors of race and gender.

It is undeniable that the Act places a limitation on the employers' perceived right to hire and promote whomever they want. There are, however, two possible inferences that one can draw from the legislative history. One could infer that Title VII is actually a merit-based statute at least for persons of color and white women. If this is true, for these intended beneficiaries of the Act, the Act does not require preferential treatment but rather guarantees a nonarbitrary merit-based selection.⁶⁴ Without this process, women and minorities fare poorly when employment decisions are made. For persons who have been the traditional victims of employment discrimination, this requirement would at least ban the employer

61. See LEGISLATIVE HISTORY, *supra* note 49, at 3190 (statement of Senator Williams, Apr. 23, 1964).

62. 110 CONG. REC. 1600 (1964) (statement of Representative Minish).

63. See LEGISLATIVE HISTORY, *supra* note 49, at 3098 (Senator Muskie and Senator Ellender debate).

64. By merit-based selection, I do not refer to the market definition of "merit" as identified by Professor Richard Epstein. Epstein argues that "merit" is subjective in market terms, measured only by "desire manifested in consent." EPSTEIN, *supra* note 60, at 163-67. If the market definition of "merit" is totally subjective, Title VII was necessary to alter the definition in order to introduce an element of objectivity into the decision making in the workplace.

from relying on defenses such as cronyism to defeat plaintiffs' claims.⁶⁵

One of the earliest and most noted commentators on employment discrimination laws, Professor Owen Fiss, agrees that employment discrimination laws operate on a merit principle. In *A Theory of Fair Employment Laws*, Professor Fiss states:

Fair employment laws reflect a rejection of any views of innate inferiority and also a commitment to the principle that the choice among individuals for scarce opportunities should be on the basis of the individual's merit. In the employment context this commitment to the merit principle means that the individual businessman is expected to choose the most productive individual, that is, the best worker at any given wage rate. This will tend to maximize the businessman's own wealth, and it will foster society's interest in efficiency—producing the greatest number of goods and services at the lowest cost.⁶⁶

Fiss notes that although the merit principle is to a certain extent self-enforcing, there is a need for the laws because the self-enforcing mechanism is limited by other factors such as employee control over hiring, tastes for discrimination, mistakes, and lack of information.⁶⁷

Early case law interpreting Title VII also suggests that the merit principle is consistent with the Act. In *McDonnell Douglas Corp. v. Green*,⁶⁸ which establishes a three-part model of proof for employment discrimination cases without direct proof of discrimination,⁶⁹ the Court required the defendant to articulate a "legitimate non-discriminatory reason" for the adverse employment decision.⁷⁰ The term "legitimate" as distinct from "non-discriminatory" implies that the Court intended that the employer have a rational reason for the adverse employment decision, that is, one related to the productivity or merit of the worker. Today, however, courts generally see this term as having no meaning independent of the term "non-discriminatory."⁷¹

The other possible inference from the statute is that employers are totally free to deny employment opportunities for any reason so long as the employers do

65. The disparate impact model of proof is consistent with this theory. Under this model, the employer cannot use neutral evaluation criteria having a disproportionately negative effect on the selection of members of the protected classes, unless they are "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)-(B) (1994). This business necessity defense requires the employer to prove that the criteria used are related to productivity, a measure of merit. For applications of the disparate impact model to cronyism, see *infra* note 142.

66. Fiss, *supra* note 56, at 241 (footnotes omitted).

67. *See id.* at 250-51.

68. 411 U. S. 792 (1973).

69. *See infra* notes 84-107 and accompanying text for a full discussion of the *McDonnell Douglas* proof construct.

70. 411 U.S. at 802.

71. Charles A. Sullivan, *Accounting for Price Waterhouse*, 56 BROOK. L. REV. 1107, 1115 n.38 (1991).

not make consciously discriminatory decisions. This reading would permit employers to make decisions for arbitrary reasons or for no reason, even when the decisions adversely affected white women and persons of color.

This interpretation reduces the statute's protection to a narrow shell, as the case of Sharon Foster demonstrates. It would elevate the interests of employers in avoiding liability over the avowed purposes of the statute: to deter discriminatory behavior⁷² in order to provide equal work opportunities for all Americans and to compensate victims of discrimination.⁷³ In fact, it would actually alter the definition of "victim" of discrimination, resulting in a definition that is underinclusive and overinclusive without regard to the injury suffered.⁷⁴

Even though it contradicts the purposes of the statute, this libertarian approach has gained increasing recognition in the courts' interpretation of the statute.⁷⁵ Courts emphasize that the Act does not defeat an employer's right to hire whomever the employer wants to hire, unless the employer consciously intends to discriminate on the basis of protected characteristics in its hiring process.⁷⁶ Thus, courts conclude that the right protected by the statute is not a right to be free of an employer's arbitrary decision making.⁷⁷ The right, instead, is much narrower. It is the right to be free of an employer's conscious, intentional, adverse employment decision because of a protected characteristic.⁷⁸

As we shall see in the discussion of cronyism below, this narrow interpretation rejecting the merit-based decision making approach has granted employers permission to make decisions with little regard to the rights of white women and persons of color. This permission has severely diluted the possible protections of Title VII and most certainly contradicts the original purposes of the Act. It also contradicts the spirit, if not the letter, of the 1991 amendments to the Act. The 1991 amendments do not support a watered-down reading of the Act. The express purpose of the 1991 Act was to give greater protection to victims of

72. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 526 (1993) (Souter, J., dissenting).

73. See *id.*

74. Many of the earlier court decisions seem to be based on the belief that the statute required merit-based decision making. See, e.g., *Teamsters v. United States*, 431 U.S. 324 (1977) (holding Kaiser Aluminum liable for a pattern and practice of discrimination where statistics of general population demonstrated far more available blacks to drive trucks over the road than were in the over-the-road jobs); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (requiring defendant to justify as business necessity the use of neutral policies that operated to exclude blacks).

75. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655 (7th Cir. 1991) (en banc).

76. See *Hazen Paper*, 507 U.S. at 609-10.

77. See generally *St. Mary's Honor Ctr.*, 509 U.S. at 508-11 (implicitly recognizing personal animosity as a defense to an employment discrimination case).

78. In fact, it is an even narrower right than this, considering the procedural barriers to winning Title VII cases. See generally McGinley, *supra* note 45; Ann C. McGinley, *Credulous Courts and the Tortured Trilogy*, 34 B.C. L. REV. 203 (1993).

discrimination.⁷⁹

II. VALUING LIBERTY OVER MERIT: EMERGING CRONYISM AND CONSTRICTING INTERPRETATIONS OF DISCRIMINATORY INTENT

A. *Splitting Hairs: Narrowing the Definition of Discriminatory Intent*⁸⁰

By severely restricting the definition of discriminatory intent, *St. Mary's Honor Center v. Hicks*⁸¹ and *Hazen Paper Co. v. Biggins*⁸² paved the way for the

79. In relevant part, congressional findings supporting the 1991 amendments to the Civil Rights Act of 1964 stated:

Sec. 2. Findings

The Congress finds that...

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991).

80. There are two sections of the original Title VII of the Civil Rights Act of 1964 that are relevant to the question of intent in individual cases of discrimination: sections 703(a) and 706(g). Section 703(a) states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994) (emphasis added).

Nowhere does the liability section of the Act, section 703(a), mention the words "intent," "motivation," or "invidious animus." The only words that could possibly be read to imply that there shall exist a state of mind to discriminate against the individual are the words "because of."

However, although section 703(a) does not mention intent, the remedial section of the statute, 706(g), does. Section 706(g) states in relevant part:

(1) If the court finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate...with or without back pay (payable by the employer, employment agency, or labor organization as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate....

§ 2000e-5(g) (emphasis added).

81. 509 U.S. 502 (1993).

82. 507 U.S. 604 (1993).

emergence of the cronyism defense.⁸³ To understand how *St. Mary's Honor Center* and *Hazen Paper* accomplished this task, it is necessary to review the development of the *McDonnell Douglas/Burdine* model of proof in discriminatory treatment cases.⁸⁴

After the passage of the 1964 Civil Rights Act, individual plaintiffs had little trouble proving that adverse employment decisions taken against them were the result of employment discrimination.⁸⁵ Employers who lacked the sophistication to realize that their actions were unlawful frequently made comments to job applicants that revealed their prejudices against women or minorities.⁸⁶

As employers became increasingly more sophisticated in their understanding of the law, employees more frequently had to revert to circumstantial evidence to prove employment discrimination.⁸⁷ In order to permit plaintiffs to prevail in the absence of direct evidence of discrimination, the Court constructed a three-part method of allocating plaintiffs' and defendants' burdens of persuasion and production, as set out in *McDonnell Douglas*,⁸⁸ *Furnco Construction Corp. v. Waters*,⁸⁹ and *Texas Department of Community Affairs v. Burdine*.⁹⁰

The *McDonnell Douglas* test requires the plaintiff in an employment discrimination case to prove a prima facie case. A prima facie case for failure to promote, for example, would include a showing that: (1) the plaintiff was a member of a protected class; (2) the plaintiff applied for the promotion for which she was qualified; (3) the defendant did not promote the plaintiff; and (4) the defendant either left the job open or filled it with someone not of the protected class.⁹¹ This proof, once met, shifts the burden of production to the defendant to articulate a legitimate, nondiscriminatory reason for the failure to promote the

83. The lower courts had begun to restrict the definition of intent a number of years before *St. Mary's Honor Center* and *Hazen Paper* were decided, but *St. Mary's Honor Center* and *Hazen Paper* placed the Court's imprimatur on the narrowing definitions. For a case before *St. Mary's Honor Center* that defines the intent requirement in a narrow way, see, e.g., *Benzies v. Illinois Dept. of Mental Health*, 810 F.2d 146, 148 (7th Cir. 1987) ("Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute."), *cert. denied*, 483 U.S. 1006 (1987). For cases after *St. Mary's Honor Center* with a narrow definition of discriminatory intent, see, for example, *Lawton v. State Mutual Life Assurance Co. of America*, 924 F. Supp. 331 (D. Mass. 1996) (Title VII does not protect against unfairness); *Scaria v. Rubin*, No. 94-CIV.3333, 1996 U.S. Dist. LEXIS 9659, at *24 (S.D.N.Y. July 11, 1996) (Title VII does not protect employees against bad business judgments).

84. See *infra* notes 85-107 and accompanying text for a discussion of the *McDonnell Douglas/Burdine* methodology.

85. See McGinley, *supra* note 78, at 215 n.45.

86. See *id.*

87. See *id.* at 214 & n.39, 215 & n.45.

88. 411 U.S. 792 (1973).

89. 438 U.S. 567 (1978).

90. 450 U.S. 248 (1981).

91. See *Nguyen v. Dalton*, No. 95-2269, 1996 WL 469904, at *2-3 (4th Cir. Aug. 20, 1996).

plaintiff.⁹² Once the defendant meets its burden of production, the burden of production shifts back to the plaintiff and merges with the plaintiff's ultimate burden to prove that the defendant's articulated reason for the failure to promote was a pretext.⁹³ The plaintiff could meet her burden in one of two ways: she could prove that the articulated reason was not true or that, even if true, was not the real reason for the failure to promote.⁹⁴ According to *Burdine*, once the plaintiff proves pretext, she is entitled to judgment.⁹⁵

In *St. Mary's Honor Center*, the plaintiff, a service worker for a correctional halfway house, alleged that his firing was a violation of Title VII's prohibition against race discrimination.⁹⁶ Melvin Hicks had worked for the defendant for six years and had received satisfactory employment evaluations.⁹⁷ Soon after the arrival of a new supervisor, Hicks' employer subjected him to increasingly severe disciplinary actions.⁹⁸ Finally, Hicks was fired.⁹⁹ The trial court, as fact finder, found that because white employees who had committed more serious violations had not been discharged, the employer's stated reason for discharge was a pretext.¹⁰⁰

The question before the Supreme Court was whether this proof of pretext *required* the fact finder to find a violation of the statute under *McDonnell Douglas*¹⁰¹ and *Burdine*.¹⁰² For years, most courts had read *Burdine* to require judgment for the plaintiff once he or she established pretext.¹⁰³ Nonetheless, the Court in *Saint Mary's Honor Center* held that although the fact finder *could* find that the defendant had discriminated against the plaintiff, it was not *required* to do so.¹⁰⁴ The Court supported its holding by noting that the plaintiff had to prove that the defendant's articulated reason for firing the plaintiff was a pretext for discrimination.¹⁰⁵ According to the Court, a finding that the defendant's alleged

92. See *id.*

93. See *id.*

94. See *Burdine*, 450 U.S. at 256.

95. See McGinley, *supra* note 78; *supra* notes 62–64 and accompanying text. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), changed this formula over a vigorous dissent. The *St. Mary's* Court decided that once the plaintiff proved pretext, the fact finder had the freedom to decide whether the defendant discriminated against the plaintiff. *Id.* at 519–20. For a critique of *St. Mary's Honor Center*, see McGinley, *supra* note 45, at 1457–59. *But see generally* Deborah Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995) (arguing that *Burdine* did not require the fact finder to find for the plaintiff upon a finding of pretext).

96. See 509 U.S. at 504.

97. See *id.* at 505.

98. See *id.*

99. See *id.*

100. See *id.* at 508.

101. 411 U.S. 792 (1973).

102. 450 U.S. 248 (1981).

103. See McGinley, *supra* note 78, at 219–20 & n.62–n.64. *But see generally* Malamud, *supra* note 95.

104. See *St. Mary's Honor Ctr.*, 509 U. S. at 519. This result is wrong under *Burdine*. See McGinley, *supra* note 45, at 1457–59.

105. See *St. Mary's Honor Ctr.*, 509 U. S. at 516.

reason for the discharge was false does not necessarily demonstrate that Hicks was fired for his race.¹⁰⁶ The fact finder could find that the defendant had fired Hicks because of personal animosity rather than because of his race.¹⁰⁷

St. Mary's Honor Center is a curious decision given the courts' earlier treatment of a finding of pretext and that the defendant in *St. Mary's* never raised personal animosity as a defense. In fact, there was no evidence of personal animosity against the plaintiff in the record. The reason in *Burdine* for requiring the defendant to articulate its reason for the adverse employment decision was to "frame the factual issue with sufficient clarity so that the plaintiff would have a full and fair opportunity to demonstrate pretext."¹⁰⁸ The defendant, in *St. Mary's Honor Center*, however, was permitted to rely on a defense of personal animosity without even submitting any evidence that personal animosity existed.¹⁰⁹

Moreover, raising personal animosity as a complete defense to a race discrimination claim ignores the very real possibility that the personal animosity may have been a result of racial bias. The Court never addressed this issue. Thus, it seems that *St. Mary's Honor Center* endorses a much narrower definition of discriminatory intent than *Burdine* had previously recognized. Personal animosity, even if rooted in race bias, may not create liability. In fact, personal animosity should be a defense to a race discrimination claim.¹¹⁰

In *Hazen Paper Co. v. Biggins*,¹¹¹ a case decided under the Age Discrimination in Employment Act ("ADEA"),¹¹² the Court invoked a similarly narrow interpretation of discriminatory intent. In *Hazen Paper*, in order to prove age discrimination, the plaintiff relied on evidence that the defendant fired the

106. *See id.* at 519.

107. *See id.* at 508, 524.

108. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

109. Evidently, both the plaintiff and a representative of the defendant testified that there was no personal animosity between Powell, the defendant's shift commander, and Hicks. *See* Respondent's Brief at 32-36, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (No. 92-602).

110. *See also* *Visser v. Packer Eng'g Assoc., Inc.*, 924 F.2d 655, 660 (7th Cir. 1991) (en banc) (Posner's ADEA decision holding that evidence that the employer was "a monster of vengefulness" creates the inference that no age discrimination occurred); *McGinley*, *supra* note, 45 at 1460-61 (discussing *Visser*).

111. 507 U.S. 604 (1993).

112. The ADEA in relevant part makes it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (1994).

plaintiff only a few weeks before his pension vested.¹¹³ The Court summarily rejected the claim, holding that even though pension rights may correlate with age, discrimination based on a person's pension rights is not age discrimination that is cognizable in a disparate treatment claim.¹¹⁴ In reaching this conclusion, the Court emphasized that proof of discriminatory motive¹¹⁵ is crucial in a discriminatory treatment case.¹¹⁶

Both *St. Mary's Honor Center* and *Hazen Paper* evidence an extremely narrow definition of discriminatory intent. The employers were not liable even though they specifically intended to harm the employees. If we are to accept the trial court's version of the facts in *St. Mary's Honor Center*, the employer may have fired the plaintiff out of personal animosity.¹¹⁷ In *Hazen Paper*, the employer fired the employee in order to prevent the employee's pension from vesting, knowing that the employee at age sixty-two would have difficulty finding another job.¹¹⁸ These factual findings, if not evidence of intent, should, at the very least, raise a presumption of discriminatory intent. But I would go further. I would find intent where a defendant has knowledge or reason to know that its actions are consciously or unconsciously based in bias or prejudice.

Like the cronyism cases that follow, *St. Mary's Honor Center* and *Hazen Paper* ignore a defendant's knowledge or reason to know of the injurious effects of his actions.¹¹⁹ Upon thoughtful examination of his actions, Hicks' employer should have known that his personal animosity was likely linked to an unconscious prejudice against blacks.¹²⁰ The employer in *St. Mary's Honor Center* knew that if he fired Hicks out of personal animosity, his actions would harm a black employee who had committed less serious violations than the white employees whom the

113. See *Hazen Paper*, 507 U.S. at 607.

114. See *id.* at 608-09.

115. The courts use the terms "discriminatory motive" and "discriminatory intent" interchangeably in this area of the law.

116. See *Hazen Paper*, 507 U.S. at 609.

117. See *St. Mary's Honor Center*, 509 U.S. 502, 508 (1993).

118. See *Hazen Paper*, 507 U.S. at 607.

119. These cases demonstrate that in employment discrimination law the term "intent" differs from its meaning in tort law. In tort law, a person acts with intent if he either "desires to cause consequences of his act" or he "believes that the consequences are substantially certain to result" from his act. See RESTATEMENT (SECOND) OF TORTS § 8A (1964).

In employment discrimination law, the "act" is the carrying out of the adverse employment decision. The "consequences" are the failure of a member of the protected class to receive equal treatment (or treatment based on the merit principle). Certainly, the employer in many employment discrimination cases is aware of this act and either desires to cause these consequences or believes that they are substantially certain to result, but this state of mind is insufficient for liability.

120. See Susan T. Fiske, *Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice*, in UNINTENDED THOUGHT 253 (James S. Uleman & John A. Bargh eds., 1989) (concluding that employers should be liable for unconscious discrimination because of their ability to control whether they act as a result of unconscious stereotyping); see also McGinley, *supra* note 45, at 1470-72 (describing Dr. Fiske's theory).

company had retained. Certainly, if the merit principle described in Part I above were enforced in *St. Mary's Honor Center*, the plaintiff would have won.

In *Hazen Paper*, the employer fired the employee for the purpose of denying him his pension benefits, knowing that such a deprivation would be more injurious to an older employee than a younger one.¹²¹ This knowledge, however, was insufficient to establish discriminatory intent.¹²² A finding that this knowledge is sufficient would, however, further the purposes of the ADEA to create economic opportunities for older Americans.

After *St. Mary's Honor Center* and *Hazen Paper* and the emergence of the cronyism defense, an employer does not even have to articulate a belief that an employee applying for a promotion was better qualified than the person selected. Instead, he can simply state that he promoted the person selected because he is his friend. This defense is absolute if believed by the fact finder. Unfortunately, by exalting the liberty interests of the employer over the interest of minorities and women in merit selection, this defense operates to maintain structural barriers to economic opportunity for persons of color and white women. Ironically, Title VII was enacted to eliminate these structural barriers.¹²³

B. Maintaining Structural Barriers Through Cronyism

In *Griggs v. Duke Power Co.*,¹²⁴ the Supreme Court stated:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of

121. In this case, the employee's pension vests 10 years after beginning work. See *Hazen Paper*, 507 U.S. at 611. Thus, it was conceivable that a very young employee could be fired in order to deprive him of pension vesting. Such a firing, however, would not be nearly as harmful to a younger employee who presumably would have the opportunity to work in another position and earn pension benefits before retirement.

122. These cases are hauntingly reminiscent of *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), in which the Court upheld a Massachusetts veterans preference law against a challenge under the Equal Protection Clause of the Fourteenth Amendment. Acknowledging that the absolute veterans preference operated "overwhelmingly to the advantage of males," *id.* at 259, and had a "severe," *id.* at 271, impact on the employment opportunities of women in the public sector in Massachusetts, the Court nonetheless held that the statute did not violate the Equal Protection Clause. This was true, according to the Court because:

"Discriminatory purpose,"...implies more than intent as a volition or intent as awareness of consequences.... It implies that the decisionmaker, in this case a state legislature, 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. at 279. This definition of intent is extremely cramped.

123. For an interesting related article, see Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643 (1996) (arguing that "reindeer games," benefits such as golf games and lunches accorded to male employees but not to females, are terms and conditions of employment that should be treated similarly to a hostile work environment).

124. 401 U.S. 424 (1971).

employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.¹²⁵

By focusing on a narrow, libertarian definition of discriminatory intent, the cronyism defense reinforces the historical barriers that the Court in *Griggs* decried. As articulated by the First Circuit in *Foster v. Dalton*,¹²⁶ the cronyism defense permits an employer to hire a less-qualified white male over a better-qualified black female if cronyism, rather than racial animus, motivated the employer's decision.¹²⁷ Thus, it exalts the employer's interests in liberty over the employee's interest in merit hiring.¹²⁸

In *Foster*, for example, decision makers knowingly bypassed the hospital's usual procedures and policies, downgraded a position, and established new requirements in order to assure that a less-qualified white male received the promotion over a more-qualified black female. Even though there was no question that the decision makers knew that their actions resulted in the failure to promote a better-qualified black female, the court of appeals upheld the lower court's finding of no racial animus.

Chances are very good that the vast majority, if not all, of Warch's fishing buddies were white males.¹²⁹ If Travis were to use his buddies as the pool for promotions, he would perhaps never promote a woman or a minority. Because most persons in positions of power in corporations are white men¹³⁰ who socialize

125. *Id.* at 429-430.

126. 71 F.3d 52 (1995). There are a number of other decisions sanctioning cronyism as a defense to Title VII. *See infra* notes 141-42.

127. *See* 71 F.3d at 54-57.

128. I describe merit hiring as an employee's interest, but it is important to note that merit hiring is in the interest of the employer and society in general as well. *See* Fiss, *supra* note 56, at 241, 249-52 (1971); *see also* Dennis Daley, *Attribution Theory and the Glass Ceiling* <<http://www.hbg.psu.edu:80/faculty/jxr11/glass1sp.html>>. It is also interesting to note that it was the representatives of *employers* who complained in the debate over Title VII that the Act may defeat the employer's right to hire by merit.

Cronyism is decidedly antimerit. One report notes that in the Detroit Police Department, a person was promoted to lieutenant over 200 sergeants who were ranked higher on a candidate list. He was the brother of the Executive Deputy Police Chief. In the same department, an investigator was promoted to sergeant over 570 cops who ranked higher. She was married to the Deputy Police Chief. *See* John Below, "Cronyism" in *Cop Promotions?*, DETROIT NEWS, Oct. 8, 1995, at A1.

129. *See infra* notes 132, 136.

130. *See* FEDERAL GLASS CEILING COMM'N, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 6 (1995) [hereinafter GLASS CEILING COMM'N]; Susan E. Tifft, *Board Gains*, WORKING WOMAN, Feb. 1994, at 37-38 (reporting that "white men continue to hold 90% of the publicly held Fortune 1000 board seats" and that "many companies still use old math for an ideal board: 10 friends of the chairman, one black and one woman").

with other white men,¹³¹ the cronyism defense has a negative disproportionate effect on persons of color and white women, the classes of persons the statute was originally designed to protect.¹³² A concept of discriminatory intent that sanctions the use of this criteria operates to defeat the very purposes of the Act.¹³³ In fact, cronyism is exactly the practice that Title VII was enacted to forbid.¹³⁴

In Part III below, I examine the prevalent myth that affirmative action's purpose and effect is to promote unqualified persons of color and white women over qualified white males. As I demonstrate, this myth has led to increasing hostility and resentment among white males.¹³⁵ Ironically, these popular misconceptions about affirmative action apply accurately to cronyism but no one—least of all those angry white men—seems to notice. In essence, cronyism is

131. Research by labor economists demonstrates that approximately 50% of all workers find their jobs through friends and relatives. See James D. Montgomery, *Social Networks and Labor-Market Outcomes*, 81 AM. ECON. REV. 1408, 1408 (1991).

132. There are "strong inbreeding biases between individuals of the same race, religion, sex, age and education." *Id.* at 1413; see also Peter V. Marsden, *Homogeneity in Confiding Relations*, 10 SOCIAL NETWORKS 57, 67–69 (1988) (demonstrating strong tendency to form intimate associations along racial/ethnic lines); Peter V. Marsden, *Core Discussion Networks of Americans*, 52 AMER. SOC. REV. 122, 126 (1987) (demonstrating race/ethnic homogeneity of interpersonal environments); *British Male Cronyism*, STAR TRIBUNE, Nov. 4, 1992 (reporting on a survey of British male business leaders who admitted that they were more likely to promote their cronies than women into top positions).

133. Similar arguments can be made for decisions based on nepotism. In his dissent in *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), Judge Adams recognized the link between making decisions based on nepotism and race discrimination. Criticizing the majority for concluding that it was not error for the lower court to exclude evidence of nepotism in a race discrimination case, Judge Adams states:

[N]epotism is by its nature a nonobjective consideration in hiring or promotional decisions that has the effect of locking in the racial and ethnic status quo. If a workforce is racially segregated and hiring is based on kinship to the workforce in place, the pattern of segregation will not be altered. Thus, in ascertaining whether purportedly legitimate reasons were the actual grounds for the employment decision, evidence that the decision-makers sought to advance "one of their own" bears important inferential weight.

Id. at 927.

134. Professor Epstein implicitly recognizes this in his argument in *Forbidden Grounds* that Title VII should be repealed in the private sector. See EPSTEIN, *supra* note 60, at 60–69. Epstein argues that workplaces should have the option to organize themselves with persons of similar tastes in order to improve efficiency of the workplace. See *id.* His argument is that persons with similar tastes create fewer communication and governance problems. Businesses, therefore, should be free to organize in this manner if they choose. See *id.* Without repealing Title VII, the courts come close to Professor Epstein's recommendation by reinterpreting the intent requirement to permit cronyism. Even Professor Epstein, however, the most vocal advocate against the employment discrimination laws, may not have endorsed the cronyism defense in an action against the Navy because he admits that there is a role for regulation of public employers. See *id.*

135. See *infra* notes 211, 212, 217–20 and accompanying text.

affirmative action (in all of its negative, mythical connotations) for white males. The only difference between the myth of affirmative action and the reality of cronyism is the identity of the beneficiaries. Affirmative action beneficiaries are women and persons of color, who traditionally have had employment opportunities closed to them. Cronyism beneficiaries are predominantly white males, who generally do not need any additional help because of their traditional connections to power.¹³⁶

A theory of affirmative action in employment discrimination law that would permit employers to exalt "less qualified" women and persons of color over white men would meet with much more opposition than the cronyism defense has, even though the affirmative action theory would be consistent with the purposes and goals of Title VII.

A return to rampant cronyism may cause even greater societal ills: it may actually contribute to a less desirable pool of female and minority workers. One study on the glass ceiling in career development of federal employees noted that women and minorities believed that "biases and in-group buddy systems" operate to deny women and minorities promotions.¹³⁷ This perception, according to the report, can seriously undermine the merit principle by adversely affecting the motivation and productivity of women and minorities who believe that they are not being promoted in accordance with their merit.¹³⁸

The evolution of the cronyism defense sheds some light on the changing nature of discriminatory intent in employment discrimination law. In earlier cases,

136. Cronyism benefits white males to the detriment of persons of color and women. See, e.g., Catherine M. Brennan, *Federal Mapping Employees File Class Action Title VII Suit*, DAILY RECORD, Sept. 5, 1996, at 9 (reporting that suit against Defense Mapping Agency alleging "nepotism and cronyism among white employees, ensuring that whites who are related to and who socialize with white managers are allowed to advance rapidly and get undeserved promotions"); David M. Halbfinger, *New Jobs for Malone's Old Pals*, BOSTON GLOBE, Feb. 10, 1997, at A9 (describing Massachusetts State Treasurer who allegedly had protected his cronies from layoffs at the expense of other workers, including eight older females who filed union grievances alleging that Malone had transferred a friend to a higher pay grade than the women who were training him for his new job); Robert J. Lopez, *Forced out of Fire Academy, Women Say*, LOS ANGELES TIMES, Nov. 15, 1994, at B1 (recounting that an audit of the Personnel Department of the Los Angeles Fire Department found that widespread cronyism, nepotism, and racial discrimination were responsible for the department's inability to integrate its 95% white male, top level administration); Juan Williams, *It's a White Thing: What's Wrong With Our Affirmative Action Debate?* WASHINGTON POST, Apr. 2, 1995, at C1 (Christopher Edley, the former Clinton administration official in charge of the White House's affirmative action review and a Harvard Law School Professor, is quoted as saying, "Cronyism is not always illegal; but it's every bit as effective in excluding people from important opportunities."); John Wilson, *Union Cronyism Thwarts Efforts to Diversify Papers' Workforce*, DETROIT NEWS, July 18, 1995, at A6 (stating that contracts allowing unions to do their own hiring for news production jobs tend to reduce diversity by permitting unions to practice cronyism and nepotism in hiring).

137. See Daley, *supra* note 128.

138. See *id.*

plaintiffs alleged that decisions resulting from cronyism or nepotism raised an inference of discrimination. Although most courts rejected this argument,¹³⁹ at least one court, the Eleventh Circuit in *Roberts v. Gadsden Memorial Hospital*,¹⁴⁰ agreed. More recently, however, in the wake of *St. Mary's Honor Center*, cronyism has emerged as a complete *defense* to employment discrimination.¹⁴¹

Although it is unlikely that cronyism accounts for a large majority of cases, its existence as a complete defense demonstrates the potential effects of the Supreme Court's recent interpretation of Title VII's intent requirement.¹⁴² In *St.*

139. See, e.g., *Autry v. North Carolina Dept. of Human Resources*, 820 F.2d 1384 (4th Cir. 1987); *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983).

140. No. 86-3826, 1988 U.S. App. LEXIS 19507, at *11-*15 (11th Cir. Jan. 13, 1988); see also *Ibrahim v. New York State Dept. of Health*, 904 F.2d 161, 162, 167 (2d Cir. 1990) (reversing the lower court's finding of no discrimination where plaintiff was clearly better qualified in "one critical respect" and cronyism masked discriminatory animus).

141. See, e.g., *Odom v. Frank*, 3 F.3d 839, 849-50 (5th Cir. 1993) (reversing a lower court's factual finding of age and race discrimination where there was strong evidence that the defendant had preselected a younger white male and was just "going through the motions" in the interview process; the court stated that even though the promotion may not have passed the "smell test," the evidence seemed to confirm the operation of the "good old boy" network, which was not proof of age or race discrimination). Before *St. Mary's Honor Center*, one court considered evidence of cronyism to create a strong inference of discrimination. See *Roberts*, 1988 U.S. App. LEXIS 19507, at *15. Other courts found that evidence of cronyism created an inference that discrimination does not exist. See, e.g., *Nunnally v. Department of Pub. Welfare*, No. 86-C-7338, 1989 U.S. Dist. LEXIS 17027, at *93 (D. Mass. Jan. 20, 1989). Other courts saw evidence of cronyism as irrelevant to the question of whether there was discrimination. See *Hill v. Bethlehem Steel Corp.*, Nos. 87-7763, 87-7764, 1989 U.S. Dist. LEXIS 6368, at *8 (E.D. Pa. June 6, 1989).

142. Some courts deciding that cronyism is not illegal under the discriminatory treatment scheme of Title VII have suggested that there may be a disparate impact cause of action if the employer adopts a policy of cronyism. See, e.g., *Autry v. North Carolina Dep't of Human Resources*, 820 F.2d 1384, 1385 (4th Cir. 1987) (stating that a discrimination suit based on cronyism "would better suit a disparate impact case than a disparate treatment case"); see also 42 U.S.C. § 2000e-2 (k)(1)(A)-(B) (1994); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); cf. *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 905 n.7 (11th Cir. 1990) (concluding that decisions made from nepotism do not constitute intentional discrimination but may be basis of disparate impact case).

This simplistic response, however, does not cure the problem. In fact, it highlights it. Because of the limitations placed on the disparate impact model of proof and an increasingly narrow construction of intent under the discriminatory treatment model, there has emerged a wide gulf between the two models of proof into which cronyism and many other types of cases fall. The disparate impact section of the 1991 Civil Rights Act states:

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*; or

Mary's Honor Center and *Hazen Paper*, the defendants' desire to harm their black and older employees, respectively, was insufficient intent to prove race and age discrimination; in *Foster*, Travis' knowing promotion of an unqualified friend over a qualified black female also fell short of the requisite intent. Thus, it seems that these cases stand for the proposition that there is no violation of Title VII when an employer's decision that is not based on merit is accompanied by a specific intent to harm, or knowledge that the decision will inevitably harm, a member of the protected class.

This proposition critically reduces Title VII's effectiveness and cannot be supported by any rational basis. If the purpose of focusing on the employer's conscious intent is to assure that the employer possesses a culpable state of mind, the employers in *St. Mary's Honor Center*, *Hazen Paper*, and *Foster* should all be held liable. None of these employers can claim that he acted "accidentally" or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refused to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1)(A)(i)-(ii) (emphasis added).

This section creates major hurdles for the plaintiff. Although there is an escape clause that permits a plaintiff to prove that the employer's practices are not severable and the decision making process must be examined as a whole, 42 U.S.C. § 2000e-2(k)(1)(B)(1), generally the plaintiff must prove that each particular practice challenged causes a disparate impact. *See, e.g., Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1370 (5th Cir. 1996).

Because hiring based on cronyism is not normally a policy or even a practice that dominates a workplace's decision making but rather is an ad hoc decision, it may be difficult to prove that cronyism causes a disparate impact. There will likely not be sufficient decisions based on cronyism in the particular workplace that will permit a plaintiff's expert to find statistical significance in order to prove that cronyism caused a disparate impact. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 999-1000 (1988); *Fisher v. Vassar*, 70 F.3d 1420, 1445-46 (2d Cir. 1995); *Thomas v. California State Dept. of Corrections*, No. 91-15870, 1992 U.S. App. LEXIS 20346, at *3 (9th Cir. 1992); *Thomas v. Washington City Sch. Bd.*, 915 F.2d 922, 926 (4th Cir. 1990); *Thomas v. Metroflight*, 814 F.2d 1506, 1509-10 & n.3 (10th Cir. 1987).

It may theoretically be possible for an individual plaintiff to prevail in a disparate impact challenge to a decision based on cronyism by using social science data demonstrating that cronyism, if it were to happen across the country, would have a disparate impact on women and minorities, *see, e.g. Dothard v. Rawlinson*, 433 U.S. 321 (1977) (striking down height and weight requirements as discriminatory against women when used as a proxy for strength). However, because cronyism differs in its ad hoc nature from a policy of weight and height requirements it may be difficult to present convincing data to the court. Moreover, even if the court would accept social science data that would demonstrate that most decision makers are white males and most of them associate with white male cronies, and that, therefore, cronyism as an employment policy would have a disparate impact on women and minorities, this proof would be extremely time consuming, inefficient, and expensive.

In fact, I have found no successful cases brought alleging that an employment decision based on cronyism violated Title VII by creating a disparate impact on members of a protected group.

“inadvertently.”¹⁴³ Each knew exactly what he was doing. If the purpose of narrowing the definition of intent is to assure that the protected characteristic is a “but for” cause of the employment decision, this narrow reading of intent also fails because it does not take into account the possibility that unconscious stereotypes and biases played a role in the employer’s decision making.¹⁴⁴

III. RECONCILING MERIT WITH LIBERTY IN AFFIRMATIVE ACTION

A. Affirmative Action Misunderstood: Definitional Problems

Affirmative action is embattled. The popular notion is that affirmative action’s purpose and effect are to promote less-qualified women and persons of color over more-qualified white men.¹⁴⁵ This understanding is seriously flawed. First, there is a definitional problem. Affirmative action means much more (and much less) than giving women and persons of color preference over more-qualified white males.¹⁴⁶ The Glass Ceiling Commission defines affirmative action as “the deliberate undertaking of positive steps to design and implement employment procedures that ensure the employment system provides equal opportunity to all.”¹⁴⁷ Affirmative action “*does not mean imposing quotas, allowing preferential treatment or employing or promoting unqualified people.* It means opening the system and casting a wide net to recruit, train and promote opportunities for advancement for people who can contribute effectively to a corporation and, consequently, the nation’s economic stability.”¹⁴⁸ As Professor Patricia Williams states:

143. Senator Humphrey inserted the word “intentional” into the statute to avoid liability for “accidental” or “inadvertent” discrimination. LEGISLATIVE HISTORY, *supra* note 49, at 3006.

144. For discussion of unconscious discrimination, see Allen David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049 (1978); Linda Hamilton Krieger, *The Content of Our Categories*, 47 STAN. L. REV. 1161, 1167 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection*, 39 STAN. L. REV. 317 (1987); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

145. See CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE 80 (1996).

146. Christopher Edley states:

Affirmative action is a phrase used in a wide range of contexts, not just about employment and university admissions, which is what most people seem to mention first. Moreover, it is not a single tool but a family of tools intended to create opportunity for its beneficiaries. However, it is not *any* opportunity-enhancing measure, only one in which race (or another relevant group characteristic) is somehow taken into account—precisely how would vary greatly depending on the tool.

Id. at 17.

147. GLASS CEILING COMM’N, *supra* note 130, at 22.

148. See *id.* (emphasis in original).

Contrary to lay understanding, very few affirmative action programs that have ever been judicially sustained force employers to hire anyone; this is the difference between goals and quotas, and affirmative action programs set goals not quotas. Other kinds of affirmative action programs encourage searches for candidates, or provide financial incentives for hiring, or set aside investment opportunities or financing breaks for minority businesspeople.¹⁴⁹

Second, the notion that affirmative action's purpose or effect is to promote less-qualified blacks over more-qualified whites is a myth.¹⁵⁰ White men tend to think that white men cannot get jobs anymore.¹⁵¹ As Professor Patricia Williams demonstrates in *The Rooster's Egg*, the numbers show that this perception is not based in reality.¹⁵² The Glass Ceiling Report, issued by a bipartisan federal commission initiated by Elizabeth Dole and sponsored by Robert Dole, found that thirty years after the effective date of the Civil Rights Act, white men still hold 95% of all senior management positions. Black women hold only 5% of middle management positions while black men hold 4% of middle management positions.¹⁵³

The Bureau of Labor Statistics demonstrates that blacks comprise approximately 10% of the labor force but work in lower paying, low status jobs with reference to their proportion in the population.¹⁵⁴ Thirty percent of nursing aides, 29% of domestic servants, 25% of vehicle washers, and 21% of janitors are black.¹⁵⁵ On the other hand, 0.7% of geologists, 1.5% of dentists, 2.1% of architects, and 2.6% of lawyers are black.¹⁵⁶

Some economists would argue that these statistics are the result of individual choice.¹⁵⁷ Wage inequality and occupational segregation, however, are not the products of individual rational choice but are caused by a host of factors including inferior schools, substandard physical environments, and discrimination.¹⁵⁸

B. Separating Myth from Reality

The antimerit concept is a myth relying on inaccurate assumptions of

149. See PATRICIA J. WILLIAMS, *THE ROOSTER'S EGG* 95 (1995).

150. Christopher Edley says that "[t]he single most pernicious popular misconception about affirmative action is that it means quotas." EDLEY, *supra* note 145, at 18.

151. See WILLIAMS, *supra* note 149, at 97.

152. See *id.* at 97-106.

153. See *id.* at 97. When faced with these numbers, employers contend that they cannot find qualified black candidates, even though there has been a 36% increase in college-educated African Americans since 1982. See *id.* at 97-98.

154. See Mark Haggerty & Colleen Johnson, *The Hidden Barriers of Occupational Segregation*, 29 J. ECON. ISSUES 211 (1995).

155. See *id.*

156. See *id.*

157. See generally, e.g., EPSTEIN, *supra* note 60.

158. See GLASS CEILING COMM'N, *supra* note 130, at 36.

black inferiority and furthered through invisible white privilege. The myth is perpetuated through the law and reinforced by the media. This Part demonstrates the interaction of forces that continue to maintain the myth.

1. Case Law's Contribution to the Myth

Case law, even cases that approve of affirmative action programs, perpetuate the myth that affirmative action programs rely on an antimerit principle. In *United Steelworkers of America v. Weber*,¹⁵⁹ the Court upheld an affirmative action plan in a collective bargaining agreement between Kaiser Aluminum and the Steelworkers union.¹⁶⁰ The program was instituted voluntarily in order to correct the imbalance of white craft workers to black craft workers in the plant. The imbalance had resulted from two historical facts: (1) before the 1974 plan, blacks had not had the opportunity to train for craft worker positions because craft unions that had historically provided the training in craft skills had excluded blacks from their ranks;¹⁶¹ and (2) the company, which did not conduct training for craft positions before the plan, refused to hire as craft workers persons who had no prior training or experience.¹⁶² The combination of these two policies, one racially discriminatory and the other facially neutral as to race, resulted in the virtual exclusion of blacks as craft workers. Before the 1974 plan went into effect, fewer than 2% of the skilled craft workers at the Gramercy plant were black,¹⁶³ even though the work force in the geographical area was approximately 39% black.¹⁶⁴

The affirmative action plan that was the subject of the litigation provided that the company would operate a training program to teach black and white unskilled workers the skills necessary to become craft workers. The company selected program participants on the basis of seniority but reserved 50% of the training program positions for black employees,¹⁶⁵ regardless of their seniority in relation to whites.¹⁶⁶

The Supreme Court upheld the training program even though selection was not colorblind. The Court reasoned that although the Act stated it would not *require* preferential treatment, it did not forbid *voluntary* preferential treatment. "Such a prohibition would augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals."¹⁶⁷

Declining to "define in detail the line of demarcation between permissible

159. 443 U.S. 193 (1979).

160. *See id.* at 197-98.

161. *See id.*

162. *See id.* at 198.

163. *See id.*

164. *See id.* at 199.

165. *See id.* at 198.

166. *See id.* The plaintiff, Brian Weber, was a white male whose application for a craft training program at Kaiser was rejected. *See id.* at 199. The most-senior black selected for the program had less seniority than a number of the white applicants. *See id.*

167. *Id.* at 207.

and impermissible affirmative action plans,¹⁶⁸ the Court upheld the Kaiser plan because its purposes mirrored Title VII's, and the plan did "not unnecessarily trammel the interests of white employees."¹⁶⁹ The Court noted that the plan and Title VII shared the common purposes of breaking down "old patterns of racial segregation and hierarchy"¹⁷⁰ and opening "employment opportunities for Negroes in occupations which have been traditionally closed to them."¹⁷¹

The plan did not unnecessarily burden white employees because it did not create an absolute bar to their advancement: 50% of those selected for training would be white.¹⁷² Moreover, the effect of nonselection would not be severe: it would not require the discharge of white employees in favor of black replacements.¹⁷³ Finally, the plan was acceptable because it was a temporary measure.¹⁷⁴

Unfortunately, the court in *Weber* did not confront the arguments of the white workers that they had the right to job training. Instead, the Court relied heavily on the goal of remedying past discrimination in order to uphold the plan. Relying on remediation as a justification for race-based affirmative action policies takes a political toll: it gives whites the impression that although they did not participate in the past discrimination, they are innocently suffering as a result of the prior discrimination.

Unfortunately, the court did not mention the more compelling justification for Kaiser's plan. The "victims" of the policy claimed that they were "entitled" to training on the basis of their seniority, not on the basis of merit. Although the recognition of seniority rights may have important policy bases, seniority is not indicative of or equivalent to merit.¹⁷⁵ Thus, although workers may have had some expectations rooted in seniority, the company did not lower its standards or reduce the merit requirement in order to include 50% blacks in the training program. In fact, it is doubtful that the plaintiff had any expectation based on seniority because the program involved in this suit had been only recently established for the specific purpose of giving minorities skills they had previously been barred from acquiring. The whites who were permitted to participate in the program had not previously been barred from the union, the source of the skills training. It is doubtful that the training program would have existed for the 50% white employees had there not been discrimination against the blacks.¹⁷⁶ Thus, Brian Weber had no previous expectation that once he acquired a certain amount of seniority he would be able to

168. *Id.* at 208.

169. *Id.* at 208.

170. *Id.*

171. *See id.* (quoting 110 Cong. Rec. 6548 (1964) (remarks of Senator Humphrey)).

172. *See id.*

173. *See id.*

174. *See id.*

175. *See Fiss, supra* note 56, at 301, 305.

176. This is a situation where the interests of blacks and working-class whites may coincide rather than conflict, although the Court did not characterize their interests as being aligned.

participate in the training. Whites actually benefitted from the plan because otherwise they would not have gotten training.

In fact, in a society where segregated work forces had been prevalent and employers generally refused to hire black employees for certain positions before the effective date of the statute, seniority itself, the "victim's" claimed advantage, was very likely a result of discrimination.

In *Johnson v. Transportation Agency of Santa Clara*,¹⁷⁷ the Court upheld Diane Joyce's promotion to the position of road dispatcher over the male plaintiff, Paul Johnson. The director of the agency, Graebner, testified that he considered Joyce's gender when he made the decision to promote Joyce instead of Johnson.

The director's decision was authorized by an affirmative action plan implemented by the county in response to the gross underrepresentation of women in certain job categories and to serious job segregation. As the Court explained:

[W]hile women constituted 36.4% of the area labor market, they composed only 22.4% of Agency employees. Furthermore, women working at the Agency were concentrated largely in EEOC job categories traditionally held by women: women made up 76% of Office and Clerical Workers, but only 7.1% of Agency Officials and Administrators, 8.6% of Professionals, 9.7% of Technicians, and 22% of Service and Maintenance Workers.... [N]one of the 238 Skilled Craft Worker positions was held by a woman.¹⁷⁸

The county policy had the long term goal of permitting "attainment of an equitable representation of minorities, women and handicapped persons" in all job categories in the county but counseled that short-range goals be established and annually adjusted.¹⁷⁹ Thus, the plan, in essence, did not require any set asides or quotas but simply authorized the consideration of race and gender along with other characteristics when evaluating qualified candidates for the job.

The Court concluded that Graebner's employment decision was compatible with Title VII¹⁸⁰ because the decision corrected a "manifest imbalance" in a traditionally segregated workforce.¹⁸¹ It did not unnecessarily trammel the interests of male workers¹⁸² because it authorized the consideration of race or

177. 480 U.S. 616 (1987).

178. *Id.* at 621.

179. *Id.* at 622. The annual adjustments were necessary because there were barriers other than illegal discrimination that could operate to hold women back, such as low turnover, the heavy lifting required for some jobs, the small number of jobs within some categories, and the smaller numbers of qualified women for jobs requiring specialized training and experience. *See id.*

180. *See id.* at 641-42. Although the defendant was a public agency, there was no challenge made pursuant to the Equal Protection Clause. *See id.* at 620 n.2.

181. Before Joyce was promoted to the road dispatcher position, not one of the 238 skilled craft positions in the county was occupied by a woman. *See id.* at 621.

182. Paul Johnson had "no absolute entitlement to the road dispatcher position." *Id.* at 638. Seven applicants were classified as qualified, and the director of the agency was authorized to select among them. *See id.*

gender as merely a plus factor.¹⁸³ Finally, the plan was legal because it was intended to attain, not maintain, a balanced work force.¹⁸⁴

The opinion leaves the definite impression that Diane Joyce is a less-qualified woman who was promoted over a more-qualified male, Paul Johnson. A closer look at the facts, however, reveals that this impression is simply false. Diane Joyce was subjected to escalating discrimination throughout her period of employment by Santa Clara County.¹⁸⁵ In 1972, Joyce, an experienced bookkeeper, applied for a job of senior account clerk with the transportation department. Two interviewers told her independently, "You know, we wanted a man." Because the job was relatively low paying (about \$550 a month), no men applied for the position, however, and Joyce got the job. A few months later, the county gave every worker a pay raise except for the seventy female account clerks at the department. When Joyce asked about the raise, the director of personnel told Joyce and her coworkers, "Oh, now, what do you girls need a raise for? All you'd do is spend the money on trips to Europe." Joyce was shocked by the personnel director's statement because all of the women she knew were supporting families through death or divorce. Joyce had never even seen Mexico, which bordered her home state. She had never traveled to Europe.

This treatment strengthened Joyce's resolve to apply for the next better-paying "male" job that came up. In 1974, an opening arose for a road dispatcher. Joyce and Paul Johnson, who years later would become the plaintiff in *Johnson v. County of Santa Clara Transportation Department*,¹⁸⁶ applied. Although neither Joyce nor Johnson got the job, the county refused to accept Joyce's application because she had no road crew experience. Johnson also lacked road crew experience, but his application was accepted.

Joyce was determined to get road crew experience. She took evening courses in road maintenance and equipment operation. Upon learning that Joyce had applied for a road crew position in 1975, her supervisor turned red and shouted, "You're taking a man's job away!" Shortly thereafter, ten openings arose for road crew workers and Joyce scored third out of eighty-seven applicants in the test. She got one of the positions.

As the only woman on the road crew, Joyce's male coworkers and supervisor harassed her constantly, changing instructions as they trained her on equipment, giving her driving tips that nearly blew up her engine, drawing obscene graffiti about Joyce on the side of trucks, calling her "the piglet," refusing to issue her the regulation coveralls,¹⁸⁷ keeping the ladies' room locked in the yard, and

Moreover, Johnson was not replaced by Joyce. He retained the same position at the same salary as before. *See id.*

183. *See id.*

184. *See id.* at 639.

185. The following fact description comes from SUSAN FALUDI, *BACKLASH* 389-91 (1991).

186. 480 U.S. 616 (1987).

187. The Court's opinion explains this incident:

In performing arduous work in the job, she had not been

refusing to stop to let her use the bathroom on the road. "You wanted a man's job, you learn to pee like a man," her supervisor told her.

A stockroom storekeeper called a general meeting in the depot's ready room at which he shouted at Joyce, "I hate the day you came here. We don't want you here. You don't belong here. Why don't you go the hell away?" The other men looked on and nodded in approval.

In 1980, another position opened up for the road dispatcher. Both Joyce and Johnson applied. The test proved them to be equally qualified for the position,¹⁸⁸ but Joyce had four years' experience on the road crew and Johnson had one and a half years. They were each interviewed by a panel of three. Of the three interviewers, at least two were biased against Joyce. One was her supervisor, whom she had grieved against in order to get her protective coveralls.¹⁸⁹ The other one, with whom she had several "differences of opinion," referred to her later in court as a "rebel-rousing, (sic) skirt-wearing person" and "not a lady."¹⁹⁰ Not surprisingly, the panel recommended that Johnson be promoted.¹⁹¹

Joyce complained to the new director of the transportation department who reversed the panel's decision. That afternoon, Joyce's supervisor told her, "Well, you got the job, but you're not qualified." Meanwhile, Johnson, who had been promised the job by the supervisor,¹⁹² decided to sue. He hired a lawyer and filed a charge alleging that the county had given the job to a "less qualified" woman.¹⁹³

Diane Joyce's story is shocking. Throughout her tenure at the county, she was the victim of extreme hostility and discriminatory treatment because of her gender. Perhaps even more startling, however, is the transformation of her story by the legal process. The panel recommended that Johnson be promoted over her even though by the county's definition Joyce's examination results were equal to those of Paul Johnson, and she had more years of experience in road work at the county. This decision was obviously tainted by the stereotypical perceptions that at least two of the panelists harbored concerning the propriety of women in the road dispatcher and road work jobs. On the panel were two persons with whom she had serious conflicts. One of the panelists was her supervisor on the road crew, the

issued coveralls, although her male co-workers had received them. After ruining her pants, she complained to her supervisor, to no avail. After three other similar incidents, ruining clothes on each occasion, she filed a grievance, and was issued four pairs of coveralls the next day.

Id. at 624 n.5.

188. Joyce got 73 points and Johnson got 75 points on the written exam. *Id.* at 624. The county "Rule of Seven" hiring policy required that the top seven scorers on the test be treated as equally qualified for the job because of the minimal differences in top scores. See FALUDI, *supra* note 185, at 529-30. It is interesting that this fact did not appear in the Court's opinion.

189. See *Johnson*, 480 U.S. at 624 n.5.

190. *Id.*

191. *Id.* at 624..

192. See MELVIN I. UROFSKY, *AFFIRMATIVE ACTION ON TRIAL 1* (1997).

193. FALUDI, *supra* note 185, at 392.

same man who had participated in her severe, hostile treatment, who had refused to issue her the standard coveralls necessary for the job, and who had told her she would have to “pee like a man.”¹⁹⁴ A second panelist had called her a “rebel (sic) rousing, skirt wearing person.”¹⁹⁵ This evidence alone would probably be sufficient for a finding of discrimination against the county under the Civil Rights Act of 1991.¹⁹⁶

Despite these egregious facts, the Court’s opinion does little to dispel the impression that Joyce was less-qualified than Johnson. Unfortunately, the trial court had found that Paul Johnson was more-qualified than Diane Joyce, and that the county had never discriminated against women. The Ninth Circuit Court of Appeals did not disturb these factual findings on appeal. Because of these findings, the Supreme Court was constrained to decide the question of whether Title VII permitted the county to promote a less-qualified female over a more-qualified male pursuant to a plan whose purpose was to overcome a “manifest imbalance” in “traditionally segregated jobs.”¹⁹⁷

Although the Court’s positive answer to this question shields from liability employers who write voluntary affirmative action plans that are properly tailored, this characterization of the facts takes a political toll: many white employees who lose out to blacks as a result of affirmative action programs believe that they deserve the jobs because they are more meritorious than the black employees who get the jobs. The same is true for many male employees who lose out to women.

Even worse is the full-fledged frontal attack against affirmative action taken by certain members of the Court. For example, in *Johnson*, Justice Scalia distorts reality in order to condemn affirmative action. Scalia waxes eloquent about poor Paul Johnson, the “better-qualified” white male who is a victim of discrimination:

[T]he only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominately unknown, unaffluent, unorganized—suffer this injustice at the hands of a

194. *Id.* at 390.

195. *Johnson*, 480 U.S. at 624 n.5.

196. 42 U.S.C. § 2000e-2 (m)(1994) provides: “Except as otherwise provided in this subchapter, an unlawful employment practice 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.”

This section, which overruled in part and upheld in part the decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), permits an employee to demonstrate that an employment decision was based on gender stereotypes. If it is, the decision is illegal. *See id.* at 250.

Of course, the facts of *Johnson* show that there was not only evidence of gender stereotyping but also evidence of an extremely hostile environment that management tolerated, condoned, and participated in.

197. *Johnson*, 480 U.S. at 627-28.

Court fond of thinking itself the champion of the politically impotent.¹⁹⁸

This statement totally contradicts the real story of Diane Joyce's employment at the department of transportation. The real story demonstrates convincingly that Diane Joyce, not Paul Johnson, was the victim of discrimination. Unfortunately, both the dissent and the majority characterize Joyce as a beneficiary of a plan that accorded her special preference. This characterization maintains the privilege of white males,¹⁹⁹ even though the result in the case vindicated, to a certain extent, the discrimination suffered by Ms. Joyce.

As *Weber* and *Johnson* demonstrate, the case law in the affirmative action context continues to enforce the "precept of inferiority"²⁰⁰ and to perpetuate the antimerit myth of affirmative action, the myth that contributes to white-male anger and is reinforced through an intense campaign of disinformation that I describe in the next subsection.

2. Disinformation and the Myth

As I mention above, the antimerit myth is also perpetuated by a campaign of disinformation. This campaign, which finds a vulnerable audience due to a downturn in the economy since the enactment of the 1964 Civil Rights Act, is fueled through the popular media, through writings by judges and academics, and through litigation.²⁰¹

A persistent campaign against affirmative action is being waged in the popular media²⁰² and in the academic literature.²⁰³ Conservatives have pumped millions of dollars into the fight against affirmative action—a battle fought on the legal and policy levels by the Heritage Foundation, the Center for Individual Rights, the Manhattan Institute for Policy Research, the Mountain States Legal Foundation, and other foundations and think tanks founded by right-wing conservatives.²⁰⁴ Many of these organizations have funded the legal challenges to affirmative action that have reached the United States courts of appeals and the Supreme Court.²⁰⁵

The California Civil Rights Initiative,²⁰⁶ or, as it is commonly known, Proposition 209, resulted from public displeasure with affirmative action and was

198. *Id.* at 677.

199. For a discussion of white privilege, see *infra* notes 258–93 and accompanying text.

200. For a discussion of the precept of inferiority, see *infra* notes 239–57 and accompanying text.

201. See JEAN STEFANCIC & RICHARD DELGADO, NO MERCY 45–81 (1996); see also Susan Sturm & Lani Guinier, *The Future of Affirmative Action*, 84 CAL. L. REV. 953, 954 (1996).

202. See WILLIAMS, *supra* note 149, at 42–56.

203. See, e.g., EPSTEIN, *supra* note 60.

204. See STEFANCIC & DELGADO, *supra* note 201, at 45–81.

205. See *id.* at 45–52.

206. CAL. CONST. art. 1, § 31.

fueled by these groups.²⁰⁷ Proposition 209, which bans the use of preferences based on race, sex, color, ethnicity, or national origin,²⁰⁸ has inspired other state legislators from Delaware, Kentucky, Missouri, South Carolina, and Texas to enact similar legislation.²⁰⁹ Moreover, former Senator Bob Dole proposed a similar bill at the federal level.²¹⁰

Radio personalities such as Rush Limbaugh and Howard Stern, drawing on support from discontented white males, rail against affirmative action.²¹¹ Politicians, particularly from the Republican Party, use affirmative action as an issue to attract the support of white males.²¹² Legal academics characterize

207. For example, the Center for Equal Opportunity, founded in 1995 by Linda Chavez, has had several conferences on affirmative action, including a panel discussion on the California Civil Rights Initiative (CCRI), with one of its coauthors, Glynn Custred, on the panel. It sponsored a trip by Custred to Washington, D.C. to testify before a House Judiciary Subcommittee Hearing, and it held a press conference in which Custred discussed his efforts to place the California initiative on the ballot. See STEFANCIC & DELGADO, *supra* note 201, at 60. The Pacific Research Institute for Public Policy, a San Francisco-based libertarian think tank, has actively promoted the CCRI while sponsoring books and conferences on affirmative action. See *id.* at 80.

208. For the language of the CCRI, which evidently is difficult to find, see Allen R. Kamp, *Anti-Preference in Employment Law*, 18 CHICANO-LATINO L. REV. 59, 60 (1996). Unbeknownst to its supporters, the CCRI could potentially backfire. Professor Kamp demonstrates that the ban on preferences could be used to attack preferences that promote white males such as legacy admits to universities, see *id.* at 74, or preferences that are considered legal under Title VII, such as granting preferences to the paramour of the boss, see *id.* at 63-64.

Proposition 209, which was passed by a majority of California voters in November, 1996, see Jerome Karabel & Lawrence Wallack, *Proponents Of Prop. 209 Misled California Voters*, CHRISTIAN SCI. MONITOR, Dec. 5, 1996, at 19, was temporarily restrained by Federal Judge Thelton Henderson, see *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), vacated, 110 F.3d 1431 (9th Cir. 1997).

209. DEL. CODE ANN. tit. 19, § 711 (Michie 1995); KY. REV. STAT. ANN. § 344.110 (Michie 1997); MO. ANN. STAT. § 213.055 (West 1996); S.C. CODE ANN. § 1-13-80 (Law. Co-op. Supp. 1996); TEX. LABOR CODE ANN. § 21.113 (West 1996).

210. S. 1085, 104th Cong. § 8(2) (1995).

211. See WILLIAMS, *supra* note 149, at 42-56.

212. See Williams, *supra* note 136, at C1:

There are different ideas among whites about what is going on with affirmative action. There are white men who feel vulnerable and are trying to knock out every competitor out of self-interest. Then you've got people who may not be anxious for themselves but are convinced that affirmative action is bad for America. But what is obvious is the partisan Republican use of the issue to attract white men.

Id. (quoting Randall Kennedy, Professor of Law at Harvard University).

A good example of this partisan use is the advertisement of North Carolina Senator Jesse Helms during the 1990 election campaign for the United States Senate seat. Helms was trailing democrat Harvey Gantt, a black, when he unleashed the ad. Helms' ad showed a pair of white hands clutching a rejection letter and a pair of black hands holding a letter of appointment. The voice-over stated, "You know you deserved that job." This ad with its implication that qualified white men were losing jobs to less-qualified blacks struck a nerve in the hearts of angry white men. Helms came from behind to win the election. Many

affirmative action as "race discrimination."²¹³ Even sitting federal judges have voiced the opinion that blacks are less qualified than whites. In *Overcoming Law*, Judge Richard Posner of the Seventh Circuit Court of Appeals discussed affirmative action in law school faculty hiring. Criticizing Professor Duncan Kennedy's prediction that hiring more minority candidates for law faculties would improve legal scholarship, Posner states:

There are not many qualified black candidates, and a law school willing to *bend* its *normal* standards only so far as necessary to hire one or two blacks may find itself under great pressure to hire the one or two who are more "authentically" black. The effect is to confine most black law professors to the *academic ghetto* of critical race theory.²¹⁴

attributed his victory to the sentiments unleashed by the ad. See Jonathan Freedland, *Us, The Angry Vote*, THE GUARDIAN, June 20, 1995, at T3; Carl T. Rowan, *Tough Talk About Racism*, USA WEEKEND, Dec. 9, 1990, at 4.

213. See, e.g., EPSTEIN, *supra* note 60, at 410.

214. RICHARD A. POSNER, *OVERCOMING LAW* 106 (1995) (emphasis added).

Posner states that there are not many qualified blacks. He does not attempt to define "qualified," but we can safely assume that he refers to the traditional qualifications required of applicants for law professor positions. Traditional qualifications include high grades from a prestigious law school, participation on law review, a federal clerkship, usually at the appellate level, recommendations from highly regarded law professors, and a demonstrated interest in writing. Although these qualifications appear to judge candidates on a race-neutral basis, they do not.

Black students do not achieve all of these "qualifications" in the same numbers as whites precisely because of prejudice, either unconscious or conscious. They generally do not earn grades that are as high as those received by whites and they are less frequently elected to law reviews. Posner would likely argue that the reason that black students do not do as well as white students is that they were admitted to law school under different standards. Law school grades usually measure, however, an extremely narrow band of achievement: the ability to perform well on timed exams. See Sturm & Guinier, *supra* note 201, at 976. Studies at the University of Pennsylvania Law School and the University of Texas Law School demonstrate that LSAT scores are very weak predictors of success in law school. See Lani Guinier et al., *Becoming Gentlemen*, 143 U. PA. L. REV. 1, 23 n.70, 27 n.74 (1994); Sturm & Guinier, *supra* note 201, at 971-75.

African Americans come from a rich oral tradition and often excel in the courses and activities that honor this tradition such as clinical courses or participation in mock trial teams and on moot court. Unfortunately for African-American students, these courses and activities often come late in the law school experience and therefore do not affect the ever-important first-year grade point average, on which law review and other opportunities often depend. Some of these activities are not graded at all.

Moreover, the law school environment itself, especially in the most prestigious of law schools, is decidedly white and male. The vast majority of faculty members are white males. See Dowd, *supra* note 60, at 472 (describing the University of Chicago Law School). Only a few token persons of color and white women grace the halls. And even where there are faculty members from these groups, they generally occupy a lower status than white males do. Law students who are female and of color encounter difficulties in the law school culture, difficulties not found by students who are members of the dominant culture. See Sturm & Guinier, *supra* note 201 at 986. See generally Guinier et al., *supra*.

Robert Bork, former Solicitor General and United States appeals court judge, argues that affirmative action is "tyranny"²¹⁵ and cites approvingly to a study in which the authors compare "the assault in American universities on white males" to pre-Hitler German anti-Semitism.²¹⁶ Ironically, Bork wrote this account as the John M. Olin Foundation Scholar in Legal Studies at the American Enterprise Institute. As holder of the Olin chair in legal studies at the Institute, Bork received \$150,880 in 1991 alone.²¹⁷

Partly due to a change in the economy, this well-financed campaign of disinformation has successfully perpetuated the antimerit myth. Except for the top 20% of Americans, there has been a 17% loss of real income for Americans in the last fifteen years.²¹⁸ Thus, white males who see their opportunities for income advancement limited tend to blame their decrease in opportunities on women and minorities rather than on the economy in general.²¹⁹ This economic climate is in

One of these difficulties is finding mentors. See Guinier et al., *supra*, at 73-75. Because mentors are important for law students wishing to apply for competitive federal clerkships, black students and many women are at a distinct disadvantage. The "old boy network" determines who gets the most prestigious clerkships after law school.

Posner's "normal" standards are actually defined by white males. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 224 (1989); STEPHANIE WILDMAN, *PRIVILEGE REVEALED* 14-15 (1996). Many of these qualifications go to white males, not because of their individual merit, but because they are privileged members of the dominant culture.

Posner's analysis also fails for its reliance on the most narrow definition of standards and qualifications. A truly dynamic law school would try not to replicate its own faculty, but to diversify it in order to improve its standards. Certainly, a faculty rich in experience is one that is rich in ideas. Different experiences and a diversity of ideas should lead to a better law school: better teaching, better scholarship, and better service.

Even more troubling is Posner's characterization of critical race theory as the "academic ghetto." Perhaps without intending to do so, Judge Posner uses a race-based, derogatory reference to the "ghetto" in order to describe the type of scholarship that many dedicated African-American scholars have engaged in. This scholarship has demonstrated in a compelling manner, through the use of personal stories, that the law is not neutral: in fact, it often operates to maintain arbitrary barriers to equality that block the way of nontraditional (i.e., nonwhite and nonmale) candidates. See, e.g., Richard Delgado, *When a Story Is Just a Story*, 76 VA. L. REV. 95 (1990); Mari J. Matsuda, *Public Response to Racist Speech*, 87 MICH. L. REV. 2320 (1989). If this scholarship exists in the "academic ghetto," it occupies this position precisely because it is scholarship that is written mostly by persons of color, just as feminist legal scholarship is considered less prestigious than scholarship on law and economics or civic republicanism. See WILDMAN, *supra*, at 122. For a story about feminist scholarship, see *id.* at 127-32.

215. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM & AMERICAN DECLINE* 233 (1996).

216. *Id.* at 235.

217. See STEFANCIC & DELGADO, *supra* note 201, at 63.

218. See WILLIAMS, *supra* note 149, at 99.

219. See *id.* Ironically, the recession has been even worse to blacks. Blacks have suffered disproportionately from downsizing. See Annette Williams, *When Downsizing Hits Home*, BLACK ENTERPRISE, Mar. 1994, at 52; Williams, *supra* note 136, at C1 (describing white resentment).

stark contrast to the economy at the time of the passage of the Civil Rights Act of 1964. At that time, the economy was expanding, and one of the justifications for the law was to fill positions that the supporters of the legislation expected would exist in the future.²²⁰

Despite the popular belief that discrimination against white males is rampant, there is little or no evidence that reverse discrimination exists.²²¹ Studies by economists regarding women and affirmative action demonstrate that companies that have diversified have not decreased their productivity compared to companies that have not diversified.²²² Thus, economists conclude, since the companies with greater numbers of women have not reduced their productivity as compared to the companies with fewer women, the hiring of women must not have resulted from reverse discrimination.²²³

Unfortunately, there is a great deal of evidence that discrimination against women and minorities still exists. Social science studies demonstrate that vast inequalities remain between black and white America.²²⁴ Opportunities for the next generation of black children may be even bleaker than for their parents.²²⁵

Studies by the Urban League, using testers, demonstrate that African Americans with equal credentials are less likely to be offered jobs.²²⁶ Over 90,000 charges of employment discrimination are filed with the federal government yearly.²²⁷ There are continuing episodes of terrorism designed to force African Americans from their communities.²²⁸ Black churches are torched.²²⁹ There are reports of increased participation in neo-Nazi groups and the Ku Klux Klan.²³⁰

The Glass Ceiling Report shows that neither women nor minorities have made significant progress in breaking into the upper echelons of management. These studies, combined with the stories of women like Diane Joyce, are convincing data that discrimination still thrives.

3. A Narrow Definition of Merit

The antimerit myth is also reinforced through a narrower definition of merit brought about by objective tests designed to measure merit. The Civil Rights Act of 1964 was passed when objective standardized tests were gaining increased

220. See McGinley, *supra* note 45, at 1489 n.295.

221. See, e.g., Williams, *supra* note 136, at C1 (quoting Arthur Fletcher, a black Republican who states that he has not seen any large "pattern or practice" of discrimination "against white males in any area of the nation's basic economy").

222. See Jonathan S. Leonard, *Women and Affirmative Action*, 3 J. ECON. PERSP. 61, 73 (1989).

223. See *id.* at 73.

224. See EDLEY, *supra* note 145, at 42-45.

225. See *id.*

226. See *id.* at 47-48.

227. See *id.* at 47.

228. See *id.* at 49.

229. See *id.*

230. See *id.*

approval for measuring ability and achievement.²³¹ These objective tests changed the way in which colleges and universities made decisions regarding admissions.²³² "Merit" became increasingly defined as the score that a person performed on an objective test. Persons with lower test scores were "less qualified," whereas persons with higher test scores were "better qualified." Colleges and universities relied heavily on test scores to predict students' future performance well beyond the tests' abilities to predict.²³³ There is also some indication that the tests themselves are culturally biased against persons of color.²³⁴ Even if the tests are not culturally biased, test scores correlate heavily with socioeconomic class,²³⁵ and therefore indirectly discriminate against persons of color.

The definition of "merit" should be much broader than a test score. "Merit" should encompass the goals and purposes of the institution in question. For example, in the university setting, an understanding of diverse cultures, a history of overcoming obstacles, fluency in a second language, and an ability to perceive society from a distinct reference point are all valuable attributes that should affect whether a person is qualified or has the necessary "merit" for admissions.

Ironically, college admissions for decades have recognized a broader definition of "merit" for certain categories. Universities have "legacy" admits, persons admitted because they have family members who have previously attended the university.²³⁶ Persons admitted under legacy policies are almost exclusively white.²³⁷ Yet, few have questioned a university's right to admit these students. The

231. See Sturm & Guinier, *supra* note 201, at 965–67. The first SAT tests were offered in 1926 when 8040 students were tested. See Mott R. Linn, *College Entrance Examinations in the United States*, J. C. ADMIN., Spring 1993, at 6, 8. But Sturm's and Guinier's point is that the meritocracy is actually a "testocracy," built on the inaccurate assumption that test scores neutrally and fairly identify merit and predict success. This system of beliefs became prevalent in the 1950s. Sturm & Guinier, *supra* note 201, at 965 n.43 (citing JAMES CROUSE & DALE TRUSHEIM, *THE CASE AGAINST THE SAT* 31–37 (1988)).

232. See Sturm & Guinier, *supra* note 201, at 965–66.

233. See *id.* at 963–89.

234. See *id.* at 992–94.

235. See *id.* at 987–989.

236. See WILLIAMS, *supra* note 149, at 91.

237. See Martha West, *Gender Bias in Academic Robes*, 67 TEMP. L.R. 67, 142 (1994). Citing to a study of John Larew, Professor West notes that Yale University's alumni children are two and one-half times more likely to gain acceptance. In 1991 Dartmouth admitted only 27% of its other applicants and 57% of its legacy applicants. The University of Pennsylvania admitted 66% of its legacy applicants in 1990, and Stanford's rate of admissions for legacy applicants is twice that of general population applicants. See *id.* at 148 n.303. Evidently, the legacy policies were adapted in order to exclude Jewish applicants, resulting in preferences for white and wealthy applicants. See *id.* at 142 n.302.

Sturm and Guinier note that:

Children of alumni, who are overwhelmingly white, constitute between twelve and twenty-five percent of some of the top schools in the country. Nepotism, networking, and word-of-mouth recruitment for positions in government and business advantage the children of those who occupy positions of influence within the system. Legacy admissions, alumni preferences, the old-boy network, and numerous

same is true for universities' admission of "less qualified" candidates in order to assure geographical diversity and the admission of students with special talents in music, art, sports, or drama who do not have the same high test scores as the average admit who does not possess these talents.

4. A "Precept of Inferiority"

The "precept of inferiority" further reinforces the antimerit myth. In *Shades of Freedom*,²³⁸ A. Leon Higginbotham, Jr.²³⁹ traces the law's systematic creation and reinforcement of the "precept of inferiority" of African Americans. He demonstrates that in 1619, when the first Africans arrived in Virginia, the colonists tended to see them as "less than human."²⁴⁰ Notwithstanding this attitude, caused by the different appearance and religious practices of the Africans,²⁴¹ Judge Higginbotham notes that when Africans first arrived in this country, the law treated them similarly to white indentured servants.²⁴² It was not until approximately 1662 that the law "would begin to put in place the components of lifetime and hereditary slavery for blacks. With that, Virginia would move into the second stage in the development of the precept of black inferiority."²⁴³

The enforcement mechanism of the "precept of inferiority" shifted from individual judicial opinions to legislative enactment.²⁴⁴ Judge Higginbotham notes that the Virginia legislature enacted statutes from 1662-91 that "articulate[d] a clear rationale for the precept of black inferiority and white superiority."²⁴⁵

Once this precept was established by the legislature, it was enforced by the court system until after the Civil War. The 1875 Civil Rights Act, which granted to blacks the right to public accommodations, was held unconstitutional by the United States Supreme Court in the Civil Rights Cases of 1883.²⁴⁶ Had the Court upheld the 1875 Civil Rights Act, it would have contributed greatly to the defeat of the precept of inferiority. Instead, the Court reinforced the precept of inferiority.²⁴⁷

other departures from so-called objective merit standards favor white males and individuals from higher socio-economic backgrounds.

Sturm & Guinier, *supra* note 201, at 995 (citations omitted).

238. See A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996).

239. Judge Higginbotham is a former Chief Judge of the Third Circuit Court of Appeals and current Public Service Professor of Jurisprudence at the John F. Kennedy School of Government at Harvard University.

240. HIGGINBOTHAM, *supra* note 238, at 18-19.

241. See *id.* at 31.

242. See *id.* at 18-27.

243. *Id.* at 27.

244. See *id.* at 29-30.

245. See *id.* at 30.

246. See *id.* at 104-07.

247. Judge Higginbotham notes that in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court's infamous opinion upholding the constitutionality of "separate but equal" statutes, the Court again placed its imprimatur on the precept of inferiority. Plaintiff Homer

Higginbotham shows that even the well-meaning abolitionists, who sought to deliver African Americans from slavery, accepted the precept of inferiority.²⁴⁸ Much of the abolitionists' writing demonstrates an attitude toward the African American as "poor but noble, ignorant but kind, oppressed but forgiving."²⁴⁹ Like protectionist arguments forwarded by the abolitionists, many of the arguments made by proponents of affirmative action (as well as its opponents) accept the precept of inferiority. Advocates for affirmative action often concede to their opponents that affirmative action is favoritism toward members of certain classes of people, "benign racial classifications" in order to remedy past discrimination.²⁵⁰ This rhetoric is ironic when compared to Justice Bradley's opinion for the Supreme Court in the Civil Rights Cases of 1883. Striking down the constitutionality of the laws guaranteeing blacks equal rights to public accommodations, Justice Bradley excoriates blacks for expecting to be "the special favorite" under the law:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, *there must be some stage in the progress of his elevations when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws*, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.²⁵¹

Because much of the debate surrounding affirmative action finds its roots in the precept of inferiority and the need to give blacks and white women *preferential* treatment, some black scholars have openly questioned the value of affirmative action policies. In *Reflections of an Affirmative Action Baby*,²⁵² Professor Stephen Carter describes the stigma of affirmative action.²⁵³ In a practice that he calls "the best black" phenomenon, he explains that whites tend to assume that blacks who have had success have done so only because they are the "best black," not because they actually can compete with whites.²⁵⁴ Others argue that affirmative action exists precisely to assuage white guilt and to reinforce white

Plessy was seven-eighths Caucasian and one-eighth black when he was prosecuted for attempting to assert his right to travel in the first-class, whites-only compartment of a Louisiana train. Had Plessy been considered white, according to the Court, he would have had the right to sue for damages for loss of reputation for his exclusion from the whites-only compartment. The Court's admission at the end of the opinion that whites could sue in Louisiana under state law for being treated like African Americans demonstrates that African Americans were considered to be inferior, and segregated facilities were by no means "equal." See HIGGINBOTHAM, *supra* note 238, at 115.

248. See HIGGINBOTHAM, *supra* note 238, at 58-61.

249. See *id.* at 58.

250. See WILLIAMS, *supra* note 149, at 106.

251. Civil Rights Cases, 109 U.S. 3, 25 (1883) (emphasis added).

252. See STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

253. Another black professor who is concerned with the stigma of affirmative action is Shelby Steele, a professor at San Jose State University. See WILLIAMS, *supra* note 136, at C1.

254. See CARTER, *supra* note 252, at 52-62.

notions of white superiority.²⁵⁵ The effect, if not the purpose, of many affirmative action programs may be to reinforce the stereotype of white superiority.²⁵⁶

5. Invisible Privilege

Besides the precept of inferiority,²⁵⁷ another phenomenon exists that reinforces the antimerit myth associated with affirmative action: invisible privilege. Professor Stephanie Wildman explains that persons operate under a number of privileges.²⁵⁸ She defines "privilege" by noting that characteristics of those who are privileged define the societal norm²⁵⁹ to which all persons are expected to conform.²⁶⁰ Moreover, persons who are privileged can rely on their privilege to avoid objecting to the oppression of other groups.²⁶¹ This conflation makes the privilege almost always invisible to its holder.²⁶²

White resentment²⁶³ results from myths that have evolved around the concepts of race, gender, and class and the invisible presence of privilege related to

255. See, e.g., Williams, *supra* note 136, at C1 (quoting Shelby Steele).

256. See CARTER, *supra* note 252, at 52–62.

257. Besides the law's precept of inferiority, there is a general assumption among whites that blacks are intellectually inferior and lazy. See Williams, *supra* note 136, at C1.

258. See generally WILDMAN, *supra* note 214. Professor Stanley Fish of Duke Law School would agree:

It's untrue that affirmative action has already broken the glass ceiling and helped integrate black Americans into white neighborhoods and workplaces. White males have for generations enjoyed the benefits of a racist and sexist culture that gave them power, wealth, and position. The white males who complain about affirmative action didn't earn the privileges they now enjoy by birth, and any unfairness they experience is less than the unfairness that smooths their life path, irrespective of their merit.

Bill Sasser, *Color-Blind or Color-Conscious?*, PERSPECTIVES (quoting Stanley Fish) <<http://www.adm.duke.edu/alumni/dm3/color.txt.html>>.

259. See WILDMAN, *supra* note 214, at 13. An example would be a woman law professor who is told that in order to do a better job teaching, she should lower her voice an octave. Because the male voice is the norm, the woman's voice in this situation is a deviation and, therefore, inferior. See *id.* at 29.

260. See *id.* at 14–15; Williams, *supra* note 136, at C1 (describing assumption that whites are competent and honest, an assumption not ascribed to blacks).

261. See WILDMAN, *supra* note 214, at 16–17.

262. See *id.* One can see how the privilege operates in law school hiring. White males who have had special access to relationships with other white males at prestigious universities and law schools are promoted by their mentors to white male judges, who hire them to serve as law clerks. Both the judges and the law school professors recommend their mentees to hiring committees who are composed mostly of white males who have the same attributes as the persons applying for the job. The hiring committee tends to define the candidate as meritorious because the candidate has conformed to the societal norm. Privilege, as Wildman demonstrates, is often mistaken for individual merit. See *id.*

263. See Williams, *supra* note 136, at C1 (describing white male resentment as arising from rumors and innuendos); Williams, *supra* note 219, at 57.

persons who belong to the dominant groups in each of these categories.²⁶⁴ Whites tend not to recognize that race has little meaning without reference to the power structures that have historically supported and are currently supporting white domination.²⁶⁵ Whites see whiteness as the norm, an absence of race.²⁶⁶ Along with whiteness come privileges that are invisible to whites.²⁶⁷ Instead of seeing privilege resulting from the historical domination of whites in this country as the source of our success, whites interpret any benefits we receive as reward for individual merit and hard work. In fact, the myth of the “American Dream” has imbued in white Americans a sense of entitlement. The myth tells us that so long as we work hard, we deserve to and will succeed unless obstacles are placed in our way. By the same token, whites consider racism and discrimination as evils committed by other individuals, not something that whites are responsible for as a group.²⁶⁸ Race discrimination is defined in Title VII disparate treatment theory as individual action resulting from a conscious intent to harm. This definition furthers the perpetrator’s perspective by assigning guilt to one individual employer and alleviating most whites of responsibility for systemic means that reinforce racism and white privilege.²⁶⁹

Professor Ruth Frankenberg demonstrates the invisibility of whiteness as a race.²⁷⁰ She describes a series of interviews about race issues with thirty white women ages twenty to ninety-three.²⁷¹ The women, many of whom described themselves as feminists, were in many cases unable to see that whiteness is not the norm but socially constructed.²⁷² Frankenberg noted that it is far easier for persons

264. Stephanie Wildman describes our intersection of privileges as similar to a koosh ball, a popular child’s toy made up of hundreds of strands of rubber. See WILDMAN, *supra* note 214, at 22.

265. *Id.* at 20–24.

266. See Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995); Barbara J. Flagg “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970 (1993).

267. See WILDMAN, *supra* note 214, at 20–24.

268. See FRANKENBERG, *supra* note 46, at 46–47.

269. See generally *id.*; Allen David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1049 (1978).

270. See generally FRANKENBERG, *supra* note 46.

271. See *id.* at 25.

272. Ruth Frankenberg explains the social construction of whiteness:

I argue in this book that whiteness refers to a set of locations that are historically, socially, politically, and culturally produced and, moreover, are intrinsically linked to unfolding relations of domination. Naming “whiteness” displaces it from the unmarked, unnamed status that is itself an effect of its dominance. Among the effects on white people both of race privilege and of the dominance of whiteness are their seeming normativity, their structured invisibility. This normativity is, however, unevenly effective. I will explore and seek to explain the invisibility and modes of visibility of racism, race difference, and whiteness. To look at the social construction of whiteness, then, is to look head-on at a site of dominance. (And it may be more difficult for white people to say

from oppressed communities to recognize the privilege that is invisible to whites.²⁷³ The white women tended to describe racism as something distant. It was something evil happening to others and perpetrated by others.²⁷⁴ It was not a part of their daily experience, nor were they generally responsible for it. They desired ardently not to be identified as "racist" or "prejudiced,"²⁷⁵ yet they harbored stereotypical attitudes toward blacks such as fear,²⁷⁶ a need to maintain boundaries,²⁷⁷ and disapproval of interracial relationships and childbearing.²⁷⁸ It was only those women in her survey who had personal, intimate relationships with persons of color who recognized the systemic oppression experienced by persons of color and the invisibility of white privilege.²⁷⁹

These distorted perceptions are typical of in-group/out-group dynamics.²⁸⁰ According to this phenomenon, called "attribution bias," members of the in-group take undue credit for positive outcomes while denying responsibility for negative outcomes.²⁸¹ The negative outcomes are attributed to external factors.²⁸² Conversely, in-group members attribute positive out-group behaviors to external factors and negative out-group behaviors to internal (or dispositional) causes.²⁸³

Because of this narrow definition of racism that alleviates whites of responsibility for social conditions and the notions of superiority and entitlement stemming from privilege, whites see affirmative action doctrine as contrary to the fair order of things. Despite the presence of white privilege, a substantial number of whites believe that affirmative action discriminates against them.²⁸⁴ This is likely because affirmative action requires selection, at least partially based on race. This requirement does not conform with "color evasion," the dominant public discourse on race in the United States.²⁸⁵ "Color evasion" is the enforced norm of colorblindness.²⁸⁶ It assumes that all discrimination based on color, regardless of

"Whiteness has nothing to do with me—I'm not white" than to say "Race has nothing to do with me—I'm not racist.") To speak of whiteness is, I think, to assign *everyone* a place in the relations of racism. It is to emphasize that dealing with racism is not merely an option for white people—that, rather, racism shapes white people's lives and identities in a way that is inseparable from other facets of daily life.

Id. at 6.

273. *See id.* at 8, 64.

274. *See id.* at 46–47.

275. *See id.* at 38, 95.

276. *See id.* at 39, 54.

277. *See id.* at 55.

278. *See id.* at 77, 81, 83, 88.

279. *See id.* at 111, 114.

280. *See* Joseph G. Weber, *The Nature of Ethnocentric Attribution Bias*, 30 J. EXPER. SOC. PSYCHOL. 482–504 (1994).

281. *See id.*

282. *See id.*

283. *See id.* at 483.

284. Williams, *supra* note 136, at C1 (quoting William T. Coleman Jr. a former Cabinet Secretary stating that 95% of white males say they do not discriminate).

285. FRANKENBERG, *supra* note 46, at 142–43.

286. *Id.*

which culture is historically dominant, is evil. Nor does affirmative action conform with "power evasion." Power evasion is the corollary of color evasion—the refusal to recognize that color and race have meaning only within the context of a history of domination and subordination.²⁸⁷

Color and power evasion have emerged in response to what Ruth Frankenberg calls "essentialist racism," a theory that racial difference is biological or essential and that the white race is superior. However, because color evasion refuses to see any race difference it actually leads its proponents into "complicity with structural and institutional dimensions of inequality."²⁸⁸

Taxman v. Board of Education,²⁸⁹ is a perfect example of the elevation of the principle of "colorblindness" over all other principles in Title VII. In *Taxman*, the board's conscious consideration of race triggered the court's scrutiny of the employment decision under the affirmative action doctrine developed in *Weber* and *Johnson*. Because the Piscataway policy does not permit consideration of race until the board has determined that the two candidates are equally qualified, the policy, by its own terms, eliminated the most common objections to, and misconceptions regarding, affirmative action. Sharon Taxman could not claim that she, rather than Debra Williams, deserved to be retained because she was better qualified, more experienced, or more deserving. Her only "entitlement" to the position was a chance that she would have prevailed in the lottery.²⁹⁰ The sole injury alleged, in fact, seems to be the failure of the Piscataway School Board to operate in a colorblind fashion.

In *Taxman*, therefore, the Third Circuit has adopted color and power evasion as the norm for interpreting Title VII. According to the court, it was not the exercise of power or the injury caused but merely the "empty act of racial classification" that offended Title VII and defined the injury.

The counterintuitive results in *Taxman* and *Foster v. Dalton* demonstrate vividly that in Title VII the principle of colorblindness operates to maintain inequality and to reinforce white power and privilege. Although colorblindness is rooted in an aversion to race discrimination, colorblindness fails to recognize that discrimination based on race (or gender) can be understood only in the historical context of power and subordination.²⁹¹ The principle of colorblindness, although well meaning, enforces and reinforces the hidden (and not so hidden) differences in power between whites and blacks and reestablishes white privilege as the dominant

287. *Id.* at 143. These ideas about affirmative action's violations of norms of color and power evasion come from a faculty presentation made by Professor Martha Mahoney at Florida State University College of Law. I thank Professor Mahoney for her provocative remarks and for introducing me to Ruth Frankenberg's work.

288. FRANKENBERG, *supra* note 46, at 143.

289. 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997).

290. The other pertinent fact is that Sharon Taxman was called back from her layoff very shortly after the decision was made to lay her off. Thus, her loss was minimal. *Id.* at 1574 (Sloviter, J., dissenting).

291. See FRANKENBERG, *supra* note 46, at 143.

norm.

Moreover, the principle of colorblindness disregards the historical and social reasons that led to the passage of Title VII. Proponents of Title VII wrote the bill for the express purpose of compensating victims of discrimination, deterring discriminatory behavior in the workplace, and creating economic opportunities for blacks. Had there already been equality between blacks and whites at the time of the Act's passage, a colorblind approach to the statute would make sense. Under these circumstances, the Act would have relied on a totally different rationale. A possible rationale for a nondiscrimination statute in circumstances where both groups have equal power would be unity and the avoidance of separatism that could be harmful to national interests. However, this clearly was not the rationale for passing Title VII.²⁹²

Title VII was passed in a historical and social context that cannot be ignored. The context gives meaning and texture to the statute; it governs, to a large extent, the type and extent of injury a person suffers when faced with an adverse employment decision. This context does not mean, however, that remediation is the only, or even the most important, justification for affirmative action. The next section proposes that an even greater justification for affirmative action is the antidiscrimination principle. My underlying thesis here is that affirmative action is necessary to prevent institutions from discriminating and to promote the merit principle.

C. The Antidiscrimination Principle: A Real Justification for Affirmative Action

The characterization of affirmative action as remedial rather than preventative reinforces a belief that discrimination no longer exists and that innocent white males are paying for the sins of their forefathers. The *Johnson* case, however, demonstrates that an important justification for affirmative action is to prevent the reproduction of privilege through the normal, apparently neutral, operation of processes that cause discrimination. Although the affirmative action plan in *Johnson* worked to avoid overt, presumably conscious, discrimination of the panel members who selected Johnson over Diane Joyce, affirmative action also has the potential of preventing unconscious discrimination resulting from invisible white privilege. Indeed, this prevention of "blameless," unconscious discrimination may be the most important justification for affirmative action.

The antidiscrimination principle is a powerful justification for affirmative action.²⁹³ Recognizing the antidiscrimination justification would shift the discussion from the merits of affirmative action candidates to the acknowledgment of privilege based on class and race, and could lead to an alignment of white working-class individuals with persons of color. This alignment is a difficult

292. See generally, LEGISLATIVE HISTORY, *supra* note 49.

293. This justification is not new. Others have previously argued for it. See, e.g., EDLEY, *supra* note 145, at 107-14. Because "affirmative action" is such a sullied concept, however, it may be beneficial to rename it and define it more narrowly. Rather than affirmative action, a system of "preventative restraint" could work.

process because a large percentage of the population appears firmly to believe that discrimination is a phenomenon of the past. Although studies have demonstrated that firms continue to discriminate,²⁹⁴ many question whether discrimination still occurs.²⁹⁵

This is true for a number of reasons. First, unlike the discrimination that took place in the Santa Clara Transportation Department against Diane Joyce, discrimination has become much less overt; much discriminatory behavior is the result of unconscious processes and biases.²⁹⁶ Second, as I have mentioned above, persons enjoying individual privileges resulting from their membership in historically dominant groups tend to attribute imbalances in the work force to individual merit and choice.²⁹⁷ A history of belief in black (and female) inferiority supports this conclusion, permitting members of dominant groups to avoid seeing their own privileges. Finally, by failing to recognize the operation of white privilege and by defining discrimination narrowly as a conscious intent to discriminate, the law reinforces discrimination and protects this precept of inferiority.

Professor Frances Olsen explains that the idea that affirmative action is "preferential treatment" has arisen as a result of a compromise:

In my experience, when law faculties I have been on have claimed to engage in affirmative action hiring, we have at best set aside prejudices and hired people we would have hired if there were not institutional barriers and if we did not unconsciously discriminate. In fact, affirmative action has worked out to be a kind of *compromise*: Those who have been discriminated against will get a few chances and be discriminated against less, if in exchange, those with power can keep on denying they do discriminate and pretend that they are doing something *for* women and minorities. Instead of really confronting the many ways that those with power discriminate, directly and indirectly, women and minorities strike a kind of deal in which they get somewhat more fair opportunities and those with power are able to call it affirmative action and think they are doing women and minorities a favor.²⁹⁸

Professor Olsen's compromise takes its toll. To avoid some discriminatory behavior, women and minorities permit white male decision makers to believe that they are bestowing unearned benefits on them through affirmative action. This

294. See *supra* notes 224–30 and accompanying text.

295. See, e.g., BORK, *supra* note 215; see also GALLUP ORG., SOCIAL AUDIT ON BLACK/WHITE RELATIONS IN THE UNITED STATES 6–9 (1997) (finding 76% of whites believe that blacks are treated the same as whites and only 15% of whites believe that blacks were not treated as well as whites in their communities; only 14% of whites responded that blacks were treated less fairly than whites on the job in comparison to 45% of the blacks who said they were not treated as fairly as whites).

296. See McGinley, *supra* note 45, at 1463–73.

297. See, e.g., EEOC v. Sears, 839 F.2d 302 (7th Cir. 1988).

298. Frances Elisabeth Olsen, *Dismantling Institutional Barriers*, 6 UCLA WOMEN'S L.J. 563, 565–66 (1996).

compromise distorts the focus of the inquiry, permitting decision makers to assuage their guilt and to reinforce the notions of white male superiority. If the compromise were to stop here, perhaps the results of the compromise would be worth the price paid. Unfortunately, however, it does not. Masking the truth fuels the fires of resentment borne by affirmative action, eventually working to the detriment of persons of color and white women through the reinforcement of historical barriers to equality.

An empirical study performed by Professors Deborah Jones Merritt and Barbara Reskin of Ohio State University²⁹⁹ supports Professor Olsen's observation. The study demonstrated that the conscious use of affirmative action in law school hiring added only a *very slight* plus factor to white female and black male candidates for the jobs.³⁰⁰ For black females, there was no preference given at all. In fact, the empirical data shows that even when faculties believed that they were giving preferential treatment to women and persons of color, black females still suffered from discrimination.³⁰¹

The study also demonstrated a significant gender bias in favor of males in course assignment and rank. Males teach more high status courses, such as constitutional law,³⁰² and gain initial appointments at higher ranks than equally qualified women.³⁰³

This empirical research is powerful support for the anecdotal reports of white women and persons of color. These stories demonstrate that white women and persons of color are often judged by changing standards of scholarship³⁰⁴ and teaching experience and by their future (generally white male) colleagues' perceptions of whether they will "fit in" or "make trouble."³⁰⁵ This is not surprising given the "group dynamic of self-perpetuation."³⁰⁶ This dynamic is a tendency of groups to reinvent themselves through their hiring processes.³⁰⁷ "The ideal candidate is the person who seems most like the decision-maker himself. Hiring someone just like yourself, or a younger version of yourself, validates your own hope that you are a valuable asset to the school."³⁰⁸

Combined with these narratives about the operation of law school hiring,

299. See Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997).

300. See *id.* at 274. This is using all the traditional "normal" criteria for hiring. The study makes no effort to attack those criteria as biased in favor of white males. See *id.* at 224-25. Sex and race, indeed, played less of a role in hiring than factors such as age, the applicant's partner's lack of employment, and the fact that a particular candidate graduated from the law school hiring the candidate. See *id.* at 280.

301. See *id.* at 274.

302. See *id.* at 275.

303. See *id.* at 274.

304. See WILDMAN, *supra* note 214, at 122, 128-130; Frances Olsen, *Affirmative Action: Necessary but Not Sufficient*, 71 CHI.-KENT L. REV. 937, 943 (1996).

305. WILDMAN, *supra* note 214, at 103-20.

306. *Id.* at 108.

307. Olsen, *supra* note 304, at 941.

308. *Id.*

promotion, and tenure, the *Columbia Law Review* study demonstrates the need for affirmative action programs to defeat pervasive discrimination against persons of color and white women.³⁰⁹ Much of the discrimination operates at an unconscious level.

Part IV below will demonstrate, through the use of hypotheticals, the different types and severity of injuries suffered by persons who have adverse employment decisions made against them. Rather than focusing exclusively on the intent of the actor (whether colorblind or color conscious) in defining liability, these hypotheticals demonstrate that the statute should consider the type of injury suffered.

IV. SHIFTING THE LENS: FOCUSING ON TYPE AND EXTENT OF INJURY TO DEFINE ILLEGAL ACTS

Adverse employment decisions made against employees and prospective employees cause differing types and degrees of harm to individuals, to classes in society, and to the society in general. The individual harms fall generally into three categories: (1) injuries caused by a failure to meet a job applicant's expectations; (2) injuries to personal dignity; and (3) economic injury. Injuries falling into the first category have a procedural and substantive component. They are procedural because the complaint is that the employer did not use a fair process to assess an applicant's ability to do a job. They are substantive because the expectation underlying this injury is that the employer will hire the most meritorious candidate.

The second category of injury, the dignitary injury, is of two types. First, and less serious, is the injury caused by the employer acting on his own personal view that the job applicant belongs to a group that is not as desirable to hire. The second, more serious, injury is caused by an employer who refuses to hire the applicant because of society's view that the applicant is inferior based on a history of domination and subordination of the group to which the applicant belongs.

The third category of injury, the economic harm, is determined by how the loss will affect the job applicant. To the extent the employer's refusal to hire an employee is based on societal prejudice, the economic harm will likely repeat itself and the injury will be greater.

These harms to classes of persons undermine not only the individual but also the group. Societal harms from loss of production and from unrest result from an unwillingness to treat all groups fairly.

A series of hypotheticals will demonstrate these points:

Example A: An Overt Policy to Exclude Based on Arbitrary Factors

Assume that there is an employer whose company manufactures trinkets. The trinket maker decides that he will employ in his plant only persons who have attached earlobes. Persons with detached earlobes will not be considered for the

309. See WILDMAN, *supra* note 214, at 103-37.

jobs, no matter how qualified they may be to work in the plant. In this hypothetical society, whether a person has detached or attached earlobes has no social significance. Will the person who has detached earlobes suffer an injury if he is refused a job by the trinket company? The answer is probably yes. Assuming that he lives in a society that vows to reward merit, his injury is rooted in the sense that he was not given an opportunity to compete on merit and that this failure was unfair. Although this injury is real, we are unsure how to evaluate it because it is unclear whether he would have been selected had the company hired on merit. Moreover, even if his work is very good, his injury will likely result in no or minimal economic injury. In a society that generally hires on the basis of merit, the applicant can likely gain employment in the competitor's plant. Thus, this "victim" suffers injury only of the first type: defeated expectations that the employer would use a fair process in selecting the employee and that it would not make the choice arbitrarily. While this is a loss, the law has never guaranteed a right to fair process and merit selection. Moreover, in this case, there is no class-wide or societal harm.³¹⁰

Example B: An Overt Policy to Exclude Based on the Employer's Individual Stereotypes—No Societal Prejudice

Change the hypothetical slightly to see a different type of injury. Assume that the employer decided that it would not hire persons with detached earlobes because the employer believes, in the absence of any proof, that persons with detached earlobes are lazy and less responsible. This belief is personal to the employer and does not reflect a societal attitude toward persons with detached earlobes. Applicant B suffers from two harms. First, like Applicant A, he suffers from defeated expectations in a fair process and merit hiring. Second, he suffers a loss of personal dignity because the employer rejected him due to a false stereotype about persons with detached earlobes. Since this second harm is caused by prejudices personal to the employer, and not held by the society in general, it should not be as severe as a harm caused by prejudices reflecting historical discrimination. Furthermore, there should be little or no group harm since the society does not share the employer's stereotypes. Nor will society as a whole suffer.

Example C: An Overt Policy to Exclude Based on Societal Stereotypes and a History of Domination

Consider a society that not only believes persons with detached earlobes are lazy and irresponsible but has also dominated persons with detached earlobes for more than two centuries. From early in the society's history, persons with detached earlobes were transported from their country of origin to act as slaves in this society; children of slaves were also slaves. Even after the abolition of slavery, the society had laws that forbade intermarriage between persons with attached and detached earlobes and laws that required schools and places of public

310. Although I contend that Title VII was designed to ensure merit selection, that assurance is limited to those who historically have suffered from discrimination.

accommodation to be segregated. The schools and public accommodations for persons with detached earlobes were inferior.

Thirty years ago, the society passed a statute prohibiting employers from discriminating on the basis of earlobe attachment, but persons with detached earlobes still hold a very small percentage of managerial and political jobs in the country; the society has never had a president or vice president with detached earlobes. There exists a great deal of not-so-subtle differential treatment of persons with detached earlobes. For example, when persons with detached earlobes are shopping in stores, store employees follow them to assure that they will not steal anything from the store, but they do not follow persons with attached earlobes.³¹¹ The message sent to the persons with detached earlobes is that they are not trustworthy.

Our job applicant who is refused a job in this historical and social context suffers to a much greater extent than Applicants A and B. Like Applicants A and B, he suffers an injury from a failure to consider merit and to give him an opportunity to compete. Like Applicant B, Applicant C also suffers a loss of dignity because the employer refused to hire him because of an inalterable characteristic. His dignity loss, however, is probably much greater than B's because the failure to hire him replicates the history of subordination and brings to the surface feelings of inadequacy and anger which reinvent the original injury caused by slavery. Because the underlying belief that the group is inferior is so often reinforced by dominant culture, C begins to believe in his own inferiority; this belief affects his motivation to continue job searching.³¹²

Applicant C also suffers a serious economic injury because it is unlikely that he will be able to get a job anywhere. If he can get employment, his employment will likely be in a low-status, low-paying job.

Moreover, as a class, persons with detached earlobes will suffer an injury to personal dignity and a loss in confidence and motivation. This loss, perceived by society in general, will ultimately become a vicious circle. Society in general will suffer from a loss of potential resources and talent that persons with detached earlobes could bring to the community.

Example D: No Overt Policy to Exclude, but Cronyism Causes Exclusion

Assume the same society described in Example C. However, the employer does not have a policy of hiring only persons with attached earlobes, but he tends to hire his friends. The employer has attached earlobes and virtually all of his social contacts also have attached earlobes. Although there are no legal

311. African-American students in my employment discrimination class recount that they are often followed in stores by white clerks, evidently to assure that they do not steal anything.

312. See Daley, *supra* note 128 (finding that failure to promote women and blacks affects their motivation and productivity); Mark Snyder, *On the Self-Perpetuating Nature of Social Stereotypes*, in *COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR* 183 (David L. Hamilton ed., 1981); McGinley, *supra* note 45, at 1467-68.

prohibitions on intermingling, the society is segregated; persons with attached earlobes live in one end of town, and those with detached earlobes live in another. Our job applicant is refused a position because the employer hires his friend who is not as qualified as the applicant.

Like Applicant A, this applicant suffers a loss to the expectation of fairness and a merit evaluation. In addition to the injuries suffered by Applicant A, he will also suffer an economic loss because of his failure to get the job. To the extent the prejudices are repeated or even simple cronyism is used to hire persons, he will find it difficult to find an equivalent job at another company.

The extent of Applicant D's dignity loss may depend on the individual. Because he has not suffered from overt discrimination, Applicant D may experience his failure to get the job as less painful, because even if it is not true, he can convince himself that the job loss results not from stereotypes but from the boss' desire to hire his friend. Thus, unlike Applicant C, who is confronted with overt earlobe discrimination, D may not suffer as great a dignity loss. On the other hand, this applicant still suffers because he knows that the vast majority of employers in the country have attached earlobes and that, given social segregation, if they are permitted to hire their friends regardless of merit, persons with detached earlobes have no opportunities.

Moreover, Applicant D may suffer even more because cronyism may veil the real reason for his job loss: conscious or unconscious prejudice against persons with detached earlobes. The employer's denial that earlobe attachment affected his decision can be even more painful than overt discrimination because the applicant's perception of reality is questioned. Applicant D may be viewed as "oversensitive" or "overreacting."³¹³

In any event, Applicant D's loss is significantly greater than that suffered by the job applicants in Examples A and B. Yet, the law as it currently stands will recognize A's and B's injuries, but will not recognize D's injury. Moreover, to the extent that the society permits and condones cronyism, there will be a serious economic loss to the class of persons with detached earlobes. A decrease in motivation will likely be caused by this economic reality. Additionally, the society as a whole will suffer, like the society in Example C, due to a loss of potential talent.

Example E: An Affirmative Action Policy to Permit Consideration of Whether Earlobes Are Attached

Assume again the society described in Example C. The vast majority of persons working in the plant have attached earlobes. The employer, recognizing the inequities in society, decides that it wants to hire persons with detached earlobes because virtually its entire work force has attached earlobes. The employer writes

313. There seems to be a contradiction here, but it appears that different people react to different situations differently. Some victims of discrimination are more comfortable when the discrimination is veiled, whereas others feel somewhat relieved when it is overt because it is impossible to deny that discrimination exists when it is overt.

an affirmative action plan that permits decision makers to take into account, among other factors, whether the applicant's earlobes are attached. As a result of this process, our job applicant gets the position, but another person with attached earlobes does not. The person with the attached earlobes sues, claiming injury. What injury does he suffer? His injury is like Applicant A's: defeated expectations in a fair process and merit-based decision making. He likely will have no economic injury because, as a member of the dominant group, he will be able to find another job elsewhere fairly easily. Furthermore, this applicant suffers no dignitary harm. He is still a member of the dominant group; his failure to obtain the job does not devalue him based on his membership in this group.³¹⁴ While it is true that this applicant may suffer feelings of anger related to his failed expectations, to the extent these expectations are based on a belief in his privilege because he has attached earlobes, the expectations are not legitimate. Neither the group to which Applicant E belongs nor the society will suffer a loss.

By examining Examples A through D, we can see that the injuries suffered by the overt earlobe-based policies depended largely on whether the person alleging injury was a member of the historically dominated group or the group with historical dominance. Translating this analysis to race-based policies, these examples demonstrate that the treatment of race classifications as odious regardless of who benefits by the classifications makes little sense. The injuries suffered as a result of the racial classification differ in type and extent depending on which groups the "victim" belongs to.

Example D, the case of cronyism, demonstrates that the injury suffered in this race-neutral decision is far greater than the injury suffered by the member of the dominant group who loses the job as a result of an affirmative action policy in Example E. The law, however, as it presently is interpreted will not protect the job applicant in Example D, the victim of cronyism.³¹⁵ The law may well protect the disappointed applicant in E.³¹⁶

Some would argue, however, that I have skewed the result in Example E because I have avoided the most prevalent complaint of affirmative action opponents. Opponents typically charge that the company has "lowered its standards" to hire the minority applicant and has hired someone who is less

314. Professor Fiss observes:

The white victim may be better able to find employment elsewhere. And the wrong may not be accompanied by a dignitary harm; it is not likely to underscore a sense of inferiority. The practical consequences to society might also be less; for example, discrimination against the white might have little or no impact on the general prospects of upward mobility. Moreover, even if unfortunate practical consequences flow from the unfair treatment to a white, society may be willing to permit, encourage or even require that blacks be preferred on the basis of their color in order to further the aggregate economic goal of improving the relative economic position of Negroes.

Fiss, *supra* note 56, at 264.

315. See *supra* notes 21–23 and accompanying text.

316. See *supra* notes 24–36 and accompanying text.

meritorious than the white (or male) applicant. The perceived injury, therefore, does not rely merely on the arbitrariness of the criterion of race or gender to the job in question but rather on a belief in merit selection and a sense that it is fundamentally unfair because the more meritorious individual, the white male, was not selected for the position.

This reaction, which is often founded on invisible white privilege and the inaccurate assumption of black inferiority,³¹⁷ is particularly curious because it is exactly the opposite of the justification for a system that relies on cronyism. When faced with the cronyism decisions, opponents of affirmative action shift gears. Instead of arguing for merit hiring as a basis for decision making, cronyism defenders shift to libertarian arguments—the employer has a right to hire whomever he desires so long as he does not base his hiring decision on conscious considerations of race, gender, or national origin. Merit is irrelevant because cronyism, by its very nature, is antimerit.

Given the domination of whites in positions of power in business, the social segregation occurring in this country,³¹⁸ the tendency of employers to replicate themselves in their hiring patterns, and the prevalence of unconscious discrimination³¹⁹ and cognitive biases,³²⁰ the libertarian argument concedes an exceedingly narrow limitation on the employer's right to hire whomever he desires.³²¹

The double standard between the discussion of merit in affirmative action and cronyism cases is stark and startling. The inconsistency of requiring merit selection for white males in the affirmative action context and of refusing to enforce merit selection in the cronyism cases raises serious questions about the effectiveness of Title VII. In fact, it seems that the statute, whose original purpose was to promote equality and job opportunities for African Americans, in effect, works to guarantee the rights of white employees to the detriment of their African-American counterparts.

One of the reasons for this double standard is the unfounded belief that voluntary affirmative action programs are necessarily antimerit. The belief that affirmative action is antimerit relies on misconceptions that are reinforced by the law and popular culture. In fact, in the case of voluntary affirmative action programs that are properly tailored, ideals of liberty and equality are furthered at the same time. Because these programs are adopted voluntarily by the employer, there is no restriction on his or her liberty; moreover, a properly constructed affirmative action plan will not conflict with merit.

317. See *supra* notes 238–56 and accompanying text.

318. Ruth Frankenberg's interviews demonstrate the class and racial segregation in which many of her interviewees lived. See FRANKENBERG, *supra* note 46, at 46–62.

319. See Lawrence, *supra* note 144.

320. See generally Krieger, *supra* note 144.

321. This limitation is even narrower due to the procedural difficulties encountered by plaintiffs in proving conscious discriminatory intent. See generally McGinley, *supra* note 45.

V. A NEW CONCEPTUAL FRAMEWORK FOR DECISION MAKING UNDER TITLE VII

This article demonstrates that current interpretations of Title VII that draw bright lines between colorblind and color-conscious decision making do not account for the complex matrix of factors involved in the decision making process and the types and extent of injuries potentially resulting from the process. In order to further the purposes of the statute—to grant equal opportunity to persons of color by deterring discrimination, to break down systemic barriers to equality, and to compensate victims of discrimination—a new conceptual framework in employment discrimination law is required.

Reflecting the multiple aims of Title VII, this framework should be multifaceted. Although this framework can be partially implemented immediately under existing Title VII law without legislative revision, other aspects of the new framework would require legislative action; some aspects would require either the Court or the legislature to overturn Supreme Court precedent. Although it is beyond the scope of this article to draft a detailed legislative proposal, this Part provides an overview of the principles that should govern the new framework and any implementing legislation.

First, antidiscrimination adjudication should reaffirm the merit principle as an important enduring value that guides interpretation of civil rights law. At least for the original intended beneficiaries of Title VII—African Americans and other persons of color, persons of diverse national origin, and women—the law should require employers to make employment decisions based on merit. This reaffirmation would prohibit the most egregious decisions that are today considered legal under the Act, such as the promotion of less-qualified white male friends of the decision maker over more-qualified black females. It should also require employers to take a much more careful look at their decision making process, reevaluating their definitions of merit in order to broaden the scope of experience and differing perspectives in the workplace.

Although this reaffirmation of the merit principle would, under some circumstances, sanction a greater encroachment by the courts³²² upon the liberty interests of employers,³²³ it would affirm the employers' often-claimed right to make decisions on the basis of merit; it would also actually grant greater liberty to some employers to construct carefully tailored affirmative action programs. In turn, merit-based decision making should benefit society by leading to more productive workplaces and greater fairness among diverse groups. Courts, therefore, should not shrink from their responsibilities to enforce the statute by hiding behind their traditional mantra that courts should not intrude into decisions made in the

322. In order to avoid the increased crowding of dockets, it would be possible to use specialized courts or specially trained arbitrators to decide these cases. *See id.* at 1484–86, 1512–13.

323. Employers would not be totally without liberty, however, because they could choose to disregard merit when making decisions between white males, for example.

workplace.³²⁴

To the extent that merit alone would not distinguish between qualified candidates, the law should encourage employers to err on the side of the original intended beneficiaries of the law—persons of color and women. Employers need this encouragement in order to combat their unconscious prejudices. Moreover, because the types of injuries suffered by intended beneficiaries and unprotected individuals are demonstrably different,³²⁵ a policy encouraging employers to err on the side of preferring intended beneficiaries in the absence of a clear indication of the relative merit of competing applicants will reduce injuries even when they occur.

Second, the new framework should eschew principles of colorblindness and power evasion, and take into account the individual and social costs resulting from the social, historical, and economic context of the decision. Thus, legal principles that would further the purposes of the Act would consider not only whether the decision was race based but also the type and extent of injury to the victim in context; they would also consider whether the decision maintains or breaks down structural barriers.³²⁶

Third, this framework would require the overruling of *St. Mary's Honor Center v. Hicks*³²⁷ and the expansion of the concept of discriminatory intent to encompass unconscious as well as conscious discrimination. The law should encourage employers, before they make employment decisions, to affirmatively search their reasons for making potential decisions and to consider the possible effects resulting from them.

Finally, the law should not place procedural and evidentiary barriers in the way of substantive justice.³²⁸ Instead, procedural and evidentiary rules should be designed to further the purposes of the Act.³²⁹

324. See, e.g., *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993) (“[U]nless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question.”).

325. See *supra* Part IV.

326. Although in some circumstances these legal principles may lead to the conclusion that a white male suffered “reverse discrimination,” these cases should be extremely rare because the consideration of the context would often discourage these suits. For instance, a white male could suffer from reverse discrimination if the decision makers are black males who hire only their friends. In this situation, the white male will suffer an injury to the expectation that decisions are based on merit, an expectation that may or may not be protected by the statute. He may also, depending on the circumstance, suffer a dignitary loss.

327. 509 U.S. 502 (1993).

328. For discussions on how procedural and evidentiary burdens undermine the purposes of the employment discrimination laws, see McGinley, *supra* note 45, at 1457–82; McGinley, *supra* note 78, at 228–42.

329. For example, at the very least, evidence of cronyism by white male decision makers should create a rebuttable presumption of illegal discrimination where the person

CONCLUSION: EDUCATIONAL, POLICY, AND LEGISLATIVE PRIORITIES

This Article describes the inherent theoretical problems in the courts' current approach to race-based and race-conscious decision making under Title VII, identifies underlying causes of these problems, and offers a new conceptual framework that would further the purposes of the Act. It advocates the reaffirmation of the merit principle, the inclusion of unconscious as well as conscious discrimination in the definition of intent, and a shift in focus from the decision maker's state of mind to the type and extent of the victim's injury considering the social, historical, and economic context in which the decision was made.

The Article also describes white male resentment, fanned by the popular media and reflected in opinions of the judiciary. Although the Article does not offer a legislative remedy for this problem because I believe that none exists that would be consistent with the egalitarian purposes of Title VII, a move toward antidiscrimination and away from remediation in the affirmative action context should ease some of the tensions. Furthermore, as a response to the campaign of disinformation, the implementation of the new conceptual framework I propose should include an educational component as well.

The combined efforts of the educational component and legislative reforms should reaffirm the promise of Title VII to women and persons of color—to eradicate discriminatory behavior in the workplace, to compensate victims, and to guarantee truly equal economic opportunities to all persons.

not hired is a woman or a minority, one of the original groups Congress sought to protect from discrimination. This presumption should shift the burden to the employer to prove that the person hired or promoted was better qualified for the position in question than the woman or minority applicant who brought the lawsuit. *See Roberts v. Gadsden Mem'l Hosp.*, No. 86-3826, 1988 U.S. App. Lexis 19507, at *14 (11th Cir. Jan. 13, 1988) (upholding lower court's ruling that informal selection methods "necessarily and intentionally favored those who moved within [the defendant's] social circles—i.e. white people," constituted race discrimination under the discriminatory treatment theory).

