Why Is Title VII in Retreat? A Socioeconomic Analysis of the Retrenchment of Contemporary Civil Rights Law

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This Article uses Title VII of the Civil Rights Act of 1964 — the Title regulating employment discrimination — as a springboard for analysis in determining why civil rights law has seen a falling off. The conclusion is that although political reasons did play a large role in the retrenchment of civil rights law as it was conceived during the Civil Rights Movement in the 1950s and '60s, they did not play the only role.

Five socioeconomic reasons have contributed heavily to the diminishing fervor of civil rights laws like Title VII. For example, Title VII precedent used to be much more favorable to employees suing their employer for wrongful discrimination. It has since become more favorable to the employer defending against a Title VII lawsuit. Shifting political winds likely had something to do with this, but so too did the shifting of cases likely to settle relative to those likely to go to litigation.

Judges in the '50s and the '60s were more likely to broadly interpret the principles undergirding Title VII. As time passed, the Title VII cases they

[*] Copyright © 2024 Jacob Chabot. Associate Research Scholar & Living Civil Rights Law Fellow at Yale Law School, 2022–2023. I am grateful to Yale Law School for giving me the opportunity to research and write this Article during that year. I would like to thank my parents, Richard and Marina Chabot, who have supported my every academic endeavor and who have given me everything from homecooked meals to a college education. I would also like to thank Brian Soucek for his excellent mentorship while I was a law student as well as the *UC Davis Law Review* team for their thoughtful edits and comments. Finally, I want to thank Sarah Megiel for thought-provoking discussions on economics and adverse selection while I was doing the research for this piece.

decided were read narrowly, thus narrowing the understanding of who could recover under Title VII. Again, politics likely had something to do with this. But so too did the increasing abundance of existing Title VII cases, which overproceduralized Title VII precedent and grew a judiciary more reluctant to interpret cases broadly against an increasingly complicated procedural tapestry.

Finally, the groups advocating in favor of Title VII have grown less cohesive since its inception. And some groups that were once in favor of Title VII now celebrate its retrenchment. Southern business owners, for example, were surprisingly pro-Title VII. They stood to profit from the enlarged customer base it would allow them to serve. Their support is no longer as fervent since their customer base will likely not shrink regardless of the degree to which Title VII is hobbled.

These socioeconomic reasons, in addition to political ones, account for a significant portion of the retrenchment of Title VII and subsequently of civil rights laws.

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INTRODUCTION

The harsh truth is that civil rights law is no longer what it used to be. This is not a contentious opinion. Many civil rights scholars have recognized the retreat of civil rights law generally and of Title VII in particular.[1]

But, until now, there has been no deep analysis, separate from political analysis, explaining this development. The current narrative points to political hurdles as responsible for the retrenchment of civil rights law.[2]

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[1] *e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1337-40 (1988) (charging Ronald Reagan, when he was President, and neoconservative scholars such as Thomas Sowell for being responsible for the decline of civil rights law and for proclaiming that the goal of the Civil Rights Movement had already been fulfilled); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. Rev. 162, 165-66, 170-72 (1994); Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1102, 1114-18 (1978); Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL'Y REV. 211, 213-17 (2008) (describing how the Civil Rights Division become politicized and stopped litigating civil rights cases as well, resulting in a retrenchment of civil rights law); Catherine Y. Kim, *Rights Retrenchment in Immigration Law*, 55 UC DAVIS L. REV. 1283, 1306-12 (2022) (accounting the United States Supreme Court's role in the retrenchment of the civil liberties entitled to immigrants); Eva Paterson & Luke Edwards, *Implicit Injustice: Using Social Science to Combat Racism in the United States*, HARV. J. RACIAL & ETHNIC JUST. ONLINE 1, 5-12 (2015) (giving a history of the retrenchment of civil rights law); Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785, 785-90 (1985) (acknowledging a decline in the efficacy of civil rights law generally and examining the Reagan administration's role in the decline).

[2] *See, e.g.*, Crenshaw, *supra* note 1, at 1336-37 (largely holding President Reagan responsible for the retrenchment of civil rights: "The Reagan Administration arrived in Washington in 1981 with an agenda that was profoundly hostile to the civil rights policies of the previous two decades."); Paterson & Edwards, *supra* note 1 (largely explaining the decline of civil rights law through the narrative of Republican presidents appointing

Consider the Reagan administration's concerted efforts to enfeeble the Civil Rights Act of 1964, which dealt a blow to the Act still felt today.[3] Consider the current makeup of the United States Supreme Court.[4] Consider the realization of those who benefited from discrimination in the past that strong antidiscrimination law meant giving up their advantage.[5]

This Article will not rehearse those political hurdles, which have already been thoroughly explored and which certainly did play a role in the slowing of civil rights law. This Article will instead put forth a brief survey of five reasons, grounded in economic and sociological theory, that explain why some degree of retrenchment of civil rights law may have been inevitable, regardless of politics. I apply these reasons to Title VII of the Civil Rights Act of 1964 — making discrimination on the basis of race, sex, religion, or national origin illegal in the workplace[6] — as an example of how one major branch of civil rights law — employment

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conservative justices to the federal courts); Selig, *supra* note 1 (discussing the Reagan administration's role in the retrenchment of Title VII law); Kennedy, *supra* note 1 (blaming the Bush administration for politicizing the Civil Rights Department); Michael L. Selmi, *The Obama Administration's Civil Rights Record: The Difference an Administration Makes*, 2 IND. J.L. & SOC. EQUAL. 108, 109-10 (2013) (discussing the importance of presidential administrations in enforcing civil rights laws).

[3] Selig, *supra* note 1, at 785-86; *See* Julie Johnson, *Reagan Vetoes Bill That Would Widen Federal Rights Law*, N.Y. TIMES (Mar. 17, 1988), https://www.nytimes.com/1988/03/17/us/reagan-vetoes-bill-that-would-widen-federal-rights-law.html, [https://perma.cc/V7GM-5Z43] (discussing Ronald Reagan's veto of a bill that would have overturned a Supreme Court opinion that narrowed a law prohibiting sex discrimination).

[4] *See* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1057 (2014) (noting that judges appointed by Republican presidents were far more likely to accept an argument made by employers sued in Title VII employment discrimination cases that blamed employees for merely having a "lack of interest" in the job rather than discriminatory policies).

[5] This kind of attitude is exemplified by the influx of reverse discrimination cases that gained prominence a couple decades after the passage of the Civil Rights Act of 1964. *See, e.g.*, Cramer v. Va. Commonwealth Univ., 586 F.2d 297, 299 (4th Cir. 1978); Freeze v. ARO, Inc., 708 F.2d 723 (6th Cir. 1982); *In re* Birmingham Reverse Discrimination Emp. Litig., 833 F.2d 1492, 1495 (11th Cir. 1987) (detailing white male firefighters who sued the fire department for entering into a consent decree that set goals for hiring and promoting black firefighters).

[6] 42 U.S.C. § 2000e-2(a).

discrimination law — has indeed been affected by these sociological and economic factors.

So, why is Title VII in retreat? The following five reasons, each of which this Article will explore further in devoted sections, provide a solid foundation of understanding:

A. (1) Legal precedent suffers from a kind of adverse selection problem.[7]As predictive precedent arises, more parties to legal disputes will begin to settle out of court instead of litigating — resulting in a kind of equilibrium in which litigation is inversely correlated with the amount of powerful precedent.[8]

B. Decision-making at the group and the individual level can be irrational as demonstrated by the phenomenon of preference reversals.[9] These preference reversals impact public perception and judicial reasoning.

C. The "status theory of cooperation and conflict" — the idea that individuals seek esteem and that groups matter, especially in overcoming collective action problems — has influenced the composition of who supports strong civil rights laws.[10]

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[7] Such adverse selection is of the kind Akerlof famously put forth in his seminal work. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488-93 (1970).

[8] This is an idea that has been explored by multiple prominent scholars of economics, law, and game theory, although this is the first time it is being introduced to explain the tides of Title VII law. *See, e.g.*, RICHARD A. POSNER, *The Economic Approach to Law*, *in* THE PROBLEMS OF JURISPRUDENCE 353, 358-59 (1990) ("The system of precedent itself has an economic equilibrium."); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 27-29 (1994); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1100-11 (1997).

[9] *See* Christopher K. Hsee, Sally Blount, George F. Loewenstein & Max H. Bazerman, *Preference Reversals Between Joint and Separate Evaluations of Options: A Review and Theoretical Analysis*, 125 PSYCH. BULL. 576, 578-80 (1999) (providing a helpful overview of these preference reversals) [hereinafter *Preference Reversals Between Joint and Separate Evaluations of Options*].

[10] Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1031 (1995) [hereinafter *Cooperation and Conflict*]; Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355-75 (1997).

D. The perpetual evolution of social norms has changed the meaning of Title VII law.

E. The rise of the internet and the group polarization its rise has facilitated stultified Title VII's efficacy.

I. THE DEVELOPMENT OF TITLE VII — AN OVERVIEW

Although Title VII is statutory — its authority emanates from Title VII of the Civil Rights Act of 1964[11] — the force behind Title VII emanates from a sea of landmark United States Supreme Court cases interpreting the statute. This Part will wade through these cases to explain how Title VII works and how it was developed. This quick sojourn into Title VII is aimed to give those unfamiliar with the territory some context so they might better appreciate the next Part, which explains Title VII's demise.

A. Introducing Title VII

Title VII of the Civil Rights Act of 1964 prohibits private employers from discriminating on the basis of race, sex, religion, or national origin.[12] The 1964 Act only regulated private employers, so Title VII employment discrimination suits against public employers, such as police and fire departments, did not come until 1972, when Title VII was amended by the Equal Employment Opportunity Act of 1972.[13]

Enforcement of Title VII since the 1964 Act's inception is split three ways between private litigants, the Attorney General and subsequently the Civil Rights Division of the Department of Justice ("DOJ"), and the

[11] 42 U.S.C. § 2000e-2(a).

[12] *Id.*

[13] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. 2000e-5). The Equal Employment Opportunity Act of 1972 transferred the authority originally vested in the Attorney General to bring pattern or practice suits against private employers to the EEOC. The Attorney General was given the power to sue public employers, like police and fire departments. Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 59 n.2, 61-66 (1972).

Equal Employment Opportunity Commission ("EEOC").[14] The original 1964 Act relied primarily on private litigants to enforce Title VII.[15] The EEOC was toothless with virtually no enforcement capabilities.[16] But the Attorney General, through the DOJ could sue private employers during this time for engaging in a "pattern-or-practice" of discrimination — a Title VII concept of discrimination that will be explained below. As will be explained in Part III, the cases brought by the DOJ during this period were monumental and paramount in creating the progressive, employee-friendly, early Title VII caselaw.

Title VII provides two foundations of unlawful discrimination on which an employment discrimination lawsuit might ground itself: disparate treatment and disparate impact.[17] The following sections will cover these two theories of discrimination, on which every single Title VII employment discrimination lawsuit hinges.

B. Disparate Impact

The theory of disparate impact does not concern the intent behind employment policies.[18] For example, whether the employer required the taking of an aptitude test for hiring because the employer *knew* this

[14] *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 286 (2002) (quoting 42 U.S.C. § 2000e-6(a)) (citing Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 325 (1980)); *see also* 42 U.S.C. § 2000e-6.

[15] Civil Rights Act of 1964, Pub. L. No. 88-352, §§706(e), 707(a), 78 Stat. 241, 260, 261-62 (allowing only individual victims of discrimination the ability to file a Title VII lawsuit against a private employer but giving the Attorney General the ability to sue in cases where the employer had allegedly engaged in a pattern or practice of discrimination).

[16] *See* Civil Rights Act § 706(e) ("[If] the [EEOC] has been unable to obtain voluntary compliance with this title, the [agency] shall so notify the person aggrieved and a civil action may . . . be brought against the respondent named in the charge [by the person discriminated against.]"); Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. RELS. L.J. 1, 7-8 (1977).

[17] *See* Ricci v. DeStefano, 557 U.S. 557, 575 (2009).

[18] *See* EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir. 2000) (noting that disparate impact "seeks the removal of employment obstacles, not required by business necessity, which . . . freeze out protected groups from job opportunities and advancement").

would weed out black applicants who had little secondary education.[19] Instead, the theory concerns the disparate effects of such policies.[20] Regardless of what the employer intended in requiring such an aptitude test, and the policy requiring a high score on this test was facially neutral, the employer could face liability if such a policy had a disparate impact on black applicants or on women and was not a business necessity.[21]

Proof of a discriminatory motive was imperative to a plaintiff's case prior to the Supreme Court's decision in *Griggs v. Duke Power Co.*[22] The Court held in *Griggs* that employment practices lacking discriminatory intent, but that, in effect, operated to disproportionately exclude minorities, were nonetheless precluded by Title VII.[23]

Before Title VII was passed into law, the Duke Power Company hired black employees in only its labor department — the department with the lowest pay and with no possibility for promotion.[24] Once enacted, Duke Power Company dropped its policy of restricting black employees to the Labor Department but implemented a new requirement for all the other departments besides the Labor Department.[25] The new policy required that applicants for any department other than the Labor Department had to pass two aptitude tests and possess a high school degree.[26] Black employees filed a class action against Duke Power Company alleging race discrimination.[27]

The case went to the Supreme Court, which held that the required aptitude tests and high school diploma for all departments besides the Labor Department at Duke Power Company operated to "freeze the status quo."[28] Even if these requirements were not intentionally discriminatory, they operated to create a disproportionate impact on

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[19] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 427-28 (1971).

[20] *Joe's Stone Crab, Inc.*, 220 F.3d at 1274.

[21] *Id.*

[22] *Griggs*, 401 U.S. 424.

[23] *Id.*

[24] *Id.* at 427.

[25] *Id.* at 427-28.

[26] *Id.*

[27] *Id.* at 428.

[28] *Id.* at 430.

black applicants and employees and were unrelated to measuring job capability.[29]

The facts and holding in *Griggs* are widely acknowledged to be the gold standard for finding and applying the disparate impact theory of discrimination.[30] Disparate impact claims today are analyzed with a three-part test. First, to establish a prima facie case, the plaintiff alleging a disparate impact must show that a facially neutral employment practice has a disproportionate impact on members of a particular race, sex, or national origin.[31] Second, if the plaintiff succeeds in establishing the prima facie case, the defendant must then show that the employment practice is manifestly related to the job in question,[32] or that the practice serves some important business purpose.[33] The defendant may also discredit the plaintiff's statistics or proffer extra statistical evidence to demonstrate the absence of any disparity.[34] If the defendant fails to make either of these showings, then the plaintiff prevails in the disparate impact claim. But if the defendant succeeds in demonstrating the necessity of the employment practice to the job in question, the plaintiff may present evidence to show that the nondiscriminatory reason for using the employment practice in question is, in fact, pretextual by pointing to an alternative nondiscriminatory practice that would also satisfy the asserted business necessity.[35]

Before discussing disparate treatment, I wish to identify a couple caveats that complicate the disparate impact analysis. In 1976, the Supreme Court decided the case of *Washington v. Davis*.[36] There, the Court seemingly departed from its reasoning in *Griggs*, holding that a showing of disproportionate impact alone, without a showing of

29. *Id.* at 430-32.

30. *See, e.g.*, Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 317 (1998).

31. *Id.* at 326.

32. *Id.* at 321; *Griggs*, 401 U.S. at 432.

33. N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 579 (1979).

34. Davis v. Califano, 613 F.2d 957, 962 (D.C. Cir. 1979).

35. *See* Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 660-61 (1989); Conn. v. Teal, 457 U.S. 440, 440-41 (1982).

36. 426 U.S. 229 (1976).

discriminatory intent, was insufficient to prove racial discrimination in violation of the Fifth Amendment of the Constitution.[37] In other words, after *Washington v. Davis*, Fifth Amendment racial discrimination claims are generally harder to prove than mere Title VII racial discrimination claims because the Fifth Amendment claims require discriminatory intent.[38]

In 1977, the Supreme Court decided *Dothard v. Rawlinson*.[39] At issue in *Dothard* were minimum height and weight requirements for prison guards working with the Alabama Department of Corrections.[40] Dianne Rawlinson applied for a position to be a security guard at the department but was rejected because she did not meet the minimum weight requirement.[41] Rawlinson sued the department alleging sex discrimination under Title VII.[42] While the lawsuit was pending, the Alabama Board of Corrections adopted a regulation establishing a male-only rule for specific positions that required close contact with inmates in all-male maximum security prisons.[43]

The Supreme Court held that the height and weight requirements had a discriminatory effect on the sex of accepted applicants, even if there was no discriminatory intent.[44] The result here deceptively affirmed the holding in *Griggs* that plaintiffs need only show a significant discriminatory pattern to successfully allege a prima facie case of discrimination.[45] But the Supreme Court in *Dothard* also concluded that the subsequent regulation adopted by the Alabama Board of Corrections, establishing a male-only rule for specific positions in all-male maximum security prisons, was perfectly legitimate.[46] The Court reasoned that being a male was a bona fide occupational qualification for the job of prison guard at an all-male maximum security prison

[37] *Id.* at 247-48.

[38] *See id.*

[39] 433 U.S. 321 (1977).

[40] *Id.* at 323.

[41] *Id.*

[42] *Id.* at 324-25.

[43] *Id.* at 326-28.

[44] *Id.* at 330-31.

[45] *Id.* at 331-32.

[46] *Id.* at 333, 336.

because female guards would create security concerns by the very nature of the setting, the close contact with the male prisoners, and the gender of the prison guard.[47]

From such reasoning easily spawns the idea that the mere sex of an applicant can be a legitimate reason to deny that applicant a job — some jobs can only be done by a man and some only by a woman. Such an idea is a dangerous and a precariously slippery slope. For a tiny minority of jobs, the idea admittedly rings true. Consider a director searching for an actor to play Cleopatra (a woman) in a historically accurate play about her reign over ancient Egypt, or the attendant in a woman's locker room (although a gender restriction even in this job might still reasonably be contested). Even race, an arguably more dubious consideration than sex for whether an applicant is qualified to work a job, might be relevant for a sliver of jobs. Consider the Broadway hit *Hamilton* and its black cast — the show purposefully hired black actors to give a commentary on racism at the time of the framing of the Constitution.[48]

For the vast majority of jobs, though, sex should not matter at all. Yet many employers are guilty of imputing the importance of sex to the job. Southwest Airlines, for example, historically refused to hire men as flight attendants or stewardesses, arguing that being a young attractive woman was paramount to the job and its sexualized women flight attendants were essential to Southwest's business.[49] This, of course, was untrue and we see many male flight attendants at Southwest today.

C. Disparate Treatment

The second type of discrimination recognized by Title VII is the theory of disparate treatment. Disparate treatment is perhaps the most clearcut theory of discrimination, grounded on palpable discrimination

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[47] *Id.*

[48] *See* Spencer Kornhaber, *Hamilton: Casting After Colorblindness*, ATLANTIC (Mar. 31, 2016), https://www.theatlantic.com/entertainment/archive/2016/03/hamilton-casting/476247/ [https://perma.cc/8G8M-JJPR]; *cf. Broadway Union Takes Issue with "Hamilton" Casting Call for "Non-White" Performers*, CBS N.Y. (Mar. 29, 2016, 11:18 PM EDT), https://www.cbsnews.com/newyork/news/hamilton-casting-call-non-white/ [https://perma.cc/JM24-ZV9Y].

[49] *E.g.*, Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 294-96 (N.D. Tex. 1981).

because of race, sex, national origin, or religion.[50] Whereas discriminatory intent need not be proved to win a disparate impact suit, proof of discriminatory intent is essential to winning a disparate treatment suit.[51] Discriminatory intent, however, need not be explicit for the plaintiff to prevail in a Title VII disparate treatment suit; intent to discriminate because of race or sex or any other characteristic protected by Title VII may be inferred.[52]

Of course, if there is proof of discriminatory intent through direct evidence, the plaintiff can succeed in a disparate treatment suit without having to convince the court to infer intent.[53] Success in proving discriminatory intent via direct evidence, though, is increasingly rare.[54] But, besides proof of intent via direct evidence, plaintiffs have two other avenues by which to get the court to infer discriminatory intent in order to succeed on a theory of disparate treatment: the *McDonnell Douglas* approach and pattern-and-practice suits.

1. Proving Discriminatory Intent Using Direct Evidence

A plaintiff may succeed in a Title VII disparate treatment suit by pointing to direct evidence of an employer's discriminatory intent, resulting in an adverse employment decision.[55] Such evidence could include racial or sexual epithets or slurs uttered by the employer or by an authorized agent of the employer or, more directly, an agent's or employer's admission that race, sex, or religion was partially the reason

[50] *See, e.g.*, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[51] *Id.*

[52] *Id.*

[53] *See id.* at 358 n.44.

[54] *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the 'plaintiff [has] his [or her] day in court despite the unavailability of direct evidence.'" (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)); *see also* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony to the employer's mental processes.").

[55] Tristin K. Green, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII* , 87 CALIF. L. REV. 983, 985 (1999).

behind an adverse employment decision.[56] Once this kind of evidence has been offered and accepted, the employer bears the burden of production to show that the same adverse employment decision would have been made even had the plaintiff's protected Title VII characteristics not been considered in making the decision.[57]

2. *McDonnell Douglas* Approach

Unsurprisingly, it is not too common for an employer to provide an employee who has experienced wrongful discrimination with direct evidence that the discrimination occurred.[58] But plaintiffs can still raise an inference of discriminatory intent indirectly using the *McDonnell Douglas* test, which was articulated by the Supreme Court in 1973 to guide plaintiffs in proving their disparate treatment cases.[59]

The *McDonnell Douglas* test was developed by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*.[60] The test is composed of three steps. First, at the outset, it is the plaintiff's burden to prove the existence of a prima facie case of discrimination.[61] To prove a prima facie case of discrimination in hiring, the plaintiff must show (a) the plaintiff belongs to a protected class; (b) the plaintiff applied and was qualified for a job that the employer was hiring for; (c) that the plaintiff was rejected from that job; and (d) that after the plaintiff was rejected, the position remained open and the employer continued to seek applicants with similar qualifications to the plaintiff.[62] Second, if the plaintiff cannot establish its prima facie case, then the defendant in the employment discrimination lawsuit will prevail.[63] But assuming the

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[56] *But see* Perry v. Woodward, 199 F.3d 1126, 1134 (10th Cir. 1999).

[57] Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981).

[58] *See* Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 9 (2005) ("This burden-shifting scheme is said to cater to the reality that Title VII plaintiffs typically lack direct evidence of an employer's discriminatory motive.").

[59] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *Burdine*, 450 U.S. at 254.

[60] *McDonnell Douglas*, 411 U.S. at 802.

[61] *Id.*

[62] *Id.*

[63] *Id.*

plaintiff can establish its prima facie case under the *McDonnell Douglas* test, the burden shifts to the defendant employer to articulate a legitimate nondiscriminatory reason for firing the employee or failing to hire the employee.[64] The employer's burden is only a burden of production — meaning the employer need only produce some evidence that would be sufficient to allow the fact finder to reasonably conclude that the adverse employment decision was legitimately nondiscriminatory.[65] If the employer cannot produce such evidence, then the plaintiff prevails.[66] Third and finally, if the employer does articulate a legitimate nondiscriminatory reason for the adverse employment decision, then the plaintiff has the chance to demonstrate that the employer's articulated reasons for the adverse employment decision were in fact pretextual — the employer intended to discriminate on the basis of a protected characteristic merely under the veil of a legitimate reason.[67]

The *McDonnell Douglas* approach is complicated, however, by subsequent Supreme Court decisions. Five years after deciding *McDonnell Douglas Corp. v. Green* in 1973,[68] in 1978, the Supreme Court decided *Furnco Construction Corp. v. Waters*.[69] Whereas the method of proving wrongful discrimination under the theory of disparate treatment designed in *McDonnell Douglas* helped plaintiffs win employment discrimination cases, *Furnco* kept it from being too easy to prove discrimination.[70]

In *Furnco*, the U.S. Supreme Court held that just because the plaintiff succeeds in proving a prima facie case of discrimination does not mean

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[64] *Id.*

[65] *See Burdine*, 450 U.S. at 254-55. Note the difference here between the burden shifting in disparate impact and the burden shifting under the *McDonnell Douglas* test of disparate treatment. In a disparate impact suit, after the plaintiff makes the prima facie case, the burden shifted to the employer is a burden of persuasion. Whereas, in a disparate treatment suit, the burden shifted to the employer after the plaintiff makes the prima facie case is only a burden of production.

[66] *Id.*

[67] *Id.* at 255-56.

[68] *McDonnell Douglas*, 411 U.S. 792 (1973).

[69] Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

[70] *See Furnco*, 438 U.S. at 577-78; Kaminshine, *supra* note 58, at 8-9 (noting that the *McDonnell Douglas* burden shifting framework helped plaintiffs).

that the court hearing the case can conclude that discrimination on the basis of a protected characteristic occurred, even if the employer failed to rebut the plaintiff's prima facie case.[71] The Seventh Circuit Court of Appeals in *Furnco* imposed a hiring plan on the employer that would force the employer to consider more minorities after it concluded that the plaintiff succeeded in proving a prima facie case, and the defendant employer failed to rebut it.[72] The Supreme Court subsequently admonished the Seventh Circuit for doing this, reasoning that no court could impose such a remedy on an employer on the scanty grounds of a mere prima facie case of discrimination.[73] Such a prima facie case, according to the Court, did not amount to a factual finding of discrimination in violation of Title VII and only such a violation would warrant that remedy.[74]

To make matters even worse for the plaintiff (but better for the defendant in a Title VII case), the Supreme Court in *Furnco* also broadened the understanding of how an employer could rebut the plaintiff's prima facie case under the second step of the *McDonnell Douglas* approach.[75] The Court held that an employer need not establish that the disputed employment practice was the method best suited to maximize minority hires; the employer need only show a legitimate nondiscriminatory reason behind the disputed practice.[76] This made rebutting the plaintiff's prima facie case much easier for employers.

In 1993, the Supreme Court in *St. Mary's Honor Center v. Hicks* would take further steps away from the pro-plaintiff framework established in *McDonnell Douglas*, making it more difficult for a plaintiff to prove discrimination with a theory of disparate treatment.[77] To understand the gravitas of the blow dealt by *Hicks* to the pro-plaintiff framework of *McDonnell Douglas*, one must understand the history of the case. In *Hicks*, after St. Mary's Honor Center underwent extensive supervisory changes, Hicks, an employee of the center, was subject to increasingly

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71 *Furnco*, 438 U.S. at 577.

72 Waters v. Furnco Constr. Corp., 551 F.2d 1085 (7th Cir. 1977).

73 *Furnco*, 438 U.S. at 576-78.

74 *Id.*

75 *Id.* at 577-78.

76 *Id.*

77 St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 502 (1993).

severe disciplinary actions and was eventually fired.[78] Hicks brought a Title VII suit against the center alleging race discrimination.[79]

Hicks attempted to prove wrongful discrimination on the basis of race to the district court via a theory of disparate treatment using the *McDonnell Douglas* approach.[80] After Hicks successfully made his prima facie case (step one), the defendant employer gave legitimate nondiscriminatory reasons justifying the adverse employment decision (step two).[81] Hicks, however, proved to the court that the employer's reasons justifying his treatment at work and ultimate discharge were mere pretext and not the real reasons behind what had happened to him (step three).[82] One would think that because the plaintiff demonstrated that the employer's proffered reasons in attempt to deflect the plaintiff's prima facie case of discrimination were proven erroneous, the plaintiff would win.

Not so, at least according to the district court in *Hicks*.[83] The district court in *Hicks* held in favor of the employer, finding that although the employer's reasons for Hicks' discharge were pretextual and untrue, Hicks had failed to carry the ultimate burden of proof that the decision was racially motivated rather than personally motivated.[84] In other words, the district court imparted a nigh oppressively strict reading to step three of the *McDonnell Douglas* approach. The result forces plaintiffs to persuade the fact finder that the employer's reasons explaining a prima facie discriminatory employment decision were pretextual and to prove that the real reason behind the employment decision was discriminatory in violation of Title VII.[85] Arguably, commanding the plaintiff to fulfill such a requirement is effectively condemning the plaintiff to Atlas's burden, thus negating the *McDonnell*

[78] Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1246-48 (E.D. Mo. 1991).

[79] *Id.* at 1249.

[80] *Id.*

[81] *Id.* at 1250.

[82] *Id.*

[83] *See id.* at 1249.

[84] *Id.* at 1252 (holding that "plaintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge. Plaintiff has not, however, proven by direct evidence or inference that his unfair treatment was motivated by his race").

[85] *Id.* at 1251.

Douglas approach entirely. Why should the plaintiff have to go through all the rigmarole of proving the prima facie case and forcing the employer to provide legitimate, nondiscriminatory, non-pretextual reasons if at the end of it all, the plaintiff still must show that the employer's reason for the adverse employment decision was discriminatory?

The Eighth Circuit indeed expressed such gripes about the district court's treatment of the case and so reversed the district court's decision, holding that once an employee discredits all of the employer's proffered reasons, the employee is entitled to judgment as a matter of law.[86] Alas, to no avail, the Supreme Court would make quick work of the Eighth Circuit's decision, reversing it and essentially reaffirming the district court's ruling.[87] The Supreme Court ultimately held that even if the employer's proffered reasons for an adverse employment decision in a Title VII case are pretextual, summary judgment for the employee does not necessarily follow; and the employee retains the burden of persuasion to prove intentional discrimination at all times.[88]

3. Pattern-and-Practice Cases

Finally, disparate treatment might also be shown by demonstrating a pattern and practice of discrimination.[89] But these types of cases are not brought and litigated by individual plaintiffs who have suffered employment discrimination; they are brought by the government.[90]

The language of Title VII authorized both private actions by individual employees for wrongful discrimination, and public actions by the Attorney General in cases that involved a pattern or practice of discrimination.[91] Title VII's pattern or practice provision provided the

86 *See* Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492-93 (8th Cir. 1992).

87 St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 523-24 (1993).

88 *Id.*

89 42 U.S.C. § 2000e-6(a).

90 *Id.* (explaining that only the Attorney General can bring these types of Title VII suits).

91 *Id*. Note that Congress amended Title VII in 1972, transferring the ability to bring pattern or practice lawsuits against private employers to the EEOC from the Attorney General and expanding Title VII's coverage to public employers — giving the Attorney

government the ability to bring discriminatory employers to court where the individual complaint system failed to do so. And that failure is unsurprising. The costs of litigating such cases (in time, attorney's fees, and risk of loss) were simply too high for the individual employee to bear; and individual employees were scared to sue their employers out of fear of losing their jobs or being ostracized from the labor market.[92]

To show that an employer was engaging in a pattern or practice of discrimination, the plaintiff must prove the employer's perpetual or systemic discrimination.[93] The plaintiff must show "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[94] To do this, the plaintiff must prove a prima facie case that the employer was engaged in a pattern or practice of intentional discrimination against a protected group.[95] In a pattern or practice suit, the prima facie case may be grounded in either direct testimony from members of the protected class that specify instances of discrimination or statistical evidence that demonstrates it would be highly improbable that the employer was not discriminating given the data.[96]

Once the plaintiff has succeeded in establishing the prima facie case, then the employer defendant inherits a burden of production to defeat the prima facie case "by demonstrating that the . . . proof is either inaccurate or insignificant."[97] Once the defendant does that, then the fact finder must consider the evidence marshaled by both sides.[98] Only if the plaintiff has established, with a preponderance of the evidence,

General power to bring those public lawsuits. *See* EEOC v. Harvey L. Walner & Assocs., 91 F.3d 963, 968 (7th Cir. 1996).

[92] *See Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1253, 1255 (1971).

[93] Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977).

[94] *Id.*

[95] *Id.* at 360.

[96] *Id.* at 339. For example, say the Chicago location for some hypothetical firm only employed 0.5% of black people in managerial positions when the relevant labor market for that position in that area consisted of thirty-five percent black people. I will skip the binomial distribution calculation, but the probability that this happened by chance given those figures is below one percent assuming a normal distribution.

[97] *Id.* at 360.

[98] *See id.* at 361.

that the defendant was engaged in a pattern or practice of discrimination, does the plaintiff prevail.[99]

II. The Sociological and Economic Factors Behind Title VII's Decline

The cases used in the previous Part were organized in such a way as to give the reader a better understanding of Title VII. In this Part, I will be reframing those cases and organizing them in such a way as to display the steady decline of Title VII's efficacy.

To be sure, Title VII is recoiling from long dealt political blows.[100] Such setbacks include judges who have penned opinions narrowing Title VII, appointed by presidents who were less than favorable to expansive readings of the Civil Rights Act. This is nothing new.[101] Here, I seek to give a thicker understanding of Title VII's decline — framing it as something that was perhaps natural, not necessarily only political, and something that we, as a society, should make it a habit to fix every few decades.

A. *Adverse Selection and the Economic Equilibrium of Legal Precedent*

Consider the following hypothetical meant to introduce the concept of adverse selection as a force altering legal precedent. A new law is passed. It is statutory, and the issues it resolves are almost entirely matters of law — the facts were not often disputed but people disagreed about whether activities that made up the facts should be illegal or not. Discrimination because of race is one example. There is no question that some people were discriminating because of race. The question was whether it should be illegal to do so. Say the statute resolved this, making discrimination because of race illegal.

At first, there is immense litigation surrounding the statute because it is so new. This litigation blazes the path that distinguishes pure theory from application. The litigation, for example, clarifies various ambiguities in the text that legislators did not foresee in promulgating

[99] *See id.* at 336.

[100] *See supra* notes 2–4 and accompanying text.

[101] *See supra* note 2.

the statute and that arose precisely because application sheds light on issues that mere pontification overlooks.

Such heavy litigation yields an abundance of precedent. And after some time, a (hopefully) coherent body of precedent arises. Now, parties in legal disputes that involve the recently passed statute can draw from this body of precedent in predicting the likely outcome if they were to take their suit to trial. If the precedent is indeed coherent and the parties have competent lawyers, then the parties' estimates of the probable outcome will converge to a degree,[102] and the parties will mostly settle out of court because going to trial is exceedingly costly.[103]

Litigation around this area of law will decline as more and more parties find it rational to settle because of existing precedent.[104] This presents an Akerlof-esque adverse selection problem in litigation.[105] Cases identical to the existing precedent in all relevant aspects are settled out of court whereas cases that have relevant dissimilarities likely to alter, instead of strengthen, existing precedent will go to court.[106] Likely, those that still litigate will do so only for a handful of reasons. The case might be one that could change precedent. The parties may be dissatisfied with the status quo and hope that a judge will render a decision antithetical to existing precedent or that the Supreme Court will take the case and change the law.[107] In short, litigation will decline because most of the cases that align with existing precedent will be settled out of court, and the cases that do go to court will be those most likely to change existing precedent.[108]

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[102] POSNER, *supra* note 8, at 358-59.

[103] *Id.*

[104] *See* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 743-44 (2005) (implying that the more information parties have about the claim, the more likely they are to settle, and pointing out that if third parties were able to purchase plaintiffs' claims, then they should "wonder why the defendant did not offer a better deal" i.e., the defendant knew something that neither the plaintiff nor 3rd party knew).

[105] *See* Akerlof, *supra* note 7, at 488-90.

[106] POSNER, *supra* note 8, at 358-59.

[107] *See* Fisch, *supra* note 8, at 1107-08 ("Decisions in which the Supreme Court overrules its own precedent or fashions a new principle of constitutional law are examples of adjudication that may disrupt a stable equilibrium.").

[108] *Id.*

This overall decline in litigation means less recent precedent. Less recent precedent means that "existing precedents will obsolesce as changing circumstances render them less apt and informative."[109] This obsolescence of old precedent means parties will no longer converge in their estimates of the probable outcome of their case.[110] The rate of litigation will rise given this increased uncertainty of result.

Furthermore, much of the newer precedent would be that rendered from cases in which lawyers thought it likely a judge would provide a decision antithetical to existing precedent in hopes of changing the status quo.[111] Given this fact, the new precedent created from this sudden wave of litigation would probably be quite different from the precedent created in the first wave.

Given enough time, a new, different, body of precedent arises. Rates of litigation again fall as parties become increasingly sure of a particular outcome to their case. The proportion of cases brought to merely upset the status quo swells yet again. Rinse and repeat.

For simplicity, call the stage in which litigation is high right after the passage of the new law "stage one." "Stage two" is when litigation is low, except for status-quo altering precedent, because of the glut of informative precedent. "Stage three" is when litigation again begins to swell but in favor of a different status quo. "Stage four" is when litigation is low again and a new status quo reigns. This new status quo can be likened to the passage of a new law, and we return again to stage one.

Given this framework, we can clearly track the development of Title VII, which today is in stage three or four of this process. Tracking Title VII precedent from its inception in 1964 to 2023 also reveals the startling accuracy of the above framework. It would be an interesting project to devote an entire paper to an in-depth analysis of how exactly Title VII legal precedent developed through each stage and perhaps enumerate each paradigm-shifting case, signifying the law's entry into a

[109] POSNER, *supra* note 8, at 359.

[110] *Id.*

[111] *See id.*

new stage.[112] It would also be interesting to apply this framework to other areas of law. Alas, both are beyond the scope of this Article.

In 1964, the Civil Rights Act was passed into law.[113] In the following decade and into the mid-to-late 1970s, the Civil Rights Division of the DOJ and the EEOC began voluminous litigation, suing hundreds of employers and unions for employment discrimination in violation of the newly passed Title VII.[114] Landmark precedents that gave extremely broad interpretations of Title VII to widen civil rights and that are still influential today were created during this period.[115] Some of these landmark precedents were even created while Richard Nixon, a Republican, was in office.[116] This does not disprove the idea that political influences are responsible for the retrenchment of Title VII, but it does indicate that other reasons are also at play.

For example, *Griggs v. Duke Power Co.*, decided unanimously by the U.S. Supreme Court in 1971 when Nixon was President, is still one of the

[112] This is analogous to Thomas Kuhn's groundbreaking work on the role of paradigm shifts in science and their roles in scientific revolutions. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 91-105 (Univ. of Chi. Press, 4th ed. 2012).

[113] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

[114] *See* Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 921 (1978); David Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement*, 42 VAND. L. REV. 1121, 1136, 1138-39 (1989) (recounting the enormous number of charges the EEOC handled from its first year until 1975 and noting how many employment discrimination cases, in particular, the DOJ brought in 1967 and 1968 alone).

[115] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (holding that Title VII prohibits the use of employment tests that are discriminatory in effect unless they have a "manifest relationship to the employment in question"); Morton v. Mancari, 417 U.S. 535, 551 (1974) (holding that the Indian Reorganization Act of 1934, which gave special preferences to Native Americans in the Bureau of Indian Affairs was not unconstitutional); Griggs v. Duke Power Co., 401 U.S. 424, 434-36 (1971) (holding that employment decisions with the effect of disproportionately and adversely affecting minorities violate Title VII even if there is no discriminatory intent, unless the decisions can be tied to job performance); Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970) (holding that a wage disparity between men and women employees for work that was "substantially equal" violated that Equal Pay Act).

[116] *See, e.g.*, *Morton*, 417 U.S. at 535 (decided in 1974 during Richard Nixon's presidency); *Griggs*, 401 U.S. at 424 (decided in 1971 during Richard Nixon's presidency); *Schultz*, 421 F.2d at 259 (decided in 1970 during Richard Nixon's presidency).

strongest[117] Supreme Court opinions to date that uses the concept of disparate impact to find wrongful discrimination in a disproportionately white workforce despite the lack of discriminatory intent.[118] From the late 1970s into the '80s and early '90s, though, Title VII reached stage two. Litigation in court against allegedly discriminatory employers stalled.[119] And new precedent was just beginning to spring up, signifying a change in the status quo and an alteration to the existing super-progressive precedent created in stage one in the late '60s and '70s.[120]

117 Indeed, even after the Reagan era's enfeebling of many civil rights laws, *Griggs* has remained on the throne. *See* Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 433 (2005) ("Aside from *Brown v. Board of Education*, the single most influential civil rights case during the past forty years . . . is *Griggs v. Duke Power Co.*").

118 *See Griggs*, 401 U.S. at 434-36.

119 *See* Rose, *supra* note 114, at 1147-48 (noting that in the period of 1975–1982, there was "relatively little change in the structure of employment discrimination law" but also noting that the Supreme Court "handed civil rights proponents their first major defeat under Title VII in 1977" and that the Court "gave a restrictive interpretation to the sex discrimination provisions of Title VII by ruling that discrimination on the grounds of pregnancy was not sex discrimination").

120 *See, e.g.*, Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 561 (1984) (striking down a court order requiring an employer to lay off white workers and keep black workers that would have reduced extreme racial disparities within the workplace); Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977) (holding that the burden of proof is on the employee to show that they would have applied absent discrimination); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 310-13 (1977) (holding that what constitutes a "relevant labor market" is a question of fact to be decided by the fact finder thus keeping the door open for district courts to shape their own "relevant labor markets" and keeping the door open for discriminatory policies); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 314 (7th Cir. 1988) (accepting the argument of employers that employees just lacked interest and not acknowledging discriminatory policies); *see also* Rose, *supra* note 114, 1155-58 (explaining that "the Justice Department during these years [the 1980s] approached equal employment opportunity issues in court as if the regulations and guidelines adopted by the agencies charged with administering equal employment opportunity law did not exist, or at least were not binding upon the government," and further alleging that the Reagan administration was actively trying to change existing civil rights law through the courts); *id.* at 1159 ("The Commission brought no testing or other adverse impact suits from 1983 to January 1989.").

Many Title VII disputes heard by district courts in the '80s were emblematic of this shift in precedent.[121] By virtue of the lower courts in which these cases were decided, they were not high-caliber precedent. However, they did signal cracks in the status quo created by the repeated litigation of cases most likely to alter the existing precedent. Consider, for example, *United States v. Commonwealth of Virginia Department of Highways and Transportation*.[122]

In the late 1970s, the DOJ went after the state of Virginia's Highway Department for discriminating against black employees and female employees in hiring and promotion.[123] The DOJ had a strong case against the Virginia Highway Department — the Highway Department's entire work force was only 10.3% black. Yet over fifty percent of the Department's black workers were working in lower-level service and maintenance jobs.[124] By this statistic alone, it was quite clear that the Virginia Highway Department was discriminating against black employees, relegating them to the less desirable jobs.[125]

The Virginia Highway Department lawyers probably knew this. Virginia agreed to settle this lawsuit and worked with lawyers from the DOJ to draft a consent decree in which the Highway Department agreed to remedy its past discriminatory behavior by paying one million dollars in damages to the victims of discrimination and by setting hiring goals (quotas) to hire more black employees and women.[126] If this were the end of the story, though, this stage two case would not be as important

[121] *See, e.g.*, EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1306 (N.D. Ill. 1986) (accepting the argument of the employer that female-identifying employees just lacked interest as a legitimate reason for why women were less represented in higher-paying roles); Vinson v. Taylor, Civ. Action No. 78-1793, 1980 U.S. Dist. LEXIS 10676, at *19, 20 (D.D.C. Feb. 26, 1980) (denying a defendant recovery for sexual harassment and going out of its way to mention that regardless of whether plaintiff and her manager engaged in an "intimate or sexual relationship during the time of plaintiff's employment" it was voluntary).

[122] United States v. Va., Dep't of Highways & Transp., 554 F. Supp. 268 (E.D. Va. 1983).

[123] *See* Fred Hiatt, *Va. Settles Road Agency Bias Suit*, WASH. POST. (Dec. 31, 1982), https://www.washingtonpost.com/archive/politics/1982/12/31/va-settles-road-agency-bias-suit/9554d786-4744-469a-a0e4-dac5a995e636/ [https://perma.cc/4F6B-72SE].

[124] *Id.*

[125] *See Hazelwood Sch. Dist.*, 433 U.S. at 308-09.

[126] *See* United States v. Va. Dep't of Highways & Transp., 554 F. Supp. 268, 270-71 (1983); Hiatt, *supra* note 123.

for scholarly analysis. Instead, it would just be one of the many cases in the 1970s that was settled in accordance with existing precedent, fading into practical legal irrelevance. But this is not one of those cases. This case is interesting because although it was clear the Department of Transportation was wrongfully discriminating, and although Virginia agreed to settle with the DOJ, the federal judge required to approve the agreement refused to do so.[127]

This case and the federal judge's decision to reject the consent decree represent the symbiosis of the political explanation to Title VII's decline and the adverse selection explanation. Admittedly, the rejection of the consent decree to settle the case was probably entirely political; after all, the judge hearing this case was Judge Warriner — a Nixon appointee and an avowed traditionally conservative Republican.[128] This is exactly the type of case in which parties would have found it rational to settle, which indeed they did. This case ended up in court because the United States was required to receive approval of the settlement in the form of a consent decree with the state of Virginia in federal court.[129] And the judge just happened to be abnormally partisan, using the federal judiciary as a bully pulpit from which to pour scorn on the imposition of quotas that "favored" black employees and women over white men.[130]

So, this case resides in an interesting middle ground of stage two cases. It lies between the many cases that obviously aligned with precedent and so were settled as existing precedent slowly obsolesced,

[127] *Va. Dep't of Highways*, 554 F. Supp. at 271; Hiatt, *supra* note 123.

[128] *Va. Dep't of Highways*, 554 F. Supp. at 271; *Federal Judge D. Dortch Warriner Dies*, WASH. POST (Mar. 18, 1986), https://www.washingtonpost.com/archive/local/1986/03/18/federal-judge-d-dortch-warriner-dies/0b2f8070-0f1f-4444-b9f3-c14070066b7d/ [perma.cc/H4C7-FP4F]; *D. Dortch Warriner*, N.Y. TIMES (Mar. 18, 1986), https://www.nytimes.com/1986/03/18/obituaries/d-dortch-warriner.html.

[129] Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 515 (W. D. Mich. 1989). *See generally Consent Decree*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/consent_decree (last visited Dec. 17, 2023) [perma.cc/E2MV-JBSM].

[130] *See, e.g.*, *Va. Dep't of Highways*, 554 F. Supp at 271 (noting in a different case that "the Court recognizes that few people of any race or sex will look a gift horse in the mouth. As far as white males are concerned, the Court has nothing in the record to indicate whether this class is willing to suffer the discriminatory impact of the consent decree"); *see also* Jane Seaberry, *Judge Rejects State Police Bias Charge*, WASH. POST (July 26, 1978), https://www.washingtonpost.com/archive/local/1978/07/26/judge-rejects-state-police-bias-charge/b0e1f82b-82ae-4168-bd89-4c275363af6f/[perma.cc/K73E-ZMZ9].

and the cases with facts that were antithetical to existing precedent and so were selected to be litigated in the courtroom at a higher frequency. In all likelihood, the *Virginia Department of Highways* case acted as a signal to Title VII defense lawyers who had cases that were likely to change precedent but who were trepidatious to pursue litigation because the existing precedent was so strong. This case signaled to them that litigation might actually yield a favorable outcome. And this case probably hastened the transition from stage two into stage three.

The later 1990s and 2000s signify Title VII's entry into stage three. Title VII employment discrimination litigation was on the rise.[131] And precedent was changing, with a number of court opinions creating new law at odds with the early Title VII precedent from stage one.[132] Finally, the 2010s and 2020s likely signify Title VII's entry into stage four, where litigation is stalling.[133] The general consensus is that disparate impact law is ineffectual, even dead.[134] And a new legal precedent reigns that is

[131] *See* ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 12, 217-18 (1993); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 14 (1996) ("[A]n unusually small percentage of the cause findings were favorably resolved — only 31.5% (607) of those findings issued in 1994 met with successful conciliation. . . . [T]he percentage is markedly lower than the general settlement rate for cases that are filed in federal court.").

[132] *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760 (1998) (using the doctrine of vicarious liability to evaluate hostile work environment claims and giving an out to employers in those environments); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 502 (1993) (holding that the employee at all times bears the burden of persuasion that they were the victim of intentional discrimination); Garcia v. Spun Steak Co., 998 F.2d 1480, 1489 (9th Cir. 1993) (holding that the employer does not automatically violate Title VII by requiring bilingual employees to speak only in English while working). It should also be noted that this is not a hard and fast time frame in which every single case decided falls exactly within the framework I have set up. Although most cases decided within the time frame fall into the framework, some cases are certainly stage 3 cases, at odds with the early Title VII precedent, but were decided in the late '80s. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 655 (1989) (increasing drastically the difficulty for defendants in Title VII cases to bring a prima facie case).

[133] *See* Bina Nayee, *Where Breaking Glass Ceilings Leads to Glass Walls: Gender-Disparate Managerial Decision-Making Power and Authority*, 87 FORDHAM L. REV. 371, 371 (2018) (noting that Title VII employment discrimination litigation was much less common in 2018 than it was two decades prior).

[134] *Id.* at 391 (noting the "diminishing force" of disparate impact litigation); Joseph A. Seiner & Benjamin N. Gutman, *Does* Ricci *Herald a New Disparate Impact?*, 90 B.U. L.

much more favorable to employers and unfriendly to racial quotas than the employee-favoring, quota-friendly precedent rendered in the late 1960s and '70s.[135]

For a prime example of Title VII precedent that closely followed this pattern of creation, obsolescence, and change to fit a new status quo, look to the precedent that emerged from the *McDonnell Douglas* method of proving disparate treatment. Indeed, we can see the steady erosion of this Title VII framework for proving intentional discrimination and the steady emergence of a new, defendant-friendly precedent, from stage one to stage four playing out from the 1970s to the 1990s.

First, it will help to understand why the burden shifting *McDonnell Douglas* rule, developed in 1973 by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[136] was so plaintiff friendly and how the test developed in *McDonnell Douglas* helped plaintiffs prove their disparate treatment cases. It is difficult to prove intent of anything, much less of something like discrimination because of race or gender. But under the *McDonnell Douglas* rule, the plaintiff's burden is not particularly high.[137] The plaintiff is entitled to summary judgement so long as the defendant cannot provide evidence of a legitimate nondiscriminatory reason for passing the plaintiff over if the plaintiff can show that: 1) they belonged to a protected class; 2) they applied to, were qualified for, and were rejected from a job for which the employer was hiring; and 3) after they

REV. 2181, 2185-94 (2010) (discussing the history of disparate impact and how it was increasingly chipped away by the Supreme Court); Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 125 (2014) (discussing how disparate impact has fallen from grace); *see also Atonio*, 490 U.S. at 642.

[135] *Compare* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (protecting the antidiscrimination claims of employees who had signed arbitration clauses as part of collective bargaining agreements), *with* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) (overruling implicitly *Gardner-Denver* and holding that arbitration agreements precluding age discrimination suits were enforceable). This is just one example demonstrating how the new legal precedent is at odds with much of the more sweeping antidiscrimination precedent created in the 1970s.

[136] 411 U.S. 792 (1973).

[137] *See* Mark R. Bandusch, *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 Cap. U. L. Rev. 965, 1053 (2009).

were rejected, the employer continued to seek applicants with similar qualifications.[138]

At first, if the only evidence is as described, it might not seem very probable at all that the plaintiff was passed over for the job opportunity because of wrongful discrimination. Was *McDonnell Douglas* too friendly to plaintiffs? No. Consider the value of missing evidence. If the employer kept complete silence about the reason for passing over the plaintiff, it is perfectly reasonable to infer a discriminatory intent. Why else would the employer, who is making the hiring decisions, be unable to give even a single reason to justify the rejection unless it was an illegal one? The *McDonnell Douglas* rule was exactly the right amount of plaintiff friendly. And it was decided in 1973,[139] during what I have called stage one, when much of the other plaintiff-friendly Title VII precedent such as *Griggs* was being created.[140] Par for the course.

Stage two, however, was not too far away in time. And the Supreme Court's decision in *Furnco*[141] would usher it in. As discussed in Part II, *Furnco* would end up zapping much of the strength from *McDonnell Douglas* and would keep it from being too easy for the plaintiff to prove discriminatory intent.[142]

The facts behind *Furnco* made it almost the perfect case with which to deal this blow to the original *McDonnell Douglas* framework. Although still certainly warranting a lawsuit, the facts in *Furnco* were much more favorable to the employer than to the employees alleging discrimination, at least relative to the facts in its progenitor — *McDonnell Douglas*.[143]

[138] *See id.*

[139] *See id.*

[140] Griggs v. Duke Power Co., 401 U.S. 414, 424 (1971).

[141] Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978).

[142] *See* William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons From* McKennon *and* Hicks, 30 GA. L. REV. 305, 332 (1996) ("The Supreme Court's subordination of employment discrimination law and its policies to the employment-at-will doctrine can be traced to its Furnco opinion in 1978.").

[143] The facts in *McDonnell-Douglas* are as follows: Percy Green, a mechanic and employee of McDonnell-Douglas Corporation, was a black man and a long-time civil rights activist. Green v. McDonnell-Douglas Corp., 318 F. Supp. 846, 847 (1970). He was laid off by McDonnell-Douglas in 1964. *Id.* at 848. He concluded that this termination

Furnco was a construction company that maintained no permanent workers, instead opting to hire workers on a job-by-job basis as the company was awarded contracts to complete construction work.[144] In 1971, Furnco was contracted to reline a blast furnace at the Chicago Blast Furnace Plant.[145] The particular furnace that Furnco was contracted to reline was allegedly responsible for around two thirds of the plant's iron production.[146] So, the job was highly lucrative for Furnco and extremely important for the plant.

While the furnace was being worked on, it would have to be completely shut down.[147] And, allegedly, the plant would lose over $100,000 each day the furnace was shut down.[148] Adjusting for inflation, the Chicago Blast Furnace Plant would be losing the equivalent of $560,086.56 per day in today's dollars while the furnace was shut down for the reline job.[149]

Furthermore, sloppy work could apparently result in a deadly explosion once the blast furnace was put back into operation, so the work did not just need to be fast; it needed to be near perfect.[150] As the district court put it "Furnco's ability to make a profit on the job was

was because of his race and decided to protest the company by participating in an, at the time, illegal, "stall-in" and "lock-in," both of which severely interfered with McDonnell-Douglas' operations. After these protests, the company advertised positions for qualified mechanics. *Id.* at 849. Mr. Green applied for re-employment, responding to these advertisements. *Id.* He, however, was denied under the reasoning that he had participated in illegal protests that hurt the company. *Id.* Green subsequently filed a complaint with the EEOC alleging that he was rejected from the job because of his race in violation of Title VII. *Id.* He also alleged violation of section 704(a) of Title VII, which prohibits discrimination based on an employee's attempt to protest or correct discriminatory conditions of employment. *Id.* Green also filed a lawsuit pursuant to these two causes of action. *See* McDonnell-Douglas Corp v. Green 411 U.S. 792, 792 (1973).

[144] *See Furnco*, 438 U.S. at 569-70 (1978); Waters v. Furnco Const. Corp., 551 F.2d 1085, 1086-87 (7th Cir. 1977); Waters v. Furnco Const. Corp., No. 72-C-2305, 1975 WL 127, at *1 (N.D. Ill. Feb. 10, 1975).

[145] *Waters*, 1975 WL 127 at *1.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *See CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Dec. 18, 2023).

[150] *Waters*, 1975 WL 127, at *2.

directly related to the speed and competence with which its bricklayers could perform their work."[151]

To facilitate the urgency of this job, Furnco hired Joseph Dacies as superintendent.[152] Furnco entrusted Dacies with complete authority to select, hire, and oversee the bricklayers assigned to this contract.[153] Dacies hired based on two factors: (1) people whom he knew to be skilled and trustworthy bricklayers; and (2) people recommended to him by Furnco's general manager, John Wright, who recommended a number of potential black employees because Furnco had an affirmative action program in which at least sixteen percent of the bricklayers assigned to any job were to be black bricklayers.[154] Because the hiring for this job was narrowed to such a degree, no bricklayers who applied to work this contract by applying at the jobsite gate were accepted for the job.[155] This included many black bricklayers, but also white bricklayers.[156]

A few of these rejected applicants sued Furnco for using such narrow hiring methods with the knowledge that such practices would root out many black applicants because the majority of black applicants were those who applied at the jobsite gate.[157] Furnco defended its process by pointing to the urgent and demanding nature of this particular contract, arguing that it hired based off skill and that applicants were only rejected because they did not possess the adequate skills for the job.[158] Furthermore, refusing to hire at the jobsite gate was apparently a common policy followed by the entire firebrick industry because doing so was not an efficient way to match applicants with jobs that aligned with the applicant's skill.[159]

Here probably lies the essential reason why this case was litigated in court by Furnco's lawyers instead of settled out of court — it was reasonable for Furnco to narrow its hiring methods to this extent,

[151] *Id.*
[152] *Id.* at *1.
[153] *Id.*
[154] *Id.* at *2.
[155] *Id.* at *4.
[156] *Id.*
[157] *Id.* at *1, *3.
[158] *Id.* at *4.
[159] *Id.*

especially given the job, and Furnco's lawyers surely knew that. Even Judge Fairchild, a Democrat on the Seventh Circuit appointed to the bench by Lyndon B. Johnson and no stranger to protecting civil rights,[160] acknowledged on Furnco's appeal that there was simply no evidence to show that some of the plaintiffs to this action possessed any requisite skills to perform this job.[161] These plaintiffs were accordingly dropped from the case.[162]

Furnco was appealed up to the United States Supreme Court, which granted certiorari to determine whether the remaining plaintiffs who were qualified for the job were wrongfully discriminated against.[163] As the Supreme Court noted in its decision

> Furnco has conceded that for all its purposes [the remaining] respondents were qualified in every sense. Thus, with respect to the *McDonnell Douglas* prima facie case, the only question it places in issue is whether its refusal to consider respondents' applications at the gate was based upon legitimate, nondiscriminatory reasons and therefore permissible.[164]

So, the question ultimately came down to whether the common, industry-wide practice of refusing to hire bricklayers at the jobsite gate was permissible in a situation where millions of dollars and lives were potentially at risk unless hiring was done quickly and efficiently.[165] The facts made this case ripe for an employer-friendly ruling. It was unsurprisingly litigated instead of settled because the defendant

160 *See* Libby Sander, *Thomas Fairchild, 94, Dies; Tried to Unseat McCarthy*, N.Y. TIMES (Feb. 15, 2007), https://www.nytimes.com/2007/02/15/obituaries/15fairchild.html [https://perma.cc/3SWE-E8EC] (describing Judge Fairchild as a Democrat appointed by Johnson); *see, e.g.*, United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972) (shielding civil rights protestors from a trial court conviction); Seth S. King, *Contempt Convictions Are Upset in Chicago 7 Conspiracy Trial*, N.Y. TIMES (May 12, 1972), https://www.nytimes.com/1972/05/12/archives/contempt-convictions-are-upset-in-chicago-7-conspiracy-trial.html [https://perma.cc/8ZGJ-6LVT] (discussing one of Judge Fairchild's most famous cases, the Chicago 7 case, in which he, alongside two other judges on the panel, penned an opinion favoring seven radical civil rights activists).

161 *See* Waters v. Furnco Const. Corp., 551 F.2d 1085, 1087-88 (7th Cir. 1977).

162 *Id.*

163 Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978).

164 *Id.* at 577 n.8.

165 *See Waters*, No. 72-C-2305, 1975 WL 127, at *4 (N.D. Ill. Feb. 10, 1975).

employer and even the bricklayer's profession writ large had so much to lose.[166] And the Supreme Court unsurprisingly handed down a ruling that stultified the plaintiff-friendly *McDonnell Douglas* rule.[167]

The result here signified the end of stage one and the beginning of stage two for Title VII precedent. The status quo of sweeping, plaintiff-friendly precedent in the late 1960s and early '70s, which offered broad interpretations to the recently passed Title VII,[168] was beginning to obsolesce and to give way to a new wave of litigated cases in the late 1970s and '80s.[169] These cases were adversely selected with facts bound to result in legal precedent antithetical to the existing plaintiff-friendly precedent precisely because the cases that aligned well with existing precedent were being settled out of court.

If *Furnco* was the case signaling the transition from stage one to stage two, then *St. Mary's Honor Center v. Hicks*[170] was the case signaling the transition from stage two to stage three. *Furnco* signaled the obsolescence of the original *McDonnell Douglas* pro-plaintiff framework; *Hicks* signaled the death of that framework and the emergence of a new framework in which it would be much tougher for plaintiffs to prove discrimination.[171]

Melvin Hicks, the plaintiff in *Hicks*, was a black man who worked as a shift commander at St. Mary's Honor Center, a minimum-security correctional facility.[172] In 1983, however, the assistant director of the Division of Adult Institutions at the Missouri Department of

[166] *Furnco*, 438 U.S. at 567; *Waters*, 1975 WL 127, at *4.

[167] *See Furnco*, 438 U.S. at 577-78. Part of the Supreme Court's holding in *Furnco* was that courts could not impose a remedy forcing employers to hire more minority employers until "a violation of Title VII has been proved." *Id.* at 578. This was true even if the plaintiff was able to successfully establish the prima facie case. *Id.* at 579. Such a ruling is antithetical to one of the core pillars grounding the *McDonnell Douglas* rule — that wrongful discrimination can be inferred from the defendant's lack of evidence and that the plaintiff need not prove discrimination at the outset. *See supra* notes 139–141 and accompanying text.

[168] *See supra* notes 119–120.

[169] *See supra* note 121.

[170] 509 U.S. 502 (1993).

[171] Although, the majority in *St. Mary's Honor Center* goes out of its way to dispute this claim. *Id.* at 512-16. *But see id.* at 525-34 (Souter, J., dissenting).

[172] Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1245-46 (E.D. Mo. 1991).

Corrections and Human Resources, George Lombardi, received a number of complaints from inmates, former inmates, staff, and even legislators and everyday citizens about poor conditions and bad management at St. Mary's.[173] After investigating the matter, Lombardi decided to completely overhaul the administrative personnel at St. Mary's.[174] Although many personnel were fired and replaced with others, the relevant replacement was that of John Powell, who replaced Gilbert Greenlee as chief of custody.[175] After he was appointed to his position, Powell would oversee the work of the plaintiff in this case.[176]

Powell would go on to subject Hicks to disciplinary action on multiple occasions for alleged poor job performance.[177] On March 9, 1984, Powell put together a disciplinary review board that gave the plaintiff a five-day suspension because officers were away from their posts during the plaintiff's shift when they were supposed to be on guard.[178] The officers who were away were not disciplined at all, but Powell reasoned that it was his policy only to discipline the shift commander for violations on their shift.[179]

On March 19, 1984, Don Moore, an officer at St. Mary's, asked Hicks if he and another officer could drive a St. Mary's vehicle for personal use, which the plaintiff in this case approved.[180] The institutional rules required each vehicle usage to be entered into a log.[181] No log entry was made.[182] Powell subsequently gathered a disciplinary board and had the plaintiff demoted from shift commander to correctional officer.[183] The two officers who took out the vehicle were not disciplined.[184]

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173 *Id.* at 1246.

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 1246.

178 *Id.* at 1246-47.

179 *Id.* at 1247.

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

On April 19, 1984, Hicks was notified of his demotion during a meeting and exchanged some unkind words with John Powell.[185] Powell told him that his words could be seen as a threat and then, again, gathered a disciplinary board.[186] The superintendent recommended that the plaintiff be fired because of how frequent and severe his violations were.[187] Hicks was terminated on June 7, 1984.[188]

From January 1984 to June 1984, Hicks told his superiors about multiple occasions where his coworkers violated the rules.[189] In one instance, officer Ratliff allowed an inmate access to an administrator's office without supervision.[190] Ratliff was not disciplined.[191] In another instance, no officer was stationed at the front door on officer Don Smith's watch.[192] Don Smith was not disciplined.[193] These were only two of at least seven instances in which the plaintiff had reported misbehavior to no effect.[194]

After the plaintiff was fired from his job, he sued alleging that St. Mary's had violated Title VII of the Civil Rights Act and discriminated against him because of his race.[195] The district court used the *McDonnell Douglas* framework to determine whether disparate treatment occurred here. Regarding the prima facie case,[196] the court found: that the plaintiff had successfully proved that he was a member of a protected class, that he was qualified to be a shift commander, that he had suffered an adverse employment action (he was demoted and fired), and that his position remained open and was ultimately filled by a white man.[197]

With the prima facie case proven, the burden shifted to the defendant to put forth a legitimate non-discriminatory motive for the adverse

[185] *Id.*
[186] *Id.*
[187] *Id.* at 1247-48.
[188] *Id.* at 1248.
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.* at 1245.
[196] *Id.* at 1249.
[197] *Id.* at 1249-50.

employment action.[198] The defendant argued that the plaintiff was demoted and terminated simply because of the severity and the number of violations that plaintiff had committed while at work.[199] The defendant cited to the disciplinary instances enumerated above to reinforce its point.[200]

The district court found that the defendant successfully put forth legitimate non-discriminatory reasons.[201] So, the burden shifted back to the plaintiff to prove that the reasons given by the defendant were only pretext for wrongful discrimination.[202] And the plaintiff was easily able to prove pretext.[203] The plaintiff was "mysteriously" the sole employee who was ever disciplined for violations committed by his subordinates.[204] Although Powell testified that it was his policy to discipline the shift commander for violations that happened on that commander's shift, the plaintiff demonstrated that this alleged policy only applied to violations that happened during *his* shift.[205] And the district court noted that the plaintiff's coworkers had engaged in much more serious rule-breaking behavior that was dealt with much more leniency than was the plaintiff's behavior.[206] The district court ultimately found that the plaintiff had proved pretext.[207]

But this is not where the district court's legal analysis ended. After the district court found that the plaintiff had proven pretext, it went on to say that the plaintiff still bore the "ultimate burden to prove that race was the determining factor in defendant's [adverse employment] decision."[208] In short, the district court apparently thought that

[198] *Id.* at 1250.

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.* ("Plaintiff has proven that the reasons proffered by defendant are pretextual. First, plaintiff was mysteriously the only person disciplined for violations actually committed by his subordinates.").

[205] *Id.* ("[P]laintiff demonstrated such a policy only applied to violations which occurred on plaintiff's shift.").

[206] *Id.* at 1251.

[207] *Id.*

[208] *Id.*

although the defendant's reasons for demoting and firing the plaintiff were bogus, race was not the motivating factor; it was mere personal bias, including that administrative personnel like Powell simply did not like the plaintiff.[209]

To back up this theory, the court pointed to other black employees who had committed serious violations and who were not disciplined in any way.[210] If the employer was engaging in race-based disciplinary action, why were they not disciplined? Furthermore, although it was the case that twelve black employees and only one white employee were fired in 1984, it was also the case that thirteen black employees were hired during this time.[211] Again, the district court inquired why St. Mary's would hire so many black employees if it was engaging in racial discrimination.

This was an incredible legal argument to make at the time. The district court was essentially doing the defendant's job. The district court injected its own legitimate non-discriminatory reasons for the adverse employment decision into its opinion.[212] Then, it accused the plaintiff of attacking a straw man in only responding to the defendant's originally proffered non-discriminatory reasons for his demotion and termination and failing to address the court's injected new reason.[213] This was essentially the Eighth Circuit's point when this case was appealed, and it was why the Eighth Circuit reversed and remanded the case.[214]

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[209] *Id.* at 1252. ("In essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated.").

[210] *Id.* at 1251-52.

[211] *Id.* at 1252.

[212] *See id.* (assuming nondiscriminatory reasons must ground the actions of defendant's employees because plaintiff had not gone so far as to disprove every plausible nondiscriminatory reason for his discharge).

[213] *See id.* ("In sum, plaintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge. Plaintiff has not, however, proven by direct evidence or inference that his unfair treatment was motivated by his race. . . . [T]he Court enters judgement in favor of defendant.").

[214] *See* Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492-93 (8th Cir. 1992) ("[D]efendants simply never stated that personal motivation was a reason for their actions or offered evidence to substantiate such a claim.").

The case was appealed further, however, up to the United States Supreme Court, which granted certiorari.[215] And the Supreme Court more or less sided with the district court.[216] The ruling that the Supreme Court handed down would drastically curtail the ability of plaintiffs to prove discrimination in a disparate treatment case. The Supreme Court ruled that the trier of fact is not compelled to presume discrimination even if the plaintiff proves that the employer's proffered legitimate, nondiscriminatory reasons for the adverse employment outcome were completely bogus and pretextual.[217] Even when faced with proof that the nondiscriminatory reasons given were mere pretext, the trier of fact is only *permitted*, not compelled, to conclude discrimination.[218] The Court also held that the employee at all times retains the burden of persuasion to prove that they were the victim of intentional discrimination.[219]

But just like in *Furnco*,[220] we should not be surprised by this ruling given the facts of this case. Indeed, the facts of *Hicks* were ripe fruit with which to nourish an employer-friendly ruling. Afterall, it was undisputed by both parties that the plaintiff in this case did break protocol.[221] It was also undisputed that many other black employees were similarly breaking protocol but were not being punished like the plaintiff.[222] It was probably easy for the Court to assume personal bias, rather than racial bias, was behind the plaintiff's termination given those facts. In other words, this was an extremely difficult case for the plaintiff to win, which was one of the reasons it was litigated, appealed, and then appealed again to the Supreme Court. And the law that the Court handed down simply reflects this.

[215] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

[216] *Id.* at 510-25 (reasoning that because not every single plausible nondiscriminatory reason could be ruled out, the defendant could not be held liable for wrongful discrimination).

[217] *Id.* at 508-09.

[218] *Id.* at 511.

[219] *Id.* at 508.

[220] Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978).

[221] This is established in the district court's findings of fact, which went undisputed by the plaintiff. *See* Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1246-49 (E.D. Mo. 1991).

[222] *See id.* at 1248; *St. Mary's Honor Ctr.*, 509 U.S. at 2748 n.2.

So, we should not be surprised at all that St. Mary's Honor Center's lawyers refused to settle with the plaintiff and instead chose to litigate. Nor should we be surprised that its lawyers chose to appeal the Eighth Circuit's unfavorable ruling up to the Supreme Court. They knew that they had a strong case for their client.

But the Supreme Court may have ruled differently if only the surely numerous prior employment discrimination lawsuits with facts favorable to the plaintiff were litigated in court instead of settled like many were.[223] Again, though, we should not be surprised that these prior lawsuits were settled whereas this one was not. The employers' lawyers in those prior lawsuits probably examined the facts of the lawsuit, saw that their client, the employer, would probably lose because of how favorable the facts were to the plaintiff, and settled with the plaintiff. Imagine if all those cases were instead litigated. Trial and appellate courts would have probably made many strong pro-plaintiff rulings, deciding against the employer and in favor of the plaintiff. And when *Hicks* finally came along, the Supreme Court would have been operating against a backdrop of a powerfully reinforced pro-plaintiff precedent.

But this is not what happened. What happened was that pro-plaintiff precedent was already beginning to obsolesce when *Hicks* was decided by the Supreme Court.[224] And *Hicks* came before the Supreme Court precisely because of how easily the facts of *Hicks* could be construed in the employer's favor. Adverse selection at its finest.

This equilibrium explanation does not preclude the theory that a political modus operandi roots the degradation of Title VII. The

[223] *See, e.g.*, United States v. Va. Dep't of Highways & Transp., 554 F. Supp. 268 (E.D. Va. 1983) (discussing the consent decree following the Department's settlement with the plaintiffs); Fred Hiatt, *Fairfax to Pay $2.75 Million to Settle Race, Sex Bias Suit*, WASH. POST (Apr. 30, 1982), https://www.washingtonpost.com/archive/politics/1982/04/30/fairfax-to-pay-275-million-to-settle-race-sex-bias-suit/9a334252-a076-43ea-bf06-d6cde51e6cab/ [https://perma.cc/7BCJ-HZ3V] (discussing the consent decree following Fairfax County's settlement); Fred Hiatt, *Va. Settles Road Agency Bias Suit*, WASH. POST (Dec. 31, 1982), https://www.washingtonpost.com/archive/politics/1982/12/31/va-settles-road-agency-bias-suit/9554d786-4744-469a-a0e4-dac5a995e636/ [https://perma.cc/FBT8-JASU] (discussing the consent decree following the Road Agency's settlement).

[224] *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (increasing drastically the difficulty for defendants in Title VII cases to bring a prima facie case and practically killing disparate impact in the process).

equilibrium explanation is an alternative theory that, when coupled with the following explanations and the political theory, carries much weight in understanding Title VII's decline.

B. Preference Reversals

1. Explaining Preference Reversals

Behavioral scientists have documented a fascinating decision-making phenomenon that affects social norms, namely: "preference reversals between joint and separate evaluations of options."[225] This is the idea that people might prefer A over B when they are presented A alone or B alone, separate from one another.[226] But those same people prefer B over A when presented the two options jointly and are allowed to compare them.[227] So, 500 people are presented A and another 500 are presented B. On average, the 500 presented A have a more positive reaction. Yet, paradoxically those same people when presented both A and B simultaneously, actually prefer B over A.

An example will help. Imagine two dictionaries, dictionary A and dictionary B. The dictionaries have the following characteristics, described in *Figure 2*.[228]

[225] CASS R. SUNSTEIN, HOW CHANGE HAPPENS 157 (2019); *see also* Max H. Bazerman, George F. Loewenstein & Sally Blount White, *Reversals of Preference in Allocation Decisions: Judging an Alternative Versus Choosing Among Alternatives*, 37 ADMIN. SCI. Q. 220, 229 (1992) [hereinafter *Reversals of Preference in Allocation Decisions*] (concluding that the results of data gathered "support the argument that when individuals evaluate multiple outcomes independently, they are more concerned with interpersonal comparisons than when they evaluate multiple outcomes simultaneously"); Hsee et al., *Preference Reversals Between Joint and Separate Evaluations of Options*, *supra* note 9, at 578-82 (presenting data and concluding that "participants' judgments of evaluability coincided with ours" insofar that the participants experienced a reverse of preferences).

[226] SUNSTEIN, *supra* note 225, at 157.

[227] *Id.*

[228] The example depicted in *Figure 2* is drawn from Christopher K. Hsee, *The Evaluability Hypothesis: An Explanation for Preference Reversals Between Joint and Separate Evaluations of Alternatives*, 67 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 247, 248 (1996) [hereinafter *The Evaluability Hypothesis*].

Figure 2.

	Dictionary A	Dictionary B
Publication date	1993	1993
Number of entries	10,000	20,000
Any defects?	No, it's like new	Yes, the cover is torn; but otherwise, it's like new

When the two dictionaries were assessed separately, people were willing to pay more for dictionary A. But when assessed jointly, and people were able to compare dictionary A with dictionary B, they were willing to pay more for dictionary B.[229]

What is happening here? In short, in separate evaluation, when a person is presented with just dictionary A or with just dictionary B, this person is unsure of how many entries a dictionary should have.[230] In isolation, 10,000 entries seem like a lot. In isolation, these numbers, so long as they are reasonable, mean absolutely nothing.[231] The torn cover is clearly a negative characteristic of dictionary B, while being "like new" is clearly a positive characteristic of dictionary A.[232] These characteristics, even in separate evaluation, mean quite a lot and people will focus on them.[233]

But a person presented with both dictionary A and dictionary B, jointly, can understand the disparity in entries between the two.[234] It is easy to see, in joint evaluation, that 10,000 entries is dwarfed relative to 20,000 entries.[235] And people likely think that what matters in a dictionary is not how tattered it is; what matters is the number of words

[229] *Id.*

[230] *Id.* at 249.

[231] *See id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*; *see also* Jeffrey R. Kling, Sendhil Mullainathan, Eldar Shafir, Lee C. Vermeulen & Marian V. Wrobel, *Comparison Friction: Experimental Evidence from Medicare Drug Plans*, 127 Q.J. ECON. 199, 200 (2012) (describing "the wedge between the availability of comparative information and consumers' use of it").

[235] *See* Hsee et al., *The Evaluability Hypothesis*, *supra* note 228, at 250.

defined.[236] That one dictionary's cover is torn might matter a bit. But the lack of a torn cover is not enough to overcome a disparity amounting to 10,000 fewer defined words.[237] What joint evaluation does here is to fill an informational lacuna. When presented with other options, people who don't initially know how many entries a dictionary should have can put one with less entries in perspective.

This is not to say, however, that joint evaluation is inherently superior to separate evaluation. Consider the following hypothetical example.

Politicians:

> Politician A: will create 1,000 new jobs; A has not received any lobbying money from any interest group.
>
> Politician B: will create 5,000 new jobs; B's campaign has received an immense amount of lobbying money from an interest group and is thus biased heavily in its favor.

I have not collected any data about this particular scenario,[238] but it seems very likely that in a separate evaluation, people will show an enormous preference for Politician A. After all, Politician A displays no negative characteristics at all whereas Politician B is essentially corrupt — in the pocket of some interest group, which has donated immensely to B's campaign.

Furthermore, 1,000 jobs, evaluated independently, sounds pretty attractive. But evaluated jointly, Politician B suddenly becomes much more attractive and Politician A suddenly less so. Sure, B is biased in favor of some interest group. But look at how many jobs B will create relative to A. B's job creation will quadruple jobs relative to A. When presented the option between Politicians A and B, people are now weighing 4,000 more jobs against what some, including a Nobel Prize-winning economist, might call corruption.[239]

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[236] *See id.* at 249-50.

[237] *See id.* at 248.

[238] A similar scenario was posed to participants in a study by George Loewenstein. The data collected in Lowenstein's study and the results there strengthen the assumption that I make about my own example. *See* GEORGE LOEWENSTEIN, EXOTIC PREFERENCES: BEHAVIORAL ECONOMICS AND HUMAN MOTIVATION 261 (2007).

[239] *See* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 165-66 (2012) ("It is generally recognized that providing money

This is a comparison that some might allege improper — being under the thumb of some monied interest and being able to create more jobs are two incommensurable characteristics.[240] Just because one is able to create more jobs should not magically allay the besmirchment rightly associated with allowing money to cloud one's judgement. Yet, in this case, joint evaluation encourages just such a conclusion. Both joint and separate evaluation have their share of costs and benefits.

2. Applying Preference Reversals

What do joint and separate evaluation have to do with the retrenchment of Title VII? I say a great deal. The phenomenon of preference reversals between joint and separate evaluations of options demonstrates the inevitable irrationality of our legal and political system. That irrationality is in full view when examining the rise and fall of Title VII, for which these behavioral preference reversals are partially responsible.

Title VII has been the victim of these preference reversals for two reasons. First, the passage of the Civil Rights Act of 1964 and subsequently of Title VII was thanks in large part to the Civil Rights Movement happening at the time.[241] And the Civil Rights Movement was

(support) conditional on a candidate's providing a favor (supporting a bill) is corruption. . . . But there is little difference between that and what actually occurs [when candidates take campaign money from special interest groups.]").

[240] *See generally* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 U. MICH. L. REV. 779, 795-805 (1994) (giving a formal definition of incommensurable and then providing helpful examples for things that might be considered incommensurable); Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147, 157-67 (1992) (providing a discussion of the problem incommensurability poses to judges and providing more helpful examples explaining what might be considered incommensurable and why).

[241] *See* Bayard Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, COMMENTARY (Feb. 1965), https://www.commentary.org/articles/bayard-rustin-2/from-protest-to-politics-the-future-of-the-civil-rights-movement/ [https://perma.cc/B4CM-JVV7] ("The civil rights movement is evolving from a protest movement into a full-fledged social movement — an evolution calling its very name into question. It is now concerned not merely with removing the barriers to full opportunity but with achieving the fact of equality."). For an excellent account of how social movements can and have played a large role in changing the workplace itself, see Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

very much a product of the rampant race- and sex-based discrimination so intertwined with pre-1960s America.[242] Lawmakers and the American public were able to compare their current situation, that is, perfectly legal discrimination in the workplace, in universities, and in public spaces, with the possible situation — a situation in which discrimination on the basis of race or sex was made illegal. In other words, they were able to make a joint evaluation of the two outcomes.

Analogize this to the dictionary example in *Figure 2*. Just as the relevant issue of the number of entries was made clear in the joint evaluation of dictionaries, so too was the relevant issue of ardent wrongful discrimination so clearly staring everyone in the face in the 1960s and '70s when Title VII was at its peak.[243] Again, the public, lawmakers, and judges were able to make a joint evaluation between a period of rampant legal discrimination and one of illegal discrimination.

That joint evaluation, however, could not last forever. The past only stays fresh for so long.[244] After many decades, judges and the public at large are not making a joint evaluation anymore; they are making a separate evaluation. Specifically, they are making a separate evaluation of the situation in which discrimination on the basis of race and sex in the workplace is already illegal.

However, without any recent drastically different status quo with which to compare it, Title VII's big draw, prohibiting wrongful discrimination in the workplace, is no longer in the spotlight as it once was when it was being jointly evaluated. Under separate evaluation, the spotlight shines on Title VII's relative trivialities — minor flaws in the

[242] *See* James R. Gaines, *These Rebels Fought Conformity in 1950s America — and Are Still Making a Difference Today*, TIME (Feb. 3, 2022, 10:47 AM EST), https://time.com/6141216/equality-lgbtq-racial-justice-the-fifties-book/ [https://perma.cc/39EB-52ZH]. For an especially jarring and poignant account of rampant discrimination in the 1950s, see Kevin Boyle, *The Kiss: Racial and Gender Conflict in a 1950s Automobile Factory*, 84 J. AM. HIST. 496 (1997).

[243] *See supra* notes 115, 120.

[244] *See* Richard Sima, *Science of Forgetting: Why We're Already Losing Our Pandemic Memories*, WASH. POST (Mar. 13, 2023, 6:00 AM EDT), https://www.washingtonpost.com/wellness/2023/03/13/brain-memory-pandemic-covid-forgetting/ [https://perma.cc/9Z7V-4DE7].

statute that should not detract from its antidiscriminatory thrust.[245] Similarly, separate evaluation has shown the spotlight on the trivial torn cover of one dictionary when the two dictionaries were compared in *Figure 2*. This partially explains Title VII's decline.

But there is a second, similar reason that links preference reversals to Title VII's decline. Whereas the first reason was rooted in the distinction between joint and separate evaluation of current events, the second reason is rooted in the distinction between joint and separate evaluation of the law itself. Following the passage of the Civil Rights Act of 1964 and of Title VII, judges had to decide Title VII cases being brought with no prior guiding precedent. Judges could not compare the cases before them with the facts of prior cases — these were the first Title VII cases being decided. Title VII was new law, and thus, judges simply referred to Title VII itself and its intended purpose, passed in the midst of the Civil Rights Movement, when deciding the early cases.[246]

[245] For example, many scholars associated with the Chicago school of thought and the early law and economics movement theorized that, within a free market, laws prohibiting race discrimination, like Title VII, were not just unnecessary, but inefficient. *See, e.g.*, Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1312 (1989) (speculating that Title VII law may have been a harm to women); *see also* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 33-35, 40-41 (1992); Harold Demsetz, *Minorities in the Market Place*, 43 N.C. L. REV. 271, 271 (1965); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 514 (1987). Although, several scholars also associated with the law & economics movement have defended antidiscrimination law and Title VII, posing their own economic theories for why Title VII is efficient or is necessary to stop discrimination. *See, e.g.*, John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1412 (1986) (arguing that "legislation that prohibits employer discrimination may actually enhance rather than impair economic efficiency"); John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1347-48, 1366-67 (1989) (arguing that Title VII can promote economic efficiency and attempting to refute Judge Posner's arguments against that idea); Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22, 24-25 (1991) (arguing that even under Nobel Prize winning economist Gary Becker's economic model of discrimination, competitive markets perpetuate discrimination).

[246] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 421-23 (1975) (Focusing more on alleviating discrimination than on citing to favorable precedent)); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (providing a short opinion that cites almost exclusively to the statute and the EEOC's guidelines while not citing to any previous cases).

In other words, judges were performing a separate evaluation of what Title VII should be. With no prior precedent with which to compare, judges likely focused on what they "wanted" Title VII to be.[247]Analogize this to the separate evaluation in the *Politicians* example. In *Politicians*, Politician A does better in a separate evaluation because attention has not been drawn toward a factor (4,000 jobs) that deserves little normative weight relative to the bigger issue that one politician is in the pocket of an interest group. Similarly, judges in the early days of Title VII's passage, with no prior precedent to draw their focus, were able to focus their attention on fixing the bigger issue at hand — wrongful discrimination.[248]

But time passed, and precedent was indeed created.[249] Judges at this later time were now jointly evaluating the Title VII legal opinions they wrote relative to the set of cases they saw as relevant Title VII precedent.[250] This assuredly drew judges' attention away from the main issue of wrongful discrimination to less important comparisons of factual niceties between cases.[251] It also resulted in an over-formalized

[247] I have found no other research connecting the way people make decisions under separate evaluation with the way judges decide cases in similar circumstances. Presumably, however, a judge deciding a case under conditions like the conditions of separate evaluation will evaluate the case much in the same way a person evaluates an item under separate evaluation. Max Bazerman, Don A. Moore, Anne E. Tenbrunsel, Kimberly A. Wade-Benzoni & Sally Blount, *Explaining How Preferences Change Across Joint Versus Separate Evaluation*, 39 J. ECON. BEHAV. & ORG. 41, 43-48 (1999) (observing that when performing a separate evaluation, people tend to evaluate the object of evaluation as they, ideally, would want it to be).

[248] *See supra* notes 115, 120.

[249] *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 313 (1977) (placing immense importance on "the relevant labor market" but holding that the definition of the "relevant labor market" was a determination to be made by the trier of fact); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (establishing a four-step framework to which courts now staunchly adhere).

[250] *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 532 (1993) (interpreting the *McDonnell Douglas* framework narrowly); Bazemore v. Friday, 478 U.S. 385, 402 (1986) (using the binomial distribution statistics in *Hazelwood* to justify using complicated multivariate regression analysis to determine if discrimination is present, thus forever entangling Title VII law with complex statistics that not everyone can understand).

[251] For example, the Supreme Court, in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009), focused far less on the overall issue that employees were unable to sue for alleged age discrimination on the part of the employer and were forced into arbitration.

"proceduralization," grounded on judges' new ability, after some critical period of time passed,[252] to perform a comparative evaluation of their own decisions against the set of less procedural, more substantive past decisions.[253]

Again, this is analogous to the faulty reasoning encouraged by joint evaluation in the *Politicians* example. Allowing people to compare

Instead, the Supreme Court was hyper focused on the factual distinctions between the facts in this case and the facts in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974). *Gardner-Denver* was relevant precedent and a case that forbade forcing employees into arbitration who were alleging Title VII wrongful discrimination. *Id.* How exactly the Court in *Penn Plaza* was able to contort the facts in such a way as to reach what was essentially the opposite result as the Court did in *Gardner-Denver* is beside the point. Rather, the Court allowed focus on these factual niceties to siphon attention away from the underlying issue of wrongful discrimination. *See 14 Penn Plaza*, 556 U.S. at 251.

[252] The exact period of time is not important for the purposes of this Article. All that matters is that the critical period of time has indeed passed, which it very clearly has. Parsing the gamut of Title VII cases to discover how long exactly the critical period was for Title VII law would be an interesting project to pursue, though.

[253] The overproceduralized decisions come mostly as cases in which the Court attempts to specify burdens of proof and in so doing takes more and more steps away from the substantive problem of wrongful discrimination. *See, e.g.*, Staub v. Proctor Hosp., 462 U.S. 411, 422 (2011) (holding that an employer is liable if "motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action" so long as there is proximate cause); Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-57 (2006) (nitpicking the circuit court's procedural analysis and vacating the circuit court's decision for that reason instead of substantive reasons); Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) (focusing more on the procedural requirement that "a plaintiff need only present sufficient evidence" such that a reasonable jury could find discrimination "by a preponderance of the evidence" rather than the substantive issue of wrongful discrimination); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153-54 (2000) (applying the *McDonnell Douglas* framework to an Age Discrimination in Employment Act case and making significant efforts to perform a procedural *McDonnell Douglas* analysis, which took away from analysis of the facts displaying discrimination); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 532 (1993) (holding that a plaintiff's evidence disproving an employer's proffered reason for an employment decision suffices but does not require a finding that the reason was a "pretext" for discrimination); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 717 (1983) (focusing on the proceduralization of the law and the facts to the plaintiff's detriment); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 260 (1981) (reducing the employer's burden to merely a burden of articulating a nondiscriminatory reason for the employment decision); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) (establishing a four-part test to determine whether there was a prima facie case of discrimination and marking the beginning of the overproceduralization process).

Politician A to Politician B drew attention away from the most important characteristic of Politician A — the lack of undue special interest group influence. So, here lies another compelling reason explaining why Title VII's decline may have been in part a result of preference reversals between joint and separate evaluations of options.

The less-than-ideal influence of preference reversals on judicial opinions over time does not just have a basis in fact;[254] it is grounded in theory. Reasoning by analogy, for example, is one method of practical reasoning at the heart of legal analysis.[255] But reasoning by analogy is not without its flaws. Reasoning by analogy encourages judges to make law incrementally by taking small steps, analogizing a present case that is different only in some small aspect to a previous case, but on the whole very similar to it, to help decide the present case.[256] However, "a series of small steps can add up to a giant stride."[257] The first iteration of this process might not be too big a leap, but imagine the tenth and the one hundredth iterations. The nth case may be so drastically dissimilar from the first case that using the first case at all as legal precedent to help decide the nth case borders on ridiculous.[258] Before too long, a judge reasoning by analogy via deference to what that judge thinks is the relevant precedent might end up straying a long way from the original goal, and the incremental nature of reasoning by analogy will conceal that fact.[259]

So, when enough precedent builds up for judges to begin confidently using joint evaluation to evaluate the decisions they make instead of separate evaluation, the problems of incrementalism, overproceduralization, and reasoning by analogy rear their ugly

[254] *See supra* notes 245–56 and accompanying text.

[255] POSNER, *supra* note 8, at 86.

[256] *Id.* at 92; *see also* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 180 (1979) (praising the incremental nature of precedent and reasoning by way of analogizing to past cases).

[257] POSNER, *supra* note 8, at 92.

[258] *See id.*

[259] *See id.* For more on the potentially devastating effects of incrementalism's tendency to yield unpalatably extreme results, see Saul Levmore, *What's the Right Drinking Age? And Other Problems of the Slippery Slope*, UNIV. OF CHI.: CHI.'S BEST IDEAS (2009), https://chicagounbound.uchicago.edu/chicagos_best_ideas/56/ [https://perma.cc/MGC8-43A2].

heads.[260] Minor niceties are more likely to end up drawing judges' focus away from the more important issues at hand. In other words, when enough precedent has built up, judges are more likely to end up straying from the original goals set in place when the law was first implemented in favor of obsessing over the punctilious observance of procedural niceties.[261]

So, as this Section has shown, the law is not necessarily on a steady march toward what is "just" or, if you're an economist, toward the efficient outcome.[262] Law is plagued by behavioral quirks such as preference reversals,[263] and by formal inconsistencies that are intertwined with any system that requires group decision making.[264] Title VII is no different, and these problems are at least part of the reason for its decline.

C. The Status Theory of Cooperation and Conflict

1. Esteem Theory and Collective Action Problems

A community of fishermen have an agreement to only catch fish commercially and to sell on the market during certain times. Although if one person defects, catching and selling fish before all the others, that person would yield immense gains at no real expense to the others. Yet

[260] *See* POSNER, *supra* note 8, at 92; *see also* Levmore, *supra* note 259.

[261] *See* POSNER, *supra* note 8, at 92; *see also* Albert W. Alschuler & Andrew G. Diess, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 925-26 (1994) (noting that such "over-proceduralization" can ensnare the court system at the retail level in jury deliberation, just as it ensnares judges).

[262] A world in which there is no discrimination on the basis of race or sex might be economically efficient. *See* Donohue, *supra* note 245, at 1420-30; *see also* John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523, 523-33. Some have even gone so far as to say that the common law in general tends toward efficient outcomes. POSNER, *supra* note 8, at 356 ("It is as if the judges *wanted* to adopt the rules, procedures, and case outcomes that would maximize society's wealth."); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 52-57 (1977).

[263] *See supra* Parts III.B.1–2.

[264] *See* AMARTYA SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 4-6 (1970).

each fisherman chooses to strictly adhere to the agreement anyway. Why? This is a classic collective action problem.[265]

Each individual fisherman stands to gain a great deal by breaking the agreement. Since no other fisherman is fishing, many fish would be caught, and they could all be sold at a great profit since no other fisherman is selling and supply is low.[266] Further, one lone fisherman breaking the agreement would not substantially deplete the fish such that there were too little in the next season.[267] If all the fishermen chose to break the agreement, however, they would all suffer an even greater loss than had they all just abided by the agreement.[268] Abiding by the agreement ensures that the fish can reproduce and that there are fish left to catch the next time fishing is allowed. But if each fisherman breaks the agreement and all continue to fish during an offseason, then the supply of fish will be eviscerated, and they will all be out of a job come the next fishing season.[269]

So, although each individual stands to gain by defecting from the agreement, the fishermen are collectively better off if they all (or a critical mass) abide by the agreement than if they all defect. Hence the name, collective action problem.[270]

Collective action problems are surprisingly common, and economists and philosophers have spent much time trying to figure out how groups manage to overcome them in real life.[271] It is widely understood that social protests and the influence of the Civil Rights Movement were

[265] For an overview of collective action problems and how they work, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 9-16 (Harv. Univ. Press 2d ed. 1971).

[266] *See* DEREK PARFIT, REASONS AND PERSONS 56-62 (1986).

[267] *See id.*

[268] *See id.*

[269] *See id.*

[270] *See* OLSON, *supra* note 265, at 6-9.

[271] *See, e.g.*, OLSON, *supra* note 265, at 5-12 (describing the collective actions that labor unions and firms were created to solve); PARFIT, *supra* note 266, at 53-66 (using collective action problems to demonstrate problems in moral philosophy and how a theory of self-interest could be considered collectively self-defeating and possibly self-effacing); Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSPS. 137 (2000) (describing how collective organization through social norms can solve collective action problems).

significant reasons contributing to the enactment of Civil Rights Act of 1964.[272]

But why would any individual person participate in such social movements in the first place? They are costly to those who participate — those who participate risk being arrested, beaten by police, shunned by those against the movement, and even killed.[273] Yet the whole group will benefit from a critical mass of participants. Such gains are not relegated to only the members of the group who participated in the protests at great risk to themselves. The gains from the collective efforts to protest the status quo are felt by everyone, even those who chose not to protest because it was too risky.[274]

By this understanding, many social movements may never come to pass because their formation is plagued by collective action problems. But the Civil Rights Movement happened to great success. Why? The material benefit of participating in a social movement and protesting the status quo is merely to slightly increase the probability that landmark legislation will be passed at some time in the future to change the status quo.[275] Indeed, although this is a noble goal, it is not great incentive, by itself, to take the kinds of risks that many social movements entail. The solution is probably obvious to anyone not so caught up in formal economic costs and benefits.

[272] *See* Rustin, *supra* note 241, at 25, 27; *see also* Clayborne Carson, *American Civil Rights Movement*, BRITANNICA, https://www.britannica.com/event/American-civil-rights-movement (last updated Dec. 17, 2023) [https://perma.cc/VA6C-ZHQ4] (largely attributing the passage of the Civil Rights Act of 1964 to the efforts of those participating in the movement beforehand).

[273] *See, e.g.*, *Assassination of Martin Luther King, Jr.*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/assassination-martin-luther-king-jr (last visited Oct. 27, 2023) [https://perma.cc/SDX4-H4YK] (describing the murder of Martin Luther King, Jr who was at the heart of the Civil Rights Movement); Julian Ring, *60 Years Ago, Medgar Evers Became a Martyr of the Civil Rights Movement*, NPR (June 12, 2023, 5:00 AM ET), https://www.npr.org/2023/06/12/1180727818/medgar-evers-civil-rights-60-years [https://perma.cc/H2QM-KTS2] (describing the murder of a black man, Medgar Evers, who publicly fought for the Civil Rights Movement in Mississippi).

[274] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (integrating public schools in the United States for everyone, not just those who fought for integration).

[275] *See* PARFIT, *supra* note 266, at 56-62 (noting the miniscule benefit to the individual who does something for the collective good).

There is another benefit that has not yet been discussed: social and psychic incentive felt only by the individual participating.[276] It might be called social esteem, or clout, or simply pride. It is an abstract sense that you, as an individual, have participated in something bigger than yourself and the appreciation that others in the group will have for your efforts.[277] It is this social esteem among members of the same group that allows groups as a whole to overcome collective action problems.[278]

Under this theory, in some circumstances, collective action problems present no problem at all.[279] When an individual member of some group considers defecting, the payoff of cooperating with the group actually outweighs the payoff of selfishly defecting. So, we observe each member of the group cooperating, even though one could plausibly defect to great advantage. This should be no surprise so long as we also observe the member as part of some cohesive group, which places value on behavior that, even if against self-interest, benefits the group.[280] Despite the potentially large payoff of defecting, the payoff of cooperating with the group where all the members of the group value cooperation is, in fact, greater.

Empirical data backs up this claim. First, consider the classic prisoner's dilemma.[281] Two people are taken into separate rooms. They are each individually informed about evidence against them for some crime. They are given two options: (1) confess to the crime, implicating their conspirator (defect); or (2) don't confess to the crime, keeping silent (cooperate). The catch, however, is that the amount of time each prisoner would have to serve after either confessing or not depends on what the other does. If both confess (defect), then they will both receive five years in prison. If neither confess (cooperate), then they both will

[276] *See* DENNIS CHONG, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT 1-12 (1991).

[277] *See id.*

[278] This is Richard McAdams's famous insight. McAdams, *Cooperation and Conflict*, *supra* note 10, at 1083.

[279] For example, consider labor unions. A corporation might try to entice the leader of a union to defect in an attempt to bust the union. But this will likely fail considering all the benefits, both financial and social, that the union provides its members. *See* OLSON, *supra* note 265, at 6-11.

[280] *See, e.g.*, ROBERT AXELROD, THE EVOLUTION OF COOPERATION 7-10 (1984).

[281] *Id.*

only have to spend two years in prison. But if one person confesses and the other does not, then the person who confessed (defected) is let free, and the person who did not confess (cooperated) must spend ten years in prison.[282]

The dilemma, according to game theory, is that if each player in the game is self-interested, then each player is better off defecting. [283] If one player does not defect and instead chooses to cooperate, it is in the best interest of the other player to defect and thus be let free.[284] If one player does defect, then it is, again, in the best interest of the other player to defect because otherwise the player would be looking at an extremely long prison sentence.[285]

Studies have put subjects in exactly this kind of dilemma. Those conducting these studies have found that when two individuals are pitted against each other, the probability that both individuals cooperate far exceeds the probability that groups cooperate when put in the same situation.[286] The studies show that even an arbitrarily created group, created for the purpose of an experiment, produces a bias in the group members to favor the other members of their own group.[287] This bias creates an extra payoff for group members when their group defects

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[282] This is a stylized version of the game, but it is representative of the original game. *See id.*

[283] PARFIT, *supra* note 266, at 56-58.

[284] *Id.* at 56-57.

[285] *Id.*

[286] *See, e.g.*, Chester A. Insko, John Schopler, Kenneth A. Graetz, Stephen M. Drigotas, David P. Currey, Shannon L. Smith, Donna Brazil & Garry Bornstein, *Interindividual-Intergroup Discontinuity in the Prisoner's Dilemma Game*, 38 J. CONFLICT RESOL. 87, 114 (1994) (contrasting prisoner's dilemma games between individual players and those between groups and finding significantly more cooperation between individuals than between groups of players forming teams against each other); Debra Moehle McCallum, Kathleen Harring, Robert Gilmore, Sarah Drenan, Jonathan P. Chase, Chester A. Insko & John Thibaut, *Competition and Cooperation Between Groups and Between Individuals*, 21 J. EXPERIMENTAL SOC. PYSCH. 301, 314 (1985) (finding increased rates of defection in the context of prisoner's dilemma games when teams were playing as opposed to individuals).

[287] *See* Louise Lemyre & Philip M. Smith, *Intergroup Discrimination and Self-Esteem in the Minimal Group Paradigm*, 49 J. PERSONALITY & SOC. PSYCH. 660, 660 (1985).

and the opposing group cooperates, meaning they effectively "beat" the opposing group.[288]

To sum up the scientific literature in this area, groups matter.[289] They create solidarity, which in turn provides incentives for group members to act for the benefit of the group even if such an act would otherwise not be what that group member would have done were this person acting individually, separate from a group.[290] Furthermore, the magnitude of such incentives created by group membership depends on the cohesiveness of the group.[291] Mere discussion among group members who were initially strangers increased the probability that they would cooperate for the benefit of the group, likely because the incentive they saw from such group cooperation was greater now that discussion had increased group cohesion.[292]

How does this play into Title VII's decline? Two reasons, one negative and one positive, offer insight. Under the negative reason, landmark civil rights legislation like Title VII was effective at changing social norms to disfavor discrimination at the time of passage because the mere announcement of such legislation depreciated the value of any perceived "esteem" that wrongful discrimination would impart on the discriminator.[293] However, that legislation's initial success meant that people stopped pushing as hard for further civil rights legislation, which created a kind of legislative lacuna that, over time, would slowly diminish the original effectiveness of the announcement of this

[288] *See id.* at 663-64.

[289] *See, e.g.*, Insko et al., *supra* note 286 (finding that groups are more competitive than individuals in a game modeled after the prisoner's dilemma); Lemyre & Smith, *supra* note 287 (demonstrating that even individuals placed in arbitrary groups express preferences in favor of group members); McCallum et al., *supra* note 286 (contrasting groups from individuals confronted with the prisoner's dilemma).

[290] *See* McAdams, *Cooperation and Conflict*, *supra* note 10, at 1006-08.

[291] *See* Robyn M. Dawes, Alphons J.C. van de Kragt & John M. Orbell, *Cooperation for the Benefit of Us — Not Me, or My Conscience, in* BEYOND SELF-INTEREST 97, 103-07 (Jane J. Mansbridge ed., 1990).

[292] *Id.*

[293] *See* B. Douglas Bernheim, *A Theory of Conformity*, 102 J. POL. ECON. 841, 860-61 (1994); Tyler Cowen, *The Esteem Theory of Norms*, 113 PUB. CHOICE 211, 215-16 (2002).

legislation.[294] As the lacuna widened over the years, so too did the willingness to partake in discriminatory behavior.[295] So, ironically, the tremendous initial success of statutes like Title VII was also a function of these statues' demise.

Under the positive reason, the same "esteem" that initially depreciated in value for the discriminator following the passage of legislation like Title VII would also depreciate in value for the activist who sought an end to discrimination.[296] Discriminators, following the announcement of antidiscrimination legislation, saw that their discriminatory behavior was not valued by a large chunk of society. On the other hand, the activists seeking to end discriminatory behavior now had no easy goal to rally behind.[297] The landmark civil rights legislation had already been passed, so civil rights groups would begin to split hairs around what more should be done.[298] This eroded the cohesiveness of the groups.[299] In other words, it is easy to rally a strong cohesive group to advocate against the broad concept of discrimination on the basis of traits like race, sex, religion, and national origin; it is much harder to get that group to agree on what to do next following its success.[300]

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[294] *See* Freeman, *supra* note 1, at 1102-03 ("The typical approach of the era of rationalization is 'to declare that the war is over,' to make the problem of racial discrimination go away by announcing that it has been solved."); Robert W. Pettis, Zehra Valencia & Breyon J. Williams, *Pride and Prejudice: Same-Sex Marriage Legalization Announcements and Hate Crimes*, 65 J.L. & ECON. 811, 823 (2022).

[295] *See* Freeman, *supra* note 1, at 1103-18.

[296] *See* McAdams, *Cooperation and Conflict*, *supra* note 10, at 1007-08.

[297] *See id.*

[298] *See, e.g.*, Schultz, *supra* note 4, at 1066-67 (noting that once pregnancy was recognized as sex discrimination, feminist scholars could not agree on whether pregnancy should be treated like a disability or whether it should be treated as a uniquely female event).

[299] *See* McAdams, *Cooperation and Conflict*, *supra* note 10, at 1007-08.

[300] Many parallels can be drawn between the splintering of the Civil Rights Movement following the passage of the Civil Rights Act of 1964 and the likely splintering of the pro-life movement following the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Anti-abortion activists were easily able to come together to fight something they all agreed that they hated. *See* Roe v. Wade, 410 U.S. 113 (1973). Now that *Roe v. Wade* has been successfully overturned, though, this group is having a lot of trouble agreeing on how to move forward. *See One Year After* Dobbs, *America's Pro-Life movement Is in Flux*, ECONOMIST (June 22, 2023), https://www.economist.com/united-states/2023/06/22/one-year-after-dobbs-americas-

2. Negative Reason

The mere announcement of antidiscriminatory policy will curb discrimination to an extent, even before enforcement.[301] Consider why some people discriminate in the first place. They unconsciously and implicitly weigh the costs and benefits they get from discriminating.[302] If the benefits exceed the costs for any individual person, that person will choose to discriminate.[303] The benefits likely consist of this person's own personal taste for discrimination and the esteem they would get from other likeminded discriminatory people who approve of others like them discriminating.[304] The costs likely consist of the social stigma associated with discrimination and the legal repercussions of discrimination discounted by the probability of getting caught.[305] Part of the function, then, of the utility that a discriminator gets from discriminating is what other people think of it.

Now consider a law, like Title VII, which makes it illegal to discriminate against an employee because of that employee's race. Assuming that the potential discriminator believes in democracy and that promulgated legislation conveys popular opinion to some extent,

pro-life-movement-is-in-flux [https://perma.cc/QR8F-MYJU]. Some people in the group want to pursue making abortion illegal in every state; some people in the group don't want this at all and just want to focus on making it easier for women to get pregnant and give birth. *Id.* Some want to narrow the conditions under which it is permissible to get an abortion in states that have generally outlawed abortions. Others want to broaden these conditions so that, although abortion is still illegal in the state, it is easier for a woman who really needs an abortion to get one. *Id.* The ease with which groups can pursue broader, more centrist, policies relative to the difficulty of pursuing narrower, more pointed policies likely glimpses a political equilibrium that favors centrism. Generalist policies that dully appeal to a broader audience are more likely to succeed at the national level than pointed policies that strongly appeal to a more passionate but smaller audience. *See* Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23, 26-29 (1948) ("If all members voted as we have supposed, the motion adopted by the committee would be that corresponding to the median optimum.").

[301] *See* Pettis et al., *supra* note 294, at 813-14 ("[S]alient, progressive policy announcements protecting LGBT rights may, by themselves, be effective at reducing hate crimes.").

[302] GARY BECKER, THE ECONOMICS OF DISCRIMINATION 14 (2d ed. 1971).

[303] *Id.*

[304] *Id.*

[305] *See* Bernheim, *supra* note 293, at 841, 844.

the announcement of this new legislation should indicate a decline in popular tolerance of racial discrimination. The potential discriminator should anticipate both "fewer like-minded individuals" who are in support of discrimination and a decline in support among the remainder that do support it relative to the period before announcement.[306]

If the esteem from others imparted on acts of discrimination is a function of the benefit that a discriminator receives from discriminating, then the mere announcement of a law against discrimination will act to diminish the benefit of discrimination for any individual discriminator. The discriminator will perceive less people who are in favor of what they do. And indeed, we have documentation that supports this conclusion. Economic scholars have identified a significant and immediate reduction in violent hate crime against LGBTQ-identifying people following the announcement of antidiscriminatory LGBTQ laws.[307]

But the same scholars have also documented diminishing effectiveness of the announcement's ability to stop this kind of discriminatory behavior after enough time has passed. They explicitly note that "this immediate decline [in hate crimes] appears to reverse 1 year following an announcement."[308] This might be yet another reason behind the retrenchment of Title VII.

Title VII was incredibly effective at curbing discriminatory behavior[309] immediately following its promulgation and subsequent

[306] *See* Pettis et al., *supra* note 294, at 815.

[307] *Id.* at 822-26. *But see* Chase Strangio, *Backlash Over the Equality Act is Fueling State-Level Attacks on Trans Youth*, TRUTHOUT (Feb. 27, 2021), https://truthout.org/articles/backlash-over-the-equality-act-is-fueling-state-level-attacks-on-trans-youth/ [https://perma.cc/G89V-W67H] (discussing a "harmful backlash against transgender people" fueled by the passage in the House of Representatives of a law protecting LGBTQ people from sex discrimination in public accommodations).

[308] Pettis et al., *supra* note 294, at 823.

[309] *See supra* note 223 (setting forth a number of cases in which employers were sued for discrimination after Title VII was passed but immediately acquiesced agreeing to settle, which resulted in consent decrees fleshing out the terms of settlement that needed to be enforced by the courts); Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999) (noting that Title VII's primary objective was not merely "to provide redress but to avoid harm") (citing Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

progressive Supreme Court rulings enforcing it.[310] But that success meant that no further legislation was announced because none was felt to be needed. The most recent iteration of the Civil Rights Act was announced in 1991.[311] So, three decades have passed since the announcement of any real landmark federal civil rights legislation. And, as stated above, the mere announcement of such legislation really matters — it sends an important signal to the population reminding it of what is socially appropriate and of what the majority wants. Perhaps Title VII would be stronger today if only Congress publicly reaffirmed it every decade or so. As it now stands, Title VII of the Civil Rights Act has become stale over the years.[312]

3. Positive Reason

Consider the circumstances near the time Title VII was passed into law in 1964. In 1961, thousands of protestors including members of the NAACP and Martin Luther King Jr. himself participated in the Albany Movement, protesting the segregationist policies in Albany, Georgia, 500 of whom were arrested.[313] 1963 marked the famous March on Washington — one of the largest and greatest civil rights demonstrations in the history of the United States — where over 200,000 people marched in Washington, D.C. demanding fair employment and where Martin Luther King Jr. delivered his renowned "I Have A Dream" speech.[314] In 1965, King and demonstrators campaigned for months in Chicago for fair unsegregated housing and employment and protested disparities in healthcare in what is known as

[310] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (focusing on how to remedy discrimination and setting forth a broad interpretation of Title VII in the process); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (creating essentially the concept of disparate impact).

[311] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

[312] *See supra* note 1.

[313] *Albany Movement*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/albany-movement (last visited Dec. 17, 2023) [https://perma.cc/2GXN-6SN5].

[314] *March on Washington for Jobs and Freedom*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/march-washington-jobs-and-freedom (last visited Dec. 17, 2023) [https://perma.cc/3EVM-73KR].

the Chicago Freedom Movement, another pivotal event in the fight for civil rights.[315] In 1968, thousands of people converged once again in Washington, D.C. to protest economic disparities and fight for minority rights;[316] they occupied the national mall for six weeks following King's assassination on April 4th.[317]

These coordinated movements demonstrate the existence of a cohesive group with a single purpose of which all members were aware and for which they were all fighting. With such a cohesive and powerfully united group behind the movement, more people felt encouraged to join.[318] The esteem and solidarity incentives mentioned in Part III.C.1 were in full play. As a result, "cooperation" in the movement was far more attractive to individuals than "defection," even if, to a neoclassical economist, defection would yield a higher material net benefit to an individual.[319] This is likely at least one reason why we saw over 200,000 people join the March on Washington.[320]

It is important to remember that lawyers and judges were members of the movement in their own rite.[321] And again, with the social

[315] *Chicago Campaign*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/chicago-campaign (last visited Dec. 17, 2023) [https://perma.cc/NM26-WMH8].

[316] Anna Diamond, *Remembering Resurrection City and the Poor People's Campaign of 1968*, SMITHSONIAN (May 2018), https://www.smithsonianmag.com/history/remembering-poor-peoples-campaign-180968742/ [https://perma.cc/8D4P-UGHC] (describing an encampment on the national mall in which thousands of people fighting for economic equality lived for over a month); *Poor People's Campaign*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., https://kinginstitute.stanford.edu/encyclopedia/poor-peoples-campaign (last visited Dec. 17, 2023) [https://perma.cc/YHF2-HTSD].

[317] *Poor People's Campaign*, *supra* note 316.

[318] *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH L. REV. 2062, 2090 (2002) (discussing the inspiration spectators felt when they witnessed successful campaigns for civil rights).

[319] *See supra* notes 302-305 and accompanying text.

[320] *See March on Washington for Jobs and Freedom*, *supra* note 314.

[321] *See* Alyssa Cochran, *Judicial Courage, Judicial Heroes, and the Civil Rights Movement*, AM. BAR ASS'N (Feb. 5, 2019), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2019/winter/judicial-courage-judicial-heroes-and-the-civil-rights-movement/ [https://perma.cc/47SL-TZ5M]; *cf. African American History Month: Six Judges' Journeys Recall Civil Rights Era*, U.S. CTS. (Feb. 5, 2015),

incentives to cooperate so high during this time, we saw many lawyers willing to sacrifice a great deal to benefit the "group" even at individual expense, when they as individuals could have defected without great cost to the movement's ultimate cause.[322] Moreover, consider a judge with a Title VII case before her at this time. Who could blame that judge if she wrote a forward-thinking, extremely progressive opinion against employment discrimination?[323] At that time, compared to the relatively few regressive judicial opinions being decided, it would have been considered standard practice.

Compare that time in history, the 1960s and early '70s, to the late '70s, to the '80s and '90s, and even to today. The scholarly consensus is that following the passage of the 1964 Civil Rights Act, the movement began to splinter.[324] To take an example, feminist activists who participated in the Civil Rights Movement were split into two camps: (1) those who thought pregnancy should be classified as a normal disability, which would merely put a woman out of commission for a handful of months, like any other disability; and (2) those who thought pregnancy should be classified as a special event unique to women.[325] Both camps considered their view of how pregnancy should be classified as the one most empowering and beneficial to women.[326] This particular splintering of the group came to a head in the '70s and '80s when courts began taking

https://www.uscourts.gov/news/2015/02/05/african-american-history-month-six-judges-journeys-recall-civil-rights-era [https://perma.cc/J84J-WW62].

[322] *See generally* Brian K. Landsberg, *The Role of Civil Service Attorneys and Political Appointees in Making Policy in the Civil Rights Division of the U.S. Department of Justice*, 9 J.L. & POL. 275 (1993) (detailing the level of effort and amount of work attorneys in the Civil Rights Division put into fighting discrimination and the sacrifices they made).

[323] *See, e.g.*, Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219, 1225 (C.D. Cal., 1968) (invalidating the entirety of Section 1251 of California's Labor Code, which was paternalistic toward women, because it conflicted with Title VII); Leisner v. New York Tel. Co., 358 F. Supp. 359, 369 (S.D.N.Y, 1973) (overturning entrenched practices deployed by the New York Telephone Company which kept women from management positions in effect).

[324] *See, e.g.*, Schultz, *supra* note 4, at 1066-67 (documenting the split among feminist activists' views on pregnancy discrimination).

[325] *Id.* at 1067-81.

[326] *See id.*

up their theories to rationalize their decisions in cases having to do with pregnancy.[327]

To be sure, the "groups" associated with progressive civil rights and antidiscrimination and fair employment practices are still very much alive.[328] However, these groups are simply not as vibrant or cohesive as they once were.[329] Thus, under the status theory model, there is less incentive for individual group members to "cooperate" in favor of the group when the option of "defecting" in self-interest is still as attractive as it ever was.

Lawyers are likely less willing to bring these types of cases pro-bono or otherwise.[330] Judges probably no longer feel such a strong pressure to go out on a limb and render the kind of progressive, antidiscriminatory Title VII decisions that they did in the past.[331] The appeal of merely

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[327] *Id.* at 1067-71; *see, e.g.*, Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (finding an employer's disability benefits plan that did not cover absences related to pregnancy was not sex discrimination); Geduldig v. Aiello, 417 U.S. 484, 494 (1974) (finding that the exclusion of benefits because of pregnancy was not sex discrimination).

[328] Groups like the ACLU and NAACP are just a few examples. *See Is the NAACP Still Relevant?*, NPR (Feb. 16, 2009, 10:00 AM EST), https://www.npr.org/templates/story/story.php?storyId=100752659 [https://perma.cc/J9LZ-ATEG]; Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis*, N.Y. TIMES (June 6, 2021), https://www.nytimes.com/2021/06/06/us/aclu-free-speech.html [https://perma.cc/BZU7-V9LY]. The fight for expansive civil rights lost its luster following its peak in the '50s and '60s. Paul Delaney, *Civil Rights Slowdown*, N.Y. TIMES (Aug. 3, 1974), https://www.nytimes.com/1974/08/03/archives/civil-rights-slowdown-movement-at-a-peak-of-activism-in-64-turns-to.html [https://perma.cc/VA9V-8H88].

[329] *See supra* note 328. While each member of the group could get behind broad antidiscrimination legislation and jurisprudence, the application of such legislation and what exactly constituted discrimination was something many civil rights advocates disagreed about. *See, e.g.*, Schultz, *supra* note 4, at 1066-67 (documenting the split among feminist activists' views on pregnancy discrimination).

[330] *See* Nayee, *supra* note 133, at 371, 372, 404 (noting that Title VII employment discrimination litigation "is much less common" in 2018 than it was two decades after the law was enacted although concluding that this is because the more "overt forms of employment discrimination have subsided" rather than because the Civil Rights Movement writ large has slackened since the '60s and '70s).

[331] Even the most progressive civil rights precedent of today, for example, comes nowhere close to being as impactful to civil rights as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *See, e.g.*, Erik Fredericksen, Note, *Protecting Transgender Youth After* Bostock*: Sex Classification, Sex Stereotypes, and the Future of Equal Protection*, 132 YALE L.J. 1149, 1211 (2023) (noting that even cases like *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)

deferring to procedure of past cases wins out. So, the splintering of the Civil Rights Movement, paired with the status theory of cooperation and conflict provides yet another explanation for Title VII's retreat.

D. Social Norms and Expressive Law

Before the Civil Rights Act of 1964 was passed into law, restaurants and hotels, owned by white southerners whose businesses were discriminating against black people and who were thus the target of regulation, actually supported the Act and heavily lobbied in favor of the legislation.[332] Why did white southern business owners go through so much effort to get a law passed that would regulate their own activity? Was it simply out of the goodness of their own hearts? Were they clandestine proponents of the Civil Rights Movement? Before those questions are answered, consider another, perhaps simpler, example[333] provided by Professor Lawrence Lessig at Harvard that gets to the root of these questions.

Generally, you would think it a good thing to wear a helmet in the sport of hockey.[334] It's not too uncomfortable. It's easy to put on and take off. It doesn't weigh the player down too much. And the protection it provides can be at least life-extending, if not lifesaving — a feature only moderately more important than the prior four. Yet, for a long time, most professional hockey players did not wear helmets.[335]

This oddity was in large part because if a player decided to come to the rink one day sporting a helmet, that player would get ruthlessly made fun of. Other players saw the act of wearing a helmet as being un-

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"ignore the connections between anti-LGBT discrimination, sex stereotypes, and sexism [and subsequently] may uphold much discriminatory state action").

332 SUNSTEIN,*supra* note 225 at 14 ; *see also* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 965-966 (1995). *See generally* McAdams, *Cooperation and Conflict*, *supra* note 10, at 1064-84 (discussing how some groups advocate for laws which seem to restrict them from favorably altering social norms).

333 The following hockey example first originated in Professor Lessig's paper on the regulation of social meaning. Lessig, *supra* note 332, at 967-68.

334 *Id.* at 967.

335 Sal Barry, *Helmet Holdouts: The Last Players Not to Wear Helmets in the NHL*, THE HOCKEY NEWS (May 16, 2019), https://thehockeynews.com/all-access/helmet-holdouts-the-last-players-to-wear-helmets-in-the-nhl [https://perma.cc/85XT-YZMW].

macho and wimpy.[336] Furthermore, helmets would just slightly reduce the player's range of vision.[337] So, a player who chose to wear a helmet would incur significant social stigma because the norm on the rink was to not a wear a helmet lest you were "unmacho."[338]

The National Hockey League ("NHL") fixed this issue quite easily. It passed a rule in 1979, requiring players to wear helmets.[339] What's interesting though, is not the effect that this rule had on the behavior of NHL players — almost all now wear helmets — but its effect over the perceptions of NHL players and what they thought about other players wearing a helmet. Whereas wearing a helmet was once a conscious choice hockey players made, it became a command that they merely followed.

In other words, the new rule ambiguated the meaning of the act of wearing a helmet.[340] Even players who were of the staunch opinion that wearing helmets was for wimps could not make fun of other players for wearing a helmet now — the player was just following the rules after all.

And over time, the act of helmet-wearing was normalized. The past anti-helmet norm and the associations of helmet-wearing with being unmacho had been undermined by the rule.[341] Many hockey players were probably happy to have an "excuse" to wear a helmet following passage of Rule 23(b).[342]

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[336] Lessig, *supra* note 332, at 967; J.T. *When Did the NHL Require Helmets? We Explain the Hockey Helmet Rule*, HOCKEY TOPICS (Aug. 1, 2023), https://hockeytopics.com/hockey-rules-hockey-helmet-rule/ [https://perma.cc/39FM-UXUD].

[337] Lessig, *supra* note 332, at 967.

[338] *See id.*

[339] *N.H.L. Rules New Players Now Must Wear Helmets*, N.Y. TIMES (Aug. 7, 1979), https://www.nytimes.com/1979/08/07/archives/nhl-rules-new-players-now-must-wear-helmets.html [https://perma.cc/G8TG-2YWN].

[340] Lessig, *supra* note 332, at 968 ("After this rule, the stigma costs of wearing a helmet are less than before the rule, since after the rule, the social meaning of wearing the helmet is — at a minimum — ambiguous between a failure in machoness and a need to conform to the rules of the game.").

[341] *Id.* at 967-68.

[342] For instance, Ryan Walter, a professional ice hockey player, in an interview commenting on the "unmanly stigma" associated with helmets, said that "I'm glad I have an excuse to wear one." Craig Neff & Robert Sullivan, *A Prescription for Safety*, SPORTS ILLUSTRATED, Jan. 13, 1986, at 7.

This brings us back to the Civil Rights Act of 1964. The primary goal of restaurants and hotels is to serve as many willing customers as possible to make as much money as possible. Refusing to serve black customers immensely shrinks the pool of customers a business can serve and subsequently loses the businesses a lot of money. Discriminating in this way is simply inefficient.[343] Many business owners, then, do not want to discriminate — it loses them money. At least a few business owners in the 1950s and early 1960s, prior to the passage of the Civil Rights Act of 1964, probably felt the same way.[344]

Furthermore, when you see a business supporting regulation of itself, that business is probably not doing so out of the goodness of its heart. It is doing so because it predicts such regulation will yield higher profit margins and will benefit its bottom line.[345] Most often, this is achieved by erecting barriers to entry in the industry, thus reducing competition and artificially reducing the supply of whatever product or service the industry provides to keep the price high given a constant demand.[346] For example, licensing and strict certification requirements for interstate motor carriers have been a great boon for those already in the industry.[347] And regardless of how those licensing requirements came about in the first place, it is certainly in the interest of the industry's status quo for these requirements to stick around.[348] But artificially

[343] *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 352 (1981) ("Some sellers will have only a mild prejudice and so will not forgo as many advantageous transactions with blacks as their more prejudiced competitors. The costs of these sellers will therefore be lower, which will enable them to increase their share of the market. The least prejudiced sellers will come to dominate the market . . . .").

[344] *See* SUNSTEIN *supra* note 225, at 51; Lessig, *supra* note 332, at 966 ("[F]or a white to serve or hire blacks was for the white to mark him or herself as having either a special greed for money or a special affection for blacks.").

[345] *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) ("[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.").

[346] *See* STIGLITZ, *supra* note 239, at 34-35 ("In business school we teach students how to recognize, and create, barriers to competition — including barriers to entry — that help ensure that profits won't be eroded. Indeed . . . some of the most important innovations in business in the last three decades have centered not on making the economy more efficient but on how better to ensure monopoly power . . . .").

[347] Stigler, *supra* note 345, at 5-6.

[348] *Id.*

reducing supply by creating barriers to entry is not the only way to keep profit margins up for suppliers. Another way to do so might be to increase demand.[349] This is usually no easy task to accomplish via regulation. But when a huge chunk of the population is ostracized and is prevented from even stepping into another's business, it is clear how business owners might increase demand for their services or their products — advocate for regulation on themselves that would make it illegal to continue ostracizing that group.

So, why did white southern business owners go through so much effort to get a law passed that would regulate their own activity? For the same reason that hockey players were glad to have a rule imposed upon them that enforced the wearing of helmets. The social norm, at the time, was for these white southern business owners to discriminate against black customers. They wanted to change that.[350]

A powerful social stigma attached a high cost to individual businesses choosing not to discriminate. When a white business owner allowed a black customer to dine in the restaurant or allowed a black customer to stay at the hotel, other people dining at the restaurant or staying at the hotel would perceive the owner as being excessively greedy or as having some abnormal affinity for black folks — a death knell in the south at the time.[351] So even though business owners may have wanted to serve black customers or hire black employees, the social cost was prohibitive.

Then, the Civil Rights Act of 1964 was passed into law. Nondiscrimination no longer was a conscious choice. Instead, it became a matter of simply obeying the law. As with the hockey example, the social meaning of the regulated act was now ambiguous if not completely changed. Business owners serving black customers could point to the law as the reason for doing so. Even those who still were explicitly racist and against the equal treatment of black people could

[349] *Supply and demand*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/money/topic/supply-and-demand (last updated Dec. 14, 2023) [https://perma.cc/Q6TW-D63D].

[350] *See* SUNSTEIN, *supra* note 225, at 51 ("[T]he law helped shift social norms and the social meaning of nondiscrimination."); Lessig, *supra* note 332, at 966 (describing how white business owners would be marked as greedy or socially eccentric for serving black customers).

[351] Lessig, *supra* note 332, at 966.

not blame the business owner for following the law at risk of getting sued otherwise.

Some scholars, however, thought that even if a law was passed that would ambiguate the purpose of desegregation, customers would still discriminate, and business owners would still lose profits.[352] And indeed there is truth to this statement; wrongful discrimination has no easy answer. Consider, for example, movie theaters in Washington, D.C. in the early 1950s. In June of 1953, the Supreme Court made a ruling that forced desegregation of businesses only in the Washington, D.C. area.[353] Prior to that ruling, movie theaters in Washington, D.C. were heavily segregated.[354] Professors Ricard Gil and Justin Marion document that the revenues of Washington, D.C. theaters during this time fell by at least eleven percent relative to theaters in other cities showing similar movies.[355] They argue that even though the Supreme Court ruling made it illegal for theaters to continue racial discrimination in the Washington, D.C. area, consumer demand was still in favor of segregated theaters because of racist consumer preferences.[356] But, although this example illustrates why discrimination is so hard to stomp out, a world of difference separates a national law from a local regulation.

Regarding race, the passage of Title VII of the Civil Rights Act likely altered what serving or hiring a black person meant.[357] In doing so, it drastically reduced the associated costs.[358] Those who were originally reluctant to associate with black people now felt pressured to do so by law.[359] Those who originally wanted integration but did not push for it because of the social norm against it felt they could now do so without

[352] *See, e.g.*, Ricard Gil & Justin Marion, *Why Did Firms Practice Segregation? Evidence from Movie Theaters During Jim Crow*, 65 J.L. & ECON., 635, 636-37 (2022) (describing movie theaters in Washington, D.C., in the 1950s).

[353] *Id.* at 636.

[354] *Id.*

[355] *Id.* at 637.

[356] *Id.* at 636-37.

[357] SUNSTEIN, *supra* note 225, at 51 (describing how laws regulating certain actors may benefit them because laws "shift social norms and the social meaning of" certain acts); Lessig, *supra* note 332, at 965-67.

[358] Lessig, *supra* note 332, at 966.

[359] *Id.*

being stigmatized.[360] And perhaps more importantly for some, they could do so without hurting their profit margins.[361]

The law shifted social norms after it was successfully enforced and given teeth by the courts.[362] Ironically, though, this shift in social norms that made the white southern business owner comfortable serving a black customer or hiring a black employee decades ago, is also partially the reason for the retrenchment of civil rights law today.

Recall the vigorous lobbying in which white southern business owners engaged to support the passage of the Civil Rights Act of 1964.[363] Recall, also, that they did so because of the social norm at the time that gave a negative connotation to working with or serving black people.[364] Finally, recall that the passage of the Civil Rights Act successfully shifted social norms and destigmatized antidiscrimination and desegregation after people realized courts were indeed willing to enforce it.

It stands to reason, then, that this kind of antidiscrimination legislation and subsequent court enforcement has lost the support of a powerful interest group. Those business owners who were only in support of such antidiscrimination legislation and judicial action insofar that it allowed them to operate their business more efficiently and profitably — serving black customers and hiring qualified black employees — lost their reason to support this kind of law as soon as social norms shifted, and they were able to serve and hire black people without social sigma.[365] The proliferation of arbitration clauses in

[360] *Id.*

[361] *See* POSNER note 343, at 352; Lessig, *supra* note 332, at 965-66.

[362] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (holding that Title VII prohibits "the use of employment tests that are discriminatory in effect unless" they have a "manifest relationship to the employment in question" (quoting Griggs v. Duke Power Co., 401 U.S. 424 (1971)); *Griggs*, 401 U.S. at 432 (holding that the effect of disproportionately excluding minorities violates Title VII even if there is no discriminatory intent, unless the exclusion can be tied to job performance); Shultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir. 1970) (holding differences between the pay of men and women for equal work violated the equal pay act).

[363] *See supra* note 332.

[364] *See supra* notes 350–351 and accompanying text.

[365] *See* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 3-4 (2015) (describing the epidemic of arbitration clauses employers now insert in employee contracts, limiting employee rights, and thus eliminating the

employment contracts at least eliminates the possibility that employers supported antidiscriminatory regulation because they were in favor of workers rights; it is thus more likely they did so because they were self-interested.[366]

In fact, most employers now have reasons to lobby against strengthening Title VII rights.[367] It was in an employer's own self-interest to shift social norms and to hire and serve black people without facing social stigma; it is now against an employer's self-interest to push further, granting more rights to an already hired employee or to a customer who has already bought the product.[368] Granting such rights would provide more opportunities for the employee or the customer to turn around and sue the employer. In other words, business owners and employers only were incentivized to support the bare minimum of civil rights law, not anything more.[369]

Business owners and employers constitute a small, organized interest group.[370] Such interest groups hold massive power in the United States.[371] Their support for antidiscrimination legislation and court

possibility that employers supported workplace antidiscrimination laws because they were pro-worker).

[366] *Id.*

[367] *See id.* at 3, 25-26; Stephen Joyce, *Arbitration Use by Employers Up as High Court Affirms Validity*, BLOOMBERG L. (Aug. 24, 2022, 2:43 AM PDT) https://news.bloomberglaw.com/daily-labor-report/arbitration-use-by-employers-up-as-high-court-affirms-validity [https://perma.cc/7J2F-2U4V].

[368] *See* STONE & COLVIN, *supra* note 365, at 3-4.

[369] This can easily be inferred by the increasingly high rate of arbitration agreements many employers force upon employees today — employers are glad to be able to have a bigger group of potential employees from which to hire, but once hired they want to keep them as far as possible from the rights to which they are entitled in the courts. *See id.* at 3; Joyce, *supra* note 367.

[370] *See, e.g.*, *Our Mission*, NAT'L REST. ASS'N, https://restaurant.org/about-us/what-we-do/our-mission/ (Last visited Dec. 17, 2023) [https://perma.cc/E4QL-VGDV] (describing the National Restaurant Association, an example of an organized interest group). *See generally* Gene Grossman & Elhanan Helpman, *Special Interest Groups and Economic Policy*, NAT'L BUREAU OF ECON. RSCH: THE REPORTER (June 1, 2000), https://www.nber.org/reporter/summer-2000/special-interest-groups-and-economic-policy [https://perma.cc/J469-HJM3] (explaining what interest groups are and how they function to influence political decision-making).

[371] *See, e.g.*, Will Van Sant, *The NRA's Shadowy Supreme Court Lobbying Campaign*, POLITICO (Aug. 5, 2022 5:00AM EDT), https://www.politico.com/interactives/2022/nra-

enforcement in the '60s was probably a significant reason contributing to the passage of the Act and to unambiguous judicial decisions upholding it.[372]

Indeed, small, niche special interest groups have a substantial effect on legislation[373] and at least some effect on judicial decision making.[374] Consider, for example, the Volumetric Ethanol Excise Tax Credit, which gave massive subsidies to the consumption of ethanol.[375] Despite multiple findings that ethanol was not actually environmentally friendly nor that was it reducing U.S. reliance on foreign oil, the Volumetric Ethanol Excise Tax Credit was in effect for multiple years and for every year it was in effect, it cost the government billions of dollars.[376] Why did the government continue to subsidize ethanol despite the sparce benefits of consumption? In short, subsidizing ethanol increased demand for corn, which made farmers in Iowa a lot of money — political

supreme-court-gun-lobbying/ [https://perma.cc/HGZ7-6FGX] (explaining how much effort the NRA has funneled into advocating overly broad readings of the Second Amendment in the Supreme Court); Joshua Kaplan, Justin Elliot, & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition*, PROPUBLICA (May 4, 2023 6:00 AM EDT), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus [https://perma.cc/ZRM9-PLK7] (insinuating the likely influence one billionaire businessman may have exerted over a Supreme Court Justice). For an excellent overview of how powerful special interest groups can be and how much they can and do distort the law-making process, see CHARLES WHEELAN, NAKED ECONOMICS: UNDRESSING THE DISMAL SCIENCE 137-48 (2002) and POSNER, *supra* note 8, at 354-55 ("Only an organized group of individuals . . . will be able to overcome the informational and free-rider problems that plague collective action. . . . The unorganized are unlikely to mount effective opposition, and it is their wealth, therefore, that typically is transferred to interest groups.").

[372] *See A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce 1: Hearings on S. 1732 Before the S. Comm. on Com.*, 88th Cong. 216 (1963) (statement of Burke Marshall, Assistant Att'y Gen. of the United States) (indicating that an organized group of southern business owners was in favor of antidiscrimination laws being passed); *supra* note 115.

[373] *See* WHEELAN, *supra* note 371, at 138-41 (discussing specific legislation that was able to survive only because of emphatic support from some special interest groups).

[374] *See, e.g.*, POSNER, *supra* note 8, at 123 (noting how the special interest group consisting of bus manufacturers encouraged a certain result from cases being decided).

[375] *See New Ethanol and Biodiesel Tax Provisions in the American Job Creation Act of 2004, H.R. 4520*, RENEWABLE FUELS ASS'N (Jan. 27, 2005), https://web.archive.org/web/20070712112357/http://www.ethanolrfa.org/policy/papers/view.php?id=6.

[376] WHEELAN, *supra* note 371, at 139.

support in Iowa is essential for any politician hoping to win their campaign in the state.[377]

Even Richard Posner, who at the time was an eminent circuit court judge and one of the most cited legal scholars ever,[378] has said "bus manufacturers are among the most enthusiastic supporters of judicial decrees that require the busing of schoolchildren to achieve public-school integration."[379] Similarly, it should not be hard to believe that a special interest group consisting of business owners in the south played a role in Title VII's passage and in the statute's judicial enforcement. Doing so was in the group's own financial interest.

Therefore, another reason behind the decline of Title VII since the early '70s has, ironically, been its early success in changing social norms. Powerful interest groups were only incentivized to support the enactment and enforcement of such a law up to the bare minimum by which they stood to gain.

Once it was no longer frowned upon to hire black employees and serve black customers, these powerful interest groups, composed of employers and business owners, were incentivized to preserve the status quo. By law, employers could not discriminate against qualified black workers.[380] Black customers could spend money consuming the goods produced by these employers and business owners. That is all this particular interest group cared about. Providing further and stronger rights to workers and consumers was not something for which they would lobby, and instead has been something they have lobbied and currently lobby against.[381] Considering the loss of this powerful interest

[377] *Id.* at 139-40.

[378] Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. CHI. L. REV. 1595, 1602 (2021); Larissa MacFarquhar, *The Bench Burner*, NEW YORKER (Dec. 2, 2001), https://www.newyorker.com/magazine/2001/12/10/the-bench-burner ("[A]s a judge on the Seventh Circuit Court of Appeals, [Posner] is one of the most powerful jurists in the country, second only to those on the Supreme Court.").

[379] POSNER, *supra* note 8, at 123.

[380] 42 U.S.C. § 2000e-2(a).

[381] Omer Unsal, M. Kabir Hassan & Duygu Zirek, *Corporate Lobbying and Labor Relations: Evidence from Employee-Level Litigations*, 46 J. CORP. FIN. 411, 411-13 (2017); Rick Paulas, *Instead of Going to Court, Corporations Pay Lobbyists for Favorable Results*, PAC. STANDARD (Dec. 14, 2017), https://psmag.com/economics/instead-of-going-to-court-corporations-pay-lobbyists-for-favorable-results [https://perma.cc/NRB6-NN72].

group, legislators no longer have as great an incentive to pass such landmark legislation, and judges no longer are as pressured to pen such unambiguously pro-antidiscrimination opinions.

E. The Rise of the Internet and Group Polarization

Consider the following social studies.

(1) *From Extreme to Mainstream*:[382] Before Donald Trump won the election in 2016 when he was campaigning, researchers gathered 458 people from Republican-leaning states such as Arkansas and Alabama. Half were told that Trump would win in their state; the other half were told nothing about whether Trump would win. They were all surveyed. One question they were asked was whether they would authorize those who were performing the study to donate one dollar to the Federation for American Immigration Reform ("FAIR") — a xenophobic organization that advocates anti-immigration and pro-European/American views.[383] Half of them were told that if they chose to donate, it would be anonymous. The other half received no such assurance and, in fact, the researchers insinuated that their donation may be public information.

For the participants not given any information about whether Trump would win in their state, the study showed that, unsurprisingly, anonymity made a big difference in who chose to donate to FAIR. Fifty-four percent of the group chose to donate when anonymity was ensured, whereas only thirty-four percent of the group chose to donate when no anonymity was ensured. But what was most startling about this study were the data gathered on the other group, which was ensured of Trump's victory in their state. For that group, anonymity made no difference at all. About fifty percent of the participants who were told Trump would win chose to donate, regardless of whether they were told the donation would be anonymous or not.

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[382] Leonardo Bursztyn, Georgy Egorov & Stefano Fiorin, *From Extreme to Mainstream: The Erosion of Social Norms*, Appendix D (Mar. 2020), https://home.uchicago.edu/~bursztyn/Bursztyn_Egorov_Fiorin_Extreme_Mainstream_2020_03_26.pdf. [https://perma.cc/D2HM-YUYC].

[383] *See About Fair: Federation for American Immigration Reform*, FAIR, https://www.fairus.org/about-fair (last visited Dec. 12, 2023) [https://perma.cc/9Y4M-QWG9].

In this study, developed and implemented by Leonardo Bursztyn while Donald Trump was running for president of the United States,[384] Donald Trump's victory was a signal to the participants.[385] The fact that participants knew that Trump, specifically, had won may have had some effect on their behavior.[386] However, the real conclusion is that some participants took Trump's victory as a kind of message, telling them that others in their state had similar beliefs relative to their own, despite not talking directly to those people at all.[387] This belief emboldened a significant proportion of people in the group to proclaim a controversial opinion that they otherwise would have wanted anonymous, that is, supporting a xenophobic group.

Next, consider the following example from Cass Sunstein:

(2) *Information Cascades*:[388]

> If A is unaware whether genetic modification of food is a serious problem, he may be moved in the direction of alarm if B seems to think that alarm is justified. If A and B believe that alarm is justified, C may end up thinking so too, at least if she lacks independent information to the contrary. If A, B, and C believe that genetic modification of food is a serious problem, D will need a good deal of confidence to reject their shared conclusion.[389]

The point of this example is that changes in social attitudes are largely dependent on factors, such as the initial distribution of opinions and the

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[384] Bursztyn et al., *supra* note 382 (noting Bursztyn and colleagues "examined information aggregation in 'real time' in the weeks just before and after the November 2016 US Presidential election").

[385] *Id.*

[386] *See id.*

[387] *Id.*

[388] Information cascades are a documented phenomenon in sociology, which provide evidence suggesting people tend to adapt their opinions based on the potency and volume of opinions held by those around them. *See generally* Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992) (providing a helpful account of the sociological phenomenon known as informational cascades).

[389] SUNSTEIN, *supra* note 225, at 10.

number of people any given person knows to share a certain opinion.[390] Merely learning some minor piece of information about what some other people believe at a specific time, might be the catalyst to a cascade, which can completely shift social norms.[391]

(3) *Jury Deliberation*:[392] In another study, conducted by Professors David Schkade, Cass Sunstein, and Daniel Kahneman, 3,048 jury-eligible citizens were gathered. They were all placed in six-person jury groups to deliberate. But before they deliberated in their group, each person first recorded their private judgement on a zero to eight scale of how harshly the defendant they were to deliberate about in the jury group should be punished. A score of "zero" meant that the person did not think the defendant should be punished at all. A score of "eight" meant the person thought the defendant should receive the harshest punishment possible. After recording their initial, individual, judgements, each person got into their six-person jury groups to deliberate about how harshly the defendant would be punished. Each group was, again, asked to give a number between zero and eight indicating how harshly the group thought the defendant should be punished.

It seems reasonable to think that each group would give, roughly, the median score of each of the six jurors of which the group was composed. For example, imagine that three of the jurors in some group thought that the defendant should be punished extremely harshly — say they responded seven or eight initially; and the other three jurors thought the defendant should only be punished mildly — say they answered four, five, or six initially. One would think that, coming together, they would reach a compromise and conclude with a punishment of six or seven. This, however, is not what the researchers who conducted this study found to happen at all.

This study showed that the deliberation created extreme polarization among the individuals who composed the jury groups. That is, when individual jurors in the group thought the defendant should be punished very harshly, the whole group ended up favoring a very harsh

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[390] *Id.*

[391] *See id.*

[392] *See generally* David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1164-67 (2000) (explaining how jury deliberation can influence the judgment of the jury members).

punishment. The group punishment score was far higher from whatever the median would have been considering the individual answers that jurors gave before deliberation. And the reverse was true when individual jurors in the group thought the defendant should be punished very lightly — the group, as a whole, would conclude with a very light verdict, far below the median.[393]

This study is a classic demonstration of group polarization and how it happens. People tend toward more polarized opinions after deliberation with a group composed of members who have similar opinions.[394] The opinions of the group members need not even be the same, so long as they are not antithetical.[395] As Cass Sunstein, one of the researchers behind the jury deliberation study, notes: "[A] group whose members are already inclined in a certain direction will have a disproportionate number of arguments supporting that same direction, the result of discussion will be to move individuals further in the direction of their initial inclinations."[396]

How do these sociological findings relate to the retreat of Title VII? First, Donald Trump did win the 2016 presidential election. And, almost assuredly, the results shown in the *Extreme to Mainstream* study came to fruition across the nation.[397] Again, that Trump, specifically, was President is not what mattered. What mattered was that when Trump was elected, some people who thought they had perhaps more fringe, regressive, beliefs about civil rights and discriminatory behavior began thinking that their beliefs were not so out of the ordinary and were emboldened to express them more frequently, more fervently, and, most important, more publicly.[398]

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[393] *Id.*

[394] *Id.* at 1166-67.

[395] *Id.*

[396] SUNSTEIN, *supra* note 225, at 25-26.

[397] *See* Alexis Okeowo, *Hate on the Rise After Trump's Election*, NEW YORKER (Nov. 17, 2016), https://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election.

[398] *See* Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments*, 51 AM. POL. SCI. ASS'N 528, 529-30 (2018); Vanessa Williamson & Isabella Gelfand, *Trump and Racism: What Do the Data Say?*, BROOKINGS INST. (Aug. 14, 2019), https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/ [https://perma.cc/2VTB-59XA].

This may have been the start of an information cascade of the kind I described in the *Information Cascades* example. The initial set of people who gained the confidence after Trump's election to publicly express their more regressive views on civil rights likely created a chain reaction.[399] People who were still hesitant about taking a position, say, the position against the teaching of critical race theory in schools,[400] even after Trump's election, may have subsequently seen the influx of those people emboldened to take such public stances against the practice and then adopted such a stance themselves. Before too long, berating the teaching of critical race theory is suddenly a mainstream stance for those who identify as Republican whereas it used to be extreme.[401] The initial stance against it cascaded into a group-wide position.

Finally, the internet and social media became a much more prominent instrument of communication in the 2000s and 2010s. The latter half of the 2000s and the 2010s were defined by the meteoric rise of online social media, allowing billions of people to share ideas and other visual content with each other at the click of the mouse.[402] In 2004, Mark Zuckerberg created Facebook.[403] Soon after, came Twitter in 2006,[404] and then Instagram in 2010.[405] In 2012, a YouTube video received one

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[399] *See* Okeowo, *supra* note 397.

[400] *See e.g.*, Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 2021), https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/ [https://perma.cc/67DK-L2ZU].

[401] *See id.*; Bryan Anderson, *Critical Race Theory Is a Flashpoint for Conservatives, But What Does it Mean?*, PBS (Nov. 2, 2021, 10:04 PM EST), https://www.pbs.org/newshour/education/so-much-buzz-but-what-is-critical-race-theory [https://perma.cc/Z7BJ-CPQ6].

[402] *See* Maryam Mohsin, *10 Facebook Statistics Every Marketer Should Know in 2023* [*Inforgraphic*], OBERLO (July 21, 2023), https://www.oberlo.com/blog/facebook-statistics [https://perma.cc/MB8Q-W7KM] (noting that Facebook alone boasts 2.94 billion monthly active users).

[403] Mark Hall, *Facebook*, BRITANNICA, https://www.britannica.com/topic/Facebook (last updated Dec. 11, 2023) [https://perma.cc/BQG9-CS87].

[404] *Twitter*, BRITANNICA, https://www.britannica.com/topic/Twitter (last updated Dec. 10, 2023) [https://perma.cc/R8LA-AXG3].

[405] Dan Blystone, *Instagram: What It Is, Its History, and How the Popular App Works*, INVESTOPEDIA, https://www.investopedia.com/articles/investing/102615/story-instagram-

billion views.[406] Only a year before that, in 2011, Snapchat was born.[407] Although starting off relatively unknown in 2005, Twitch began to see immense popularity in 2014, when Amazon also saw its potential and purchased it for $970 million.[408] And TikTok is now impacting popular culture around the world.[409]

Platforms like Facebook, TikTok, YouTube, and Instagram run on specialized algorithms that are designed to feed users content to which they are accustomed and that the algorithm predicts they would like or agree with.[410] From here it should be easy to see the line leading directly to the *Jury Deliberation* study.[411] Those with only slightly regressive views on certain issues, like discrimination at work, are fed increasingly radical opinions on the topic thanks to their time on the internet and the algorithmic nature of these platforms. Like the jurors in the study, these social media users are exposed to radical positions and are polarized.[412]

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rise-1-photoosharing-app.asp (last updated Oct. 22, 2022) [https://perma.cc/KK9L-ELKQ].

[406] *See "Gangnam Style" Becomes the First YouTube Video to Reach One Billion Views*, HIST., https://www.history.com/this-day-in-history/gangnam-style-first-youtube-video-to-hit-one-billion-views (last updated Aug. 8, 2019) [https://perma.cc/86ME-UG6J].

[407] Biz Carson, *The Rise of Snapchat from a Sexting App by Stanford Frat Bros to a $3 Billion IPO*, BUS. INSIDER (Feb. 5, 2017, 5:30 AM PST), https://www.businessinsider.com/the-rise-of-snapchat-from-a-stanford-frat-house-to-a-3-billion-ipo-2017-1 [https://perma.cc/5EZU-4US3].

[408] *See* Eugene Kim, *Amazon Buys Twitch For $970 Million In Cash*, BUS. INSIDER (Aug. 25, 2014, 1:03 PM PDT), https://www.businessinsider.com/amazon-buys-twitch-2014-8 [https://perma.cc/J5K5-8F5J].

[409] John Herrman, *How TikTok Is Rewriting the World*, N.Y. TIMES (Mar. 10, 2019), https://www.nytimes.com/2019/03/10/style/what-is-tik-tok.html [https://perma.cc/Q4EK-HCBH].

[410] *See* Shira Ovide, *The YouTube Rabbit Hole Is Nuanced*, N.Y. TIMES (Apr. 21, 2022), https://www.nytimes.com/2022/04/21/technology/youtube-rabbit-hole.html [https://perma.cc/7FTX-CWXS]; Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html [https://perma.cc/3F5V-P23Z].

[411] *See generally* Schkade et al., *supra* note 392(demonstrating that mere exposure to more extreme views tends to polarize members of a jury).

[412] Noah Pflueger-Peters, *Do YouTube Recommendations Foster Political Radicalization?*, UC DAVIS (Aug. 25, 2022), https://cs.ucdavis.edu/news/do-youtube-recommendations-foster-political-radicalization [https://perma.cc/A7BZ-6WT4]; Zeynep

Essentially, the period of the 2000s and 2010s was a perfect storm for the decline of civil rights law and Title VII by proxy. The internet's ability to polarize, the election of Donald Trump, and subsequent information cascades have led to a change in social norms.[413]

For example, race and sex quotas (setting goals to hire a specific number of racial-minority workers or women workers) were not seen as problematic in the 1960s and '70s and, in fact, were seen as a normal and reasonable remedy to past and existing discrimination in the workplace.[414] Now, however, "quota" is seen as a dirty word, and so many people abhor the usage of quotas such that even progressive groups avoid arguing in favor of them.[415]

The Civil Rights Act of 1964 and the Title VII judicial precedent created in its wake were both products of a different age combatting a different problematic social norm than the one we face today. Title VII and early Title VII legal precedent successfully fought the kind of explicit wrongful discrimination that many people perpetuated because it was the norm at the time.[416] Today, society deals with a different, more invidious, type of discriminatory norm. That discriminatory norm likely has roots in an idea that the famous, or infamous, economist, Milton

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Tufekci, *YouTube, the Great Radicalizer*, N.Y. TIMES (Mar. 10, 2018), https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html [https://perma.cc/BTX9-GQLJ].

[413] *See supra* notes 382, 388.

[414] *E.g.*, United Steel Workers v. Weber, 443 U.S. 193, 200 (1979) (holding that a private employer's use of a race-conscious affirmative action plan essentially setting a quota in the workplace for minority workers was not forbidden); Morton v. Mancari, 417 U.S. 535, 545 (1974) (holding that it was perfectly fine to have a conscious preference for Native Americans for jobs in the Bureau of Indian Affairs); *see* Rose, *supra* note 114, at 1154-56 (documenting the downfall of race-conscious affirmative action in the '80s even though it was previously an accepted practice).

[415] *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 993 (1988); *Affirmative Action*, ACLU, https://www.aclu.org/other/affirmative-action-aclu-position-paper?redirect=affirmative-action-aclu-position-paper (last visited Dec. 18, 2023) [https://perma.cc/7NSE-S52K]. Bush, vetoing the 1990 Civil Rights Act, reasoned that the bill "employs a maze of highly legalistic language to introduce the destructive forces of *quotas* into our national employment system." Steven A. Holmes, *President Vetoes Bill on Job Rights; Showdown Is Set*, N.Y. TIMES (Oct. 23, 1990), https://www.nytimes.com/1990/10/23/us/president-vetoes-bill-on-job-rights-showdown-is-set.html [https://perma.cc/7KK4-6J3X] (emphasis added).

[416] *See supra* notes 357–362 and accompanying text.

Freidman, brought to the spotlight: it is impossible to wrongfully discriminate if "merit" is the evaluating factor, even if the result is a disproportionately white workforce or a disproportionately white school.[417]

And judges, contrary to what Chief Justice Roberts proposed in his nomination to the Supreme Court,[418] are not societally detached umpires calling out "balls and strikes" in the void.[419] Judges are abreast of current social norms and customs of society because they, like the rest of us, live in society. So, to say that a judge is totally unaffected by social norms is a difficult position to defend. A judge today, for example, is much more comfortable striking down a race-conscious affirmative action program than a judge would have been in the early 1970s.[420]

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[417] *See* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 131-32 (1980) ("No arbitrary obstacles should prevent people from achieving those positions for which their talents fit them and which their values lead them to seek. Not birth, nationality, color, religion sex, nor any other irrelevant characteristic should determine the opportunities that are open to a person — only his abilities."); U.S. DEP'T OF JUST., OFF. OF LEGAL POL'Y, REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION 76-86 (1987).

[418] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.).

[419] Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1050-55 (2006) ("No serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires. The rules are created by the judges themselves. They are created out of materials that include constitutional and statutory language and previous cases, but these conventional materials of judicial decision making quickly run out when an interesting case arises; in those cases the conventional materials may influence, but they do not determine, the outcome.").

[420] *Compare* United Steel Workers v. Weber, 443 U.S. 193, 200 (1979) (affirming quotas as legitimate legal remedies of past discrimination), *with* Ritchie v. Napolitano, 196 F. Supp. 3d 54, 66 (D.D.C. 2016) (holding that a white employee passed over for an assignment because the employer implemented a race-conscious affirmative action plan had an actionable Title VII claim). This one comparison provides an excellent perspective of the impact that social norms of the times can have on the decision-making process in our courts. The antagonistic attitude in recent years concerning affirmative action policies is not just affecting affirmative action in employment, but affirmative action in higher education as well. *See, e.g*, Students for Fair Admissions v. Harvard, 600

The social norms today are different, and Title VII was not written to combat this behavior.[421] This change is yet another reason for Title VII's retrenchment.

III. REVERSING THE RETRENCHMENT?

With the reasons behind the retrenchment of Title VII set forth, the question should be clear: what can be done to fix the problem? Although no single solution would come close to solving every single problem set forth in this Article, some solutions show great promise. Extremely promising, for example, is the policy requiring Congress, or the president with congressional approval, to reaffirm and if necessary, modify the Civil Rights Act with every new president or every eight years.

Requiring a regular and publicized checkup so to speak of the Civil Rights Act is so promising a solution because of its elegance and because of its potential to solve at least three of the problems enumerated in this Article all at once. Before I discuss what such a practice would solve, I should note that the most important aspect of this practice has nothing to do with ensuring civil rights law stays up to date. In fact, it has nothing to do with substantive civil rights at all. The most important part of this solution is the published, publicized, and regular nature of it.

This should preempt the most salient criticism of this measure — that it is a double-edged sword. Presidents and congresses favorable to the original Civil Rights Act of 1964 might indeed reaffirm the Act. But what about presidents and congresses not so enamored with it? It is perfectly reasonable to think that, if it were easier to do, a president or Congress would modify the Civil Rights Act to fit partisan demands rather than to improve the substance of civil rights law. But that objection to this solution has an easy answer. The simple public reaffirmation of the Civil

U.S. 181 (2023) (holding race-based affirmative action programs in college admission violated the Fourteenth Amendment's Equal Protection Clause).

[421] *See* 42 U.S.C. § 2000e-2(a); Jonah Gelbach, Jonathan Klick & Lesley Wexler, *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. CHI. L. REV. 787, 823 (2009) (describing Title VII's failure to adequately address passive discrimination).

Rights Act should be much easier to do than modifying it or getting rid of it.[422]

Reaffirmation need not even be formalized. A mere public announcement by the president with congressional backing, for example, would suffice. The prerequisites to merely publicly reaffirm an Act that has already been passed with a simple announcement should be extraordinarily low.[423] The process to overturn the Act or to modify it are indeed high.[424] All I am advocating for here, however, is a requirement that if the Civil Rights Act is *not* being modified or being overhauled altogether, it *must* be publicly reaffirmed. Here are the problems such a practice would fix.

First, such a practice would send an important message to the public and would therefore address the problem set forth in Part III.C.2 of this article — the negative implications of esteem theory.[425] As recounted in that Subsection, the mere announcement of a law that makes discrimination on the basis of some protected trait illegal serves to curb discriminatory behavior against people belonging to the protected class, even before the law is enforced and even if the law is not enforced at all.[426] The reasoning is that marginal discriminators may take the social esteem imparted on them by society into account when deciding whether or not to discriminate on the basis of some characteristic.[427]

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422 *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 538 (1983) ("There are a hundred ways in which a bill can die even though there is no opposition to it.").

423 *See, e.g.*, Michael D. Ramsey, *Presidential Declarations of War*, 37 UC DAVIS L. REV. 321, 323-25 (2003) (noting the "routine" nature of presidential announcements to the nation, even when those announcements are "declarations of war").

424 *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 6 (1982) ("Getting a statute enacted is much easier than getting it revised."); Easterbrook, *supra* note 422, at 538.

425 *See supra* Part III.C.2.

426 *See, e.g.*, Pettis et al., *supra* note 294, at 813-14.

427 *See id.* Of course, discriminating because of relevant characteristics is perfectly acceptable and even expected. We discriminate based on merit all the time. I do not want an unlicensed, unskilled doctor operating on my loved-one to perform a lifesaving heart transplant. In that case, I am going to heavily discriminate on the basis of medical skill and practice to determine the operating doctor. *See generally* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971) (inquiring into the meaning of what fair employment really is, and what fair employment laws actually seek to achieve).

The announcement of such an antidiscrimination law serves to inform these people that society imparts less esteem on such behavior than it previously did.[428] Even if such behavior was already shamed before the passage of such a law, after the passage of such a law, such behavior will likely be seen as something to be even more ashamed of.[429] The announcement of such a law sends a message to that end.

Scholars, however, have documented that such announcements suffer diminishing effectiveness as time passes.[430] After a year it seems, the announcement becomes stale, and the efficacy continues to diminish until it flatlines as more and more years pass.[431] Thus, a repeated announcement from elected officials publicly denouncing discrimination on the bases of race, sex, national origin, or religion in employment would help solve the problem. It at least would remind people that at one time a large chunk of the population was so passionate about this issue as to get a landmark piece of legislation passed.

Second, the practice of regularly and publicly reaffirming the Civil Rights Act would also help remedy the preference reversal problem discussed in Part III.B of this Article.[432] To refresh, a preference reversal refers to the unusual change in preferences people tend to have when evaluating two items jointly as opposed to separately.[433] Two groups of people each evaluating two separate items might rank item one as more desirable. But another third group of people, when evaluating these items at the same time, might think item two more desirable now that it has been evaluated relative to item one.[434] Separate evaluation puts the inherent flaws, however irrelevant those flaws may be, of the thing

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[428] Pettis et al., *supra* note 294, at 815.

[429] *See, e.g.*, *id.* (describing how law can alter social norms to make certain behavior more or less acceptable). *But see* Elinor Aspegren, *LGBTQ-Hate Violence Increased during Pride Month*, USA TODAY (Aug. 16, 2019, 1:09 PM EDT), https://www.usatoday.com/story/news/2019/08/16/lgbtq-hate-violence-increased-pride-month-ncavp-reports/2028537001/ <https://perma.cc/GUZ3-S5HM> (documenting heightened reports of violence targeting members of the LGBTQ community during pride month).

[430] *Id.* at 823.

[431] *Id.*

[432] *See supra* Part III.B.

[433] *See* Bazerman, *Reversals of Preference in Allocation Decisions*, *supra* note 225, at 220-22.

[434] *Id.*

being evaluated in the spotlight.[435] Joint evaluation puts the inadequacies of one thing relative to another thing in the spotlight, regardless of how incommensurable those inadequacies might be.[436]

In Part III.B, I argued that this behavioral quirk might stand behind the retrenchment of Title VII for two reasons. First, when the rampant racism of the period before the passage of the Civil Rights Act of 1964 was still fresh, the populous could jointly evaluate public affairs before and after the passage of the Act.[437] This put the main thrust of Title VII in the spotlight — the need to stop discriminating on the basis of protected characteristics. After some time passed, though, the populus began to separately evaluate public affairs. With the memories of the times when discrimination was perfectly legal so far in the past, the smaller flaws of Title VII were magnified and support for it withered.[438] The second reason is that when no legal precedent existed to inform judicial opinions on Title VII cases, judges were forced to evaluate what Title VII should be and how it should be applied in the cases before them independent of anything else — akin to separate evaluation.[439] This allowed those judges to be idealistic and to focus on the main goal of antidiscrimination.[440] But when a robust body of legal precedent was formed, judges began jointly evaluating their Title VII cases, comparing them to the cases decided before.[441] This obscured the main goal of Title VII and judges could not see the forest for the trees — they lost the big picture. Judges began to focus more on the minor niceties of Title VII

[435] *Id.*

[436] *See supra* notes 239–241 and accompanying text.

[437] *See supra* notes 241–45 and accompanying text.

[438] *See* notes 244–45 and accompanying text.

[439] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 436 (1975) (citing to both a few previous case precedents on the issue of backpay and to the *Griggs* case, but focusing on the issue of discrimination itself and how to fix it given the intrinsic purpose of Title VII of the Civil Rights Act of 1964); Griggs v. Duke Power Co., 401 U.S. 424, 428 (1971) (providing a short opinion that cites almost exclusively to the statute and the EEOC's guidelines while not citing to any previous cases).

[440] *See supra* notes 246–48 and accompanying text.

[441] *See, e.g.*, St. Mary's Honor Ctr v. Hicks, 509 U.S. 502 (1993) (narrowing the application of *McDonnell Douglas*); Bazemore v. Friday, 478 U.S. 385 (1986) (using a multivariate regression analysis to prove discrimination).

to ensure adherence to prior precedent, making Title VII overproceduralized.[442]

A regular and public announcement reaffirming Title VII of the Civil Rights Act would assuage both of those problems. In terms of society's understanding of Title VII and of public affairs, such a public reaffirmation would serve to remind people of the main thrust behind Title VII, forcing them to remember why Title VII passed in the first place.[443] This might spur at least some people to begin jointly evaluating the circumstances before and after the passage of Title VII again. In terms of judicial behavior and the evaluation of Title VII, this practice might also remind judges of the same ideals.[444] Perhaps such an announcement would encourage at least some judges to stop obsessing over the punctilious observance of Title VII precedent and procedural exactitude so as not to risk being overruled, and start focusing on the one big goal of Title VII — stopping discriminatory behavior in employment.

Third, the practice of regularly and publicly reaffirming the Civil Rights Act would help remedy the problem of group polarization discussed in Part III.E of this Article, reminding people of how many others still support such policies.[445] Information cascades caused by events like the election of Donald Trump and ease of group creation thanks to the internet have resulted in a more polarized society and a different set of social norms. The *Information Cascades* example, in particular, demonstrated the arbitrary nature of how dominant social attitudes form.[446] It turns out, for example, that the mere number of people that any given person knows to share a certain opinion will vastly

[442] *See supra* notes 260–61.

[443] *See, e.g.*, Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 UC DAVIS L. REV. 1913 (2021) (analyzing the lasting impact of the #MeToo movement, which served to remind many people of the rampant sexual harassment to which women have been subjected in the workplace, previously highlighted by feminist scholars in the 1970s).

[444] *See, e.g.*, Doe v. Stonehill Coll., Inc., 55 F.4th 302, 335 (1st Cir. 2022) (explicitly acknowledging the #MeToo movement and rejecting the plaintiff's assertions that the "emergence of the #MeToo movement in the fall of 2017" pressured the college to "'find a male student responsible for sexual misconduct'").

[445] *See supra* Part III.E.

[446] *See supra* note 389 and accompanying text.

influence that given person's own opinion about the same subject matter.

People are not infallible. I am willing to bet that many if not most people who live in the United States do not think about Title VII and the Civil Rights Act every day. Many probably go months, years, or even their entire lives completely unaware of what Title VII is and what the Civil Rights Act was supposed to do.

So, reminding everyone every so often about Title VII of the Civil Rights Act and reaffirming its legitimate foothold in our society and legal system should encourage at least some to think about all the others who must passionately believe that discrimination on the basis of sex or race in the workplace is repugnant. How else would laws like Title VII have come about if not for the existence of those in favor of antidiscrimination measures? And, just as in the *Information Cascades* example,[447] a group of people might develop their own opinions about how loathsome discrimination in employment on the basis of protected traits is just because they come to know how many other people believe the same thing.

CONCLUDING REMARKS

Although it is true that some progress had been made on specific civil rights law issues,[448] in general, civil rights law, and specifically Title VII, is weaker now than it was before.[449] The reasons for such retrenchment are complex. But to say they are exclusively political — that certain presidents simply had agendas to dismantle the Civil Rights Act and appointed judges to that effect — would be to take a crude and incomplete stance.[450]

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[447] SUNSTEIN, *supra* note 225, at 10.

[448] *E.g.*, Bostock v. Clayton County, 590 U.S. 644, 683 (2020) (holding that Title VII precluded employers from discriminating against employees because of their sexual orientation); Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (holding that same-sex marriage is constitutional under the 14th Amendment).

[449] *See supra* note 1 and accompanying text.

[450] *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101-102, 105 Stat. 1071, 1071-74 (providing claimants the right to a jury trial and giving punitive and compensatory damages to victims of intentional discrimination, which passed under a republican administration when George H.W. Bush was President).

A number of economic and sociological reasons underlie the retrenchment of Title VII and indeed of civil rights law in general. This Article has embarked to account for the least obvious and most impactful of those reasons. Providing a concrete solution to this problem is far out of the scope of this Article. In fact, a holistic and all-encompassing solution to the problems discussed in this Article would fill an entire book.[451] Almost assuredly, such a solution involves a shift in social norms and a collective societal push toward a more progressive culture favoring minority representation in the workplace and in society, akin to the Civil Rights Movement in the 1950s and '60s.

I hope, however, that shedding some light on these sociological and economic factors and identifying them as playing a large role in Title VII's retrenchment will stimulate further discussion that is not just political about how we can fix Title VII and how we can improve civil rights law as a whole.

[451] Cass Sunstein, for example, has provided an excellent discussion of social norms, cascades, and the phenomenon of preference reversals and how these factors affect law and society in general in his book *How Change Happens*. SUNSTEIN, *supra* note 225.