Indiana Law Review

Volume 21 | 1988 | Number 4

The Supreme Court, Title VII and "Voluntary" Affirmative Action—A Critique*

Paul N. Cox**

TABLE OF CONTENTS

Introduction 769
I. The Individualist Model 772
  A. The Disparate Treatment Prohibition 772
  B. Justification of the Disparate Treatment Prohibition 774
  C. Summary 785
II. The Court's Group "Rights" Model 785
  A. The Disparate Impact and Systematic Disparate Treatment Theories of Title VII Discrimination 786
  B. Affirmative Action 790
    1. "Voluntary" Affirmative Action: The Supreme Court Opinions 790
    2. The Relationship Between "Voluntary" Affirmative Action and Group Rights 795
      a. The Remedial Rationale 795
      b. White Male Interests 798
      c. Limitations on the Court's Group Rights Model 799
  C. Summary: Title VII's Incoherence 806
III. Justifications of Group "Rights" 808
  A. Three Varieties of Group "Rights" Theory 808
    1. Community Theory 808

---

*Copyright by Paul N. Cox, 1987.

**Professor of Law, Indiana University, Indianapolis. I thank Joe Tucker and Robin Malloy for a series of conversations in which many of the arguments made here were raised. I am alone responsible both for the opinions expressed and for any error, a responsibility enhanced by the fact that neither agrees with me.

2. Governmental Distribution Theory 809
3. Compromise Theory 810

B. Limited Individualism and the Social Good 812
1. The Argument 812
2. Some Counterarguments 816
a. The Impoverished Individual 816
b. Individual Responsibility 818
c. Prejudice 820
d. Pedagogy 825
e. The Suffering of Innocents 827
f. Morality and the Incompetence of Government . 832
3. Rejoinder 833

C. Pragmatic Bureaucratic Justice 835
1. Overenforcement and Bureaucracy 836
a. The Argument 836
b. A Counterargument 839
2. Process Rules and Substantive Allocation Rules 846
a. The Argument 846
b. A Counterargument 848

D. Summary 851

IV. The Statute and its Interpretation 852

A. The Statute and the Understanding of the Congress that Enacted It 854
B. The Supreme Court's Interpretation and the 1972 Amendments 857
C. Alternative Theories of Statutory Interpretation 860
D. A Critique of the Court's Interpretations: Traditional Theory 865
1. The Purpose Counterargument 866
2. The Unconsidered Case Counterargument 867
3. The Section 703(a)(2) Counterargument 870
4. The Deference to Administrative Expertise Counterargument 871
5. The Ratification Counterargument 871
6. The Ratification By Silence Counterargument 873

E. On Understanding the Court's Interpretations: Nontraditional Theory 873
1. The Rhetoric of Nontraditional Theory 875
2. Nontraditional Theory Viewed Functionally 879

V. Conclusion 886

It is commonplace that the concept of equality is ambiguous.[1] It is commonplace, as well, that Title VII of the Civil Rights Act of 1964 has been judicially interpreted as simultaneously mandating quite distinct understandings of the anti-discrimination principle intimately related to competing and largely incompatible understandings of equality.[2] According to the Supreme Court, Title VII prohibits disparate treatment of individuals on the basis of race or gender in employment,[3] but also prohibits the disparate effect of employment criteria on race and gender groups[4] and permits remedial race and gender preferences benefiting judicially favored groups.[5]

The tension between the individualist model of equality represented by the disparate treatment prohibition and the group rights model of

---

[1]*See generally* Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Affairs 107 (1976); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. Chi. L. Rev. 65 (1975); Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982).

[2]*See generally* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. Rev. 531 (1981); Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235 (1971); Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. Rev. 419 (1982); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 Neb. L. Rev. 345 (1980).

These incompatibilities may roughly be derived from the tension between freedom understood as negative freedom and freedom understood as positive freedom. *See* I. Berlin, *Two Concepts of Liberty* in Four Essays on Liberty 118 (1969). Negative freedom is freedom from interference by others and is associated with individualism or classical liberalism. Positive freedom is the practical ability to achieve self-realization and, therefore, requires not only absence of interference by others but also possession of the means to achieve self-realization. *Compare* Westen, *The Concept of Equal Opportunity*, 95 Ethics 837 (1985) (advocating a conception of equal opportunity compatible with negative freedom) *with* Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 Cal. L. Rev. 1687 (1986) (advocating a conception of equal opportunity compatible with positive freedom).

[3]*See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); McDonald v. Sante Fe Trail Transport Co., 427 U.S. 273 (1976). Although Title VII prohibits discrimination on the basis of religion and national origin, as well as race and gender, the primary lines of doctrinal development have occurred in the latter contexts. This article will discuss only doctrine as applied to race and gender, although much of what is said here is applicable to national origin discrimination as well.

[4]*See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[5]*See, e.g.*, Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); United Steelworkers v. Weber, 443 U.S. 193 (1979).

equality represented by the disparate impact prohibition and by remedial preferences is most obvious in the question of the compatibility of affirmative action with Title VII. The academic commentary examining this tension is voluminous.[6] The initial justification for this further addition to that commentary is that the Supreme Court has recently concluded that race and gender preferences are justifiable under Title VII on the basis of statistical disparities between group representation rates in qualified labor pools and group representation rates in a work force.[7] That conclusion, in combination with the Court's general recent tendency to uphold affirmative action in a variety of contexts,[8] suggests that the group rights conception has triumphed over the individualist conception of equality in employment under Title VII.

There are, however, further justifications for this effort. The tension between competing versions of equality in the jurisprudence of Title VII has left the case law in a state of incoherence. The courts simultaneously seek to enforce both the individualist model and the group rights model.[9] This incoherence is partially attributable to the

---

[6]As the tension is evident in both constitutional and statutory analyses, useful commentary exists at both levels. *See, e.g.*, J. Ely, Democracy and Distrust 135-79 (1980); N. Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy (1975); R. Posner, The Economics of Justice 351-407 (1981); Bell, Bakke, *Minority Admissions and the Usual Price of Racial Remedies*, 67 Calif. L. Rev. 3 (1979); Bell, *In Defense of Minority Admissions Programs: A Reply to Professor Graglia*, 119 U. Pa. L. Rev. 364 (1970); Belton, *supra* note 2; Cox, *The Question of "Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role*, 23 Ariz. L. Rev. 87 (1981) [hereinafter Cox, *Voluntary Quotas*]; Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974); Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1; Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 Texas L. Rev. 41 (1986); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559 (1975); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harv. L. Rev. 1 (1977); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 Va. L. Rev. 955 (1974); Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. Chi. L. Rev. 423 (1980); Sandalow, *supra* note 1; Strauss, *The Myth of Color Blindness*, 1986 Sup. Ct. Rev. 99; Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775 (1979); Wasserstrom, *Racism, Sexism and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev. 581 (1977); Wright, *Color-Blind Theories and Color-Concious Remedies*, 47 U. Chi. L. Rev. 213 (1979).

[7]Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

[8]United States v. Paradise, 107 S. Ct. 1053 (1987); Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). *See* California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 693-94 (1987); *id.* at 695-97 (Stevens, J., concurring).

[9]*See generally* Cox, *Substance and Process in Employment Discrimination Law: One View of the Swamp*, 18 Val. U. L. Rev. 21 (1983).

differing commitments of Supreme Court justices and to shifting majorities on the Court. It is, however, also attributable to dissonance between the Court's rhetoric and the functional realities of its pronouncements. A thesis of this article is, therefore, that the Court has engaged in a sustained effort to adopt a group rights conception as the central theme of its version of Title VII.[10] However, the Court's version of this conception is limited; it compromises incompatible individualist and group rights perspectives. The compromise reflects the tension between individualist and group rights strands of doctrine and, therefore, reinforces the claim that doctrine is incoherent. However, the claim of incoherence requires that the individualist model of the anti-discrimination principle be viewed as incompatible with the group rights model underlying affirmative action. There is, therefore, an additional thesis argued here: justifications of affirmative action cannot be adequately reconciled with pristine forms of the individualist model. Examinations of pristine versions of the individualist model are undertaken both because the language of Title VII and the political rhetoric of the legislative process that enacted it invoke that model and because aspects of individualist thought help to explain fundamental disagreements between advocates of individualist and advocates of group-based versions of the statute.

If the claim that the Court has adopted a group rights conception of Title VII is viable, the claim raises profound questions of the legitimate role of the Court in statutory interpretation. It raises such questions because of the claim made here that Title VII is premised upon the individualist model. If this is the premise of the legislation, the Court's reconstruction of that legislation can be justified only by reference to a theory of statutory interpretation that authorizes an extraordinary degree of judicial discretion to pursue the judicially defined social good. Moreover, such reconstruction would seem explicable, as a descriptive matter, only by reference to such a theory of interpretation. The final theses argued here are, therefore, that the Court's pursuit of group rights is incompatible with Title VII understood from the perspective of traditional conceptions of judicial function in interpreting and applying legislation and is an instance of, and, indeed, can only be understood within the context of, a nontraditional[11] conception of that function.

---

[10]*See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1458 (1987) (Stevens, J., concurring) (before 1978, the Court followed an individualist approach, but has since followed a group approach).

[11]The nontraditional conception may be labeled the "post-legal process school." The legal process school is best represented by H. Hart & A. Sacks, The Legal Process:

This Article proceeds as follows: Part I describes the individualist model implicit in the disparate treatment theory of Title VII liability, examines justifications of that theory and attempts to relate the theory to elements of traditional individualist thought. Part II describes the group rights model implicit in Supreme Court doctrine governing disparate impact and systematic disparate treatment theories of liability and governing "voluntary" affirmative action. Part III then attempts to relate these doctrines to two alternative justifications of affirmative action: a straight-forward redistribution of employment rationale and an overenforcement of disparate treatment theory rationale. In particular, Part III examines whether either justification is compatible with the individualist justifications of disparate treatment theory. Finally, Part IV examines Title VII's text, legislative history and arguments favoring affirmative action from traditional and nontraditional perspectives of statutory interpretation.

I. The Individualist Model

A. The Disparate Treatment Prohibition

The individualist model of equality requires that like persons be treated alike. "Likeness" for this purpose precludes consideration of race or gender: persons are alike even if they are of distinct races or genders. The model is captured by the disparate treatment theory of prohibited employment discrimination: an employer may not treat an individual differently than such individual would have been treated "but for" that individual's race or gender.[12] Facial race and gender classifications are therefore prohibited,[13] as well as race or gender motivated employment actions.[14]

It is important to recognize that the disparate treatment prohibition is simultaneously radical in its implications and narrow in its scope and that the prohibition, if applied with discipline, is clearly distinguishable from group-based conceptions of the anti-discrimination principle. The best known illustration of these features of the prohibition

---

Basic Problems in the Making and Application of Law (10th ed. 1958). The post-legal process school is best represented by G. Calabresi, A Common Law for the Age of Statutes (1982) and R. Dworkin, A Matter of Principle (1985) [hereinafter Dworkin, Principle]. *See* Cox, Book Review, 1983 Utah L. Rev. 453; Weisberg, *The Calabresian Judicial Artist: Statutes and The New Legal Process*, 35 Stan. L. Rev. 213 (1983).

[12] *See* P. Cox, Employment Discrimination 6-5 to 6-18 (1987).

[13] *See, e.g.*, City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

[14] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

is the *Manhart* case.[15] The employment practice there challenged was a rule compelling greater contributions to a pension plan of female employees than of similarly situated male employees. The justification for this disparity in treatment was the accurate generalization that women outlive men. Given that generalization, higher contributions by women were necessary to (1) ensure that pension benefits would be payable to women over their greater life span in periodic amounts equal to benefits payable to men and (2) ensure fairness as between men and women. Disparate treatment was necessary to fairness because absent such treatment, male employees would be forced to subsidize female employees, and the actuarial value of male benefits would be less than the actuarial value of female benefits.

The employer's rule was nevertheless held prohibited because the rule entailed facial disparate treatment on the basis of gender. According to the Supreme Court in *Manhart*, the actual longevity of an individual male or female is not compelled by the average longevity of the gender group to which he or she is classifiable, and fairness as between gender groups does not justify disparate gender treatment of individuals.[16] Notice, then, that the prohibition is of disparate race or gender treatment of individuals and that efficiency, fairness and other values are trumped by it.[17] In particular, notions of fairness of distribution of burdens and benefits are trumped by the prohibition, and the prohibition may be applied even where race and gender are generally accurate proxies for legitimate considerations. Indeed, the prohibition was applied in *Manhart* even though the classification invalidated in that case was not plausibly attributable to prejudice. Nevertheless, the prohibition is also quite limited. An employer is free to use any criteria for an employment decision other than the prohibited criteria.[18] Formal "freedom of contract" is preserved by the prohibition in all respects except that protected status may not be privately used in contracting.[19]

---

[15]City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978). The case also illustrates the controversy generated by the radicalism of the prohibition. *See, e.g.*, Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. Chi. L. Rev. 505 (1980); Kimball, *Reverse Sex Discrimination:* Manhart, 1979 Am. B. Found. Res. J. 85; Freed & Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 Am. B. Found. Res. J. 585.

[16]435 U.S. at 709. *See* Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983).

[17]The prohibition, if consistently applied, trumps, for example, associational freedom, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); sexual privacy, Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 Va. L. Rev. 199 (1979); and efficiency, R. Posner, *supra* note 6, at 362-63.

[18]*See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[19]The legislative history of Title VII confirms the limited character of the prohibition.

B. *Justification of the Disparate Treatment Prohibition*

What justifies the disparate treatment prohibition? One possibility, a possibility less suspect than is sometimes imagined, is that race and gender classifications are *a priori* wrong.[20] Another is that they may be founded upon prejudice or hostility and that this hostility is wrong.[21] The difficulty with the hostility possibility is that some classifications, such as that at issue in *Manhart*, do not appear grounded upon prejudice or hostility.[22] A third justification is that race and gender, when used as proxies for other characteristics that are deemed to be legitimate considerations, are inaccurate generalizations in the nature of irre-

---

For example, the additional majority views of Congressmen McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias and Bromwell in H.R. Rep. No. 914, 88th Cong., 2d Sess., 2150 *reprinted in* 1964 U.S. Code Cong. & Admin. News 2391, 2516 provide:

> It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies membership in unions are strictly filled on the basis of qualification.

The Interpretative Memorandum of Senators Clark and Case on H.R. 7152, the House bill that formed the basis for the Senate compromise bill ultimately enacted as Title VII, states:

> It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

110 Cong. Rec. 7212 (1964). For further statements consistent with these views, see, *e.g.*, 110 Cong. Rec. 8921 (1964) (remarks of Sen. Williams); 110 Cong. Rec. 2594 (1964) (remarks of Rep. Griffin); 110 Cong. Rec. 7215-18 (remarks of Sen. Clark); 110 Cong. Rec. 13,088 (remarks of Sen. Humphrey).

[20]*See* A. Bickel, The Morality of Consent 133 (1975). An *a priori* assumption that race and gender discrimination is "wrong" is not implausible as moral commitment given the tragedy of our experience with such discrimination even if we are unable to articulate the precise features of that morality. One advantage of the *a priori* approach is its simplicity and, therefore, its understandability by the mass of members of the society. Another is that the assumption is compatible with the expressed views of proponents of Title VII in its legislative history. *See infra* note 34.

[21]*See* J. Ely, *supra* note 6, at 153-54.

[22]*See, e.g.*, R. Posner, *supra* note 6, at 362-63; Strauss, *supra* note 6, at 108-13; Wasserstrom, *supra* note 6, at 618.

buttable presumptions.[23] According to this justification, fairness requires individual consideration with direct measurement of the underlying characteristics. The difficulties with the irrebuttable presumption analysis are that race and gender are often accurate generalizations and that other often accurate but imperfect generalizations in the nature of irrebuttable presumptions are universally employed without objection in employment and other contexts.[24] This rationale, therefore, fails to provide a reason why race and gender should be treated differently than other proxies.

A fourth justification is that race and gender classifications, even when used as accurate proxies, generate psychological harm: they stigmatize disfavored persons as inferior and thereby deny the humanity of such persons.[25] The difficulty with the stigma argument is less with the probable accuracy of the psychological hypothesis than with its manipulability. For example, it is sometimes said that a benign racial preference favoring minorities does not stigmatize whites as inferior because its purpose is remedial. Aside from the possibility that the preference stigmatizes the favored minority person as inferior, the argument fails to account for the attitude of the disfavored majority person toward the remedial motivation. If the majority person does not accept that remediation is a justification for suspending "merit" criteria otherwise applicable, he is likely to regard the favored minority person both with hostility and as inferior.[26] If the majority person accepts the remediation rationale, he is likely to regard himself as morally inferior.[27] Perhaps the majority person is morally inferior, but, if so, it is difficult then to see why feelings of inferiority are plausible explanations for the disparate treatment prohibition. Moreover, it is difficult to see why feelings of inferiority generated by merit criteria,

---

[23]*See* Sugarman v. Dougall, 413 U.S. 634, 646-47 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971).

[24]*See, e.g.*, Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815, 825-31, 840-43 (1980); R. POSNER, *supra* note 6, at 362-63; Strauss, *supra* note 6, at 108-13; Wasserstrom, *supra* note 6, at 592-94, 618-19.

[25]Brown v. Board of Education, 347 U.S. 483, 494 (1954). *See* Karst, *supra* note 6, at 6 n.25; Karst & Horowitz, *supra* note 6, at 972.

[26]That is, the majority person is likely to respond by viewing the favored minority person as inferior under alternative merit criteria and may respond with hostility to that person's minority status both because the standard rhetoric of "meritocracy" has been violated and because the moral lesson of color blindness has been exhibited as a sham.

[27]*See* Cox, *Voluntary Quotas*, *supra* note 6, at 149-50. The majority person is likely to feel this way to the extent that the justification for the action is the moral necessity of redressing past injustice. Because race or gender are then used as proxies for the victims of injustice, race and gender become moral claims on employment opportunity.

such as educational credentials, are not also subject to legal solicitude.

It is possible, given this litany of difficulties with alternative explanations of the disparate treatment prohibition, to conclude that the prohibition is unwarranted or, at least, that it is warranted only where one or another of the underlying rationales for it is found to be present.[28] That conclusion, however, is a mistake because it fails to account for underlying individualist values, and for certain tensions within these values that may explain both the prohibition and its breadth.

The two central features of the disparate treatment prohibition described above are: (1) race and gender may not be used as employment criteria in the sense that they may not directly cause an employment decision and (2) the prohibition is quite limited in the sense that any other basis for an employment decision independent of race or gender is unaffected by the prohibition. These features of the disparate treatment prohibition express the values, crucial to individualism,[29] that

---

[28]*See* Strauss, *supra* note 6, at 118-30.

[29]The notion that persons are distinct and inviolable and that they are to be distinguished from their attributes is asserted, for example, by I. Kant, Groundwork of the Metaphysics of Morals 90-97 (H. Paton trans. 1951) [hereinafter Kant, Groundwork]; and I. Kant, Metaphysics of Morals in Kant's Political Writings 132-36 (H. Reiss ed. 1970); by R. Nozick, Anarchy, State and Utopia 30-33 (1975); and by J. Rawls, A Theory of Justice 3-4 (1971). The notion that persons, as distinguished from the attributes of persons, may not be subjected to the valuations of others is implicit in the notion of inviolable distinctness. *See, e.g.*, R. Nozick, *supra*, at 33. Individualist theorists differ, however, in their positions about the connection between persons and attributes and about the proper social mechanism for valuing attributes. As the disparate treatment prohibition assumes that all attributes other than race or gender are the subjects of private exchange, *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), it implicitly takes the position that these attributes, albeit separable from persons, are objects to which persons possessing such attributes are entitled. The implication is therefore a Lockean version of individualism. *See generally* J. Locke, The Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government, Ch. VI (3d Oxford ed. 1966); R. Nozick, *supra*, at 232-75. There are other versions, incompatible with the implications of the Lockean version. *See infra* text accompanying notes 186-203.

The separation of person from attributes and possessions is related to a separation of law and morality. *Compare, e.g.*, Fletcher, *Law and Morality: A Kantian Perspective*, 87 Colum. L. Rev. 533 (1987) (distinguishing internal and external freedom in Kant's philosophy and claiming that internal freedom, or morality, is communitarian in Kant, but external freedom, or law, is liberal or individualistic in Kant); and Grey, *Serpents and Doves: A Note on Kantian Legal Theory*, 87 Colum. L. Rev. 580 (1987) (Kantian ethics are separated from amoral Kantian law) *with* Benson, *External Freedom According to Kant*, 87 Colum L. Rev. 559 (1987) (arguing that, although law and morality are distinct in Kant, they are unified by reference to a comprehensive understanding of Kantian "practical reason" and by the priority of the Kantian notion of ideal law to Kantian

persons are radically distinct and may not be subjected to the valuations

---

morality).

The positivist version of this separation is generally designed to address a task of identification of that which is law and that which is not, so the debate between positivists and anti-positivists tends to be either over this question of identification or over the questions whether law may be judged by moral criteria or whether judicial discretion is cabined by morality. *Compare* Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958) *with* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958). However, the separation of law and morality has a more fundamental aspect relevant to the individualist-collectivist debate. For the individualist, law ought to be separate from morality in the sense that law ought to be neutral as between competing conceptions of the good. Morality, given the individualist's moral relativism, is allocated to the realm of the person, and law is allocated to the realm of regulating interpersonal conflicts over desired objects or possessions. For the collectivist, understood as a proponent of the use of the coercive apparatus of the state to achieve the good, law and morality cannot be separated because law is the instrument by which his (absolutist) view of morality is implemented. The positivist's insistence on separation can be related to this more fundamental debate, as where the particular positivist in question employs his position on the question of identification in service of an individualist agenda. *See generally*, J. Raz, The Morality of Freedom (1986). This relationship, however, is not necessary, as the identification question leaves room for quite utilitarian agendas.

The individualist and collectivist are, of course, caricatures employed here to state extreme positions. Many who would claim to be individualists (or, at least, "liberals") nevertheless permit broad discretion to the state to implement "moral" or utilitarian agendas. *See, e.g.*, Dworkin, Principle, *supra* note 11. The extent to which this permission will be granted appears to turn on certain modifications of the separation principles noted above. In particular, it turns upon a rejection of sharp distinctions between law and morality, R. Dworkin, Taking Rights Seriously 22-45 (1978) [hereinafter Dworkin, Rights], and upon employing the person-attribute distinction in a way that subjects attributes to the authority of the state. The separation of person and attribute in more radical versions of individualism is not a means of distinguishing between those matters over which individuals have rights against the state and those matters over which they do not, because the task of the state within such versions remains minimal—the state is to enforce bargains, prohibit coercion or fraud and implement a limited scheme of corrective justice. The separation in more contemporary versions of liberalism is, however, a means to make this very distinction. *See infra* text accompanying notes 186-203.

Two further aspects of separation theses should be noted. First, the propositions that person and attribute and law and morality are separable are related to the notion that fact and value are separable, that is, that objective description of fact is possible. So, too, are counterarguments. The critic who claims that person and attribute are in fact inseparable may also claim that fact and value are inseparable. *See, e.g.*, Radin, *Market Inalienability*, 100 Harv. L. Rev. 1849, 1877-87 (1987). This claim has important implications for the problem of statutory interpretation. *See infra* text accompanying notes 340-493. If fact and value are radically inseparable, then law is indeterminate, Cohen, *The Ethical Basis of Legal Criticism*, 41 Yale L. J. 201, 216 (1931), and it is implausible that a statutory text can be understood by a judge except in terms of or by reference to his preferences. It is, however, questionable that radical separation of fact and value is a viable description of interpretation. Even if the mechanism of communication through texts is not the texts themselves, but rather, the practices of users of language within a

of others. That is, persons are valuable in the sense that the individual is of ultimate or prior value, but the prior value of the individual precludes valuation in the sense of assessment of desert. Persons should not, for example, be used as mere means to another's ends.[30] This implies that persons are equal in the sense that they are equal before the law or have rights to equal opportunity. Persons are not, however, equal in their possession of the attributes, conferred either by nature or by nurture, that enable them to confer benefits on others.[31] These attributes, conceived as separated from but owned by individuals, may be valued in the marketplace through the consent of the individuals entitled to them, but the persons who own such attributes are not subject to valuation, and they are equal because they are not subject

---

community of users, L. Wittgenstein, Philosophical Investigations (G. Anscombe trans. 1970), or the perspective of or governing "paradigms" of a community of readers, S. Fish, Is There A Text in this Class? The Authority of Interpretive Communities (1980); T. Kuhn, The Structure of Scientific Revolutions (2d ed. 1970), it is not the case either that political ideology defines communities or that persons committed to an ideological position are incapable of "finding" a textual meaning with which they disagree. Cox, *Ruminations on Statutory Interpretation in the Burger Court*, 19 Val. U. L. Rev. 287, 371-94 (1985). *See generally* Solum, *On The Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462 (1987); Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. Rev. 429 (1987).

Second, the above-described separations are also related to the notion of separation of means and ends. For an individualist, this separation takes the form of a preference for rules of process over rules of substantive allocation, so that the state is to regulate the means by which persons interact, but not the private ends for which they act. *See infra* text accompanying notes 50-53. The separation may, however, also be employed as a basis for interpreting actions of the state, so that the state's action is narrowly confined to precise means (as through the constitutional nondelegation doctrine or techniques of statutory interpretation) and is not given a force or application consistent with the broad principle or policy that may be attributed as the end for which such means were legislatively adopted. *See* Fletcher, *Principlist Models in the Analysis of Constitutional and Statutory Texts*, 72 Iowa L. Rev. 891 (1987). For the anti-individualist, means and ends are inseparable. For example, process rules are in fact rules of substantive allocation, *see e.g.*, Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987); and legislation ought to be interpreted to further underlying purpose or policy. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977).

[30]*See* Kant, Groundwork, *supra* note 29, at 90-96; I. Kant, Theory and Practice in The Philosophy of Kant 415-21 (C. Friedrich ed. 1949).

[31]*See* F. Hayek, The Constitution of Liberty 85-102 (1960). It is possible to view the notion that it is permissible to value only benefits conferred or conferrable on others as more a justification of capitalism than of individualism and to therefore criticize it as paying insufficient attention to individual entitlements in the Lockean sense. *See* R. Nozick, *supra* note 29, at 158-59. Nevertheless, the notion is compatible with the concept of individual liberty of choice in the use and transfer of holdings because it denies that an end-state principle of moral desert is a permissible basis for the coerced distribution of holdings.

to valuation.[32] In short, individualism separates persons from the attributes and possessions of persons, treats persons as of ultimate but equal value and permits market valuations of attributes and possessions through consensual private exchange.

In effect, the disparate treatment prohibition assigns race and gender to the realm of the person and removes it from the distinct category of attributes of persons; it precludes valuation of race and gender. This understanding is commonly expressed by the assertion that persons should be judged on the basis of their individual talents, accomplishments and attributes, and not by reference to race or gender.[33] Both the legislative history of the Civil Rights Act[34] and Supreme Court

---

[32]F. Hayek, *supra* note 31, at 95. It should more generally be noted that individualists differ among themselves in their views both of the historical process by which social institutions that maximize individual freedom come about and in their rationales for such freedom. For a Locke or a Nozick, the historical (or, at least, hypothetically historical) explanation is conscious design (as in social contract theory), and the rationales rely upon *a priori* versions of the value of the individual and systematic deduction from this value. For a Hayek, the historical explanation is accident or evolutionary accident, and the rationale is ignorance and incompetence (man is incapable of consciously formulating a moral social/political structure). *See* N. Barry, Hayek's Social and Economic Philosophy 5-9 (1979).

[33]*See, e.g.*, Reynolds, *Individualism v. Group Rights: The Legacy of* Brown, 93 Yale L.J. 995, 998-1000 (1984); Meltzer, *supra* note 6, at 424. It is, of course, possible to attack this value not merely on the ground that social practice permits use of proxies for merit that are imperfect but on the ground that "merit" itself is problematic. *See* Wasserstrom, *supra* note 6, at 619-21. It is true that the concept of merit is problematic in the sense that there can be and are widely divergent and incompatible views of merit founded upon divergent understandings of the good. Access to resources might be viewed as best given to persons who have demonstrated the least capacity to use them effectively (on the theory that they deserve help or practice) or to persons who have demonstrated the most capacity to use them effectively (on the theory that they should be rewarded or the theory that social wealth requires such an allocation). It is, however, not true that individualism has no position on the matter or that its answer is less viable than its alternatives. Also, it must be kept in mind that the individualist value permeates disparate treatment theory.

[34]"Meritocratic" arguments were repeatedly invoked as the rationale for Title VII by its proponents. *See, e.g.*, 110 Cong. Rec. 8921 (1964) (remarks of Sen. Williams) ("The language of [Title VII] simply states that race is not a qualification for employment. Every man must be judged according to his ability."); 110 Cong. Rec. 13,088 (1964) (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications . . ."). *See also supra* note 19. It is apparent that proponents of the legislation that became Title VII cannot be plausibly described as radical individualists. They are merely post-New Deal liberals and, therefore, necessarily proponents of a modified individualism by which expansive state authority over objects is deemed legitimate. *See infra* text accompanying notes 186-203. The general philosophy of Title VII's proponents was not, however, the form of argument employed in support of the legislation. The form of argument employed was individualist in a quite

pronouncements in cases in which the Court has invoked the disparate treatment theory[35] repeatedly invoke this understanding.

Nevertheless, it should be apparent that this version of individualism is in substantial tension with values typically identified with individualism, particularly that of individual liberty of association. To enforce the disparate treatment prohibition is to preclude race- and gender-based choice and to coerce governmentally approved association.[36] The disparate treatment prohibition therefore suggests a version of individualism not grounded in libertarian logic, but in notions of collectively defined personhood and collectively enforced respect for personhood. In effect, the disparate treatment theory declares race and gender inalienable—employers may not purchase and employees may not sell their race or gender—a result incompatible with at least extreme versions of individualism.[37]

The collectively defined notion of personhood protected by the disparate treatment prohibition is nevertheless compatible with the individualist notion that persons ought to be free to constitute themselves through interaction with the social context in which they find themselves without arbitrary limitation.[38] The difficulty, of course, is that the crucial terms "self" and "arbitrary" are defined by the disparate treatment prohibition in particular and controversial ways. The self permitted to interact is an intact self with a right of control over and alienation of all attributes and possessions other than race or gender[39]

---

radical sense, perhaps because proponents of the legislation, whatever their personal preferences, recognized that the individualist argument was the one that had some prospect of passage. *See infra* notes 350-54 and accompanying text.

[35] *See, e.g.*, City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).

[36] *See, e.g.*, Wechsler, *supra* note 17.

[37] *See* H.R. Rep. No. 914, 88th Cong., 2d Sess. 30, *reprinted in* 1964 U.S. Code Cong. & Admin. News 2391, 2517.

> Aside from the political and economic considerations, however, we believe in the creation of job equality because it is the right thing to do. We believe in the dignity of man. He is born with certain inalienable rights. *His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable.* All vestiges of inequality based solely on race must be removed in order to preserve our democratic society to maintain our country's leadership, and to enhance mankind.

Id. at 2517 (emphasis added).

[38] A regime that limits collective intervention into private ordering only to preclude use of "force or fraud" would treat individual preferences, including "tastes for discrimination," as givens. It would not seek to intervene on the grounds that these preferences were "wrong" or "distorted" because such a regime is profoundly skeptical about collective competence to define "wrong" and "distorted."

[39] *See* Texas Dep't Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978).

and a limitation is arbitrary only if it requires reference to race or gender.[40] It is possible both to more narrowly define the self and more broadly define that which is arbitrary.[41] Nevertheless, the definitions implicit in the disparate treatment prohibition may be derived from two elements of dominant rhetoric in American society: first, individuals are to be treated as distinct for reasons of their distinctiveness (individual "merit," understood as the distinctive attributes of persons, is valued)[42] and second, free exchange among individuals is valued as an expression of their sovereignty over their distinctness (private exchange between autonomous individuals is preferred to centralized allocation). Once it is conceded that race and gender are no part of the distinctiveness of the individual, these rhetorical elements are compatible with the disparate treatment prohibition. While it is true that this concession is centrally compelled, neither element of individualist rhetoric could be applied without a collective understanding of the individual, and the particular understanding compelled by the concession maximizes private interaction and minimizes centralized allocation.[43]

Actual social practice may be viewed as incompatible with the notion that persons should be judged on the basis of individual merit. In the first place, "merit" is a controversial notion. For example, whether the selection of an employer's relative as an employee is a selection based upon merit is a question answerable only by reference to one's particular understanding of merit, of several distinct understandings of merit, in social practice.[44] In the second place, group measures of merit are commonplace, even when merit is understood in terms of competence. Intelligence tests, for example, are group

---

[40] *See* Robbins v. White-Wilson Medical Clinic, Inc., 660 F.2d 1064 (5th Cir. 1981) (Smith, J., dissenting), *vacated*, 456 U.S. 969 (1982); Riley v. Univ. of Lowell, 651 F.2d 822, 824 (1st Cir. 1981), *cert. denied*, 454 U.S. 1125 (1982). *Cf.* Personnel Admin. v. Feeney, 442 U.S. 256 (1979) (disparate treatment at constitutional level of analysis).

[41] *See infra* text accompanying notes 186-203.

[42] "Merit," as the term is used here should be distinguished from the concept of desert. A person's attributes may be valued as meritorious even though he does not deserve them. For example, raw musical talent or athletic ability is meritorious even though the persons having such talents and abilities cannot be said to have earned them except by the accident of birth. *Cf.* F. HAYEK, *supra* note 31, at 94 (using "merit" in the sense of desert). Moreover, the notion that merit is valued does not, in individualist theory, imply that persons are subjected to the valuations of others; persons may not be so treated under that theory. *Id.* Rather, merit understood as attributes apart from but possessed by persons are subject to valuation.

[43] *Cf.* Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253, 254-55 (1980) (collective decisions are necessary and inevitable, but it is possible to distinguish collective decisions that maximize volume and scope of *individual* decisions from collective decisions that maximize volume and scope of *collective* decisions).

[44] *See generally* Fallon, supra note 24.

measures, both over- and under-inclusive in their capacity to predict individual competence for particular jobs.[45]

To say that actual social practice is incompatible with "meritocratic" individualism assumes, however, an authoritative criterion by which "merit" may be identified. The individualist argument is less that merit should be valued than that individuals should be free to transact on the basis of their individual, and perhaps idiosyncratic, versions of merit. In particular, the argument is that "merit" should not be centrally assessed. Race and gender criteria, again, are exceptions to the argument, as the disparate treatment prohibition renders them authoritatively non-meritorious.

A justification for the exception is that historical governmental practice with respect to race and gender has in fact been inconsistent with the individualist argument: race and gender were valued by government and this valuation influenced private practices by, for example, fostering prejudice. On this account, the disparate treatment prohibition serves to undo this influence. Related justifications are those noted above, for example, that race and gender criteria are often used prejudicially and this prejudice is a distortion within the individualist scheme of free exchange. Why, however, should a concededly collective and authoritative decision about the non-meritorious character of race and gender be so broad? That is, if the decision to adopt the disparate treatment prohibition is justified, for example, by a perceived need to preclude prejudice, why should this exception to the individualist scheme of free exchange not be narrowly confined to instances of prejudice?

One justification is a claim from administrative convenience: it is both difficult to distinguish justifiable departures from the value from nonjustifiable ones in the context of race and gender and problematic whether legal decision makers, who are products of that experience, can be trusted to make distinctions.[46] A second justification is pedagogic. It is not surprising that the disparate treatment prohibition focuses upon and renders visible race and gender by singling out only race and gender proxies for prohibition,[47] because a central function of the prohibition is to emphasize repeatedly the moral impermissibility of these particular proxies and the hostility that often underlies their use. It is obvious that this emphasis would be unnecessary, even peculiar, had our historical experience in fact been "color blind,"[48] but that has not been our historical experience. The color blindness slogan is,

---

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

[46]*See, e.g.*, R. Posner, *supra* note 6, at 368-71, 378-86.

[47]Strauss, *supra* note 6, at 108-13.

[48]*Id.*

therefore, not descriptive of the disparate treatment prohibition. It is, rather, evocative, not merely of aspiration, but of moral precept.[49]

A third justification is that the form of the disparate treatment prohibition is compatible with the form favored by individualists: it is relatively general, understandable and predictable. It therefore, minimizes the discretion of adjudicative authorities to pursue substantive agendas independent of that expressed by the prohibition.[50] In the present context, the justification from form is often expressed as the proposition that the disparate treatment prohibition is concerned with a narrow aspect of the *process* of employer decisionmaking, rather than with the *results* reached through that process.[51]

The disparate treatment prohibition is a rule of process in the sense that it is a rule that structures the employment game; players in that game must adhere to the rule but are free to otherwise interact within the game as they wish. They are not compelled to reach particular decisions. In this sense, the prohibition is analogous to classical conceptions of the law of contract. Process rules are inherently over- and under-inclusive because they are general; they do not purport to ensure just allocation of resources or just distribution of wealth, nor to decide questions of desert within the context of particular facts. We are not concerned with the justness of a particular bargain within contract law classically conceived; we are concerned instead, for example, with whether the bargain was induced by fraud, under a narrow definition of fraud.[52] So it is with the disparate treatment prohibition. The prohibition is over- and under-inclusive if viewed as directly addressing the unjustness of prejudice, stigma, and inaccurate or arbitrary employee selection, or if viewed as indirectly allocating employment on the basis of desert. Although it is compatible with these objectives, the prohibition does not have these functions. It functions, instead, as a rule of process and, therefore, as a rule that does not require the degree of governmental intrusion into allocation of employment that would be necessary if these matters were directly addressed. A primary justification of the disparate treatment theory is, therefore, its narrow scope and limited

---

[49]The slogan is therefore expressive both of ideal and of means to that ideal. *Cf.* Wasserstrom, *supra* note 6, at 603-15 (recognizing ideals as an element of the analysis, but rejecting color blind theories). Whether it is an effective means is, however, problematic.

[50]*See, e.g.*, F. Hayek, *supra* note 31, at 148-61. *Cf.* Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976) (describing formalist general rules and critizing same) [hereinafter Kennedy, *Form and Substance*].

[51]*See, e.g.*, Reynolds, *supra* note 33, at 1001.

[52]It is of course possible that contract doctrine is not in fact applied in a fashion consistent with this characterization. *See, e.g.*, Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563 (1982).

content. Within a particular conception of government and a particular conception of the freedom of individuals to interact, the theory has the virtue of precluding governmental allocations founded upon governmental definitions of just distribution of employment.

A problem with this characterization is the difficulty with the claim that classical contract law provided a mere process within which private transactions between autonomous individuals could occur: the process is neither "neutral" nor "prepolitical."[53] The limited character of the disparate treatment prohibition leaves unaltered a distribution of resources that dramatically favors whites and males. These resources, in particular the human capital investment[54] measured and rewarded by merit criteria, are crucial to entry and success within the employment process. A process rule conception of the disparate treatment prohibition is, therefore, not race or gender neutral with respect to the distribution of employment it yields: its result is to disfavor groups lacking human capital resources. To the extent that disparities in the distribution of resources are attributable to the historical practice of disparate treatment and to governmental encouragement and enforcement of that practice, it may be further said that this tendency is attributable to the gov-

---

[53]*See, e.g.*, Sunstein, *supra* note 29, at 873, 882, 894-95. It is obvious that the process characterization is an appeal to the classical liberal notion of neutrality, that government should not choose between interests or values because to do so is to abandon the central liberal notion of the relativity of values and to deprive individuals of choice. As such, the appeal is subject to the standard critique, currently espoused most emphatically by adherents of Critical Legal Studies, that government cannot exist if the neutrality value is taken seriously. Government takes sides when it regulates, when it creates rights, and even when it creates rules to facilitate private exchange. *See, e.g.*, Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo L. Rev. 205 (1979) [hereinafter Kennedy, *Blackstone*]. For example, in the present context, the "right" to freedom from race-based decision advanced by the individualist model is simultaneously a denial of a privilege of association. Indeed, it is an imposition of an enforceable obligation regarding association. *Cf.* Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917) (implicitly recognizing, as a matter of analytical jurisprudence, the non-neutral character of "rights" by postulating the necessity of a duty given recognition of a right).

A response to the claim of impossibility is to refine the governing understanding of neutrality. *See, e.g.*, Rawls, *supra* note 29; B. Ackerman, Social Justice in the Liberal State (1980). Another response is to resort to consensus, or to the generality of the welfare to be maximized under a proposed governmental action, or to alternatives to neutrality (such as equality). The response suggested by the text is to concede the contradiction between neutrality and the governmental enforcement of a right from race or sex based decision, but to nevertheless claim that the violation of the neturality principle implicit in recognition of the right is both limited and consistent with a concededly controversial conception of the individual the neutrality value is supposed to protect.

[54]*See infra* note 136. *See generally* G. Becker, Human Capital: A Theoretical and Empirical Analysis with Special Reference to Education (1964).

ernmentally provided and privately utilized process of exchange in employment even though the disparate treatment prohibition is now a part of this process.

The systematic tendency of the race and gender neutral process yielded by the disparate treatment prohibition to produce race and gender disparities in distribution of employment may count as a reason for rejecting the prohibition. Certainly it is central to justification of the group rights model to be discussed immediately below. However, the tendency serves better to support the distinction between a focus on process and a focus on the results produced by the process than to defeat this distinction. The complaint that the disparate treatment prohibition produces group disparities is a complaint that it fails to address distribution—that it is, indeed, a mere rule of process.

C. *Summary*

The disparate treatment prohibition precludes race or gender based employment decisions. However, the prohibition is limited because it requires proof of illicit motivation and a direct causal link between such a motivation and an allocation of employment. Indeed, the prohibition is compatible with an individualistic conception of corrective justice: if A harms B (by using B's race as a criterion for decision with respect to B), A must compensate B. The prohibition is also limited in scope: an employer may utilize any criterion for an employment decision other than race or gender, as such. These features of the disparate treatment prohibition are justified by reference to individualist thought, both as a matter of the political rhetoric of the legislative history of Title VII and as a matter of the judicial rhetoric employed in cases in which the prohibition is applied. Moreover, aspects of individualist philosophy, including separation of person and object, distrust of collective decision, favoring of private exchange in impersonal markets and preference for general rules of process aspects of such a philosophy, are compatible with the prohibition.

II. The Court's Group "Rights" Model

A group rights model of race and gender equality, unlike the individualist model, is concerned with results, not with process. There are distinct group rights models predicated on distinct understandings of what constitutes a group and distinct justifications for recognizing rights in groups. Nevertheless, all of the group rights models are concerned in the present context with a just distribution of employment among race and gender groups. All recognize a group right in the sense that the locus of the claim to just results is in the group; claims of individuals to participate in these results are derived by virtue of

group membership. Distinct versions of the group rights model are outlined at a later point of this article.[55] The present objective is to establish that Supreme Court doctrine, within the rubrics of disparate impact theory, systematic disparate treatment theory and voluntary affirmative action, is characterized by an analytical focus upon substantive distribution of employment among race and gender groups.

There are three potential explanations of this analytical focus. Specifically, it is possible to claim that the Court focuses upon substantive distribution either (1) for purposes of effectively enforcing the individual rights enshrined in disparate treatment theory; (2) for purposes of compensating minorities and women for deficiencies in resources (human capital investment) generated by past societal discrimination and to ensure that competition among individuals will be fair once this "temporary" remedial measure has succeeded in overcoming the legacy of discrimination; or (3) for purposes of ensuring proportional distribution of wealth (that is, of employment and compensation) among race or gender groups.[56] There are clear differences between these purposes. The first purports to enforce disparate treatment theory, the second purports to temporarily suspend it and the third seeks forthrightly to repeal it. Nevertheless, a major theme of the following discussion is that it is not possible to definitively identify which alternative purpose is pursued in practice. In particular, the degree to which one or another of these purposes is functionally achieved is dependent upon the degree and cost of justification of employee qualification requirements.[57] Moreover, judicial rhetoric regarding purpose is an untrustworthy guide to identification. Even where the rhetoric is confined to an enforcement purpose, the costs a court imposes on employers may generate incentives that cause pursuit of equal distribution as an objective.

A. *The Disparate Impact and Systematic Disparate Treatment Theories of Title VII Discrimination*

Under the Supreme Court's interpretation of Title VII, use of race and gender neutral employment criteria is unlawful if the criteria have a disparate effect on minorities or women and if they are not justified by "business necessity."[58] For example, use of an educational require-

---

[55]*See infra* text accompanying notes 166-85.

[56]See P. Cox, *supra* note 12, at 7-1 to 7-3.

[57]*Id.* at 7-36 to 7-48.

[58]Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See* Connecticut v. Teal, 457 U.S. 440 (1982); New York Transit Auth. v. Beazer, 440 U.S. 568 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

ment, such as a high school diploma requirement, as a prerequisite for a job is unlawful where a substantially greater proportion of the black population than the white population would be excluded from employment by the requirement and where the employer cannot affirmatively establish a "manifest relationship" between possession of the educational credential and acceptable job performance.[59]

There are three possible explanations of the disparate impact theory. The theory might be viewed, particularly if the employer may avoid liability by establishing a facially reasonable relationship between a challenged criterion and job performance, as a proof construct for approximating a disparate treatment theory.[60] Illicit employer motivation is difficult to establish in the litigation process, and it is possible that an employer has used a facially race neutral criterion as a pretext for intentional discrimination, particularly if the disparate effect of use of the criterion was foreseeable. The combination of disparate effect and absence of reasonable relationship raises an inference of illicit motive.[61]

A second explanation of the disparate impact theory is that the policy objective is to eliminate employer use of neutral criteria with disparate effect and, therefore, to implicitly require proportional distribution of employment among race and gender groups. This explanation is particularly persuasive where (1) disparate effect is measured by a comparison of minority or female representation rates within populations or subpopulations and work forces or subsets of work forces;[62] (2) all neutral criteria are subject to the theory, including subjective employer assessments and the entire employee selection process viewed as a single criterion (without regard to its subparts)[63] and (3) it is difficult, expensive or impossible to, in fact, establish business necessity.[64] Although neither the Supreme Court nor the lower federal courts have been consistent in interpreting impact theory, each of these three elements of a proportional distribution explanation of the theory

---

[59]*See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 (1978).

[60]*See* P. Cox, *supra* note 12, at 7-56 to 7-64.

[61]*See* Washington v. Davis, 426 U.S. 229, 253-54 (1976) (Stevens, J., concurring).

[62]*See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). *But see, e.g.*, Connecticut v. Teal, 457 U.S. 440, 454-55 (1982).

[63]*See, e.g.*, Watson v. Fort Worth Bank, 108 S. Ct. 2777 (1988). In *Watson*, the Court held that subjective criteria are subject to the impact theory. No conclusion was reached regarding the question of systems, but four Justices expressed the view that impact theory would not apply to systems.

[64]*See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-35 (1975); Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). *But see, e.g*, New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Wright v. Olin Corp. 697 F.2d 1172, 1189-92 (4th Cir. 1982). *See generally* Brodin, *Costs, Profits and Equal Employment Opportunity*, 62 Notre Dame L. Rev. 318 (1987).

finds support in the case law.[65] If the proportional distribution explanation is correct, the disparate impact theory is the instrument through which a group rights model is implemented.

The final explanation of the disparate impact theory is that it is a remedial means of achieving social and economic conditions necessary to the implicit suppositions of the individualist model. Recall that the individualist model rests on the proposition that an individual's talents and capacities, rather than the individual's race or gender, should determine allocation of employment opportunities. However, the model fails to take into account the historical legacy of racism and sexism: minorities and women must compete as individuals with talents and capacities adversely affected by race- and gender-based distributions of social resources.[66] Arguably, then, a "fair game" of current competition for employment opportunities requires that elimination of employment criteria which "give effect to" past discrimination.[67] Although the Supreme Court has invoked past discrimination as an explanation of disparate impact theory,[68] it has failed to pursue that explanation by undertaking the analysis necessary to it.[69] Specifically, it has failed to identify the characteristics or types of neutral employment criteria likely to give effect to past discrimination. It has likewise failed to respond to the tendency of lower federal courts to ignore the question of characteristics and types.[70]

Both the first and third of these explanations of disparate impact theory may be characterized as compromises. They compromise individualist and group rights models. However, they are compromises of distinct characters. The first, approximation of disparate treatment explanation, is compatible with the individualist model in the sense that it is an attempt to implement the individualist model within the limitations of the litigation process. The third, remedial explanation, is compatible with the individualist model only in the sense that it aspires to the premises of the individualist model. The means by which its aspirations are translated into action, however, is a reliance upon a group right to freedom from barriers to fair game competition. The

---

[65]*See* P. Cox, *supra* note 12, ch. 7.

[66]*See, e.g.*, L. Thurow, The Zero Sum Society: Distribution and the Possibilities for Economic Change 184-87 (1980); Friedman, *supra* note 6, at 63-64; Fallon & Weiler, *supra* note 6, at 32-53; Wasserstrom, *supra* note 6, at 584-603.

[67]*See* P. Cox, *supra* note 12, at 7-50 to 7-56.

[68]Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[69]*See* P. Cox, *supra* note 12, ch. 7. The Court has alluded to the question on occasion, but has never provided sufficient analysis for guidance. *See* Furnco Constr. Co. v. Waters, 438 U.S. 567, 575 n.7 (1978); Nashville Gas Co. v. Satty, 434 U.S. 136, 144-45 (1977). *But see* Watson v. Fort Worth Bank, 108 S. Ct. 2777 (1988).

[70]*See* P. Cox, *supra* note 12, at 7-50 to 7-56; *Watson*, 108 S. Ct. 2777.

dependence of the third explanation upon notions of group rights is exacerbated to the extent that no jurisprudence of barriers has developed. In the absence of such a jurisprudence, the third explanation gravitates to the second—a group right to proportional distribution of employment.

Moreover, both the first and third explanations may gravitate to the second as a functional matter. Particularly where business necessity is made difficult to establish, the employer incentive structure generated by the impact model closely resembles a proportional distribution requirement.[71] As costs of validation of employment criteria with disparate effect rise, employers can be expected to abandon such criteria. The tendency will be to replace such criteria with systems designed to ensure proportionate representation of minorities and women both because quotas are an alternative to abandoned neutral criteria and because of a development within the disparate treatment theory.[72]

Specifically, disparities between a minority group's representation rate in a labor pool and that group's representation rate in an employer's work force are *prima facie* evidence that the employer has engaged in systematic disparate treatment.[73] The primary means by which the inference of illicit motive may be rebutted is proof that there is no such disparity between the labor pool defined by employer selection criteria (the qualified labor pool) and the work force.[74] However, this "rebuttal" of systematic disparate treatment establishes a *prima facie* case of liability under the disparate impact theory.[75] In combination, then, the two theories of liability, if accompanied by a stringent business necessity defense, functionally compel race and gender preferences. Indeed, it is plausible to view systematic disparate treatment theory and disparate impact theory as complementary means of enforcing a single legal command: employers must ensure that they achieve and maintain race and gender balance in their work forces in the sense that their work forces must reflect the race and gender composition

---

[71]*See, e.g.*, P. Cox, *supra* note 12, at 7-36 to 7-48.

[72]*See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 463-64 (1982) (Powell, J., dissenting); Albemarle Paper Co. v. Moody, 422 U.S. 405, 451 (1975) (Burger, C. J., dissenting).

[73]Hazelwood School Dist. v. United States, 433 U.S. 299, 309 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 337-40 (1977).

[74]*See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). *See generally* P. Cox, *supra* note 12, at 6-22 to 6-29.

[75]*See, e.g.*, Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 115 (1985); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88 (6th Cir. 1982); Williams v. Colorado Springs School Dist., 641 F.2d 835 (10th Cir. 1981). *But see* Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982).

of qualified labor pools. The impact theory, on this characterization, is merely a device for identifying qualified labor pools.[76]

It is true that this result is merely functional; the rhetoric found in judicial opinions does not suggest that the functional result is purposive. Nor could judicial rhetoric imply such a purpose, given that Title VII expressly declares that race and gender balance is not required by the statute.[77] Nevertheless, it would require extraordinary judicial blindness to fail to recognize that race and gender balance is functionally mandated by the Supreme Court's interpretations of the statute. Concurring and dissenting opinions by a variety of justices have, therefore, recognized this functional mandate.[78]

B. Affirmative Action

1. "Voluntary" Affirmative Action: The Supreme Court Opinions.—"Affirmative action," understood here as the use of race and gender preferences to allocate employment opportunities in favor of minorities and women, typically arises as an issue in two contexts under Title VII: (1) whether, and under what circumstances, a court may order such preferences as a remedy for discrimination,[79] and (2) whether employers are liable for disparate treatment of white males where they "voluntarily" utilize such preferences. The latter context is of primary importance here.

It is immediately apparent that the potential for liability to white males is a direct threat to the functional mandate discussed in the last subsection. If employers are required as a functional matter to ensure race and gender balance, they must necessarily be permitted to engage in disparate treatment on the basis of race or gender.[80] It is also

---

[76]Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L. J. 429, 433 (1985).

[77]Civil Rights Act of 1964, (Title VII) § 703(j), 78 Stat. 241 (codified as amended 42 U.S.C. § 2000e-2(j) (1982)).

[78]*See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 463 (1982) (Powell, J., dissenting); United Steelworkers v. Weber, 443 U.S. 193, 209-10 (1979) (Blackmun, J., concurring); Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring).

[79]*See* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984). The question has also arisen with respect to the issue of the permissible scope of consent decrees, but is governed in that context by its resolution in the context of voluntary affirmative action. *See* Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986). A variation on the theme has also arisen in the context of federal pre-emption. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 695-97 (1987) (Stevens, J., concurring).

[80]*See* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 232-34 (1977) (Wisdom, J., dissenting), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

immediately apparent that such disparate treatment is a direct assault upon the individualist model. The extent to which affirmative action threatens the individualist model is, however, a function of the extent to which theories of Title VII liability, particularly disparate impact theory, encourage or compel disparate treatment. Affirmative action is in this sense the mirror image of theories of liability, reflecting the ambiguities of the functional mandates of these theories. Indeed, a central thesis here is that "voluntary" affirmative action cannot be accurately understood in isolation; it is a mere complementary aspect of, indeed the logical implication of, disparate impact and systematic disparate treatment theories of liability. Affirmative action, properly understood, encompasses the entire process by which employers are made to ensure race and gender balance in their work forces.

The Supreme Court initially addressed the issue of "voluntary" affirmative action in *United Steelworkers v. Weber*.[81] The Court concluded that an express quota adopted by an employer and union in collective bargaining requiring that fifty percent of the positions in a craft-worker training program be allocated to black employees did not violate Title VII where a series of conditions were satisfied. These conditions were: (1) the quota was a "remedial" measure designed to overcome the effects of past racial discrimination by craft unions; (2) the quota was "temporary" in that it was designed to overcome racial imbalance rather than to maintain racial balance; and (3) the quota did not "unnecessarily trammel the interests of white employees" in that such employees were neither discharged nor wholly barred from participation in training.[82]

The Court's rationale for this result was in two parts. First, although Title VII expressly prohibits disparate treatment, the statute's purpose was to open employment opportunities for blacks in occupations traditionally closed to them, and the plan effected this purpose.[83] Second, Title VII's anti-quota provision merely states that racial balance is not required; it does not state that "voluntary" quotas are prohibited.[84] The first of these rationales invokes judicially identified statutory purpose and elevates it over statutory language as the touchstone for decision. Moreover, it represents a choice of a relatively abstract congressional purpose, increasing employment opportunities for racial minorities, over a relatively concrete congressional purpose, prohibiting exclusion of racial minorities from such opportunities.[85] The second

---

[81]443 U.S. 193 (1979).

[82]*Id.* at 207 n.7.

[83]*Id.* at 203.

[84]*Id.* at 203-04.

[85]*See* Cox, *Voluntary Quotas*, *supra* note 6, at 176.

rationale invokes a peculiar understanding of the term "voluntary." The quota in *Weber* was "voluntary" in the sense that no governmental authority had formally ordered it. It was "involuntary" in the sense that the employer had adopted it as a means of avoiding liability under the functional mandate of disparate impact theory and because a government agency had informally insisted upon it.[86]

Following *Weber*, the Court directly addressed "voluntary" affirmative action in two cases. *Wygant v. Jackson Board of Education*,[87] entailed the constitutionality of a school board decision to provide preferential protection against layoffs to minority employees in derogation of normal seniority rules. *Johnson v. Transportation Agency*,[88] entailed the question of the validity of a gender preference favoring women in hiring under Title VII where the asserted justification for the preference was a disparity between labor pool and work force representation rates.

In *Wygant*, four Justices concluded that historical societal discrimination was not an adequate constitutional justification for a remedial preference: a governmental employer may "remedy" its past acts of discrimination by means of racial preferences, but may not seek to remedy society's discrimination by such means.[89] However, a governmental employer need not make a "finding" of its past discrimination at the time of adoption of a preference, so long as it can produce convincing evidence of such discrimination and of a purpose to remedy it at the time it is challenged.[90] An argument that retaining minority teachers was necessary to provide role models for minority students was rejected by at least three of these Justices.[91] Moreover, these four Justices and a fifth concluded that protection against layoff was not a means sufficiently "narrowly tailored" to a proper remedial purpose to be constitutional because it "unnecessarily trammeled" the seniority expectations of white employees.[92] In contrast to hiring quotas, the impact of a layoff preference is upon identifiable white employees.[93] The dissenting opinions of four Justices would have upheld the plan as a means of preserving affirmative action in hiring for purposes of

---

[86] *Id.* at 98-147.

[87] 476 U.S. 267 (1986).

[88] 107 S. Ct. 1442 (1987).

[89] *Wygant*, 476 U.S. at 274-89 (Burger, C.J., Powell, Rehnquist & O'Conner, J.J.).

[90] *Id.* at 277, 289-91.

[91] *Id.* at 275-76. Justice O'Connor's position on this question is unclear as she both rejected the role model theory and noted that diversity may in some contexts be a legitimate objective of affirmative action. *See id.* at 288 n.*.

[92] *Id.* at 280, 293 (Burger, C.J., Powell, Rehnquist, White, & O'Connor, J.J.).

[93] *Id.* at 283.

overcoming societal discrimination and ensuring educational diversity.[94] Interestingly, three dissenting Justices would have rejected the argument that the quota "unnecessarily trammeled the interests of white employees" because it allocated the burden of furthering these objectives "proportionately between two racial groups"[95] and because white employees had been adequately represented in collective bargaining over the quota.[96]

In *Johnson*, the Court modified, if it did not abandon, the remedial rationale it had employed in *Wygant* and *Weber*. The plan in question provided that "in making promotions within a traditionally segregated job classification in which women have been significantly underrepresented" the employer would consider the sex of qualified applicants as "a factor" in the promotion decision.[97] The plan was adopted because, although 22.4 percent of the employer's employees were women (compared to a 36.4 percent female representation rate in the relevant labor market),[98] the women employees were concentrated in job categories "traditionally held by women."[99] No women occupied positions within the skilled craft-worker category at issue before implementation of the plan.[100] The plaintiff, a male, challenged a promotion decision by which a woman had been promoted within the skilled craft-worker category in preference to the plaintiff. Although the promoted employee and the plaintiff had both satisfied minimum qualifications, the trial court found as a fact that the plaintiff was better qualified and that sex had been the "determining factor" in the promotion decision.[101]

The Supreme Court reaffirmed *Weber* over the dissents of three Justices who would have overruled the "voluntary" affirmative action exception to the disparate treatment prohibition.[102] However, the plan at issue in *Johnson* had features distinct from those of the plan at issue in *Weber* that rendered the former both less and more problematic than the latter. The *Weber* plan included a strict racial quota for a training program for employees not qualified for craft-worker positions.[103] The *Johnson* plan involved the use of gender as a "positive factor" in promotion of employees possessing minimum qualifica-

---

[94]*Id.* at 305-06 (Marshall, Brennan & Blackmun, J.J., dissenting); *see also id.* at 314-15 (Stevens, J., dissenting).

[95]*Id.* at 308 (Marshall, Brennan & Blackmun, J.J., dissenting).

[96]*Id.* at 310-11.

[97]Johnson v. Transportation Agency, 107 S. Ct. 1442, 1447 (1987).

[98]*Id.*

[99]*Id.*

[100]*Id.*

[101]*Id.* at 1449.

[102]*Id.* at 1465-76 (Scalia, Rehnquist & White, J.J., dissenting).

[103]United Steelworkers v. Weber, 443 U.S. 193, 199 (1979).

tions.[104] Although race and sex were "but for" causes of the employment decisions at issue in both cases, the preference in *Johnson* was therefore perhaps less blatant than that in *Weber*. However, the plan in *Weber* was justified as a means of remedying "traditional job segregation" in craft-worker positions generated by systematic racial discrimination on the part of craft unions.[105] Although the Court declined to rely on the employer's potential exposure to impact theory liability in *Weber*,[106] it is apparent that the employer's use of an experience requirement in that case "gave effect" to that craft union discrimination by excluding persons who were the victims of that discrimination.[107] The quota in *Weber* thus arguably remedied both third party disparate treatment discrimination and employer disparate impact discrimination. In *Johnson*, no effort was made to trace the gender imbalances "remedied" by the plan in issue to past discrimination on the part either of the employer or of third parties. If the imbalances had been attributable to disparate treatment discrimination on the employer's part, that discrimination was remediable by means of Title VII's prohibition of such discrimination. Absent evidence of disparate treatment, a plausible explanation of the imbalances was self-selection on the part of women: as women have internalized societal role definitions, they have not, in large numbers, sought work "traditionally performed by men."[108]

Despite the Court's insistence that the plan in issue in *Johnson* was a "remedy," it is apparent that the condition remedied was mere gender imbalance in the work force. Although the plurality opinion in *Wygant* required governmental employers to justify preferences in terms of their past discrimination as a constitutional matter, the majority opinion in *Johnson* concluded that representation rate disparities are sufficient as a justification for Title VII purposes[109] and defined the appropriate comparison for this purpose as that between the labor pool qualified under an employer's minimum qualification criteria and the subset of the work force in issue.[110] According to the majority, an employee selection process that failed to require reference to minimum qualifications and mandated selection merely by reference to minority

---

[104] *Johnson*, 107 S. Ct. at 1447.

[105] *Weber*, 443 U.S. at 198-99.

[106] *Id.* at 209 n.9.

[107] *Id.* at 209-16 (Blackmun, J., concurring).

[108] *Johnson*, 107 S. Ct. at 1471 (Scalia, J., dissenting). *See* T. Sowell, Civil Rights: Rhetoric or Reality? 99-108 (1984). It is, of course, possible to define discrimination so as to include self-selection, simply by treating the current imbalance as a reflection of "societal discrimination." This definition, however, establishes the point made in the text: imbalance, as such, is the targeted evil of "voluntary" affirmative action.

[109] *Johnson*, 107 S. Ct. at 1452-53.

[110] *Id.* at 1454.

or female representation rate disparities between the relevant general population and the relevant work force "fairly could be called into question."[111] However, again according to the majority, disparities between qualified populations (defined by an employer's minimum selection criteria) and a work force are a legitimate basis for race and gender preferences.[112]

2. The Relationship Between "Voluntary" Affirmative Action and Group Rights.—The Court's treatment of affirmative action strongly suggests that it has adopted a group rights model for two reasons. First, the Court's tendency to rely upon remedial rationales as justifications for benign preferences is unintelligible except by reference to a group rights model. Second, the Court's understanding of the majority group interests that may not be "unnecessarily trammeled" by affirmative action is a group-based understanding.

a. The Remedial Rationale.—In the context of court-ordered remedies, racial preferences have been justified as remedies for "egregious" discrimination on the part of defendants.[113] Under *Wygant*, governmental employees must justify preferences by reference to their past discriminatory conduct.[114] Even in *Weber*, an employer's "voluntary" affirmative action could be viewed as a "remedy" for the discriminatory practices of craft unions and as a "remedy" for the disparate impact of the employer's selection criteria.[115] From a traditional perspective, however, these remedial rationales were never persuasive.[116] Although they purport to require evidence of past discrimination, they neither require evidence that the persons benefited by affirmative action remedies were indeed victims of such discrimination nor do they require evidence of a nexus between discriminatory practices and injury to individual beneficiaries.[117] The claim that affirmative action is a remedy

---

[111]*Id.*

[112]*Id.* at 1455.

[113]*See, e.g.*, Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

[114]Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

[115]*See* United Steelworkers v. Weber, 443 U.S. 193, 209 n.9 (1979).

[116]The traditional notion of remedy is that a wrongdoer is responsible for harm caused by the wrongdoer. Underlying it is a notion of individual responsibility, of individual blameworthiness and of individual freedom from responsibility for both the conduct of other individuals and for the plight of injured persons whose injuries are not causally traceable to the conduct of the wrongdoer. *See, e.g.*, Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 41 (1976); Bush, *Between Two Worlds: The Shift From Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. Rev. 1473, 1474 (1986).

[117]*Compare* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC 478 U.S. 421, 447 (1986) (court's authority under Title VII to order affirmative action remedy not

for discrimination invokes the individualist model by implying that preferences are a means of compensating victims of disparate treatment for harm generated by disparate treatment.[118] The absence of a nexus between disparate treatment and injury to the beneficiaries of the remedy belies that implication.

The claim nevertheless might find support in the individualist model if affirmative action is viewed as a means of overcoming a pattern of disparate treatment through forced integration of a work force. Perhaps a form of deterrence, or of restructuring power and information relationships within work forces, is the true remedial rationale, so affirmative action is not retrospective and compensatory, but, rather, prospective.[119] Court-ordered preferences arguably conform to this interpretation.[120] The premise of the interpretation, however, is that the "discrimination" thus remedied is traceable to the individualist model. "Discrimination" for voluntary affirmative action purposes is not traceable to that model; the discrimination "remedied" is "discrimination" only as it is understood within the group rights model. This can be seen by examining *Johnson*,[121] *Wygant*, and *Hazelwood School District v. United States*.[122]

Under Justice O'Connor's concurring opinion in *Johnson*, evidence of a *prima facie* case of disparate treatment liability under *Hazelwood*

---

limited to actual victims of discrimination) *with* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579-80 (1984) (policy of Title VII remedies is to compensate only victims of discrimintion).

[118]*See Sheet Metal Workers*, 478 U.S. at 445 (affirmative action is a remedy for violations of Title VII).

[119]*See id.* at 474. It can be argued, for example, that disparate treatment is partially explicable as a failure of information: as employers lack information about the performance of minorities or women, they decline to hire or promote minorities or women. *See* POSNER ECONOMIC ANALYSIS OF LAW 624 (3d ed. 1986). Forced integration of the workforce overcomes this failure.

It is possible to view any utilitarian justification for liability or legal obligation such as a deterrence justification, as incompatible with individualist premises. *See* Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEG. STUD. 165 (1974); Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). It is true that deterrence policy is directed at group behavior; the goal is to deter a class of behavior engaged in by a class of persons. Nevertheless, such a policy remains compatible with individualist models so long as the occasions for imposition of enforced legal obligation are limited to individual breaches of such obligation and the breach is defined in terms of individual responsibility for individual conduct.

[120]*See Sheet Metal Workers*, 478 U.S. at 474. *But see* United States v. Paradise, 107 S. Ct. 1053 (1987) (affirmative action may be imposed as a remedy for defeated expectations of minorities under an earlier court decree).

[121]Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

[122]433 U.S. 299 (1977).

would suffice as proof of past discrimination for *Wygant* purposes.[123] This understanding of "past discrimination," however, is far less evocative of disparate treatment than of an employer's cost-benefit analysis in contemplating litigation. A *prima facie* case of systematic disparate treatment is made out under *Hazelwood* by proof of a statistically significant disparity between minority representation in a minimally qualified labor pool within a relevant geographical area and an employer's work force or subset thereof.[124] Such a disparity raises an inference of intentional discrimination on the supposition that a work force will, over time, reflect the racial composition of the population from which it is drawn.[125] This supposition is obviously erroneous: as race and gender are correlated both with qualifications not considered in establishing the *prima facie* case and with the employment preferences of potential employees, work forces are not in fact randomly drawn samples from populations even where there is no intentional discrimination.[126]

The inference of intentional discrimination is entertained under *Hazelwood* as a matter of litigation management, not because the inference is a strong one; the *prima facie* case forces the defendant to establish the correlations that rebut the inference.[127] Rebuttal, of course, is expensive and risky; hence, *Hazelwood* generates an incentive to engage in race and gender quotas to ensure a balanced work force. Moreover, successful rebuttal subjects the employer to exposure under the disparate impact theory. Proof of a correlation between employment criteria and race or gender is proof of the disparate effect of such criteria. To treat a *prima facie* case of discrimination under *Hazelwood* as "discrimination" for *Wygant* purposes is therefore to define discrimination in terms of the incentive structure generated by the litigation

---

[123] *Johnson*, 107 S. Ct. at 1462-63.

[124] *Hazelwood*, 433 U.S. at 308.

[125] *Id.* at 307.

[126] *See, e.g.*, H. Blalock, Social Statistics 140-41 (2d ed. 1972); T. Sowell, Ethnic America 273-96 (1981); Meier, Sacks & Zabell, *What Happened in* Hazelwood*: Statistics, Employment Discrimination, and the 80% Role*, 1984 Am. B. Found. Res. J. 139, 154-57; Smith & Abram, *Quantitative Analysis and Proof of Employment Discrimination*, 1981 U. Ill. L. Rev. 33, 42.

[127] *See Hazelwood*, 433 U.S. at 308-09. There is of course an inference of illicit motive that arises from such a disparity, and the inference is sufficient to warrant shifting the burden of production to the defendant where the prima facie case has accounted adequately for plausible qualifications, plausible employee recruitment or commuting distances and relevant time frame. *See* P. Cox, *supra* note 12, at 6-22 to 6-29. Nevertheless, there is a significant risk that allocation of the burden of proof will be outcome determinative, because the availability of data from which rebuttal might be constructed may be as problematic for the defendant as for the plaintiff. *Id.* at 18-14 to 18-16.

risks emanating from *Hazelwood*. Under Justice O'Conner's definition, "past employer discrimination" functionally denotes race or gender imbalance in a work force.

The majority opinion in *Johnson* renders this definition explicit by, in effect, conceding that an understanding of past discrimination rooted in the individualist model is not a prerequisite to voluntary affirmative action; imbalance will suffice. Indeed, the majority opinion is explicit in noting that imbalance sufficient for a *prima facie* case under *Hazelwood* is not required.[128] If "voluntary" affirmative action is a "remedy," it is a remedy for imbalance. It is not a "remedy" for past disparate treatment on the part of the employer adopting it nor is it a remedy compensating actual victims of any identified disparate treatment. *Hazelwood*, *Wygant* and *Johnson* therefore imply a definition of "discrimination" quite distinct from the definition underlying the individualist model: "discrimination" is failure to allocate employment proportionately among race and gender groups.

b. White Male Interests.—The second reason for the conclusion that the Court has adopted the group rights model is that the requirement that an affirmative action plan not "unnecessarily trammel" the interests of white males[129] has been defined by the Court in group terms, with the possible exception of individual expectations in seniority principles for discharge or layoff purposes. Justices Marshall, Brennan and Blackmun were quite explicit about this in *Wygant*. According to their dissenting opinion in that case, a racial preference in layoff protection did not unnecessarily trammel white interests because whites as a group retained proportional employment under the preference; an individual white employee's loss of employment because of his race was, on this view, irrelevant.[130] White interests were similarly defined by the majority in *Weber*, a case not entailing discharge or layoff of white workers.[131] A majority of the Justices declined to adopt a group version of white interests in *Wygant*, apparently because individual expectations of continued employment on the part of incumbent employees are assigned a special status by the majority.[132] Nevertheless,

---

[128]Johnson v. Transportation Agency, 107 S. Ct. 1442, 1452-53 (1987).

[129]*Id.* at 1451; *see also* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

[130]Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1986) (Marshall, J., dissenting).

[131]"Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white." *Weber*, 443 U.S. at 208.

[132]*Wygant*, 476 U.S. at 283 (Powell, J., Burger, C.J. & Rehnquist, J.); *see also id.* at 284 (O'Conner, J., concurring); *id.* at 294 (White, J., concurring). It is significant that the two cases in which the Court struck down affirmative action plans, *Wygant* and Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984), entailed plans that deprived incumbent white employees of employment on the basis of race. The cases in which the

a majority of Justices adopted a group version of white interests in *Johnson*, and did so under circumstances that defeated the promotion expectations of a limited number of identifiable incumbent employees.

According to the Court in *Johnson*, the plan there in issue merely identified sex as one factor among many that would be considered in promotion decisions, and the individual plaintiff had "no legitimate firmly rooted expectation" in the promotion as he had no entitlement to it.[133] Nevertheless, the trial court had found that sex was the determining factor in the promotion decision, and the objective of the preference was gender balance in the work force. The expectation defeated by the preference was, therefore, the expectation rooted in the individualist model: the expectation that gender status would not cause employment decisions with respect to the individual. The individual "white male interests" recognized as legitimate under the Court's rationale are solely vested interests in current positions: individual white males may not be discharged because of their race or gender. With this exception, the expectations recognized under the Court's opinions are group expectations, expectations to proportional race and gender group representation.

c. Limitations on the Court's Group Rights Model.—There is, however, a further aspect of the Court's opinion in *Johnson* that suggests that the Court's group rights model is both incomplete and ambivalent. The Court's focus upon minimum qualifications in *Johnson* appears anomalous if interpreted as a condition to immunize employers from disparate treatment liability to white males, because it is difficult to see why minimum qualifications should be required of a "voluntarily" adopted plan given that the employer is the party most clearly interested in qualifications. Why should a white or male employee, disfavored by a preference not triggered by minimum qualifications, have standing to complain that the employer did not impose such qualifications? However, the minimum qualifications requirement *is* plausible if viewed in relation to the disparate impact theory and systematic disparate treatment theory.

From the employer's perspective, a legally viable qualifications requirement is one that will not generate excessive costs of justification. The more likely the possibilities that a requirement will be challenged

---

Court has upheld affirmative action plans, (Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); United States v. Paradise, 107 S. Ct. 1053 (1987); United Steelworkers v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987); Local 93 Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986)), all entailed plans that allocated prospective employment opportunities to which white incumbents had no immediate claim.

[133]*Johnson*, 107 S. Ct. at 1455.

and that a heavy burden of justification will be imposed, the less likely it is that these costs will be justified by the benefits obtained in utilizing the requirement.[134] Under the disparate impact theory, a legally viable minimum qualification is one justifiable under the disparate impact model. A viable qualification under that theory is one either sufficiently "necessary" that it will pass muster under the business necessity defense[135] or one that has no substantial adverse effect due to its identification of attributes generally possessed by minorities and women as well as whites and males. Qualifications requirements measure human capital investment.[136] For example, a job experience requirement measures investment in experience. Non-elite forms of human capital investment are devalued under the disparate impact model because qualifications that identify such investments are less likely to pass muster under the business necessity test.[137]

Moreover, a *prima facie* case of discrimination may be made under the systematic disparate treatment theory by taking into account only minimum qualifications.[138] Minimum qualifications requirements are themselves subject to attack under the disparate impact theory.[139] Non-elite forms of human capital investment therefore also tend to be devalued under systematic disparate treatment theory.[140] Given the threat of liability arising from these theories, the minimum qualifications an employer is likely to employ within lower level job categories are those that will ensure a supply of women and minority candidates and

---

[134]*See* P. Cox, *supra* note 12, at 7-36 to 7-48.

[135]Arguably, the business necessity defense has been relaxed in recent years. *See, e.g.*, New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). Nevertheless, the disparate impact theory continues to impose significant costs of justification. *See, e.g.*, Gilbert v. City of Little Rock, 799 F.2d 1210 (8th Cir. 1986); Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981).

[136]"Human capital investment" means investment in education, experience and training. In theory, such investment determines supply in the labor market and may be used as a basis for comparing compensation levels (return on investment) on the supposition that measurable forms of investment are good proxies for productivity. *See* A. Rees, The Economics of Work and Pay 33-52 (2d ed. 1979).

[137]*See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982).

[138]*See, e.g.*, Segar v. Smith, 738 F.2d 1249, 1274 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); De Medina v. Reinhardt, 686 F.2d 997, 1003 (D.C. Cir. 1982).

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

[140]*See* Hazelwood School Dist. v. United States, 433 U.S. 299, (1977) (distinguishing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) on the ground that anyone can drive a truck, but teachers must be certified). For criticism of this tendency, see Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 48-49.

substantial subjective discretion in selecting among candidates. Subjective discretion replaces formal, objective criteria where these criteria are subject to legal attack (under the disparate impact theory) or are ignored (for purposes of a *prima facie* case under the systematic disparate treatment theory).

An employer is more likely to utilize formal minimum qualification for higher level and elite job categories, thus reducing the minority and female representation rate in the qualified population where minorities and women disproportionately lack elite qualifications. Employers are therefore less likely to encounter disparities between workforce and qualified population rates with respect to high-level and elite positions. However, the employer is again faced with making subjective judgments in choosing between qualified candidates once minimum qualifications have been satisfied. Although the judicial tendency is to give greater deference to these subjective judgments where elite positions are at stake,[141] the courts question disparities in group representation rates generated by subjective processes in lower level job categories.[142]

Subjective employee selection processes present a difficulty for employers, as they may produce disparities between white male and minority or female selection rates and these disparities are evidence of unlawful discrimination. This difficulty will be particularly acute for high-level managers who have delegated responsibility for employee selection, because it will be difficult to determine whether such disparities are attributable to disparate treatment or are instead attributable to race and gender neutral criteria informally considered but not accounted for in formal minimum qualification criteria. From the point of view of a complex bureaucratic organization, such as a modern corporation, control of and monitoring of the exercise of discretion in employee selection may require formal and relatively simplistic measurements of the performance of officials exercising such discretion.[143] This suggests the use of objective minimum qualifications criteria as a control and the need for a means to prevent the varieties of minority

---

[141]*See generally*, Bartholet, *supra* note 137; Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 Nw. U.L. Rev. 776 (1983).

[142]*Compare* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (requiring that plaintiff account for minimum professional qualifications) *with* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (permitting plaintiff to rely upon gross population data for analysis of truck-driving positions).

[143]*See Affirmative Action and Federal Contract Compliance: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 114-18 (1985) (statement of George P. Sape, Vice Pres., Organization Resources Counselors Inc.) (large companies would use numerical goals and timetables as necessary means of management even absent governmental compulsion).

and female underrepresentation that may be used as evidence against the employer.

A solution is to require selection by reference to group representation rates in the qualified populations defined by minimum qualifications criteria. A difficulty with express adoption of such a solution is that it invites disparate treatment claims by white males; it creates a race or gender quota. An affirmative action exception to the disparate treatment theory obviates this difficulty. An affirmative action exception that incorporates a minimum qualifications element both minimizes the threat of white male lawsuits and serves the corporate bureaucracy's interest in controlling the discretion (including the discretion to engage in disparate treatment) of the elements of the bureaucracy engaged in employee selection.[144]

From the point of view of relatively large employers with complex bureaucratic organizations, then, *Johnson*[145] is a godsend. Although *Weber*[146] had recognized an affirmative action exception to the disparate treatment prohibition and had not conditioned the exception on an employer's concession that it had discriminated, *Weber* was subject to the interpretation that affirmative action would be appropriate only where the employer was at risk under the disparate impact theory. The employer in *Weber* had utilized a race-neutral experience requirement that "gave effect to" the disparate treatment of craft unions and therefore perpetuated the "traditionally segregated job categories" the affirmative action plan there in issue sought to address. *Johnson*, however, is not subject to this interpretation, because imbalance, as such, may be addressed by an employer under that opinion. *Johnson* obviates the uncertainties faced by an employer engaged in subjective decision making by providing a ready benchmark, in the form of race and gender balance, for employee selection decisions.

Johnson's minimum qualifications requirement, therefore, appears to have far less to do with the "right" of white male employees to insist upon such qualifications than with the interest of employers in finding a safe harbor from exposure to Title VII liability. It is no coincidence that this safe harbor is compatible with an objective of

---

[144]In a sense, then, *Johnson* resurrects a form of the "bottom line" defense rejected in Connecticut v. Teal, 457 U.S. 440 (1982). Although an employer may not claim that bottom line racial balance justifies use of a neutral criterion that could otherwise be impermissable under the disparate impact model, bottom line balance precludes adverse inferences that would arise from representation rate disparities appearing from the use of subjective criteria or from the effect of the selection process viewed as a whole. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577-78 (1978).

[145]Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

[146]United Steelworkers v. Weber, 443 U.S. 193 (1979).

race and gender balance in work forces; the price of the safe harbor is such balance. There is, however, a paradox inherent in this safe harbor. It is that the group right to proportional allocation of employment implicit in it is limited in scope.

The minimum qualifications "required" by *Johnson* are presumably those that would survive attack under the impact theory and would be taken into account for *prima facie* case purposes under the systematic disparate treatment theory; at least, they are the qualifications an employer remains willing to use in the face of threatened liability under these theories. As there is progressively more judicial deference to the human capital investment requirements of employers for progressively higher level jobs (because such requirements in fact do increase progressively), minimum qualifications requirements for *Johnson* purposes are more likely at relatively high-level job positions and less likely at relatively low-level positions. Given that there are disparities among race and gender groups in the human capital investment measured by many minimum qualifications, the capacity of "voluntary affirmative action" to ensure proportional allocation of employment is limited. The greater the disparity in human capital investment between groups, the greater the likelihood that affirmative action will benefit only relatively elite members of minority groups. "Tokenism" within relatively high-level positions is therefore an implication of the minimum qualification requirement.[147] Ironically, race and gender preferences in relatively high-level positions may be quite visible. If the number of minorities possessing elite qualifications is low and the demand for minorities, stimulated by the Court's doctrines, is high, wage premiums for minority status may result.[148]

---

[147]Some critics of affirmative action have argued that its effect is to aid minorities and women who possess valuable human capital investment portfolios and who therefore do not require this aid. *See, e.g.*, T. Sowell, Civil Rights: Rhetoric or Reality? 50-53 (1984). On this premise, affirmative action has no effect on the problem of the permanent minority underclass. Glazer, *supra* note 6, at 70-74. This argument is plausible in one sense and implausible in another sense. Its plausibility is a function of three factors: the extent to which minimum qualifications requirements survive the threat of legal attack under the disparate impact and systematic disparate treatment theories, the extent to which persons in the minority underclass are unemployable even within low-level jobs and the extent to which low-level jobs are available in the economy. If qualifications requirements for even low-level jobs survive, if the minority underclass cannot satisfy these requirements and if the supply of low-level jobs is low, then the argument is plausible. If qualifications requirements for low-level jobs do not survive, if the minority underclass is therefore employable and if the supply of low-level jobs is high, the argument is less plausible. Even on these latter suppositions, however, the argument remains plausible in the sense that minorities or women who satisfy minimum qualifications requirements for relatively high-level jobs are favored.

[148]*See* Winkes v. Brown University, 747 F.2d 792 (1st Cir. 1984).

At the same time, affirmative action of the sort contemplated by *Johnson* may have a greater likelihood of ensuring proportional allocation of employment within contexts in which persons lack valuable human capital investment portfolios. Ironically, the whites or males most likely to be affected by affirmative action under this interpretation more closely resemble the beneficiaries of affirmative action in the sense that they, too, will lack the forms of human capital investment measured by minimum qualifications that survive disparate treatment and the disparate impact theory.[149] Nevertheless, affirmative action may have no substantial effect on alleviating the condition of the minority or female underclass. A minimum qualification requirement suggests that only those employment opportunities for which very little or no

---

[149]*See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1476 (1987) (Scalia, J., dissenting). It is possible to claim that labor organizations are a source of economic power for such persons. Indeed, some justices have relied upon the fact that a labor organization agreed in collective bargaining to an affirmative action plan in concluding that the plan must not have unfairly harmed individual whites or males. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 303 (1986) (Marshall, J., dissenting). This argument necessarily assumes, however, that the labor organization's interests are compatible with those of the white males disfavored. There is certainly evidence of compatibility in some cases; unions have resisted affirmative action in litigation. *See, e.g.*, Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984). There are also cases in which unions have actively defended affirmative action, particularly in collective bargaining agreements. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979).

There are reasons to doubt that unions are viable representatives of persons disfavored by collectively bargained plans (and to doubt that unions are viable representatives of minorities or women in many instances). In the first place, political power within the union may disfavor particular interests. The origin and history of the duty of fair representation is adequate testimony of the absence in racial and other contexts of cohesion among bargaining unit employees or union members. *See, e.g.*, Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944). In the second place, the union is itself exposed to Title VII liability and its interests as an institution are at stake. Indeed, its incentive structure very much resembles the incentive structure of employers under Title VII. *See* Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2623-24 (1987).

A legitimate objection to this line of reasoning is that collective bargaining through an exclusive representative is a collectivist enterprise necessarily premised upon a theory of group rights. *See* Cox, *On Honoring Picket Lines: A Revisionist View*, 17 VAL. U. L. REV. 118 (1983). On this premise, negotiated plans should be respected simply out of deference to the collectivist structure of national labor policy. The difficulty is that the collectivist thrust of that policy has never been wholly respected and that it has, in fact, been ignored or rejected in the case of race and gender discrimination, both as a matter of judicial decision. *See* Vaca v. Sipes, 386 U.S. 171 (1967); and as a matter of statute. Civil Rights Act of 1964, (Title VII) § 703(c), 78 Stat. 241 (codified as amended 42 U.S.C. § 200e-2(c) (1982)). The resulting law may be characterized as a hodgepodge of individualist and collectivist values yielding no clear benchmark from which fairness to individuals may be derived. *See* Freed, Polsby & Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461 (1983). It is, however, not itself a basis for rejecting the relevance of questions of fairness to individuals.

human capital investment is required are open to persons who have had limited opportunities to acquire investment. If the demand for such persons is low, the capacity of affirmative action to affect employment of the underclass is limited.[150]

In addition to the limited scope of the Court's group rights model, there is a further *caveat* arising from *Johnson's* minimum qualifications requirement. It is at least possible to postulate a link between that requirement and the individualist model, and, therefore, to cast some doubt upon the claim that *Johnson* represents a triumph for the group rights model. On its face, the minimum qualifications requirement gives effect to the underlying notion, earlier attributed to the individualist model, that persons should be judged on the basis of their individual talents, accomplishments and attributes.[151] It is only after this judgment has been made that race and gender are considered as, in effect, additional attributes.[152] The group rights model suggested by *Johnson* is therefore ambivalent in that it contains meritocratic elements.

Nevertheless, there are two difficulties with this observation. First, the observation ignores the fact that the minimum qualifications at issue are of a highly refined sort; they are the survivors of the set of potential criteria subject to theories of liability that may be interpreted as implementing a group rights model. Second, the observation ignores the district court's finding in *Johnson*, a finding that would be necessary to any disparate treatment claim asserted by white males. The district court concluded that, but for his gender, Mr. Johnson would have been promoted.[153] That is a finding that Johnson's talents, accomplishments and attributes were not ultimately the basis upon which he was judged. Absent the affirmative action plan, these would have resulted in *Johnson's* promotion. The minimum qualifications requirement serves to allocate employment on the basis of the human capital investment measured by such qualifications, but forms of human capital investment not measured by minimum qualifications that would control allocation absent a race or gender preference are ignored. In short, race and gender ultimately trump meritocratic considerations. More importantly, the affirmative action plan at issue in *Johnson* removed gender from the category of "the person" to which it is relegated by the disparate treatment prohibition and moved it to the category of "attributes of persons;" it made of gender a meritocratic consideration.

---

[150]*See supra* note 147.

[151]*See supra* text accompanying note 33.

[152]Indeed, the qualifications of the male and female candidates for the promotion at issue in *Johnson* were effectively equal. *See Johnson*, 107 S. Ct. at 1448.

[153]*Johnson*, 107 S. Ct. at 1449; *see also id.* at 1469 (Scalia, J., dissenting).

C. *Summary: Title VII's Incoherence*

In summary, then, *Johnson* is representative of a shift from the individualist model to the group rights model. "Voluntary" affirmative action is congruous with the disparate impact theory of Title VII both because that theory encourages race and gender preferences and because affirmative action provides a safe harbor from the disparate treatment claims of white males. Although affirmative action is characterized as a remedy for discrimination, the discrimination remedied is race and gender imbalance in the work force. White male interests may not be "unnecessarily trammeled" by affirmative action, but, with the exception of individual interests in currently held positions, white male interests are defined in terms of proportional representation of white males conceived of as a monolithic majority without regard to problems of distribution of resources, power or burdens within that "majority."

It is true that the Court has not directly pronounced the group rights model as controlling. Indeed, it continues to claim that affirmative action designed to achieve race and gender balance is merely "permitted," not "required." But the claim is disingenuous in the extreme. The shift from the individualist model to the group rights model has occurred through a systematic judicial effort to alter the incentive structure of the persons in control of allocation of employment opportunities—the employers and unions. Employers and unions are not formally subject to liability for failure to achieve balanced work forces, but they incur substantial risks of liability and costs of defense both in utilizing selection criteria correlated with race or gender and in having imbalanced work forces. They may, moreover, minimize these risks through conscious and formal efforts to achieve race and gender balance. Employers, therefore, have every incentive both to adopt affirmative action as an operating policy and to defend it so long as the incentive structure generated by Title VII theories of liability remains in place. To suggest that affirmative action is not required by this judicially created incentive structure is to engage in "newspeak."[154]

At the same time, it should be recognized that the group rights model thus adopted is of a limited variety because its greatest potential for redressing group disparities in the distribution of employment is within middle and lower socio-economic strata, both because of the respect for the vested positions of incumbent employees and because of the rhetorical deference to individualist values evidenced by the minimum qualifications requirement. The Court's adoption of a minimum employee qualifications criterion for measuring race and gender

---

[154]*See* United Steelworkers v. Weber, 443 U.S. 193, 219-20 (1979) (Rehnquist, J., dissenting).

imbalance in *Johnson* suggests that professional and other "higher level" job categories are not fully subject to the group rights model.[155] This does not mean that affirmative action plans are not operative at such levels or that problems of unfairness to individual white males do not occur at such levels. Indeed, employer competition for minority and female professionals has been so keen in some instances that the courts have been forced to justify premium compensation for blackness and femaleness.[156] Nevertheless, the prospects for race and gender balance within occupations characterized by high levels of human capital investment are limited for the foreseeable future, at least with respect to race.[157] The minimum qualifications requirement, therefore, implies that affirmative action will not be used to cause redistribution of wealth along race or gender lines to the extent that would be possible if Title VII liability theories were less deferential to such qualifications and if the qualifications criterion had not been invoked in *Johnson*.[158]

The foregoing suggests that Title VII, as the Court has interpreted it, is incoherent. The Court, in cases in which the disparate treatment theory is invoked, strictly pursues the individualist model and rejects arguments from fairness to groups.[159] The Court, in cases in which the disparate impact theory is invoked, functionally pursues group interests in a fashion incompatible with the individualist model, while employing the rhetoric of the individualist model.[160] The Court, generally pursues group interests, again incompatibly with the individualist model,[161] but occasionally shifts to the individualist model on the few occasions where it has invalidated an affirmative action plan.[162] In short, the Court's resolution of any given case is dependent upon its discretion (or more properly, the "discretion" inherent in shifting and unstable majorities of justices) in choosing between underlying models of equality.[163]

This incoherence does not mean that it is impossible to reconcile the cases. A cynic could claim that the Court's invocation of individ-

---

[155]*See supra* notes 29-54 and accompanying text.

[156]*See* Winkes v. Brown Univ., 747 F.2d 792 (1st Cir. 1984).

[157]*See* T. Sowell, *supra* note 147, at 50-53 (1984).

[158]*See supra* note 147.

[159]*See, e.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

[160]*See* Connecticut v. Teal, 457 U.S. 440, 457 (1982) (Powell, J., dissenting); Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallocy of* Connecticut v. Teal, 20 Harv. J. on Legis. 99 (1983).

[161]*See, e.g.*, Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987); United Steelworkers v. Weber, 443 U.S. 193 (1979).

[162]*See* Firefighters Local No. 1784 v. Stotts, 467 U.S. 561 (1984).

[163]*See generally* Fallon & Weiler, *supra* note 6.

ualist rhetoric is predictable where it is alleged that minorities or females are victims of disparate treatment[164] and that invocation of group fairness is predictable where it is alleged that whites or males are victims of disparate treatment.[165] But this is too simplistic a version of the "who's ox is gored" hypothesis. There are potential reasons for shifts between models and, therefore, potential grounds for cabining discretion. The question is whether these reasons are convincing.

III. Justifications of Group "Rights"

A. *Three Varieties of Group "Rights" Theory*

1. Community Theory.—There are roughly three versions of group rights theory. Under the first, groups are to be legally recognized as having inherent rights against the state, individuals and other groups, largely on the premise that persons are individuals distinct from social structures and, simultaneously, part of these structures.[166] Identification of relevant groups is through empirical observation of the existence of "communities." However, the rights of these communities are in some sense inherent; they are not derived from state-supported policies or versions of the social good, nor from individualist values.[167] Communities are spontaneous phenomena, rather than state-defined phenomena.[168] A community's insistence upon behavior incompatible with state-defined social good or individualist values would be tolerated as a matter of community rights. For example, a community's internal practice of subjugation of women might be respected as its "right,"[169] and it is possible that unequal distribution of resources and wealth

---

[164]*See, e.g.*, Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

[165]*See* California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 293-94 (1987) (Stevens, J., concurring).

[166]*See, e.g.*, M. Sandel, Liberalism and the Limits of Justice 142-44, 173-74 (1982); Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. Rev. 1473 (1986); Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 1 (1983); Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980); Garet, *Communality and Existence: The Rights of Groups*, 56 S. Cal. L. Rev. 1001 (1983); Macneil, *Bureaucracy, Liberalism, and Community—American Style*, 79 Nw. U.L. Rev. 900 (1984); Michelman, *Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986); Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985).

It should be obvious from the diversity of viewpoints in this list that there is substantial disagreement among advocates of "community" about just how the notion is to be worked out in practice.

[167]*See* Garet, *supra* note 166, at 1029-75.

[168]*See* Macneil, *supra* note 166, at 934-39.

[169]*See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

among communities might be tolerated on these grounds.[170] This version of group rights is, therefore, largely incompatible with race and gender preferences as these are currently administered. The most glaring incompatibility is that affirmative action treats white males as a monolithic group. A version of group rights sensitive to the spontaneous existence of community would be compelled to recognize the rights in subgroups of the white male "majority."[171]

There is, however, a version of community theory that might justify a governmentally compelled allocation of employment along group lines. A premise for recognition of community is the relativity of perspective.[172] One conclusion that may be derived from this premise is that, as perspective governs interpretation,[173] no norm can claim to be neutral. A merit criterion for employment, for example, is not neutral with respect to race or gender if distinct racial or sexual experiences yield distinct understandings either of the operational meaning or of the value of the quality measured by the criterion.[174] It arguably would seem to follow that a governmental decision about the use of such a criterion should be avoided, both because collective choice cannot be neutral as between perspectives (it expresses a perspective) and because private ordering permits expression and survival of alternative perspectives. There is, however, an alternative conclusion that may be derived from the relativity of perspective. To the extent that one concludes that resources have been so distributed that a "white male perspective" precludes entry by competitors, governmental prohibitions might be justified as a means of breaking down these barriers.

2. Governmental Distribution Theory.—The second version of group rights is predicated expressly upon some understanding of state-defined social good, in particular, upon distributive justice understood as at

---

[170]*Cf.* Macneil, *supra* note 166, at 944-46 (community value may trump equality value). Indeed, the regime of Plessy v. Fergusson, 163 U.S. 537 (1986), particularly as "separate but equal" worked out in practice, would seem compatible with at least some versions of communitarianism. For example, it was commonplace for segregation to be defended on the basis of associational freedom. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973).

[171]*See* N. GLAZER, *supra* note 6, at 168-95, 202.

[172]*See, e.g.*, Minow, *Foreward: Justice Engendered*, 101 HARV. L. REV. 10 (1987). *Cf.* Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1169-71 (1986) (distortion of perspective is a justification for legal intervention, but distortion analysis risks elimination of autonomy).

[173]The extreme version of this position is that textual meaning is inseparable from the act of interpretation and that this act is governed by the interpretative stance of the community in which the interpreter is "embedded." *See* S. FISH, *supra* note 29.

[174]*Cf.* J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) (generally comparing managerial and working class perspective on the meaning and value of work).

least rough equality of results among groups.[175] The group right recognized by this version is not a right in the sense that it trumps governmental policy. Rather, it is an expression of governmental policy.[176] Identification of relevant groups is through empirical observation by reference to the state-defined norm of equality. Groups, therefore, are not self-generated and spontaneous, as in the first version of group rights. Nor are they self-governing or respected as self-governing. State intrusion into them to protect individualist values would be permissable. Further, as the economic, social and political objective underlying recognition of the group is to ensure that no group be found consistently at the short end of distributions of resources or of wealth,[177] toleration of such inequalities is of course precluded. There is some tendency among advocates of this second version to rely upon elements reminiscent of the first, in particular in emphasizing the common historical experience of black persons or women to identify a common, subjugated community.[178] But these communities are more internally pluralistic than cohesive.[179] The primary rationale, therefore, remains distributive equality.[180]

3. Compromise Theory.—The third version of group rights theory tends to combine elements of the first two under an umbrella of individualist rhetoric. For example, the notion that individuals are constituted by community has permitted recognition of group rights on individualist rationales, particularly in the context of religion. A religious group's right to freedom from state interference is predicated upon the right of free exercise of its individual members.[181] In addition, the notion that no racial group should be found consistently on the short end of distributions of resources and wealth animates disparate impact liability and affirmative action. The primary distinction that identifies the third version is that it neither recognizes group rights as inherent nor expressly adopts distributive equality as social policy. Rather, it treats group equality as an instrumental means to individualist ends, thus retaining at least the appearance of adherence to a general rhetorical commitment to these ends. Thus, affirmative action is con-

---

[175]*See* Fiss, *supra* note 1.

[176]The right is, then, a "statist" conception of a right, in Professor Mashaw's terminology. *See* Mashaw, *"Rights" in the Federal Administrative State*, 92 Yale L. J. 1129 (1983).

[177]*See* Fiss, *supra* note 1, at 151; Wasserstrom, *supra* note 6, at 584-94.

[178]Fiss, *supra* note 1, at 148-49; *see also* Blumrosen, *supra* note 160.

[179]*See* T. Sowell, *supra* note 147, at 77-82, 92-102.

[180]*See* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78 (1986).

[181]*See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

ceived as a remedial measure that must be temporary rather than permanent so that individualist competition among persons someday may proceed free of the unfair disadvantages generated by past discrimination.[182] Disparate impact theory is justified as a means of granting "individuals" equal opportunity free of "barriers" to opportunity that unfairly take these disadvantages into account.[183] Indeed, the Supreme Court's apparent exemption of "vested" employment rights from redistribution under affirmative action plans can be understood as a concrete instance of adherence to individualist rhetoric, as it treats the current positions of incumbent white males as possessions so identified with them that they should be respected.[184] Perhaps the Court's emphasis in *Johnson* upon retaining minimum qualifications has a similar individualist source. That is, perhaps white males are viewed as having a stake in employer-defined minimum qualifications because the white males are viewed as "owning" the attributes identified by these qualifications.

Nevertheless, the functional implications of the third version very much resemble the functional implications of the second version of group rights theory. The third version is a compromise theory in that it is functionally a group rights theory reconciled to individualist values through a tactic of instrumentalism. There is, however, a second distinction that distinguishes compromise theory. Unlike the first two theories, compromise theory is not utopian; it does not ground its version of the good upon an articulated system of moral or political thought. Rather, it grounds its version of the good upon authoritative legal texts, so that its recommendations are said to be compelled by, implicit in or at least not incompatible with the requirements of "law" as these are currently understood by lawyers.

Justifications of the first and second versions of group rights are dependent upon the conceptions of the good society underlying them. Neither version is implausible given acceptance of these underlying conceptions. Nevertheless, it is the third version that has found acceptance with the courts. Justifications of compromise theory, therefore, are here deemed interesting because it is apparent that these justifications will be seriously heard within a rhetorical practice that generally continues to eschew facial claims to "fair" distribution of race and gender shares.[185] This, of course, does not mean that such justifications actually

---

[182]United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

[183]Connecticut v. Teal, 457 U.S. 440, 452 (1982).

[184]See *supra* text accompanying notes 134-53.

[185]The notion that particular forms of rhetoric will or will not be heard within rhetorical practice is obviously a reference to the position of Stanley Fish. *See* S. Fish, *supra* note 29.

connote mere instrumental means to individualist ends. At the level of theory, it is possible that the instruments are so incompatible with the ends that the ends lose both meaning in social experience and their persuasive power as rhetoric. As a matter of historical observation, it is possible that instrumental means can alter dramatically the vision of the social good that dominates rhetorical practice so that, over time, argument within a pure group rights vision may, by virtue of the implementation of instrumental means, become both heard and obligatory. The interesting character of justifications of compromise theory means only that it is these justifications, and the counter arguments that may be invoked against them, that are most plausible within current practice.

As compromise theory purports both to respect individualist values and to respect or to find its source in law, these would seem to constitute the relevant criteria for assessing compromise theory. There are two general lines of justification to be discussed here. The first seeks forthrightly to reconcile individualist values with a governmental policy of distribution of employment among groups by denying that a true account of individualist values is threatened by such a policy. The second attempts a reconciliation by claiming that a limited policy of focusing upon distribution among groups is a necessary means or technique of enforcing individualist values.

B. Limited Individualism and the Social Good

1. The Argument.—The first justification is that fairness, understood as rectification, or social welfare requires affirmative action and that the individualist model, properly understood, does not preclude it. The factual premise underlying this justification, unlike the factual premise underlying the second justification to be discussed below, is that the "meritocratic" considerations that otherwise would control in a free exchange are expressly ignored or devalued under an affirmative action plan; the human capital investment of persons disfavored under such a plan is trumped by race or gender. The first justification is therefore most compatible with a version of a compromise theory of group rights that approximates the second theory of group rights, the governmental distribution theory, noted above.

Fairness requires affirmative action for the reason that persons are not deserving of their human capital or of their lack of human capital where allocation of human capital investment has itself been influenced by race and gender.[186] Fair competition among individuals, therefore,

---

[186]*See* United Steelworkers v. Weber, 443 U.S. 193, 214-15 (1979) (Blackman, J., concurring).

requires that misallocations be first rectified. An obvious difficulty with the fairness argument is that affirmative action of the sort upheld in *Johnson* bears a highly problematic relationship to misallocation; there is no effort to connect affirmative action entitlements to evidence of race or gender based misallocation, except by reference to the questionable assumption that all disparities in group representation within employment categories are necessarily attributable to misallocation.

The social welfare explanation avoids the difficulty encountered by fairness as rectification. It does so by postulating a straight-forward utilitarian rationale. Social welfare might be said to require affirmative action for purposes of social and political stability, economic efficiency or even fair allocation of employment among groups; a society in which there is equal distribution of employment among groups is a better society than one in which there is not.[187] The over- or under-inclusive character of the affirmative action remedy for misallocation is on this account of little force, as it is plausible that the remedy tends to correct misallocation, and in other contexts we do not require a precise fit of social welfare programs.[188] In short, fairness as rectification tends to collapse into social welfare as a justification of compromise theory because the *a priori* principle that distribution among race and gender groups should be equal is appealing and because rectification defined in group terms is simply a call for adoption of this principle.

This leaves, nevertheless, the problem of confronting the individualist model implied by the disparate treatment prohibition, because compromise theory purports to reconcile its recommendations with that model. As that model has been postulated thus far, it is that individuals are entitled, at least as a matter of common perceptions of individualist morality,[189] to employ and to realize the benefits of their individual talents and capacities without regard to their race or gender.[190] Thus described, the individualist model implies both that individuals are

---

[187]*See* DWORKIN, RIGHTS, *supra* note 29, at 239.

[188]*Cf.* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (tolerating underinclusive regulation as a matter of rationality review for equal protection purposes).

[189]"Common morality" is here employed as an appeal to consensus about moral commitments, in the sense that individualist rhetoric implies a consensus of this character about the demands of respect for persons and of their interaction. *Cf.* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 88-112 (1977) (describing ordinary adjudication as a process of working out rights and duties from rhetoric and consensus implied from rhetoric). Common morality is therefore to be distinguished from systematic morality, from the demands of an internally consistent theory of morality (e.g., Kantian morality) and from systematic utilitarianism, the demands of society as defined within an internally consistent theory of the social good (e.g., neoclassical economic analysis of law).

[190]See *supra* notes 29-53 and accompanying text.

entitled to their talents, capacities, experience, knowledge and other attributes and that these entitlements may be exercised through a right of free exchange.[191] The value of one's attributes for purposes of employment is dependent, within the individualist model, upon the valuation reached through consensual transactions in a market free of governmental intrusion.

Given this account of the individualist model, both the fairness and social welfare rationales for affirmative action are incompatible with individualism. To deprive a white male of an employment opportunity on the basis of his race or gender is, in a sense, to deprive him of his attributes because he is deprived of the valuation that would otherwise be placed upon these attributes. Moreover, if the governmental source of the race or gender basis of the employment decision is acknowledged, the deprivation is not a function of free choice in an interaction among individuals. If the individual to be respected under the dictates of individualism is defined to include attributes devalued by race and gender criteria, individuals so defined are not respected. This is so even if race and gender are not valued as such, so such criteria are not employed from prejudice but from their usefulness to society. The societal explanation quite directly asserts that the individual is to be sacrificed to the greater good.[192]

The strategy by which the most persuasive advocates of affirmative action seek to circumvent these difficulties is to proceed further down the path of stripping the individual of his or her attributes, and to therefore deny that a true account of individual rights is threatened by affirmative action.[193] In its most extreme form, this technique leaves the individual independent even of such characteristics as appearance or intelligence, and certainly of acquired attributes, such as human capital investments, on the ground that these are products of genetic, social and economic accident or circumstance.[194] In the form most

---

[191]*See, e.g.*, R. Nozick, *supra* note 29, at 149-231; M. Sandel, *supra* note 166, at 66-72.

[192]M. Sandel, *supra* note 166, at 72-77.

[193]*See, e.g.*, R. Dworkin, Law's Empire 393-97 (1986) [hereinafter Dworkin, Empire]; Dworkin, Principle, *supra* note 11, at 298-302; Fallon & Weiler, *supra* note 6, at 18, 39-44; Wasserstrom, *supra* note 6, at 619-21.

[194]*See generally*, J. Rawls, *supra* note 29. Rawls technique, as he recently emphasized, was not designed to provide an amount of what counts as a person. Rawls, *Justice As Fairness: Political Not Metaphysical*, 14 Phil. & Pub. Aff. 223 (1985). Rather, he employed the technique as a device for defining the social structure within which the attributes and characteristics of real persons should be worked out. *See* Baker, *Sandel on Rawls*, 133 U. Pa. L. Rev. 895 (1985). Although the issue of what constitutes a just social structure is distinct from what constitutes a person, *id.* at 909, that distinction breaks down when such a just social structure is imposed on a real society inhabited by real persons. Any

pertinent here, the technique strips the individual of attributes that can be made to fall within the fairness rationale for affirmative action: attributes connected to race- and gender-based misallocations of social resources are no part of the individual because they are undeserved.[195]

The strategy by which the individual is rendered independent of his attributes is reinforced by noticing that the value placed on such attributes within the individualist model is arbitrary, in the sense, at least, that it is contingent upon historical, social and economic circumstance.[196] A capacity to make rock music is of no value in a society that listens only to Mozart. At least it is of no value in the sense material here—it is not rewarded with employment in private exchange. If the value placed on attributes is arbitrary, two conclusions would seem to follow: society is free to arbitrarily change its valuations and there is no individual right to any given valuation. Society is, therefore, free to value blackness or femaleness over, for example, educational or experience credentials. Such a valuation intrudes upon no right of a white male to a higher valuation of his credentials because it is society, in the person of the market, and not the individual acting autonomously, that places values on attributes privately exchanged.[197]

In the present context, moreover, society is free to correct a distribution of attributes that has its source in historical wrongs. That is, even if a persons's attributes are in some sense his, and even if a market mechanism rather than governmental authority generally should place valuations on attributes, still, attributes unjustly obtained may be governmentally redistributed or ignored.[198] A thief has no right to

---

such imposition, where the imposed social structure is founded upon a conception of persons stripped of attributes, necessarily denies real persons their selves as defined by the displaced structure. The argument that the issue of structure and issue of personhood are distinct would therefore seem to render the argument for a particular structure trivial in the sense that the particular structure cannot properly be adopted until some theory of the person compatible with its imposition is devised.

[195] *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 214-15 (1979) (Blackmun, J., concurring); Fallon & Weiler, *supra* note 6, at 39-44.

[196] *See* J. Rawls, *supra* note 29, at 60-75; Fallon & Weiler, *supra* note 6, at 39-44; Wasserstrom, *supra* note 6, at 619-21. Of course, from the perspective of an adherent of individualism in the strong sense, the value placed attributes is not arbitrary. It is instead the value put in place by a free market through voluntary exchange, a mechanism itself linked to individualism. For such an advocate, moreover, there is a crucial difference between value as it is defined by society through a free market and value as it is defined by society through the intercession of government.

[197] "Society" in an unregulated economy makes valuation decisions through a market mechanism. As "voluntary" affirmative action is in fact governmentally-compelled affirmative action, society makes a racial valuation through authority, here the courts. *See supra* text accompanying notes 58-78, 113-64.

[198] Fallon & Weiler, *supra* note 6, at 41-42.

assets he has stolen or to the value a market would place on such an asset.[199] Society, therefore, is free to value blackness or femaleness as a means of correcting the race and gender based misallocations of resources that are the source of current distribution of attributes.

This strategy does not suggest, however, that society is free to value blackness or femaleness as such or to devalue whiteness or maleness as such. Such valuations, by the terms of the strategy, impermissably violate the sovereignty of what remains of the individual. What remains of the individual is very little indeed, but the being thus stripped of his attributes is entitled to "equal concern and respect."[200] Society cannot legitimately treat this being as more or less valuable than his fellows for reasons of the attributes that have been stripped from him. It may merely treat his attributes as more or less useful for particular social ends.[201] On this account, the white male may be denied employment opportunity and the black female granted employment opportunity for reasons of fairness or of social welfare, but not for reasons of "prejudice."[202] This is the reason that affirmative action is said to be distinguishable from the traditional forms of discrimination it is supposed to correct. Traditional discrimination devalued individuals by conceiving them as inferior in themselves; affirmative action values and devalues for purposes of pursuing the social good.[203]

2. Some Counterarguments.—

a. The Impoverished Individual.—There are a number of things wrong with this reconciliation of affirmative action and individualist values. First, the individual as thus conceived is so impoverished that the strategy of stripping individuals of attributes collapses into utilitarianism.[204] At least where the strategy is pushed to extremes, individuals are fungible, not distinct, and are valued as abstractions, not for their distinctness. It is true that the strategy values all equally; the white male is not disadvantaged because whiteness or maleness is thought to be inherently inferior and the black female is not advantaged because blackness or femaleness is thought to be inherently superior.

---

[199] *Id.* at 41.

[200] Dworkin, Rights, *supra* note 29, at 272-78; J. Rawls, *supra* note 29, at 504-12.

[201] Dworkin, Principle, *supra* note 11, at 301-02.

[202] *Id.*

[203] *Id.*; J. Ely, *supra* note 6, at 170-71; Fallon & Weiler, *supra* note 6, at 37-38; Greenawalt, *supra* note 6, at 579-94; Karst, *supra* note 6, at 65; Wasserstrom, *supra* note 6, at 618.

[204] M. Sandel, *supra* note 166, at 135-47; R. Nozick, *supra* note 29, at 228. *See* Radin, *supra* note 29, at 1903-09; Radin, P*roperty and Personhood*, 34 Stan L. Rev. 957 (1982).

To the extent, however, that the individual is said to have no entitlement to his attributes, so that society, in the person of government, may value these attributes as it wishes, the beings remaining are abstractions with merely a metaphysical version of the self intact. It is a small consolation to real individuals with real selves defined by attributes that they are equally valued as means to socially desirable ends.[205]

Of course, this objection may also be made to individualism's reliance on impersonal markets for valuations of attributes; the social utility of the attributes of persons is then merely measured by alternative means. Individualism asserts its own version of the impoverished individual in claiming that attributes may be valued in the market but that persons, considered apart from their attributes, may not be subjected to the valuations either of the market or of government.[206] The objection assumes, however, that there is no distinction meaningful to persons in the means by which attributes are valued. Individualism asserts that persons are entitled to their attributes and that the priority of the individual is expressed through this entitlement. The social means by which attributes are valued is therefore crucial to individualism: persons must be collectively treated as equals, but collective valuations of attributes denies the priority of the individual.[207] Market valuation of attributes is not thought to entail this denial both because participation in the market (through alienation of attributes) is consensual and because such participation is thought to be expressive of the priority of the individual.[208]

The questions of the extent to which an entitlement to attributes is important to the notion of the priority of the individual and, therefore, of the permissible scope of governmental distinctions between persons is, of course, debatable.[209] Our judgments about that question may be influenced by our empirical judgments, themselves structured by our political commitments,[210] about the likely self concepts of per-

---

[205]M. Sandel, *supra* note 166, at 141-44.

[206]*See supra* text accompanying notes 29-52.

[207]*See supra* text accompanying notes 29-52; *infra* text accompanying notes 219-36. The notion that persons are entitled to their attributes and to engage in the process of their exchange may be grounded on the priority of the individual, so that the entitlement is derivative of or inherent in the concept of the person. *See* R. Nozick, *supra* note 29, at 183-231. Alternatively, the notion that attributes may be valued in a market but persons apart from these attributes may not be valued (either in a market or by government) may be grounded on the argument that no one is competent to provide an authoritative valuation. *See* F. Hayek, *supra* note 31, at 85-102. The latter argument appears premised more upon a moral relativism than upon a theory of entitlement. *See*, *supra* note 31.

[208]*See* R. Posner, *supra* note 6, at 88-115.

[209]*See generally* Radin, *supra* note 29.

[210]*Id. See generally* T. Kuhn, *supra* note 29.

sons. For example, one committed to the notion that workers are alienated by work in a market economy and experience disempowerment through reification of market forces[211] may conclude both that work experience is a meaningless aspect of the individual and that workers, in fact, view attributes connected to their work as separate and distinct from themselves. One committed to free market exchange as an expression of and a means to self-actualization may come to the contrary conclusion.[212]

Nevertheless, the stripping of attributes strategy leaves the individualist value unrecognizable because it locates the individual's right to "equal concern and respect" in an impoverished individual indistinguishable from his fellows. The individualist value is distinguished by its celebration of the distinctness of the individual and by its claim that this distinctiveness is to be preserved from governmental valuation.[213] We are left, then, less with reconciliation than with a need to choose between pursuing the social good and enforcing a stronger version of the individualist value.

b. Individual Responsibility.—The second difficulty with the reconciliation, particularly when it relies upon a principle of rectification, is that the grounds upon which the individual is to be stripped of his attributes are problematic. *Johnson*[214] is illustrative: should the human

---

[211]*See, e.g.*, K. Marx, Capital, in Essential Works of Socialism 133-44 (I. Howe ed. 1971). *Cf.* A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 302-04 (E. Cannan ed. 1976) (describing alienation of workers generated by division of labor).

[212]*Compare* West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 Harv. L. Rev. 384 (1985) *with* Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 Harv. L. Rev. 1431 (1986).

It is possible that the Supreme Court has recognized this point both by exempting from permissible race and gender preferences vested claims to employment and by conditioning preferences on minimum qualifications. These features of the Court's case law may be characterized as recognizing the personal (as well as economic) stake of white males in currently possessed jobs and in attributes and credentials. Perhaps the Court's criteria reflect a rough guess about the relative importance of these stakes to the self. But the Court's limitations on affirmative action are prudential; they enforce mere expectations, not rights, and are therefore subject to being overcome by social need or by the morality of equal distribution.

[213]There is, however, another contradiction in the individualist position: its treatment of race and gender as inalienable, particularly given its aspiration that we become "color blind" and "sex blind" (or that assimilation occur), may be characterized as denying attributes of persons that are clearly viewed subjectively by persons as crucial to their self-concept—race and gender. *See* Wasserstrom, *supra* note 6, at 585-87. Whether this is so would seem to be dependent upon whether one views a rule of inalienability as enforcing or denying personhood, but the general commitment of individualism to alienability arguably generates a contradiction. *See* Radin, *supra* note 29, at 1898-1903.

[214]Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

capital investment decisions and the ambitions of women and of the family units within which they were nurtured be counted as a misallocation which explains workforce disparities? They might be so counted on the hypothesis that they reflect internalization of sexist role definitions. Alternatively, should human capital investment decisions instead be treated as legitimate expressions of the values of individual free choice and respect for the family as a "community"? If these decisions are not to be respected, the rectification principle underlying the fair competition rationale is in operation a principle of redistribution; it in effect calls for a new starting point for distribution. This should not be surprising. As the rectification argument proceeds from the premise that disparities in distribution of employment between groups are to be rectified, fairness is merely another means of asserting that distribution should be equal.

The rectification argument is questionable for another reason. It fails to seriously address the question of just what should count as an undeserved current holding. For example, should a white male's current holding of some number of years of experience in a job be ignored in preference to race or gender because society has generally excluded minorities or women from the opportunity to obtain such experience? Instead, should there first be a determination that the white male would not have had the experiences but for his employer's exclusion of minorities or women, or even that the white male in some degree participated in the exclusion policy? A conclusion that societal discrimination, particularly where defined to include human capital investment decisions of minorities and women, is a sufficient ground for rectification again implies a simple policy of redistribution, because it denies the importance of a causal relationship between current holdings and past injustice, a relationship central to an individualist ethic.[215]

It is in a sense true that an individual's attributes are largely the product of accident, but it is also true that they are the product of his interaction with the accidents of his past circumstances; he has some claim to the fruits of his more or less conscious interaction.[216] It is also in a sense true that current allocations of attributes have been affected by a history of intentional discrimination. It is not true that all disparities in allocation among race and gender groups are attributable to discrimination[217] (unless discrimination is tautologically defined merely as all causes of current disparities). It is, finally, in a

---

[215]*See, e.g.*, R. Nozick, *supra* note 29, at 150-55.

[216]*See, e.g.*, R. Nozick, *supra* note 29, at 155-60; J. Locke, *supra* note 29, at ch. VI.

[217]*See generally* T. Sowell, Ethnic America (1981).

sense true that white males as a group have benefited by past discrimination, at least to the extent that past discrimination has freed them from competition from minorities and women in acquiring portfolios of human capital investment. The extent to which a given individual may be said to possess tainted attributes, however, is problematic; the connection between his set of attributes and past discrimination or his participation therein is both unproven and in any event tenuous. His possession is not, in short, analogous to that of a thief's possession of stolen goods.

It is quite possible to conclude that these considerations are outweighed by social need (or by the morality of equal distribution among groups). However, the conclusion is not a reconciliation; it is a conclusion that social need trumps individualist considerations. It is, moreover, a conclusion incompatible with the historical, transactional and causal analysis of entitlements that characterizes individualism.[218] The conclusion substitutes for that analysis a focus upon a desired end-state—distributive equality—without regard to the question of individual responsibility for a current distribution. Again, it is, of course, possible to reject the notion of individual responsibility as a condition to reallocation, but such a rejection is not a plausible reconciliation.

c. Prejudice.—The third difficulty with the reconciliation is that the strategy's understanding of prejudice is problematic. The question of prejudice was addressed at an earlier point in this article in assessing the scope of the disparate treatment prohibition.[219] The question addressed in that discussion, however, was whether the disparate treatment prohibition, which is broader than a prohibition of prejudiced disparate treatment, could be justified on individualist grounds. The premise of that question was that unprejudiced disparate treatment is a private phenomenon currently uncoerced by governmental authority. This premise is not available in the present context. Given the relationship between liability theories and "voluntary" affirmative action, and the stripping strategy's emphasis upon the social utility of race and gender criteria, the present question is whether a governmental policy of fostering use of such criteria is, as the stripping strategy suggests, unprejudiced.

Recall that a race or gender preference granted for some socially desirable end, such as remediation of past wrongs, is not granted from prejudice under the stripping strategy because the person advantaged is not treated as inherently superior for reasons of race and the person disadvantaged is not treated as inherently inferior for reasons of race.[220]

---

[218]*See, e.g.*, Gjerdingen, *The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought*, 35 BUFFALO L. REV. 871, 876-78 (1986).

[219]*See supra* text accompanying notes 45-54.

[220]*See supra* text accompanying notes 193-203.

Rather, the advantaged person is merely more useful for the social purpose at hand. One difficulty with this notion is that it is not clear, given an historical social practice of prejudice, either that the persons affected will so perceive the matter or that the decision maker's stated motivation can be trusted.[221] But this objection can be left aside for the moment. The more important objection is that it remains the case that persons are advantaged or disadvantaged by reason of race because the advantaged race is viewed as superior for purposes of the social use in question. In what sense is this not a prejudiced view of the race of the disadvantaged person?

A dictionary definition of prejudice is "an adverse opinion or leaning formed without just grounds or before sufficient knowledge".[222] Apparently, then, the strategy treats contempt for a race, as such, as an unjust ground but use of race for a socially desirable purpose as a just ground for the "opinion" by which employment is allocated. In effect, race is no different as an employment criterion under the strategy than possession of a college degree where contempt is absent: both persons denied employment because they were white and persons denied employment because they lack such a degree are not useful for some legitimate reason independent of the worth of the persons in issue.

This claim assumes both an understanding of that which constitutes the person and may not be socially used and an understanding of that which is distinct from persons and may be socially used—the impoverished individual understanding. It assumes, as well, an understanding of legitimate use, in particular, of the permissible scope of collective decision regarding use.[223] Neither assumption is reconcilable with the individualism of the disparate treatment model, but an understanding of this irreconcilability requires an extended discussion of the respects in which the stripping strategy differs from the separation of person and object in traditional individualist theory.[224]

Arguably, the problem of prejudice from the perspective of the individualist value underlying the disparate treatment theory is that the opinions of persons formed from prejudice fail to recognize the distinctness of individuals.[225] The opinion thus formed is "unjust and

---

[221] *See supra* text accompanying notes 45-49.

[222] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 928 (1985).

[223] *See* T. SOWELL, A CONFLICT OF VISIONS 153 (1987) (contrasting versions, of individualism, according to one of which individualism consists of freedom to choose within a systematically generated structure not collectively determined and according to the other of which individualism consists of freedom to participate in collective determinations).

[224] *See supra* note 29.

[225] Celebration of the distinctness of the individual, including the distinctiveness of

without sufficient knowledge'' because it is formed by reference to a generalization about the race or gender group with which the individual is identified and not by assessment of the individual. However, this will not suffice as explanation. An employer's use of a college degree as a proxy for estimating projected job performance relies as well on a generalization and not upon a particularized assessment of the individual. The claim that it is a particular form of generalization—hostility or contempt for race and gender groups—that is the true understanding of impermissible prejudice, thus, seems to have merit. Otherwise, individualism's distinction between permissible and impermissible proxies appears arbitrary.

The matter, however, is considerably more complex than this. Recall that in the version of individualism characterized by operation of a free market, there is a separation of the capacities of persons to confer benefits on others, which are valued by an impersonal market, from the persons engaged in transacting. These persons are of ultimate value, but are not subject to the valuations either of the market or of government in the sense that distinctions between persons are generally impermissible.[226] This separation is the means by which individuals are said to be equal before the law or to have rights to equal opportunity (the realm of the person) but are simultaneously and properly unequal in their attributes and possessions. The individual is rendered free in the senses that there is no authoritative valuation of his self other than that he supplies and that the individual is entitled to employ his distinctive resources (his attributes) in formally consensual transactions.[227] Persons (including employers and employees) transact in a free market under these assumptions using generalizations (such as existing human capital investments) as proxies for the benefits individuals can confer on others by virtue of their attributes, except that race and gender status may not be used as such proxies under the disparate treatment prohibition.

The exception for race and gender is attributable to a belief that generalizations about race and gender are valuations of persons rather than of the benefits that such persons are capable of conferring on others and are thus deemed illicit. This belief, when authoritatively enforced through the disparate treatment prohibition, constitutes a

---

talents and abilities, is basic to traditional notions of individualism. *See, e.g.*, R. Nozick, *supra* note 29, at 228-29.

[226]*See supra* text accompanying notes 29-54. Distinctions are, of course, made for limited purposes, as in cases of corrective justice.

[227]It is disputable whether this separation in individualism operates to celebrate the individual or is instead alienating. *See supra* note 29.

collective characterization of personhood.[228] Nevertheless, the exception is quite narrow; persons, viewed apart from their attributes, are not generally valued by a market and are not generally subjected to collectively determined valuations in individualist theory. This is the source of individualism's claims that the law ought to be neutral; government should not be permitted to distribute wealth by reference to desert because to do so is to value persons differently.[229] It is also the source of individualism's preference for market mechanisms—valuation of attributes by reference to an impersonal market avoids individualism's objection to collective valuations, that no person or group of persons is competent to formulate measures of desert, apart from those measures necessary to a system of corrective justice.[230]

There are obvious parallels between this account of individualism and the reconciliation strategy's effort to justify affirmative action: both separate individuals from their attributes and purport to value not the impoverished persons yielded by this separation but, rather, the utility of the attributes severed from persons. There is, however, this important difference: the defense of affirmative action has as its objective the imposition of centrally and collectively determined valuation of race and gender by separating these attributes from persons. By contrast, individualism rejects both "commodification" of race and gender *and* central and collective valuation. This is more than a mere restatement of the obvious point that the disparate treatment prohibition precludes, and affirmative action permits, use of race and gender as criteria for allocating employment. It has important implications for the scope and meaning of liberty as that term is understood under individualist and collectivist conceptions of the good society.

The central objection of individualism to collective decision, an objection grounded in individualism's moral relativism, is the incom-

---

[228]*See* Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239 (1987). *Cf.* Radin, *supra* note 29, at 1891-98 (generally noting the problem of distinguishing between that which is alienable from that which is not in the person-object dichotomy).

[229]Radin, *supra* note 29, at 1891-98. As expressed in political theory, the notion of neutrality is that government may not prefer one conception of the good to other conceptions of the good; it may not "take sides." *See, e.g.*, J. LOCKE, A LETTER CONCERNING TOLERATION (J.W. Gough ed. 1966). A difficulty with the neutrality proposition is of course the legal realist's point that governmental neutrality is impossible; the law inevitably takes sides. *See, e.g.*, Hale, *Force and the State: A Comparison of Political and Economic Compulsion*, 35 COLUM. L. REV. 149 (1935). For a recent statement of the neutrality value, see Stewart, *Regulation in the Liberal State: The Role of Non-Commodity Values*, 92 YALE LJ 1537, 1539-49 (1983). For a recent statement of the impossibility of neutrality, see Sunstein, *supra* note 29.

[230]*See generally* T. SOWELL, *supra* note 223 (arguing that distrust of the competence of collective decision is at the root of positions often characterized as individualist).

petence of central authority.[231] This objection would have no force in the context of "voluntary" affirmative action if the fiction is entertained that race and gender are benignly used by employers in that context merely as a matter of private decision. We have seen, however, that this characterization *is* fictional: affirmative action is not separable as a phenomenon from the liability theories that give rise to the incentives to engage in it.[232] Individualism's objection to collective decision is, therefore, relevant; affirmative action expresses a collective valuation founded upon an evaluation of desert and expressed through the proxy of race or gender status. Moreover, the affirmative action phenomenon is related to the historical phenomenon of invidious discrimination in precisely the respect that rendered a disparate treatment prohibition appealing to individualism.[233] Individualism could be persuaded to render race and gender inalienable, to assign race and gender to the realm of person rather than the realm of attributes, because the regime of racism and sexism was enforced by means of, and, in many respects, had its origin in, collective decision enforced coercively through state power.[234] The market mechanism for valuing attributes was, therefore, both circumvented by and tainted by centralized valuation, a state of affairs remedied by rendering race and gender inalienable.[235]

Individualism's analysis is distinguished from the strategy of stripping individuals of attributes in three respects. First, race and gender are, under the disparate treatment prohibition, inalienable aspects of

---

[231]*See generally* F. Hayek, *supra* note 31; R. Nozick, *supra* note 29, at 153-74.

[232]*See supra* text accompanying notes 58-78, 113-64.

[233]For examples of individualist rhetoric used to support enactment of the disparate treatment prohibition, see generally Reynolds, *supra* note 33.

[234]*See, e.g.*, Lee v. Washington, 390 U.S. 333 (1968) (segregated prisons); Johnson v. Virginia, 373 U.S. 61 (1963) (segregated courtrooms); Turner v. Memphis, 369 U.S. 350 (1962) (segregated restaurants); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (segregated beaches); Brown v. Board of Educ., 349 U.S. 294 (1954) (segregated schools). The effect of state and local law on private conduct is illustrated by state action cases treating private conduct pursuant to state-imposed custom as state action. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963).

[235]*See* R. Posner, *supra* note 6, at 351-58 (1981) (arguing that an unregulated market would minimize discrimination and that laws enforcing discrimination circumvented the normal effect of such a market); T. Sowell, Markets and Minorities 103-24 (1981) (arguing that government policy affects operation of markets and may increase discrimination, but also arguing that government policy is often ineffectual). *Cf.* Sunstein, *supra* note 172, at 1153 (distortion of private preference for discrimination generated by law is justification for governmental interferences with such a preference). It should nevertheless be apparent that radical individualism, understood as distrust for collective decision, would be suspicious, at best, of a claim that a central authority may competently distinguish between distorted and undistorted preferences. *See* Epstein, *A Last Word on Eminent Domain*, 41 U. Miami L. Rev. 253, 259-63 (1986).

the person removed even from the realm of legitimate valuation by markets; they are, under the stripping strategy, attributes subject to governmental valuation. Individualism legitimately views affirmative action as prejudiced in the sense that it purports to value an aspect of its version of personhood.

Second, the stripping strategy separates persons and attributes for the purpose of rendering the latter subject to collective valuation and use; individualism separates persons and attributes for purposes of rendering the latter exchangeable in markets. Individualism would object to affirmative action even if race and gender were assigned to the realm of attributes; affirmative action is prejudiced in the sense that it reflects an unjustified collective valuation both of race and gender and of the "meritocratic" attributes competing with race and gender.

Third, the stripping strategy treats attributes separated from persons as independent of persons in the strong sense that they are subject to collective allocation; individualism separates attributes from persons, but does so in the much weaker sense that persons retain strong claims to them, even as they alienate them in the marketplace. Indeed, individualism celebrates the distinctiveness of the attributes of individuals even as it insists upon the equality of persons and treats the process of transacting in attributes as liberating.[236] From this perspective, affirmative action is prejudiced in the sense that it denies the distinctiveness of individuals through collective valuation of status.

d. Pedagogy.—In individualist theory, individuals are viewed as autonomous actors whose references and choices are autonomously and rationally selected. An alternative understanding is that preferences, choices and even self-understanding are socially determined.[237] The alternative understanding is a potential basis for adopting centralized

---

[236]*See, e.g.*, R. Nozick, *supra* note 29, at 235-65.

[237]*See, e.g.*, Sunstein, *supra* note 172 (generally describing ways in which private preferences may be distorted, including by means of social structures or practices).

It is possible to claim that this tendency to internalize social valuations renders the autonomous individual postulated by the individualist model an impossibility. *See* Schuck, *Regulation, Non-Market Values, and the Administrative State: A Comment on Professor Stewart*, 92 Yale L.J. 1602, 1604-05 (1983). If the autonomous individual does not exist, there is no principled basis for precluding a collective decision to remold socially determined individuals. *Id.* This, however, overstates both the hypothesis that individuals are largely constituted by social valuations and the limited point made in the text that social valuations have a pedogogic impact. *See* Epstein, *supra* note 235, at 259-63. Indeed, it is clear that individualists have often accepted at least versions of the thesis that individuals are blank slates until influenced by society. *See* J. Locke, *An Essay Concerning Human Understanding*, in 1 The Works of John Locke 134-79 (repl. 1969). Even if an extreme version of this thesis were accepted, there would remain the fundamental question of just who is competent to decide which private preferences are permissible and which are not.

collective valuations of attributes, because it denies that individuals are self-determining free agents. Even given, however, that individuals are in some degree socially determined, it is not clear that a collective valuation of race or gender is desirable. The stripping strategy may have an unintended pedagogic consequence.

In actual social practice, some attributes, such as a given number of years of job experience, are highly valued and real individuals either possess or do not possess these attributes. A remedial racial preference imposed within such a context now permits race to trump the attribute. What are the persons negatively affected by this change to make of it? The superseded attribute is a part of the person disadvantaged by the preference and a part of his sense of self. It is the case that the value he placed on this part of himself is at least arguably attributable to social context; he has perhaps derived it from the former social practice of valuing the attribute. The likely consequence of the social devaluation of the attribute is resentment and perhaps eventual feelings of inferiority and absence of self-worth, but we tolerate both revaluations and their consequences generally. Farmers and steelworkers have, for example, been devalued, and our concern as a society for the resulting potential for suicide is passing at best.

What of the person advantaged by the preference? The absence of the formerly valued attribute was equally a part of that person and a part of his sense of self. However, it has been devalued. What is he to make of its devaluation and of the elevation of race to a higher value? According to the strategy, very little, for he is not formally permitted to consider his race something good in itself; he is permitted only to recognize that his race is an attribute society has now found useful for its purposes. Similarly, the person disadvantaged is not supposed to consider his race something bad in itself, he is supposed to recognize that it has not been found currently useful. Indeed, the person disadvantaged erred in formerly thinking the devalued attribute a valuable part of himself; his internalization of society's valuation was a mistake.

Nevertheless, the disadvantaged person also made that mistake, and both he and the advantaged person are likely to repeat it under the new valuation regime. Social valuations of attributes are not merely the judgments of markets or of governments; they become in time internalized conceptions of the self.[238] If social valuations are inter-

---

[238]Models of self-concept suggest that this concept is in part a matter of personal attributes, in part a matter of role definitions and in part a matter of perceptions of social valuations of attributes and role. *See, e.g.*, M. Rosenberg, Conceiving the Self 62-77 (1979); Feather & O'Brien, *A Longtitudinal Study of the Effects of Employment*

nalized, a formal and governmental revaluation fosters prejudice because it is at least doubtful that persons affected by it will either be convinced by, or retain the distinction between, prejudice and utility. The reason for this predicted failure seems clear; people are not inclined to think of themselves merely as useful for social purposes even if the source of their self-valuation is ultimately social utility. Placing value on race and gender for reasons of social utility may have the consequence of placing value on race and gender for purposes of self-valuation and self-conception. The contention that a distinction may be drawn between social valuations founded upon utility and social valuations founded upon prejudice is, then, problematic precisely because it is crucially dependent upon the abstraction of the impoverished individual.

e. The Suffering of Innocents.—A further counterargument is that affirmative action, if viewed as a remedy for historical discrimination and, therefore, as a means of ensuring fair competition, is insufficiently general.[239] The argument is implicit in the notion that the responsibility of individual white males for current conditions of unfairness is problematic. If fairness, nevertheless, requires that persons who suffered from past discrimination be compensated, the burden of this remedy should be shared generally, not imposed arbitrarily on isolated individuals.

It is claimed, however, that both disparate treatment theory and group rights theories cause innocent people to suffer, so the alternatives are indistinguishable in this respect.[240] Innocents are made to suffer under a strict application of disparate treatment theory, and in a variety of ways. Indeed, innocents are made to suffer whenever disparate treatment theory is applied so as to prohibit rational use of race or gender as proxies. Assume, for example, the facts of the *Manhart* case.[241] Prohibiting the use of gender in calculating pension contributions harms innocent males by forcing them to subsidize females and by rendering the actuarial value of male benefits less than the actuarial value of female benefits for similarly situated individuals. Indeed, the prohibition requires use of neutral criteria that have a disparate adverse

---

and Unemployment on School-Leave 59 J. OCCUPATIONAL PSYCHOLOGY 121 (1986); Hoelter, *The Structure of Self-Conception: Conceptualization and Measurement*, 49 J. PERSONALITY AND SOCIAL PSYCHOLOGY 1392 (1985); Schaer & Trentham, *Self-Concept and Job Satisfaction: Correlations Between Two Instruments*, 58 PSYCHOLOGICAL REPORTS 951 (1986); Yount, *A Theory of Productive Activity: The Relationships Among Self-Concept, Gender, Sex Role Stereotypes, and Work-Emergent Traits*, 10 PSYCHOLOGY OF WOMEN Q. 63 (1986).

[239] *See* Johnson v. Transportation Agency, 107 S. Ct., 1442, 1476 (1987) (Scalia, J., dissenting).

[240] *See* Strauss, *supra* note 6, at 103, 110-11.

[241] City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978). *See supra*, text accompanying notes 15-16.

effect on males as a group.[242] Permitting use of gender in calculation avoids this harm but generates a new form of harm: the periodic and current compensation of an individual female employee is less than the periodic and current compensation of a similarly situated male employee. Moreover, both prohibiting and permitting use of gender in this context renders gender visible; it is visible in the female's paycheck where use is permitted and it is visible in the actuarial value of the male's pension benefit where use is prohibited.

The inevitability of suffering under both possible legal regimes is, however, beside the point. The point is that either regime imposes the particular form of suffering that is the consequence of denial of an "ought." The distinction between the regimes is that distinct "oughts" are denied by them. The regime of permission denies the "ought" that race or gender status should be rejected as criteria. The regime of prohibition, while enforcing this "ought," denies the distinct "ought" that race and gender groups should enjoy a fair distribution of employment.

To understand why these "oughts" are at stake in the suffering of innocents argument, it is necessary to briefly explore the requirement of generality as that requirement is understood within individualist theory. Specifically, neither the requirement of generality nor the more restrictive requirement of neutrality preclude within individualist theory wealth transfers for public purposes through taxation or the enforcement of, for example, rules of contract against a person whose version of the good is thereby coercively denied by the state.[243] Moreover, individualist theory tolerates, in degree, inalienabilities.[244] The disparate treatment prohibition is an example. In short, the suffering of innocents is a possibility even given generality and neutrality requirements. It is true that an absolute version of the requirements would render government impossible, so individualism, by reference to such a version, is self-contradictory.[245] Nevertheless, individualists have insisted on government as necessary to individualism,[246] so the requirements have not

---

[242]*Manhart*, 435 U.S., at 710-11 n.20.

[243]*Cf.* Sunstein, *supra* note 29, at 878 (so suggesting under the regime of Lochner v. New York, 198 U.S. 45 (1905)).

[244]*See* 2 J.S. Mill, Principle of Political Economy 300-06, 442-80 (Colonial Press ed. 1899). The degree to which adherents to individualism tolerate inalienabilities varies with the adherent. *See* Radin, *supra* note 29, at 1859-63.

[245]*See, e.g.*, Frug, *Why Neutrality*? 92 Yale L. J. 1591 (1983); Radin, *supra* note 29, at 1902.

[246]*See, e.g.*, J. Locke, *supra* note 29; J.S. Mill, *supra* note 244; R. Nozick, *supra* note 29. The question, then, is not the choice between either-or possibilities postulated by collectivist rhetoric. The question, rather is how much government and in what form, can be justified.

been treated as absolutes, but as aspirations to be more or less realized in practice.

In particular, the generality requirement is thought to be satisfied if collective decision appears both grounded on a purpose to further the common good[247] and does not benefit or burden relatively limited and identifiable groups of persons.[248] Neutrality is thought to be satisfied, under one version of the requirement, if collective decision may be traced to a legitimate public purpose.[249] Under another version, the requirement is satisfied if collective decision does not, *ex ante*, formally distinguish between persons or relatively identifiable groups of persons, so individuals may comply with the decision, *ex post*, through action formally possible because unrelated to immutable status.[250]

It is obvious that neither requirement under these formulations yields determinate conclusions. At a minimum, the notions of legitimate public purpose and relatively limited and identifiable groups leave much room for dispute. This, however, is the point; the formulations become at least more determinate when linked to underlying "oughts" and to the values and judgments that yield these "oughts."[251] It is, for example, possible to justify affirmative action as neutral and general, despite the suffering of innocents, by postulating redistribution as a legitimate public objective, by speculating that all will eventually benefit by such a redistribution, and by narrowly construing the entitlement upon which the claim to a neutral collective decision is based (persons are entitled to be free of prejudiced distinctions).[252] Similarly, it is possible to reject affirmative action as non-neutral by rejecting redistribution as a legitimate objective, by speculating that only an identifiable few will be burdened and by more broadly construing the entitlement upon which the neutrality claim is based (persons are entitled to be free of race

---

[247]The "public purpose" requirement of the takings clause of the Fifth Amendment is an example. *See* R. Epstein, Takings, Private Property and the Power of Eminent Domain 161-81 (1985). *But see* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (rendering public purpose requirement a dead letter).

[248]*See* F. Hayek, *supra* note 31, at 154.

[249]*See* Dworkin, Principle, *supra* note 11, at 301-02. *Cf.* R. Nozick, *supra* note 29, at 272-73 (rules are neutral if justified by a reason independent of granting differential benefits); F. Hayek, *supra* note 31, at 154 (rule is neutral even if it distinguishes between groups if the distinction is recognized as legitimate by members of both of these groups).

[250]*See* F. Hayek, *supra* note 31, at 148-59. Action is only "formally" possible *ex post* because the standard critique of this position is that such relatively neutral rules in fact favor or disfavor identifiable groups or persons (particularly those without power, wealth or resources). *See, e.g.*, Hale, *supra* note 229.

[251]*Cf.* Sunstein, *supra* note 29, at 903-10 (choice of baseline is necessary in assessing neutrality).

[252]*See, e.g.*, Dworkin, Principle, *supra* note 11, at 301-02.

or gender distinctions).[253] The claim that innocents are made to suffer from a non-neutral and insufficiently general policy of affirmative action is both permissible and accurate given the latter of these arguments.

Does the claim made presently that arguments from generality and neutrality require reference to underlying values and judgments defeat the claim made earlier[254] that individualism rejects affirmative action from a distrust of collective decision? It may be argued that the earlier claim is defeated because individualism postulates a relatively unstructured state of affairs, untainted by intrusive collective decision, and because this state of affairs is not, in fact, neither natural nor wholly untainted by collective decision.[255] The claim that neutrality and generality presuppose a normative "baseline"[256] does not, however, preclude the further claim that affirmative action is illicit because it is collectively imposed.

The normative baseline for the latter claim is, at its core, distrust of collective decision, just as the normative baseline for the claim in support of affirmative action is an abiding faith in collective decision. Consider the structures of the opposing arguments, pro and con, outlined above. The argument favoring affirmative action, in postulating redistribution as a legitimate objective, presupposes a correct, and centrally mandated, basis for redistribution (one that ignores alternative bases, e.g., to the poor as a class). It also presupposes a capacity to accurately predict the consequences (burden and benefits) of collective decision. It finally presupposes a capacity to meaningfully distinguish between prejudiced and unprejudiced decision (and, therefore, a choice between alternative understandings of the relevant entitlement).

The argument opposing affirmative action implicitly rejects each of these presuppositions. Redistribution is rejected, in keeping with individualist theory generally, either because (1) the correct basis for distribution is unknown[257] or (2) even if a correct basis may be identified, the means necessary to effect the correct result are intolerable[258] or (3)

---

[253]*See generally*, T. Sowell, *supra* note 147.

[254]*See supra* text accompanying notes 231-36.

[255]Sunstein, *supra* note 29, at 896-97.

[256]*Id.*

[257]*See, e.g.*, F. Hayek, *supra* note 31, at 25-38.

[258]*See* 2 F. Hayek, Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy, 64-84 (1976); R. Nozick, *supra* note 29, at 160-64, 172-73. Nevertheless, Nozick's historical entitlement theory would permit rectification of wrongs in the acquisition and transfer of holdings. *See id.*, at 152-53, 172-73. However, it is not clear that Nozick's rectification principle would permit redistribution from persons not shown to have themselves wrongfully acquired their holdings. *Cf.* F. Hayek, *supra*, at 81 (principle of material equality would be justified if deliberate human action was necessary to distribution, which it is not in a free society).

the objective cannot, in fact, be achieved.[259] The argument's claim that only an identifiable few will be burdened or benefitted assumes competence to predict consequences, but is simultaneously pessimistic about consequences. Indeed, its prediction may be predicated upon the supposition that consequences, in keeping with individualism's taste for formalism, cannot be predicted.[260] Although the argument postulates a collective decision regarding entitlement, the entitlement selected is one compatible with a distrust of collective decision; the argument distrusts the governmental discretion inherent in rendering prejudice the basis for the entitlement.[261] Indeed, even the decision to adopt the inalienability of race and gender as an entitlement reflects this distrust. The decision responds to the claim that current distributions of resources and wealth are tainted by a history of race- and gender-based collective decision by conferring only a highly limited authority on government to preclude private allocations that may reflect preferences engendered by that history.

What distinguishes these alternative baselines is, then, not the reliance of individualism upon a problematic claim that existing distributions of resources are "natural" or untainted. Rather, it is a fundamental disagreement about the competence of central authority either to define or to implement the good. It is important to recognize, however, two related caveats: individualism's distrust need not be complete to be coherent and that distrust need not be enshrined as a constitutional mandate precluding debate to be nevertheless real.[262]

---

[259]*See, e.g.*, T. SOWELL, *supra* note 147, at 42-60. *Cf.* R. EPSTEIN, *supra* note 247, at 263-82 (effect of economic regulation is often merely wealth transfer, rather than general welfare); Epstein, *supra* note 235, at 272.

[260]By "formalism" is meant rigid adherence to formal and general rules without regard to the social consequences or "realities" of the operation of such rules. The attack of legal realists on formalism was in part an attack upon the pretense of deduction from such rules. However, the attack was also normative in that the realists thought that the operation and effect of rules in actual practice was an important inquiry and that the task of law was to purposively mold law to achieve desirable consequences. *See generally* White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819 (1986); White, *From Sociological Jurisprudences to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 VA. L. REV. 999 (1972). Individualism's reliance on formalism is therefore compatible with its distaste for governmental assessment of consequences. What was at stake in the realist attack on formalism was not merely a dispute about methodology. It was a dispute about the legitimate capacity of government (including the courts) to act.

[261]It is apparent that substantial fact finding discretion exists in determining whether race or gender was or was not the cause of an employment decision under the disparate treatment theory. *See* Anderson v. City of Bessemer, 470 U.S. 564 (1985). Nevertheless, a concern with prejudiced use of race or gender exacerbates this problem.

[262]In particular, no claim is made here that affirmative action is unconstitutional.

f. Morality and the Incompetence of Government.—Individualism's distrust of the competence of collective decision will seem a hollow complaint to many. Given the reality of race and gender disparities in the distribution of employment and the reality of a history of overt discrimination that at least partially explains these disparities, it is difficult to credit a claim that we are not competent to conclude that this state of affairs is immoral. Individualism's moral relativism and skepticism concerning competence do not, however, compel this claim.

The point of individualism's moral relativism is not that current distributions are moral. Rather, the point is that we cannot decide that the means employed to correct these distributions are justified, given that these means require assessments of individual desert and require the coerced defeat of expectations or entitlements (as these are defined in the individualist universe).[263] Moreover, the point of skepticism about governmental competence is not merely that government should be neutral as between competing conceptions of the moral, but also that government is incompetent to devise an instrumental program to achieve even an agreed upon moral end. It is incompetent both in the sense that centrally designed means to achieve desired end-states do not produce such end-states and that such means intrude upon or deny values deemed crucial within individualist thought. This, indeed, is the thrust of individualist positions in the empirical debate over the question whether affirmative action "works." For the individualist, even one who agrees that it would be better if disparities in the distribution of employment along race and gender lines did not exist, affirmative action will not effectively change the current state of affairs and may well generate unintended and perverse consequences.[264] It is therefore

---

See Cox, *"Voluntary" Quotas, supra* note 6, at 155-70 (arguing that Congress may constitutionally impose affirmative action in employment). The claims, rather, are that affirmative action is incompatible with the individualism that underlies the disparate treatment prohibition and that individualism's distrust of government plausibly supports that prohibition. Individualism's moral relativism can as easily support a stance of judicial passivity at the constitutional level as a stance of judicial activism in overturning legislation. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[263]*See, e.g.*, T. Sowell, *supra* note 223, at 19-23, 67-71, 121-33.

[264]Some commentators have taken the view that affirmative action "works." *See, e.g.*, Freeman, *Black Economic Progress after 1964: Who Has Gained and Why*? in Studies in Labor Markets 247 (Rosen ed. 1981) (timing of black economic progress suggests civil rights legislation and affirmative action work); Leonard, *The Effectiveness of Equal Employment Opportunity Law and Affirmative Action Regulation*, 8 Res. in Lab. Econ., pt. B, 319 (1986) (affirmative action increases proportion of minorities in work forces of contractors subject to federal contract compliance program as compared to employers not so subject). Others take the view that it does not "work." *See, e.g.*, N. Glazer, *supra* note 6, at 70-76; T. Sowell, *supra* note 147, at 48-53; Butler &

not a viable answer to the individualist skepticism to claim that he defends an immoral distribution; he does not defend the morality of such a distribution.

3. Rejoinder.—The difficulty faced by the individualist critique of affirmative action is that the critique is predicated upon a view of the individual and of the limited competence of government that predates

---

HECKMAN, *The Government's Impact on the Labor Status of Black Americans: A Critical Review*, EQUAL RIGHTS AND INDUSTRIAL RELATIONS 235 (1977). *Cf.* Smith & Welch, *Affirmative Action in Labor Markets*, 2 J. LAB. ECON. 269 (1984) (increases in black employment and wages occurred prior to affirmative action); Kellough & Kay, *Affirmative Action in the Federal Bureaucracy*, 6 REV. OF PUB. PERS. ADMIN. 1 (1986) (affirmative action policy in federal employment had no appreciable effect on rate of increase in black employment). For some advocates of affirmative action, evidence of its failure is interpreted as a basis for expanding or intensifying the policy. *See, e.g.*, Huckle, *Whatever Happened to Affirmative Action? Employment of Women in the Los Angeles City Department of Water and Power, 1973-83*, 6 REV. OF PUB. PERS. ADMIN. 44 (1985); Richards, *The Declining Status of Women Revisited*, 19 SOC. FOCUS 315 (1986); Stasz, *Room at the Bottom*, 9 WORKING PAPERS, Jan.-Feb. 1982, at 28.

Disagreements on this question are in part attributable to disputes about empirical methodologies, but are more fundamentally about appropriate criteria for measuring success. In particular, the methodological issues entail (1) the problem of separating the effect of affirmative action in employment from the effects, for example, of improvement in the human capital investment of minorities and women (i.e., of separating effects of demand and supply), (2) the problem of measuring, not gross improvements but, rather, changes in the rate of improvement in relevant time periods, and (3) the problem of identifying relevant proxies for data collection (for example, proxies for the relevant time periods within which affirmative action can be said to be operative and widespread). The problem of appropriate criteria is illustrated by the tendency of advocates of the "affirmative action works" hypothesis to focus upon increases in the proportion of minorities in workforces and of advocates of the "it does not work" hypothesis to focus upon gross measures of minority economic progress (as in wage levels) and to focus upon the question of what subgroups within minority groups benefit from affirmative action.

The critical position is that affirmative action has either no effect or a detrimental effect upon improving the general economic condition of minorities and benefits only those subgroups who possess human capital investments that would enable them to effectively compete under a disparate treatment prohibition. *See, e.g.*, T. SOWELL, *supra* note 147, at 48-53. To the extent that affirmative action is justified on the basis of the moral claim that minority groups should not be consistently found to have a disproportionately smaller share of the economic pie, the relevant inquiry would seem to be whether affirmative action causes this share to increase. Nevertheless, a counterpoint is that, although improvements in human capital investment and growth of the economy are the primary and long-term means of increasing this share, affirmative action does impede declines in the share, at least during periods of general economic downturn. *See* Feinberg, *Are Affirmative Action and Economic Growth Alternative Paths to Racial Equality?* 50 AM. SOC. REV. 561 (1985). For a recent debate on the efficacy of antidiscrimination regulation generally, compare Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987) with Donohue, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987).

1937.[265] The strong version of the individual contemplated by individualist counterargument, despite rhetorical commitments to him, was rejected by the New Deal and has been repeatedly rejected since the New Deal, on grounds which, to some degree, accept the propositions that both individual attributes are subject to governmental valuation and that collective decision is a legitimate means of allocation and distribution.[266] Indeed, we are so pervasively confronted with governmental denials of the strong version of the individual in contexts not entailing race or gender that it is questionable that the strong version is a generally available construct in American jurisprudence.[267]

The impoverished individual may be the best means by which to reconcile a rhetorical commitment to individualism with post New Deal practice. It is perhaps only the particularly strong emphasis rhetorically placed on "meritocratic" individualism in the race and gender context since 1954 that warrants a claim that there exist expectations consistent with that rhetoric.[268] Apart, however, from the possibility that the impoverished individual is useful for reconciling rhetoric with practice, the fact that we honor the strong individual in the breach subjects reliance upon him in the present context to charges of hypocrisy (or worse).[269]

Nevertheless, there is a potential response to the problem of hypocrisy. If compromise theory is compatible with individualism as

---

[265]In 1937, the Supreme Court upheld the National Labor Relations Act of 1935 (codified as 29 U.S.C. § 151 (1982)), thus signaling an end to its resistence to the New Deal. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). It is also arguably the case that the strong form of individualist argument has never, in fact, been consistently adopted in American society. For example, apart from governmental intervention, university admission policies can be described as historically entailing "affirmative action" for white males. *See A Joint Resolution Proposing an Amendment to the Constitution of the United States Relating to Affirmative Action, 1981: Hearings on S.J. Res. 41 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 73-81 (1981) (statement of Martin Kilson).

[266]If evidence is needed for this proposition, it would seem inherent in both the claims of radical scholars that American law is beset by contradiction, and by the claims of libertarian scholars that American law is tainted by paternalism, utilitarianism and statism. *Compare* Kennedy, *Blackstone*, *supra* note 53 (radical position) *and* Kennedy, *Form and Substance*, *supra* note 50 *with* Epstein, Takings, *supra* note 247 (libertarian/utilitarian position). On the effect of the New Deal on American law generally, *see Symposium*, 92 Yale L.J. 1083 (1983).

[267]*See* Mashaw, *supra* note 176. *But cf.* Sunstein, *supra* note 29 (recounting surviving elements of individualism in constitutional law incompatible with post-New Deal thinking).

[268]Brown v. Board of Education, 347 U.S. 483 (1954).

[269]There is nevertheless an unfortunate tendency on the part of some to mistake genuine disagreement with incompatible, but nevertheless legitimate perspectives as evidence of evil. *See, e.g.*, Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327 (1986).

actually practiced (albeit not with individualist rhetoric), there remains the question whether the authoritative texts of law, and particularly in the present context, Title VII, have adopted rhetoric or general practice as the operating principle. At least within the assumptions of a compromise theory of affirmative action, a conclusion that Title VII enacts the strong version of the individual may count as a good reason for an exemption from general, post-New Deal practice. The question of Title VII's operating principle is however postponed until a second justification of group rights theory has been examined.[270]

C. *Pragmatic Bureaucratic Justice*

The second general justification of affirmative action is that it is inherent in, and perhaps an inevitable consequence of, enforcement of the disparate treatment theory of Title VII liability and is therefore again reconcilable with the individualist model.[271] Unlike the justification from fairness and the social good, this justification does not purport to ignore or devalue "meritocratic" considerations that would control allocation of employment in the absence of affirmative action and, therefore, purports to be a limited governmental intrusion into private allocation. It is recognized that these considerations may be ignored or devalued in individual cases as a consequence or by-product of effective enforcement of a theory intended to preserve them, but it is not part of the rationale that they be ignored or devalued. It should be apparent that Supreme Court doctrine that purports to limit the scope of permissible affirmative action, particularly by preserving employee qualifications requirements, is more compatible with this justification than the social good justification. The social good justification would authorize more direct and less limited versions of affirmative action. Whether the functional consequences of Supreme Court doctrine are compatible with this justification is, as shall be seen, problematic.

---

[270]*See infra* text accompanying notes 340-504.

[271]*See, e.g.*, Johnson v. Transportation Agency, 107 S. Ct. 1442, 1462-63 (1987) (O'Connor, J., concurring) (invoking remedial rationale for voluntary affirmative action of correcting past discrimination on part of employer); United Steelworkers v. Weber, 443 U.S. 193, 209-11 (1979) (Blackman, J., concurring) (arguable violation theory of voluntary affirmative action); Fiss, *supra* note 2, at 299-304 (disparate impact as functional disparate treatment); Rutherglenn, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297, 1305-11 (1987) (disparate impact theory is used to identify pretextual disparate treatment). *Cf.* P. Cox, note 12, at ¶ 7.06 (disparate impact theory is both a pretext theory and a theory eliminating criteria that perpetuate historical discrimination); Friedman, *supra* note 6, at 64 (Court's liability theories should be interpreted as prohibiting both overt discrimination and criteria that unfairly preclude access by individuals to employment).

The foundation of this second justification rests upon the claim that it is not possible to maintain a firm distinction between substantive allocation of employment proportionately among race and gender groups on the one hand and a restriction on the process of employment decisionmaking precluding use of race and gender as criteria on the other.[272] If this claim is correct, then the notion earlier advocated, that the disparate treatment theory is a mere process rule, cannot stand.[273]

There are two senses in which the claim may be made. First, the distinction between a governmentally enforced rule of process and a substantive rule of governmental allocation cannot be maintained because an effective rule of process inevitably compels substantive allocation given the limitations of adjudication.[274] If this is so, enforcement of disparate treatment theory inevitably compels affirmative action, meaning that affirmative action is not incompatible with the individualist premises of disparate treatment theory. Second, the distinction between a process of private decision in employment and substantive allocation by private action cannot be maintained either because these are inseparable or because inherent in the notion that race and gender may not be considered, is a requirement that they be considered.[275] If this is so, private internalization of the norms expressed by disparate treatment theory inevitably leads to affirmative action; again there is no incompatibility.

1. Overenforcement and Bureaucracy.—

a. The Argument.—The disparate treatment theory is easily applied where disparate treatment is express. It is applied with difficulty where the presence of disparate treatment must be inferred from circumstances. The difficulty is that a court must determine whether an employment action attributable to a number of potential motives was, in fact, "caused by" race or gender. Not only is the parsing of potential motivating causes an inherently tricky business, but the notion of a race or gender motivation is itself a slippery concept.[276]

Predictably, these difficulties have been "resolved" in the courts by means of redefining them within the procedural apparatus of adjudication. The issue of motive is to be determined as a finding of

---

[272]*See generally* Strauss, *supra* note 6.

[273]*See supra*, text accompanying notes 50-54.

[274]*See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1463 (1987) (O'Connor, J., concurring) (risk of liability under Title VII as justification for "voluntary" affirmative action).

[275]*See generally* Strauss, *supra* note 6.

[276]*See, e.g.*, Schnapper, *Two Categories of Discriminatory Intent*, 17 Harv. C.R.-C.L. L. Rev. 31 (1982); Wasserstrom, *supra* note 6, at 594-603.

fact,[277] and the parties to litigation are assigned burdens of production and persuasion regarding this issue of fact.[278] An allocation of burdens of production and of persuasion is simultaneously an allocation of costs of litigation and risks of judicial error in fact finding. To the extent these costs and risks are assigned to plaintiffs, the disparate treatment prohibition is underenforced.[279] To the extent they are instead assigned to defendants, the prohibition is overenforced.[280] A choice must therefore be made between under- and overenforcement.

One way of characterizing the Supreme Court's Title VII precedents is that the Court has sought both to have and eat its cake on the matter of this choice. Cases entailing individual disparate treatment claims are governed by a choice that underenforces the prohibition.[281] Cases entailing systematic disparate treatment and disparate impact claims are governed by a choice that overenforces the prohibition.[282] The incoherence of Title VII is, therefore, in part attributable to the Court's failure to make a clear choice and adhere to it.

To the extent that the adjudicative apparatus overenforces the disparate treatment theory, there is an inherent functional tendency to compel proportional allocation of employment among race and gender groups. As argued here earlier, such overenforcement alters the incentive structure of employers and renders group based allocations inevitable.[283] Affirmative action is in this sense a "natural" by-product of overenforcement of the disparate treatment theory.

The alternative, underenforcement of the disparate treatment theory, would avoid this result by imposing a heavy burden of proof to establish

---

[277]*See* Anderson v. City of Bessemer, 470 U.S. 564 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

[278]Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[279]It is underenforced both in the obvious sense that an allocation of the risk of nonpersuasion is an allocation of the risk of judicial error in detecting disparate treatment and in the sense that allocations of burdens of production and persuasion is an allocation of costs of litigation. The decision to proceed with litigation is rationally made on the basis of a calculation of the benefit of success discounted by the probability of failure and on the basis of a calculation of costs of litigation whether or not successful.

[280]It is overenforced both in the obvious sense that more conduct will be characterized as entailing disparate treatment than is, in fact, the case (due to allocation of the risk of judicial error) and in the sense that the higher probability of failure in litigation, in combination with the costs of litigation, will generate attempts at finding safe harbors from the threat of litigation, such as a racially balanced workforce.

[281]*See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

[282]*See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971). For an example of the "double whammy" generated by these theories, see Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

[283]*See supra* text accompanying notes 58-78, 113-64.

illicit motivation on plaintiffs. For example, statistical disparities in representation rates could be made an inadequate basis for a plaintiff's *prima facie* case unless all race neutral qualifications requirements are taken into account.[284] The impact theory could be overruled so that neutral requirements would be challengeable only upon a proof of pretextual use of such requirements.[285]

Underenforcement would result if either of two factual assumptions are made. If overt race and gender prejudice remains an extant and pervasive phenomenon, difficulties of proof would limit the capacity of disparate treatment theory to overcome this phenomenon even though the theory is conceptually designed precisely to attack it. Alternatively, difficulties of proof would leave untouched "subtle" forms of racism or sexism. For example, an employer's failure to actively recruit minorities or women, motivated not by overt prejudice but by "selective indifference,"[286] or even by a simple reluctance to incur information costs,[287] would be extremely difficult, if not impossible, to reach under a strict version of the disparate treatment theory. In short, a requirement that plaintiffs prove illicit employer motive would leave much of the practice of disparate treatment untouched. The disparate impact and systematic disparate treatment theories are, therefore, explicable as devices designed to overcome this dilemma.

Supreme Court opinions that appear to invoke group rights theories may be viewed as instances of overenforcement of disparate treatment theory. For example, *Griggs v. Duke Power Co.*,[288] the case in which the Supreme Court adopted disparate impact theory, is widely known for the proposition that employer motive is irrelevant if a race neutral employment criterion has a disparate adverse effect on a protected racial group and is not justified by business necessity. However, *Griggs* is explicable as a case in which the employer utilized education and testing requirements as a pretext for racial exclusion. The difficulties inherent in proof of pretext arguably led the Court to ease the burden on plaintiffs by shifting the burden to employers to establish the absence of pretextual use through the rubric of "business necessity."[289]

---

[284]*See, e.g.*, T. Sowell, *supra* note 147, at 53-56.

[285]*See, e.g.*, Gold, *supra* note 76, at 593-98.

[286]*See* Brest, *supra* note 116, at 14-15, 31-37; Schnapper, *supra* note 276.

[287]The use of race or gender as a proxy for information about potential employees would clearly constitute disparate treatment. A failure, however, to actively seek minority applicants, at least absent evidence of active efforts to recruit majority group applicants, may not.

[288]401 U.S. 424 (1971).

[289]*See* Rutherglenn, *supra* note 271, at 1299-1316. In *Griggs*, the employer had replaced a system of overt disparate treatment with education and testing requirements that had

Privately adopted affirmative action plans may be similarly characterized. At least so long as such plans utilize the rhetoric of "goals" and "timetables" as their operating characteristics, they may be viewed as mere monitoring devices through which employers control the discretion of officials engaged in employee selection.[290] They, therefore, are arguably designed to preclude as well as to "remedy" disparate treatment. Indeed, the remedial rationale, on this understanding, should be understood not as a reference to retrospective relief for past harm but, rather, as a reference to a benchmark for continuous assessment of the risk of disparate treatment.[291] The Supreme Court's tendency to uphold affirmative action plans may be characterized as recognizing this monitoring function.

b. A Counterargument.—There are two crucial aspects of these characterizations: they contemplate a particularized judgment within the circumstances of a single case and this judgment is retrospective in the sense that it concerns the risk of occurrence of disparate treatment on a series of historical occasions (a series of past employment decisions). It is true that this judgment is not as particularized, circumstances-dependent, or historical in form as the judgment required in "finding" illicit motive within a strict application of disparate treatment theory. However, the judgment remains particularized, circumstances-dependent, and historical in the sense that the analytical focus upon group measures of employee selection is a mere device for ensuring sensitivity to the risk of disparate treatment, requiring a careful examination of circumstances to determine whether that risk was realized.[292] Even a monitoring conception of affirmative action displays

---

a disparate exclusionary effect on blacks. 401 U.S., at 426-28. Moreover, the requirements in question measured qualities facially irrelevant to the jobs in question. In short, and despite the Court's rhetoric in *Griggs*, the combination of circumstances suggested disparate treatment. In general, the combination of a substantial disparity in effect and facial irrelevancy of the neutral criteria generating this effect raise an inference of pretextual use of the criteria. *See* Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring).

[290]*See* Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 496 (1986) (O'Connor, J., dissenting in part) (distinguishing goals from quotas); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 289 (1986) (O'Connor, J., concurring) (affirmative action justified if adopted as a remedy for government employer's past discrimination); Johnson v. Transportation Agency, 107 S. Ct. 1442, 1463 (1987) (O'Connor, J., dissenting) (affirmative action justified to remedy work force imbalance which is sufficient to establish a *prima facia* case of systematic disparate treatment).

[291]*See, e.g.*, Jencks, *Affirmative Action for Blacks: Past, Present and Future*, 28 Am. Behavioral Scientist 731, 753-59 (1985).

[292]This is also arguably true where affirmative action takes the form of a "flexible goal" rather than a "rigid quota." *See Johnson*, 107 S. Ct. at 1447 (gender as "a factor" used as a benchmark to ensure inclusion of women).

these characteristics: failure to achieve a "goal" generates inquiry into the reasons for this failure, arguably for the purpose merely of ensuring that race and gender played no illicit role in producing the failure.

Nevertheless, there is a further dimension to the overenforcement explanation that renders it a problematic means of reconciling individualist values. Overenforcement of the disparate treatment theory occurs within a social context increasingly bureaucratized, both within governmental and private aspects of American culture.[293] The features of this bureaucratization include (1) an emphasis upon purposes or goals, (2) an emphasis upon planning to achieve these goals, (3) an emphasis upon control of bureaucratic activity in service of the goals and, therefore, upon quantified measurement of progress in achieving them, and (4) that the purposes and goals agenda of the organization, at least where the organization is governmental, are rationalized in terms of social welfare and distributional fairness.[294] These features combine to ensure non-particularized bureaucratic judgment intolerant of circumstance and ahistorical in emphasis.[295] A purely bureaucratic activity is inherently antagonistic to individualistic notions of "due

---

[293]"Bureaucracy" can be understood to mean (1) a particular institutional arrangement, characterized, for example, by rule-governed behavior, specialized expertise, rational planning, etc.; (2) the general phenomenon of a shift from private to public ordering (or of "reactive" law to "activist" law; *see generally* B. Ackerman, Reconstructing American Law (1984)); (3) a historical tendency to shift from the model of tripartite government (executive, legislative, judicial) with distinct functions to the administrative state (in which these functions are combined, perhaps through centralization); or (4) some combination of these. For present purposes, the term is used primarily to refer to the second of these possibilities, but all of the first three are elements of the phenomenon.

To this definition must be added the following caveats. First, bureaucratization does not require a wholly centralized administrative state; there can be bureaucracy in senses (1) and (2) even where there are a series of horizontal bureaucratic institutions. Second, bureaucratization does not necessarily imply that bureaucratic behavior is wholly rule governed in a Weberian sense. A central aspect of experience with the American administrative state is bureaucratic discretion, in multiple senses of the term discretion. *See, e.g.*, Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L. J. 1487 (1983); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975).

Third, bureaucracy is not confined to institutions labeled either administrative agencies or bureaucracies. Indeed, it is possible to so characterize courts, at least in sense (1) and possibly in senses (2) and (3), despite the mediating or limiting role sometimes ascribed to them in administrative law theories. *Cf.* Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L. J. 1442, 1461-63 (1983) (advocating a role for courts that implies a continuous and perhaps centralized exercise of "collective power" over "social life").

[294]*See, e.g.*, Macneil, *supra* note 166, at 903-09.

[295]*See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1466-68 (1987) (Scalia, J., dissenting) (flexible goal in fact operates as rigid quota); Mashaw, *supra* note 176, at 1150-59.

process" because such notions assume both a need for individuated judgment about particular circumstances and the premise that individual rights are at stake. Bureaucracy assumes, instead, a need for rules in service, not of individual rights, but of the policy or welfare objectives of the bureaucratic organization.[296] This is the reason that the essentially individualist character of American political rhetoric has produced due process obstacles to bureaucratic activity and a resulting tension between the mores of process and a bureaucratic culture.[297] It is also the reason that bureaucratic organizations are justified, not in terms of a need to correct past wrongs, but as mechanisms for achieving particular desired end-states.[298]

The bureaucratic environment in which overenforcement operates is not merely governmentally bureaucratic; it is "privately" bureaucratic as well.[299] Employers subjected to overenforcement theories of liability are not typically sole proprietors; they are complex bureaucracies, often in corporate form, that share the general features of governmental bureaucracy and are highly interconnected with formal governmental bureaucracy. The consequence is that overenforcement of disparate treatment theory encounters and is transformed by bureaucratic dynamics. In particular, particularized and circumstance-dependent judg-

---

[296]The tension between the perception of a need for individuated judgment on the one hand and the perception of a need for general categorization responsive to bureaucratic objectives on the other is illustrated by irrebutable presumption doctrines. *Compare* United States Dep't of Agric. v. Murry, 413 U.S. 508 (1973) (irrebutable presumption impermissible) *with* Weinberger v. Salfi, 422 U.S. 749 (1975) (irrebutable presumption permissible). The argument that "rights" in an administrative state are not individual, but are instead responsive to the needs of bureaucratic organization and its policy agenda is made by Professor Mashaw. *See* Mashaw, *supra* note 176.

These tensions are evident in individualist theory as well. On one hand, individualists favor general and relatively certain rules; on the other, they exhibit a distaste for governmental categorizations of persons that fail to account for the distinctness of persons and circumstances. The tension in individualism is perhaps partially resolved by noting that the general rules favored by individualists are of a certain character—those subject to characterization as rules of process and those expressive of a regime of corrective justice. *See supra* text accompanying notes 49-54. The difficulty with the general rules yielded by bureaucracy in an administrative state, from this perspective, is that they are often designed to effect an agenda of distributive justice. *See* Mashaw, *supra* note 176, at 1153-59.

The tensions are also reflected in critical perspectives by the assertions that bureaucracy is caught between claims that it must be both objective and subjective and that no plausible distinction between objectivity and subjectivity may be maintained. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1286-92 (1984).

[297]Macneil, *supra* note 166, at 909-13.

[298]*See, e.g.*, B. SCHWARTZ, ADMINISTRATIVE LAW 9-10 (2d ed. 1984) (justifying legislative powers of agencies).

[299]Macneil, *supra* note 166, at 904.

ment is displaced by a bureaucratic dynamic that measures success in terms of simplistic, objective and quantifiable criteria.

The most clear cut illustration of this phenomenon, and of the distinction between particularized and non-particularized versions of overenforcement theory, is the debate over characterization of affirmative action as entailing "quotas" or "goals and timetables."[300] A "strict quota" is said to be a mandatory requirement that a particular minority representation rate be achieved. A "goal" is said to be a mere benchmark for measuring progress in achieving such a representation rate, requiring merely "good faith efforts."[301] The "goal" understanding assumes particularized and circumstance-dependent judgments both within the bureaucratic organization seeking achievement of the "goal" in its employee selection decisions and within the bureaucratic organization reviewing compliance with the "good faith effort" test. A "quota" understanding assumes a requirement that the bureaucratic organization subject to it achieve quantifiable objectives through control of its selection decisions without regard to circumstance.

To the extent that organizations subject to a "goals" understanding and organizations charged with enforcing a "goals" understanding are characterized by the noted bureaucratic dynamic, there is an inevitable tendency for the "goals" understanding to become, functionally, a quota understanding, despite the dominant rhetoric of "goals" and "good faith effort."[302] The debate over proper characterization is more than semantic, it reflects the tension between rhetoric and the bureaucratic dynamic that implements this rhetoric.

The courts are not immune from the phenomenon of bureaucratization. Overenforcement theory itself illustrates this point, as it is in a sense designed to more efficiently achieve the objective of prohibiting

---

[300]The debate has been most intense in the context of the enforcement program under Executive Order 11246. The regulations implementing that order purport to adopt a goals and timetables position. 41 C.F.R. § 60-2.12 (1987). However, the debate has also occurred in the Title VII context. *Compare* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1455 (1987) (majority opinion) *with id.* at 1466-68 (Scalia, J., dissenting).

[301]*See* Legal Aid Soc. v. Brennan, 608 F.2d 1319, 1343 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

[302]For example, the Office of Federal Contract Compliance Programs once adopted an enforcement strategy in its field operations that invoked a quota system while simultaneously maintaining the rhetoric of goals and timetables in its regulations. *See* Firestone Synthetic Rubber & Latex Co. v. Marshall, 507 F. Supp. 1330 (E.D. Tex. 1981). This practice has been formally stopped, OFCCP Order No. 660a(2) (March 1, 1983), but it is not clear whether it has been stopped in practice. The "quota" perception of some industries subject to the practice is recounted in *Hearing on Affirmative Action and Federal Contract Compliance Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong. 1st Sess. 151-217 (Nov. 7, 1985).

disparate treatment by reducing proof costs through overinclusive coverage. If disparate impact theory was originally intended merely as a means of identifying disparate treatment, then disparate effect and absence of business necessity could be characterized as mere means of inferring illicit motive while requiring particularized judgments under the circumstances of individual cases. Nevertheless, the tendency of both private bureaucracies subjected to judicial inquiry within this analysis and the judicial bureaucracies engaged in the analysis has been to become impatient with it. Although "business necessity" is a potentially open-ended and fact-dependent standard, it has taken the form, under administrative agency guidelines and under some judicial decisions, of expert analysis, largely dependent upon measures of statistical correlation, of the relevance of job criteria to job performance, a development in keeping with expertise as a rationale for bureaucratic decisionmaking.[303] The inherent difficulty of gathering adequate data to account for racial disparities in representation rates has meant that allocation of the burden of production of evidence is outcome-determinative and therefore a means of avoiding particularized judgment.[304]

Both disparate impact and systematic disparate treatment theories are systematic and prospective in focus and effect; they are as much means of administering employment systems through a prospective threat of liability as means of making after-the-fact judgments about particular conduct on particular occasions. Moreover, even where Title VII doctrines are applied by courts in a particularized fashion, they yield functionally rigid rules when confronted by private and public bureaucracies subjected to them. As particularized judicial judgment is not predictable *ex ante*,[305] and as bureaucratic organizations prefer predictability to uncertainty in the norms governing their behavior, implicit functional rules and safe harbors from exposure to liability will be sought in the interstices of Title VII doctrine. The Supreme Court has, in effect, supplied these rules and safe harbors in its voluntary affirmative action cases.[306]

---

[303]*See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 (1987). *But see* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Washington v. Davis, 426 U.S. 229 (1976).

[304]*Compare* Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983) (plaintiff must account for qualifications) *with* Davis v. Califano, 613 F.2d 957, 964 (D.C. Cir. 1979) (plaintiff need account only for minimum qualifications). *Cf.* Bazemore v. Friday, 106 S. Ct. 3000 (1986) (regression equation containing fewer than all relevant variables can establish a prima facie case).

[305]*See* Johnson v. Transportation Agency, 107 S. Ct. at 1466-69 (Scalia, J., dissenting) (flexible goal characterized as in fact a rigid quota).

[306]*See supra* text accompanying notes 134-48.

In short, the juxtaposition of an overenforcement explanation with bureaucratic dynamic threatens the overenforcement explanation. Even if voluntary affirmative action is a mere by-product of effective enforcement of the disparate treatment prohibition, it is also a rational bureaucratic response to that enforcement. It permits construction of an identifiable, objective goal (proportional representation), planning to achieve that goal, and control of employee selection through objective measurement of progress in achieving the goal. But the bureaucratization of overenforcement thus transforms the very character of overenforcement. It permits the conclusion that overenforcement of disparate treatment theory has become a group rights theory, despite the individualist rhetoric that may be invoked to justify it. Indeed, given a policy of overenforcement and the bureaucratic character of current social organization, a functional group rights theory would appear to be inevitable.

If this understanding of the adjudicative process through which Title VII has been implemented is correct, it may nevertheless be argued that the individualist and group rights models are reconcilable because the sharp conceptual distinction between them is inoperative in practice. At least so long as overenforcement is deemed necessary as a strategy of social control and social organization is characterized by bureaucratic dynamic, the individualist model flows into the group rights model— the models are operationally indistinct. Any given case, and any given instance of judicial analysis of a case, is merely an application of one or the other model.

There is, however, a sense in which this reconciliation is implausible; it assumes the necessity of an active and intensive governmental role in enforcing disparate treatment theory and sacrifices the basic individualist distrust of centralized collective decision for the individualist conclusion that race and gender should be inalienable.[307] To the extent that individualist distrust is thought primary and its conclusion secondary, an overenforcement rationale is no reconciliation.

Even if the necessity of overenforcement is conceded, it is not necessarily the case that the individualist and group rights alternatives are so wholly indistinct in practice that no meaningful conceptual distinction can be made between them. Moreover, it remains possible that the conceptual distinctions between the models will influence judicial decision at the margin and that the body of judicial precedent can be viably placed at a point in the functional spectrum lying between the conceptual models. This, indeed, will be the ultimate point of the next subsection of this article: despite the bureaucratic dynamics of

---

[307]*See supra* text accompanying notes 231-36.

overenforcement, there remain important distinctions between the individualist and group rights models that produce real world differences in consequences.

For present purposes, the claim that conceptual distinction may be meaningfully made is illustrated by attempting to refute an argument from the equivalence of overt discrimination and discriminatory effect. The argument proceeds as follows: (1) overt race and gender classifications are suspect because of the risks that are created from prejudice;[308] (2) race and gender neutral criteria that have disproportionate race or gender effects are also suspect because they, too, may have been adopted from prejudice;[309] (3) indeed, the risk of prejudice is a function of the (foreseeable) effects of a measure, not of its explicit language[310] because, if decisionmakers are prejudiced they will be concerned with effects, not with the language of the classification that produces these effects;[311] (4) because the primary concern is with effects of classifications due to the risk of prejudice, there is no clear distinction between disparate treatment theory and affirmative action—both are concerned with the same problem.[312]

One difficulty with this argument is its assumption that concern with prejudice, narrowly defined, exhausts the meaning and scope of the disparate treatment prohibition.[313] Nevertheless, let that assumption be entertained. Notice that the argument nicely tracks bureaucratic dynamic; effects are observable and, therefore, directly and rationally treatable phenomena from a bureaucratic perspective. The argument also is a variation on the general theme that process of decision and substantive allocation are indistinguishable; the risk of prejudice is collapsed into a concern for effects. Nevertheless, there is a fatal flaw in the argument in its step (3) that invalidates its conclusion at step (4).

---

[308]Strauss, *supra* note 6, at 118-21.

[309]*Id.* at 121.

[310]*Id.*

[311]*Id.*

[312]*Id.* at 122-26. To some extent, this argument appears to rely on the notion of selective indifference: if a decision maker undervalues minority interests in adopting a race-neutral criterion, and if we are concerned about this valuation, we are concerned with its effects. *Id.* at 123-24. We are concerned, however, with effects only if we postulate some criterion of proper valuation and seek to measure effects against this criterion. We can instead be concerned with illicit motive, so that the problem of selective indifference is not undervaluation but, rather, the *selectivity* of valuation. In the latter case, we are concerned with effects as evidence of selectivity, not with effects as such. The difficulty is in assessing the strength of the inference of selectivity from disparate effects, but this does not establish, except by reference to a bureaucratic ethic, the primacy of effects.

[313]*See supra* text accompanying notes 231-36.

While it is certainly the case that a decisionmaker may adopt a neutral classification for the purpose of generating adverse effects on a given race or gender group (either in the sense that he desires to bring about harm or is selectively indifferent to the harm generated) and that decisionmakers are generally concerned with bringing about their desired effects from the language they employ, it is not true that our concern with prejudice is a concern with effects. If we are concerned about prejudice, our concern with effects is derivative; it is a concern with evidence of prejudice. This is of course not to say that the distinction between a concern with prejudice and a concern with effects is not difficult to maintain where the evidentiary weight assigned effects is substantial, but this difficulty does not establish the absence of a conceptual distinction or the proposition that the conceptual distinctions will not influence judicial decision.[314] Still less does it reconcile affirmative action and individualist ideals. Indeed, if individualist ideals are taken as primary, it suggests instead that the evidentiary weight assigned effects is problematic.

2. *Process Rules and Substantive Allocation Rules.—*

a. The Argument.—At an earlier point in this article it was claimed that the disparate treatment theory is a rule of process and group rights theories are rules of substantive allocation.[315] A disparate treatment theory is a rule of process in the sense that it precludes consideration of race or gender status in a private exchange, but does not purport otherwise to compel allocation of an employment opportunity through that exchange. There is of course a sense in which this characterization is clearly false: the disparate treatment theory is neither value free nor a mere means or structure for facilitating private exchange. Indeed, the theory precludes some forms of private exchange on the basis of a collectively determined morality; race and gender are rendered inalienable by it.[316]

---

[314]Indeed, the conceptual distinction between motive and effect clearly does make a difference. *See* Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979).

[315]*See supra* text accompanying notes 50-54.

[316]*See supra* text accompanying notes 33-35. This may be true of all purportedly value neutral process rules. *See, e.g.*, Kennedy, *Form and Substance*, *supra* note 50. For example, paradigmatic process rules, contract doctrines, are expressions of substantive societal values. *See generally* I. Macneil, The New Social Contract: An Inquiry into Modern Contractual Relations (1980). The presence of the sovereign both as an enforcer and intervenor in the process of private exchange alters allocation. Moreover, the process rules of contract may be so subject to distinct conceptualizations, founded on distinct systems of values, that their meaning becomes largely a function of the conceptual system of the person manipulating them. *See* Macneil, *Values in Contract: Internal and External*, 78 Nw. U. L. Rev. 340 (1983).

There is a further sense in which the distinction may be challenged. It is possible to claim that the process by which an employer makes an allocation of employment is inseparable from the allocation itself. If process and allocation are inseparable, an affirmative action constraint on allocation may be so like a disparate treatment constraint on process that the individualist model need not be reconciled with the group rights model—they are themselves inseparable.

The premise of this argument is that race and gender have a unique and peculiar status under the disparate treatment theory similar to their unique and peculiar status under group rights theories. Prohibiting only consideration of race or gender, and not consideration of other and different aspects of persons, focuses attention on race and gender.[317] Disparate treatment theory renders race and gender visible even while purporting to enforce a race and gender blindness ideal. Consider the decisionmaking process of an employer choosing among applicants for a scarce employment opportunity. It is unlikely that the employer would take eye color into account in selecting between applicants of relatively equal qualifications because there is no social practice or legal compulsion that would make such a basis for decision plausible.[318] There is, however, a legal compulsion that the employer not take race or gender into account where the disparate treatment theory is operative. That prohibition emphasizes race and gender status even for an unprejudiced employer, an employer who would not otherwise view race or gender as plausible bases for decision. The employer, aware of this emphasis, must necessarily ask himself, if he is acting in compliance with the prohibition, whether his inclinations in the matter of employee selection are tainted by race or gender.

This tendency of the disparate treatment theory to force self-examination is exacerbated by governmental overenforcement of the theory. The employer is necessarily aware of the fact that the allocation he makes is evidence. If we add to this mix the fact of our collective historical experience with race and gender, an experience shared by the employer, it seems clear that race and gender will be considered in the process of decision *precisely because* it is not supposed to be considered. This is not merely a temptation; it is inherent in the decisionmaking process of the employer acting in good faith where we attribute either a reasonable degree of introspection or a rational calculation regarding the risk of liability to that employer.

In short, the distinction between process of decision and allocation of employment breaks down, at least at the margin, where differences

---

[317]*See* Strauss, *supra* note 6, at 100-13; Wasserstrom, *supra* note 6, at 586-87.
[318]Wasserstrom, *supra* note 6, at 586-87.

between visible employee qualifications are minimal or unimportant. Affirmative action "goals" in allocation of employment are inherently a part of the process of decision even where informally and unconsciously formulated.[319]

b. A Counterargument.—Nevertheless, there is a question about just how far this explanation of an employer's decisionmaking process may be pushed. It is a plausible explanation of that process where allocation decisions at the margin are assumed; it is not plausible if unequal qualifications are assumed. Race and gender, absent a governmentally enforced group rights theory, need not be considered by an employer where a candidate's seniority, education or work experience are superior.[320] *Johnson v. Transportation Agency,*[321] can be viewed as consistent with this distinction. Its emphasis on employee qualifications suggests that the Court recognized the inevitability of affirmative action at the margin but was unprepared to authorize it where qualifications are unequal.[322] If some set of minimum qualifications could be identified and predictably utilized without threat of liability, the form of affirmative action validated in *Johnson* would resemble the form implicated by introspection and rational calculation.

The obvious difficulty with this interpretation is that *Johnson* cannot be properly viewed in isolation. As qualification requirements are subjected to theories of liability that compel their assessment in terms of allocation of employment among race and gender groups, it cannot be said that *Johnson's* authorization is limited to the margin.[323] What renders race and gender visible in contexts in which employee qualifications are unequal is a governmental policy of forced devaluation of qualifications. Moreover, an "at the margin" interpretation of *Johnson*, when *Johnson* is read in conjunction with other of the Supreme Court's affirmative action precedent, is problematic because the interpretation best characterizes only the position of some of the Justices, most particularly that of Justice O'Connor.[324]

---

[319]*Cf.* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1463 (1987) (O'Connor, J., concurring) (use of gender as a factor is prospective means of ensuring non-discriminatory selection). *But cf.* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 378-79 (1978) (Brennan, J., dissenting) (arguing that formal quota and use of race as an additional factor in decisionmaking are constitutionally indistinguishable).

[320]*Cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring) (objective employment criteria are a means of precluding disparate treatment).

[321]107 S. Ct. 1442 (1987).

[322]*See supra* text accompanying notes 134-48.

[323]*See supra* text accompanying notes 149-53.

[324]*See, e.g.*, *Johnson*, 107 S. Ct. at 1462-63 (O'Connor, J., concurring); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 489-99 (1986) (O'Connor, J., concurring and dissenting); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 289-93 (1986) (O'Connor, J., concurring in part).

According to these Justices, affirmative action is not justified as a means of remedying "societal discrimination" and is not justified merely as a means of ensuring proportional representation of minorities or women.[325] It is justified, instead, by overenforcement theory and bureaucratic dynamic. In particular, it is justified by past discrimination on the part of the employer adopting or subjected to an affirmative action plan[326] and as a flexible goal designed as a monitoring mechanism to ensure that such discrimination is not repeated.[327] Other Justices are quite straight-forward in accepting a quite distinct rationale. Affirmative action, for them, is justified by societal discrimination or by the objective of proportional allocation so long as the particular plan in issue permits a proportional share for whites and males as well.[328] The fact that these rationales are distinct and yield different votes in marginal cases[329] is evidence that there is a viable conceptual distinction between a process of employment decision theory of antidiscrimination policy and a substantive allocation theory of antidiscrimination policy.[330] The fact that the rationales are often combined to produce working majorities favoring affirmative action is evidence that the former very often flows into the latter—that sharp conceptual distinctions between the two break down in practice.[331]

There is a further and more fundamental difficulty with any claim that the Court's doctrines constitute a mere recognition of the inevitable dynamics of disparate treatment theory and are therefore compatible with the individualist model. It is the difficulty of the Kuhnian paradigm shift.[332] The premise of a paradigm shift is that rhetoric matters: the structure of thought and value through which we perceive the "reality" of our world defines the content of that reality because there are no "facts," untainted by the structure of perception, capable of ascertainment. The rhetoric of a process conception of the antidiscrimination principle may be viewed as such a structure of thought and value, a

---

[325] *See Wygant*, 476 U.S. at 274-76 (Burger, C.J., Powell and Rehnquist, J.J.); *id.* at 288 (O'Connor, J., concurring in part); *Johnson*, 107 S. Ct. at 1462-63 (O'Connor, J., concurring in judgment).

[326] *See Wygant*, 476 U.S. at 274 (Burger, C.J., Powell & Rehnquist, J.J.); *id.* at 289 (O'Connor, J. concurring in part).

[327] *See id.* at 290 (O'Connor, J., concurring in part); *Local 28*, 478 U.S. at 495-96 (O'Connor, J., concurring and dissenting).

[328] *See Wygant*, 476 U.S. at 309-10 (Brennan, Marshall & Blackmun, J.J., dissenting); *id.* at 316-17 (Stevens, J., dissenting); *Johnson*, 107 S. Ct. at 1456-57 (Brennan, Marshall, Blackmun, Powell & Stevens, J.J.); *id.* at 1458-60 (Stevens, J., concurring).

[329] *See, e.g.*, *Local 28*, 478 U.S. at 421; *Wygant*, 476 U.S. at 427.

[330] *See supra* text accompanying notes 307-14.

[331] *See supra* text accompanying notes 292-312.

[332] *See generally* T. Kuhn, *supra* note 29.

Kuhnian paradigm. So, too, may the rhetoric of a substantive distribution (equal effects or results) conception of that principle. The judicial rhetoric of compromise reconciles these conceptions, as by emphasizing employee qualifications as a constraint upon affirmative action. Judicial rhetoric nevertheless both generates, functionally, a group right to proportional distribution and expressly recognizes and condones race and gender preferences. Both the datum of the functional group right and the express condonation fundamentally undermine the process paradigm; it no longer works as a plausible structure for modeling and, therefore, for perceiving legal "reality."

An example may clarify this point. Recall that disparities in the substantive distribution of employment among race and gender groups is evidence of disparate treatment under an overenforcement version of disparate treatment theory, the "systematic" discrimination theory.[333] As a conceptual matter, the characterization of a disparity between the black representation rate in a labor pool and the black representation rate in a workforce as mere evidence is compatible with the process paradigm because the employer is free to explain the disparity as attributable to a factor, such as employee qualifications, not accounted for in calculating the disparity.[334] This compatibility hypothesis is, however, undermined if it is recognized both that the employer's explanation is subject to judicial assessment under criteria of relevance and necessity and that the employer may escape this assessment through a conscious effort to eliminate the disparity.[335] The process paradigm no longer quite fits as a description of the phenomenon of systematic discrimination litigation. The *rationale* for the theory of liability fits the process paradigm because an overenforcement strategy is instrumentally compatible with that paradigm, but the functional implications of the theory fit a substantive distribution paradigm.[336]

Nevertheless, the paradigm from which decisionmakers perceive such litigation strongly influences, perhaps compels, its functional implications. If the decisionmaker has internalized the rhetoric of the process paradigm, emphasis will be placed on the notion that a disparity is "mere evidence," and assessment of an employer's explanation of the disparity will be in terms of the credibility of that explanation.[337] If

---

[333]*See supra* text accompanying notes 73-76.

[334]*See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

[335]*See supra* text accompanying notes 71-78.

[336]This is the reason that justices with quite distinct rationales for affirmative action very often combine to form Supreme Court majorities upholding it. *See* Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

[337]*See* Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*,

the decisionmaker has instead internalized the rhetoric of the distribution paradigm, the notion of discrimination and disparity will be equated and an employer's explanation of the disparity will be in terms of whether it is truly "necessary."[338] In short, the paradigm influences both the results reached and the long-term function of the theory of liability.

What the Supreme Court's affirmative action decisions add to this mix is express recognition that race and gender based distribution is permissible. Even if this permission is explicable as an acknowledgment of the tendencies of overenforcement or of the inevitability of consideration of race and gender, it implicates the distribution paradigm. The effect is that the normative perspectives of the judges who administer the law of employment discrimination and of the participants in the employment process whose incentives are molded by that law are influenced in the direction of the distribution paradigm. If it is correct that the Court's conclusion produces a partial paradigm shift, the new paradigm, a distribution paradigm, matters. It generates the shifts in emphasis and character of analysis that change results in cases and in long-term function. In particular, it moves a bureaucratic overenforcement rationale for Title VII doctrine in the direction of policy of redistribution of employment among groups. The pragmatic bureaucratic justice justification of affirmative action tends to collapse into the social welfare justification of affirmative action.[339]

D. *Summary*

This section has postulated three versions of group rights theory: communitarian theory, distributive equality theory and compromise theory. It has claimed that Supreme Court rhetoric best fits compromise theory. As compromise theory purports to reconcile individualist ideals with a policy of group based allocation of employment, the section explored two lines of justification for group based allocation with a view to questioning this reconciliation. The justifications examined were,

---

455 U.S. 1021 (1982); Gillespie v. Wisconsin, 771 F.2d 1035 (7th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986).

[338] *See* Gilbert v. City of Little Rock, 799 F.2d 1210 (8th Cir. 1986); Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981).

[339] *Cf.* Mashaw, *supra* note 176 (treating rights in the administrative state as "statist" in the sense that they are dependent upon governmental definition of public welfare and the dynamics of the administrative apparatus); Rabin, *Legitimacy, Discretion, and the Concept of Rights*, 92 Yale L. J. 1174 (1983) (traditional notion of individual rights has in effect been abandoned in favor of an administrative process for reconciling collective interests).

first, that social welfare requires affirmative action and no individual right is defeated by that requirement and, second, that affirmative action is implicit in enforcement of the individualist conception of the antidiscrimination principle.

Seven conclusions have been reached: (1) the social welfare justification can be reconciled with the individualist ideal only by rendering the ideal meaningless. (2) Nevertheless, the individualist ideal, although real as a matter of rhetorical commitment, may plausibly be described as empty as a matter of actual practice. Adherence to the individualist ideal in the context of race and gender requires justification. (3) Such a justification may be found in Title VII if Title VII can be said to authoritatively adopt the individualist ideal. (4) Overenforcement of disparate treatment theory and the bureaucratic environment within which enforcement operates tend to compel affirmative action, so a compromise version of group rights may be explained as an inevitable or natural byproduct of enforcing the individualist ideal. Nevertheless, there are important conceptual distinctions between disparate treatment, disparate impact and affirmative action that generate meaningful differences in the understanding of antidiscrimination law adopted by enforcement authorities. (5) Race and gender consciousness is implicit in the disparate treatment prohibition and this consciousness renders affirmative action implicit in the prohibition at the margin. However, this implication is confined to marginal cases; it is compelled generally only where group rights theory is authoritatively adopted as general principle. (6) If race or gender imbalance, as such, is authoritatively viewed as a justification for remedial measures, the adoption of such a view itself restructures thought and action. A bureaucratic overenforcement rationale then tends to collapse into a redistribution of employment for purposes of social welfare rationale. (7) As the Supreme Court's most recent pronouncements treat imbalance as a justification for affirmative action, the Court may have adopted a fair distribution of employment, rather than process or bureaucratic overenforcement paradigm for its version of Title VII.

IV. The Statute and Its Interpretation

The Supreme Court has consistently proclaimed that both the disparate impact theory and its treatment of affirmative action are compelled or at least compatible, with Title VII.[340] The implication of these proclamations is, then, that a compromise theory of group rights is

---

[340] *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

supported by the statute. A number of commentators have so argued.[341]

Neither the proclamation nor the implication are supportable by reference to traditional theories of statutory interpretation. This, of course, is a bold claim. Paradoxically, it is a claim supportable by reference both to the concessions of some commentators who advocate group rights theories[342] and to the concessions of five Justices of the Supreme Court, three of whom nevertheless support the Court's interpretation.[343] Indeed, it appears generally conceded that neither the language of Title VII nor the understanding of the Congress that enacted it would support an overt governmental policy of compelling a redistribution of employment to ensure proportion among race and gender groups.[344] If the analysis of this article is correct, there is nevertheless a group rights regime in place promulgated on the authority of the statute. Although this version may be explained in terms of bureaucratic overenforcement of disparate treatment theory, the Supreme Court's most recent affirmative action decisions have moved the doctrine in the direction of proportional distribution of employment among race and gender groups. If this state of affairs is to be explained, it must

---

[341]*See, e.g.*, Blumrosen, *supra* note 160.

[342]*See, e.g.*, Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After* Brown v. Board of Education, 41 U. Chi. L. Rev. 742, 765-66 (1974); Fallon & Weiler, *supra* note 6, at 14-18.

[343]Of the Justices who served on the Court at the time of the *Weber* decision, the *Johnson* decision or both, four (Burger, C.J., Rehnquist, White & Scalia, J.J.) took the position that Title VII prohibits race and gender preferences. Two Justices (Brennan & Marshall, J.J.) consistently argued that Title VII permits such preferences. Two Justices (Powell & O'Connor, J.J.) have voted to uphold affirmative action plans, but the extent to which they adhere to the position that such plans are compatible with the legislation is unclear. One of these two (O'Connor, J.) has at least hinted that she does not believe the plans to be compatible with original congressional intent. Johnson v. Transportation Agency, 107 S. Ct. 1442, 1460-61 (1987). Two Justices (Stevens & Blackman, J.J.) have conceded that voluntary affirmative action is incompatible with the statute as Congress conceived it, but have voted to uphold preferences on the basis either of stare decisis or "equity." *Johnson*, 107 S. Ct. at 1457-60 (Stevens, J., concurring). *Weber*, 443 U.S. at 209-16 (Blackmun, J., concurring). By this count, then, five of the nine Justices who sat on the Court when *Johnson* was decided (Rehnquist, White, Blackmun, Stevens & Scalia, J.J.) have at least on occasion agreed that voluntary affirmative action is inconsistent with original legislative intent.

[344]This is so because the Court continues to adhere to the fiction that "voluntary" affirmative action is not "required." However, the Justices are not consistent on the question, either collectively or individually. For example, the majority in Connecticut v. Teal, 457 U.S. 440 (1982) rejected a group rights explanation of disparate impact theory. That majority was composed of Justices who have voted to uphold affirmative action plans. The dissenters in *Teal* came rather close to explaining impact theory as a group rights theory, but some of the dissenters have consistently rejected the legitimacy of voluntary affirmative action.

be by reference to a theory of interpretation and, therefore, of judicial function that treats neither language nor legislative understanding as controlling.

A. The Statute and the Understanding of the Congress that Enacted It

The chief prohibitory provision of Title VII that is applicable to employers provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[345]

On its face, this provision precludes (1) overt use of race or gender as an employment criterion and (2) pretextual use of race and gender neutral criteria to intentionally discriminate. It is plausible to read the second subdivision as concerned with effects, but its reference is to effects on individuals. Moreover, both provisions rest on the phrase "because of race, color, religion, sex, or national origin," and therefore invoke a causal conception of discrimination in keeping with the disparate treatment theory.[346] This facial emphasis on intentional discrim-

---

[345] 42 U.S.C. § 2000e-2(a) (1982).

[346] *See* P. Cox, *supra* note 12, at 6-9 to 6-13. The causal understanding is central to the disparate treatment theory because the narrow issue under that theory is whether, e.g., race or some factor independent of race explains the defendant's decision. The causal understanding is to be distinguished from a correlation understanding. Under the correlation understanding, some factor facially independent of e.g., race (such as possession or nonpossession of a high school diploma) explains the employer's decision, but this independent factor is related to race in the sense that there is a disparity among groups with respect to possession of the independent factor. This disparity may be attributable to disparate treatment, but, unless that disparate treatment is traceable to the employer (or the employer utilizes the independent factor pretextually), the employer has not engaged in disparate treatment.

A dilemma posed by the causal understanding is whether selective indifference should count as a cause of an employment decision. *See, e.g.*, Schnapper, *supra* note 276, at 41-44. Arguably, it should, but there are substantial difficulties presented in proof of selective indifference. If the burden were allocated to a plaintiff, the plaintiff would have

ination is reinforced by other provisions of the Act. For example, Section 703(h) provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the result is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[347]

On its face, this provision both exempts qualifications criteria independent of race and gender from judicial evaluation and precludes only the pretextual use of race and gender neutral criteria.[348] Indeed, it is a virtual restatement of the individualist position that governmental authority is to extend only to the narrow prohibition of disparate treatment.

Finally, Section 703(j) of the Act specifically addresses the possibility that the Act might be interpreted to recognize a group right to proportional allocation of employment by banning such an interpretation:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may

---

to establish that an employer would not have relied upon a race-neutral factor correlated with race if the correlation adversely affects the employer's favored racial group. If the burden of disproving selective indifference is imposed upon the defendant, as by treating disparities generated by a neutral criterion as prima facie evidence of selective indifference, the functional result is likely to be a prohibition of disparities, not a prohibition of selective indifference. For a good statement of the causal understanding of the disparate treatment theory that nevertheless pays inadequate attention to the latter point, see Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. Cal. L. Rev. 733 (1987).

[347]42 U.S.C. § 2000e-2(h) (1982).

[348]Rutherglenn, *supra* note 271, at 1302-12 (1987) (treating section 703(h) as adopting a pretext theory of discrimination, but approving of *Griggs* when construed as recognizing a pretext theory).

> exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[349]

The 1964 legislative history of the Act further reinforces these facial appearances. That history is replete with the appeals of sponsors and supporters of the legislation to the individualist ideal.[350] It is replete,

---

[349]42 U.S.C. § 2000e-2(j) (1982).

[350]For example, the Interpretive Memorandum of Senators Clark and Case on the House Bill states:

> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.
>
> There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicnats have these qualifications, and he may hire, assign, and promote on the basis of test performance.
>
> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

110 Cong. Rec. 7213 (1964). Senator Humphrey, the principal author of the compromise bill eventually enacted argued:

> Nothing in the bill or in the amendments requires racial quotas. The bill does not provide that people shall be hired on the basis of being Polish or Scandinavian, or German, or Negro, or members of a particular religious faith. It provides that employers shall seek and recruit employees on the basis of their talents, their merit, and their qualifications for the job.
>
> The employer will outline the qualifications to be met for the job. The employer, not the Government will establish the standards. This is an equal employment opportunity provision.

110 Cong. Rec. 13,088 (1964).

as well, with (1) the claims of opponents of the legislation that it would be interpreted to recognize group rights, (2) the denials of sponsors and supporters of these claims and (3) amendments to the legislation, chiefly in the form of Section 703(j), designed to ensure that no such interpretation would be attempted.[351] This is not to say, of course, that the Congressmen who sponsored or advocated the legislation were radical individualists who generally subscribed to the individualist model. They were not. It is to say, instead, that the rationale for the legislation—the principle of political morality that was employed as the reason for and content of the legislation—was individualist, quite probably because an appeal to that principle was thought to render the legislation passable given the political climate of the times.[352] Finally, however, the legislative record also clearly discloses that the Congressional objective was to improve the economic lot of minorities and women, and perhaps primarily, to ensure full economic participation for blacks.[353] It was thought, possibly erroneously, that the disparate treatment prohibition would achieve this end.[354]

B. *The Supreme Court's Interpretation and the 1972 Amendments*

The first of the Supreme Court's steps down the road to a compromise theory of group rights came in *Griggs v. Duke Power Co.*,[355] where the Court formally rejected the claim that Title VII prohibits only intentional discrimination and adopted the disparate impact theory. As has been previously argued here, *Griggs* is subject to an interpretation

---

[351]*See* the legislative history recounted in Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 452-65 (1986) and United Steelworkers v. Weber, 443 U.S. 193, 231-53 (1979) (Rehnquist, J., dissenting).

[352]It is apparent, for example, that Senator Humphrey would have preferred that a broader obligation be imposed on employers. *See Hearings Before the Senate Subcomm. on Employment and Manpower*, 88th Cong., 1st Sess. 144-45 (1964) (statement of Sen. Humphrey on S. 1937, a bill that did not become a part of Title VII). Nevertheless, Humphrey employed individualist argument in support of Title VII and claimed that Title VII enacted individualist principle. *See, e.g.*, 110 Cong. Rec. 11, 848 (1964):

> The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any persons, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices.

[353]*See, e.g.*, 110 Cong. Rec. 7220 (1964) (remarks of Sen. Clark); 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).

[354]The 1972 legislative history suggests, at least from the perspective of those who wrote the committee reports, both that Congress held this view in 1964 and that the view was naive. *See* H.R. Rep. No. 238, 92d Cong., 1st Sess. 8-9 (1971).

[355]401 U.S. 424 (1971).

that renders it compatible with disparate treatment theory.[356] Nevertheless, it clearly authorizes impact theory and clearly postulates an interpretation of the statute that compels an analytical focus upon harm to groups. Specifically, the Court held that (1) as the congressional objective was to "achieve equality of employment opportunities and to remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,"[357] use of unjustified neutral criteria with adverse effects on groups is prohibited and (2) Section 703(h)'s testing defense was not a bar to liability for the adverse effect of a test on a protected group because such an effect demonstrates that the test was "used to discriminate."[358] Oddly, the Court subsequently interpreted Section 703(h)'s seniority defense to preclude the application of impact theory to seniority systems, despite the similar language of the two defenses.[359] Indeed, the Court relied upon legislative history indicating that seniority principles would not be subject to attack under Title VII absent intentional discrimination in interpreting the seniority defense,[360] but declined, in *Griggs*, to treat the similar legislative history of the testing defense as establishing a disparate treatment rationale for the latter defense.[361]

In 1972, following *Griggs*, Congress amended Title VII, chiefly by modifying its procedural mechanisms.[362] No relevant modification of its substantive provisions was made. Bills that would have ratified *Griggs* interpretation of the testing defense were introduced, but rejected for reasons apparently independent of the merits of disparate impact theory.[363] Both the House and Senate reports on the legislation contain language that may be read as recognizing the *Griggs* decision and, perhaps, as approving of it. However, the thrust of the discussion in both reports is that (1) "experts" have indicated that discrimination

---

[356]*See supra* text accompanying notes 288-91.

[357]*Griggs*, 401 U.S. at 429-30.

[358]*Id.* at 433. The Court relied also on the fact that amendments to the bill that would have exempted use of any professionally developed test were defeated. *Id.* at 434-36. However, this defeat, in conjunction with adoption of the testing defense with the promise that tests could be employed if not "designed, intended or used" to discriminate, indicates that Congress was concerned with the problem of pretextual use of tests, a species of disparate treatment, not with the effect of tests on minorities, as such. *Id.* at 433. *See* Rutherglenn, *supra* note 271, at 1305-06. *See also infra* note 407.

[359]International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

[360]*Id.* at 350-52.

[361]*See* Gold, *supra* note 76, at 533-49. *But see supra* note 358. The anomaly has led to some embarrassment in attempting to explain the Section 703(h) merit defense. *See* Guardians Ass'n v. Civil Service Comm'n, 633 F.2d 232, 251-53 (2d Cir. 1980), *aff'd on other grounds*, 463 U.S. 582 (1983).

[362]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

[363]H.R. 1746, 92d Cong., 1st Sess. § 8(c)(1971); 117 Cong. Rec. 17,539 (1971).

is a systematic rather than individual problem, (2) *Griggs* indicates that "expertise" is necessary in assessing the phenomenon and (3) EEOC enforcement authority should be expanded (as the 1972 amendments were designed to do) because the EEOC has such "expertise."[364] Finally, the section by section analysis of the committee reports indicates, without citing or referring to *Griggs*, that present case law (as of 1972) was intended to govern where the 1972 amendments did not expressly change the 1964 Act.[365]

The Supreme Court has subsequently cited the 1972 legislative history for the proposition that Congress "ratified" *Griggs*.[366] It has also, however, rejected reliance on the 1972 history, where no enacted amendment was in issue, on the ground that "the views of members of a later Congress, concerning different sections of Title VII. . . are entitled to little if any weight."[367]

Somewhat belatedly, the Court, following *Griggs*, has attributed the disparate impact theory to Section 703(a)(2). Specifically, it has argued that the provision's reference to classifications that "tend to deprive any individual of employment opportunities" or otherwise affect his status as an employee justifies prohibiting neutral criteria with an adverse effect on groups.[368] The Court's justification of the use of representation rate disparities in systematic disparate treatment litigation has been that Section 703(j) precludes liability only for disparities as such, it does not preclude reliance upon the inference of intentional discrimination arising from representation rate disparities.[369]

With respect to the question of voluntary affirmative action, the Court has conceded that affirmative action violates the literal language of Section 703(a).[370] The Court has argued, however, that the "spirit" of the statute is not violated because affirmative action tends to achieve the congressional objective of opening employment opportunity to per-

---

[364]H.R. Rep. No. 238, 92d Cong., 1st Sess. 8-9 (1971); S. Rep. No. 415, 92nd Cong., 1st Sess. 5 (1971). The closest Congress came to addressing the merits of *Griggs* was in a committee report in which the Senate committee discussed the 1972 extension of Title VII to federal employers and indicated that the Civil Service Commission should re-examine its testing procedures to ensure compliance with *Griggs*. *See* S. Rep. No. 415, at 14-15.

[365]118 Cong. Rec. 7166 (1972).

[366]Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982).

[367]International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977). Also, *compare* Local 28 of the Sheet Metal Workers' Int'l Ass'n, 478 U.S. 421, 466-70 (1986) *with* Firefighters Local 1784 v. Stotts, 467 U.S. 561, 582 n.15 (1984).

[368]Connecticut v. Teal, 457 U.S. 440, 448 (1982).

[369]*Teamsters*, 431 U.S. at 354 (1977). This is in keeping with the 1964 legislative history. *See* 110 Cong. Rec. 7213 (1964).

[370]United Steelworkers v. Weber, 443 U.S. 193, 201 (1979).

sons traditionally barred from it.[371] Moreover, the Court has argued that the literal language of Section 703(j) precludes only governmentally compelled racial preferences; it does not preclude privately adopted "voluntary" preferences.[372]

C. *Alternative Theories of Statutory Interpretation*

It is probably the case that there is no authoritative, consistently applied theory of statutory interpretation in American jurisprudence.[373] Nevertheless, it is possible to identify a set of traditional theories that, albeit diverse, share the common element that courts are to defer to legislative judgments and to enforce legislative commands. Courts within traditional theories are conceived of, if not as servants of the legislature, at least as highly constrained by legislation.[374]

This is not to say that alternative theories within the traditional set share a common conception of what it means to be constrained by the will of the legislature. For example, a literalist strategy of interpretation purports to defer to legislative judgment by adhering to the literal meaning of statutory language.[375] Aside from the questions whether there is such a thing as literal meaning[376] or whether it is

---

[371]*Id.*

[372]*Id.* at 205-08.

[373]H. Hart & A. Sacks, *supra* note 11, at 1201. *See* Cox, *Ruminations on Statutory Interpretation in the Burger Court*, 19 Val. U. L. Rev. 287, 289-95 (1985).

[374]*See, e.g.*, H. Hart & A. Sacks, *supra* note 11, at 1156-57, 1410-17. The force of this idea is best illustrated by the fact that even those who may be accused of placing primary emphasis upon the judicial interpreter of statutes feel nevertheless compelled to add that courts are in some sense bound by statutes. *See* Dworkin, Principle, *supra* note 11, at 119-77. For criticism of Professor Dworkin's tendency to simultaneously accept and reject the authority of the text, *see* Fish, *Wrong Again*, 62 Tex. L. Rev. 299 (1983). Hart and Sacks may be interpreted as advocating a view consistent with (or, at least, a source of authority for) the nontraditional view that courts are the primary actors both in supplying a characterization of statutory meaning and in attributing a scope of operation to a statute. *Compare* H. Hart & A. Sacks, *supra* note 11, at 1410-17 (courts should assume that legislature acted resonably) *with* Dworkin, Principle, *supra* note 11, at 326-31 (courts should interpret a statute to advance a policy that is the best political justification of the statute). *See generally* Wellman, *Dworkin and the Legal Process Tradition*, 29 Ariz. L. Rev. 413 (1987). Nevertheless, Hart and Sacks so surrounded their position with conditions, limitations and caveats that they can be viewed as within the position here deemed "traditional." *See* H. Hart & A. Sacks, *supra* note 11, at 1415 (attribution of purpose by reference to common law baseline).

[375]*See* TVA v. Hill, 437 U.S. 153 (1978).

[376]If literalism is taken to mean that the text has a pristine meaning that "announces itself" to all comers, it is subject to the weak version of the claim that the interpretor supplies meaning. The weak version of this claim appears to be a statement about the mechanism of interpretation, that the means by which a text is understood is shared

possible to escape responsibility for supplying the minor premise in the syllogism of statutory application,[377] literalism arguably fails to take seriously the court's role as an implementor of statutes because it ignores the necessity that "servants" interpret the "commands" of masters to ensure effective implementation.[378] Similarly, purposive interpretation purports to defer to legislative judgment by implementing statutory policy. A difficulty with purposive interpretation, however, is the judicial discretion inherent in formulating statements of statutory purpose.[379]

There is no reason to be sanguine about either the descriptive plausibility of an agency conception of judicial role in the context of statutory interpretation or the probability that actual judicial power will be exercised within any theory of interpretation in a fashion wholly consistent with such a conception. It is in fact not a plausible understanding of the interpretive enterprise that judicial interpreters are mere passive conduits for conducting the legislative will.[380] The inter-

---

practice within a community of speakers and listeners, rather than correspondence between words and things. *See generally* L. Wittgenstein, Philosophical Investigations (GEM Anscombe ed. 1963). A middle version of the claim, building on the weak version, simultaneously asserts both that texts do not constrain interpreters and that interpreters are nevertheless heavily constrained by the "interpretive communities" within which they are "embedded," in the sense that possible interpretations are those rendered possible by the changing practices of such communities. *See, e.g.*, S. Fish, *supra* note 29. The strong version of the claim is that texts are descriptively incapable of providing a meaning that binds interpreters and the "constraints" of interpretive community are in fact mere competing precepts of political ideologies. Levinson, *Law as Literature*, 60 Tex. L. Rev. 373 (1982). *See* Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863 (1930); Radin, *A Short Way With Statutes*, 56 Harv. L. Rev. 388 (1942); Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259 (1947); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L. J. 1063 (1981); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781 (1983).

[377]*See* Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151 (1981). On this view, there is a form of "literal meaning" in the sense, at least, that conventions preclude words from having any meaning the interpreter wishes them to have, but the interpreter remains responsible for his syllogism. *See also* J. Searle, Expression and Meaning, Studies in Theory of Speech Acts 1-29, 117-36 (1979).

[378]*See* R. Posner, The Federal Courts: Crisis and Reform 292 (1985). It is, however, possible to utilize this critique to justify a rather expansive judicial use of statutes, *see, e.g.*, Landis, *Statutes and the Sources of Law*, in Harvard Legal Essays 213 (R. Pound ed. 1934); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Middle Road,"* 40 Tex. L. Rev. 751 (1962); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Low Road,"* 38 Tex. L. Rev. 392 (1960); Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The High Road,"* 35 Tex. L. Rev. 63 (1956).

[379]*See* H. Hart & A. Sacks, *supra* note 11, at 1413-17.

[380]There are two reasons to doubt the passivity thesis, related to two steps necessary

pretive enterprise confronts a legal text, but it can by no means be described as a passive activity. And it is not probable that a judiciary whose tradition is one of active, even aggressive law-making will behave passively. Nor, perhaps, is passivity, even if it were a plausible alternative, a desirable one. The tradition, despite the rhetoric of deference to legislative will, legitimates activist interpretation.[381]

The point of this invocation of the standard academic litany regarding interpretation is not merely to anticipate and deny the charge of naivete. It is also to forthrightly recognize that traditional theory cannot deliver on its promise: legislative "command" cannot in fact be pristinely realized in judicial interpretation and application of statutes, both because the significance of a statute within the factual circumstances in which it is sought to be applied[382] is necessarily supplied by its interpreter, and because courts as our tradition has understood

---

to statutory interpretation. The first step is that of interpretation, the second of application. *See* R. Dickerson, The Interpretation and Application of Statutes (1975). The difficulty at the first step, that of establishing a meaning for the statute, is commonly thought to be that of the problematic character of language. It is more fundamentally, however, a problem of competing conceptions of what it means to establish such a meaning. For the literalist, the task is a matter of, for example, applying conventions. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958). For the intentionalist, it is a matter of ascertaining intention. *See* E. Hirsch, Jr., The Aims of Interpretation (1976). For those who view the reader as primary, it is a matter of attributing a meaning or purpose. *See, e.g.*, H. Hart and A. Sacks, *supra* note 11, at 1413-17; Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958); Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899).

The second step is that of establishing the significance of the statute within the factual context of a case. *See* E. Hirsch, Jr., *supra* at 49. The problem is, again, disagreement about how this descriptively can be and normatively should be done. For the positivist, language controls application; for the intentionalist, intention controls application; for those who believe that the reader is crucial, the minor premise supplied by the reader controls application. *See generally* Moore, *supra* note 377. In the present context, these two steps may be illustrated by the interpretive problems presented by Title VII. The first question is what does Title VII prohibit. For example, does it prohibit disparate treatment or disparate effect or both? The second question is application. For example, if Title VII prohibits disparate treatment, should that prohibition be applied to a "voluntary" affirmative action plan?

It should be noted that, although distinction between interpretation and application is traditional, the distinction has been challenged. *See generally* H. Gadamer, Truth and Method (1984). The challenge, however, is in keeping with what is here deemed a non-traditional perspective. *See* Habermas, A Review of Gadamer's Truth and Method in Understanding and Social Inquiry (F. Dallmayr & T. McCarthy eds. 1977).

[381]*See generally* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L. J. 221 (1973).

[382]*See* R. Dickerson, *supra* note 380 (generally distinguishing interpretation from application); E. Hirsch, *supra* note 380, at 49 (distinguishing meaning and significance).

them are supposed to interpret and apply statutes reasonably, as "reasonably" is understood by persons engaged in interpretation and application understand it.[383]

Nevertheless, the traditional notion that a court is to enforce legislative command is not wholly devoid of meaningful content. Communication between legislature and court is plausible even if the mechanism of communication is neither the words of the statute as such nor the purpose of the statute as such, but is instead a shared understanding of practice within a "community." There are "on the wall" and "off the wall" interpretations.

However, the characterization of an interpretation as "on" or "off" the wall is largely dependent upon a choice between two alternative characterizations of legislative command related to alternative normative understandings of the judicial role. In current academic debate these alternatives are often stated as, on the one hand, treating a statute as the product of legislative compromise among contending interest groups seeking private advantage and, on the other, treating a statute, compatibly with its rhetorical justification, as a legislative judgment regarding the public welfare.[384] These current conceptualizations of the choice are related, however, to earlier conceptualizations of the choice as one between literalism and purposive interpretation or between (1) treating statutes as intrusions into the fundamental baseline of the common law to be narrowly confined and (2) treating statutes as sources of law to be used to modify the common law in service of legislative policy.[385]

Extreme versions of these alternatives illustrate their relationship to the normative question of judicial role. Under one alternative, courts are simultaneously responsible for preserving the common law (the subject matter of their independent authority to make law) and for nevertheless complying with legislative command. Compliance, however, is confined to the ascertainable limits of that command. For example, use of a statute as a source of policy for common law decision would be illicit because, for example, it would erroneously assume that the

---

[383]H. Hart & A. Sacks, *supra* note 11, at 1415. *See* Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 Tex. L. Rev. 551 (1982).

[384]*See, e.g.*, R. Posner, *supra* note 378, at 262-72; Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179, 192-93 (1986).

[385]For examples of the first position, see Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983); Kelsen, *The Pure Theory of Law*, 51 Law Q. Rev. 786 (1935). For examples of the second, see Landis, *supra* note 366; Landis, *A Note on Statutory Interpretation*, 43 Harv. L. Rev. 886 (1930). *Compare* Pound, *Spurious Interpretation*, Colum. L. Rev. 379 (1907) *with* Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908).

legislature had adopted a policy to be used in such a way. In fact, legislatures adopt, under this understanding, statutes constituting political compromises about relatively narrow questions, not policies to be judicially employed beyond the subject matter of these questions.[386]

Under the second alternative the common law baseline enjoys no presumptive inviolability. The court's role, as a servant of the legislature, is to treat statutes as, at least potentially, statements of policy to be incorporated into the fabric of the common law.[387] This, however, does not imply a passive judiciary, because treatment of statutes as statements or sources of policy implies both a requirement that the policy be judicially articulated in terms broader than the relatively narrow questions addressed by a statute and an evaluation of the statute in assessing its worth as a basis for judicial law-making.[388] Indeed, the notion of incorporation into a common law may be obsolete under some versions of this view. Judicial law-making might more properly be characterized as proceeding by extensive extrapolation from judicially defined statements of statutory policy than as accommodation of statutory policy to common law principle.[389]

It should be apparent that any given adherent to one or the other of these positions is an adherent only in degree; the alternatives are extreme positions likely to be qualified in practice. It should also be apparent that the alternatives are related to underlying "political" positions. The alternative that legislation is to be narrowly confined to original legislative compromise, here termed "traditional theory," is compatible with individualism. The position that legislation is to be used to further judicially perceived statutory policy, here termed non-traditional theory, is compatible with the view that courts should play a substantial role in the post-New Deal "activist" state.[390] The Supreme Court's interpretation of Title VII is "off-the wall" when viewed from

---

[386]*See* generally Easterbrook, *supra* note 385. *Cf.* R. Epstein, *supra* note 247, at 19-31 (advocating plausibility of adherence to original text).

[387]*See* Landis, *supra* note 378. For a recent analysis proposing a similar function but rejecting the assumption that courts are subordinate "servants," see Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. Cal. L. Rev. 541 (1988).

[388]*See generally* G. Calabresi, *supra* note 11.

[389]This is implicit in the notion that change may render statutes obsolete. *See generally* G. Calabresi, *supra* note 11. The obsolesence characterization assumes a judiciary capable of ascertaining a set of principles consistent with change by reference to which a statute may be either used to advance these principles or confined or "overruled." To the extent, however, that the changed principles are not those of the essentially individualistic common law, but, rather, are the "activist" principles of the "administrative state," *see generally* B. Ackerman, *supra* note 285, statutes are likely to be used as legitimating foundations for pursuing these activist principles.

[390]*See generally* B. Ackerman, *supra* note 293.

the perspective of the former of these positions; it is "on-the-wall" when viewed from the perspective of the latter. The remaining sections of this article are devoted to supporting these contentions.

D. A Critique of the Court's Interpretations: Traditional Theory

The line of argument appropriately employed by others to establish the proposition that the Court's interpretation is off-the-wall given traditional norms[391] is as follows: (1) Congress clearly viewed the problem of discrimination as a problem of disparate treatment in 1964 and just as clearly prohibited disparate treatment.[392] (2) The political justification for this prohibition was the individualist ideal, and the rhetoric of this ideal permeates the legislative history.[393] (3) Congress did not directly address disparate impact theory in 1964, but did specifically disapprove of examples of disparate impact theory.[394] (4) Congress was clearly aware of the notion that racial imbalance could be construed to constitute discrimination and expressly rejected such a construction.[395] (5) Congress clearly contemplated a color blind and gender blind standard; it not only prohibited "required" preferences through Section 703(j), it also prohibited privately adopted preferences through Title VII's general prohibitions.[396]

---

[391]This claim necessarily assumes that a traditional stance has in some sense resolved the establishing meaning and application of meaning dilemmas previously noticed. *See supra* note 380 and accompanying text. It does not, however, necessarily assume that any particular methodology be adopted. At the level of establishing meaning, it is possible for both a literalist and an intentionalist to agree on a meaning, and traditional theory often relies upon both language and the context of its use (the "intention" reflected in legislative history) to ascertain or attribute a meaning. At the level of application, matters are more difficult, because the rhetoric of the traditional stance, which states that the language of the statute just "applies" by virtue of its own force, or that the legislature intended a particular result in a given case, is implausible. Readers are responsible for establishing the significance of a meaning within the factual context of a case. *See generally*, Moore, *supra* note 377. Normative positions about just how this inevitable readers' discretion is to be exercised are therefore crucial. Nevertheless, it is not implausible for a traditionalist to claim, for example, that the disparate treatment meaning of Title VII applies to and therefore prohibits affirmative action by virtue of that meaning, even if this claim is more objectively described as an agreement among traditionalists that the meaning should be applied. It is not implausible because the traditionalist's normative position is that his discretion should be exercised in a fashion that appears (e.g., instrumentally) to confine application within the bounds of ascertained meaning (even if this position fails to achieve an agreed upon purpose of that meaning).

[392]Gold, *supra* note 76, at 491-503. *See* United Steelworkers v. Weber, 443 U.S. 193, 220 (1979) (Rehnquist, J., dissenting).

[393]Gold, *supra* note 76, at 513-20; *Weber*, 443 U.S. at 254 (Rehnquist, J., dissenting).

[394]Gold, *supra* note 76, at 520-49.

[395]Gold, *supra* note 76, at 503-11; *Weber*, 443 U.S. at 231-51 (Rehnquist, J., dissenting).

[396]*Weber*, 443 U.S. at 244-45 (Rehnquist, J., dissenting).

It is not necessary to repeat the details of this line of argument here. The proposition that the Court's interpretation is "off the wall" by reference to the traditional view will instead be supported by reference to the counterarguments of those who have responded to the noted line of argument. The importance of these counterarguments is that they assume and appeal to traditional norms. The objective of this rebuttal is to establish that this appeal is mistaken and that the Court's interpretation must, therefore, be justified by reference to nontraditional norms.

A preliminary point should, however, be first addressed. One of the theses of this article has been that "voluntary" affirmative action is not a phenomenon separable from Title VII liability theories, but is instead a consequence of those theories.[397] A second thesis has been, however, that the phenomenon and the theories are subject to alternative characterizations: they may be viewed either as a straight-forward effort to establish group rights to fair distribution of employment (the substantive distribution paradigm), or as overenforcement devices that merely incidentally and functionally yield such rights (the process of employment decision paradigm).[398] As will become evident from the discussion below, the first of these possibilities is more susceptible to this rebuttal than the second. It requires an extreme version of the traditional stance, perhaps the version of formalism, to wholly reject the overenforcement rationale. Nevertheless, there are alternative understandings of the overenforcement rationale dependent upon subtle matters of emphasis, judgment and degree in applying that rationale.[399] This rebuttal is plausibly directed to the overenforcement version of the Court's interpretations to the extent that version approaches the fair distribution rationale.

1. The Purpose Counterargument.—The chief counterargument is that the Court's interpretation is consistent with the purpose of Title VII.[400] The appeal is to the strategy of purposive interpretation. The purpose of Title VII is said to be that of improving the employment opportunities of minorities and of women. As disparate impact theory and voluntary affirmative action tend to accomplish this purpose, they are legitimate under, even compelled by, the statute.

There is no doubt that this was a congressional purpose, but this concession is not the end of the matter. Purposive interpretation is a

---

[397] *See supra* text accompanying notes 58-78, 113-64.

[398] *See supra* text accompanying notes 320-39.

[399] *See supra* text accompanying notes 337-39.

[400] *E.g.*, United Steelworkers v. Weber, 443 U.S. 193, 202-04 (1979); Blumrosen, *supra* note 160; Blumrosen, Griggs *Was Correctly Decided—A Response to Gold*, 8 INDUS. REL. L. J. 443 (1986) [hereinafter Blumrosen, *Response to Gold*].

technique well within the accepted norms of legal interpretation, but there are risks inherent in the technique, well recognized by its advocates.[401] Every statute has both relatively concrete and relatively abstract purposes; courts, therefore, choose among statutory purposes in interpreting statutes. The more abstract the purpose chosen, the greater the judicial capacity to expand upon the statute and the greater the risk that a court may thereby pursue its own agenda. Statutes cannot be said to merely provide that courts are to go forth and do good and avoid evil merely because these are the statutes' purposes, without rendering them mere legitimating grounds for implementing judicial preferences regarding the public welfare. This is the reason that traditional versions of the purposive interpretation strategy take care to address only relatively concrete purposes.[402]

There is a further difficulty with the purpose argument: it ignores the problem of means. Indeed, the argument is in the following form: the congressional purpose in enacting Title VII was to improve employment opportunities for minorities and women; devices that instrumentally achieve this end are therefore required or permissible. But this is a misstatement of the statute. The statute adopts a means to its end: prohibiting disparate treatment. If that means is inadequate to accomplish the statute's end, that end does not itself justify judicial substitution of alternative means. Legislatures do not enact ends; they enact statutes. Something more is required to justify substitution: a conception of the legitimate role of courts under which they are entitled to ignore the political compromise inherent in legislative selection of means. That conception is incompatible with the traditional view of legitimate roles postulated by traditional theory.

2. The Unconsidered Case Counterargument.—A variation on the purpose argument is that disparate impact theory and voluntary affirmative action are unconsidered cases in the sense that Congress expressly considered neither.[403] They are merely instances of the common problem of cases not specifically contemplated or addressed by a statute but, nevertheless, within the "policy" of the statute. As it is well within traditional norms of statutory interpretation to apply the "policy" of statutes to unconsidered cases, the Court's doctrines are compatible with traditional norms.[404]

---

[401] *See* H. Hart & A. Sacks, *supra* note 11, at 1413-17.

[402] R. Dickerson, *supra* note 380, at 87-102.

[403] *See, e.g*,. Blumrosen, *Response to Gold*, *supra* note 400, at 449; Schatzki, United Steelworkers of America v. Weber: *An Exercise in Understandable Indecision*, 56 Wash. L. Rev. 51, 66-67 (1980).

[404] *See* Neuborne, *Observations on* Weber, 54 N.Y.U. L. Rev. 546 (1979).

There are three difficulties with this argument. First, it is not entirely true that Congress did not consider disparate impact theory or voluntary affirmative action. It is true that neither "case" was directly postulated nor considered in the language of the statute or in its legislative history.[405] It is not true that the central features of both doctrines were unconsidered. Congress specifically considered and rejected work force imbalance as a basis for liability in Section 703(j),[406] specifically rejected a disproportionate effects understanding of discrimination in use of employment tests in Section 703(h),[407] and generally

---

[405]*See* Blumrosen, *Response to Gold*, *supra* note 400, at 449; Gold, *supra* note 76, at 520-30.

[406]42 U.S.C. § 2000e-2(j) (1982). The legislative history of Title VII disclosed that Section 703(j) was inserted to confirm the representations of sponsors and supporters of Title VII, made in response to the claims of opponents that the legislation would require the use of quotas to achieve racial balance, that no such requirement was imposed. *See* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 452-65 (1986) (recounting legislative history); United Steelworkers v. Weber, 443 U.S. 193, 231-52 (1979) (Rehnquist, J., dissenting) (recounting legislative history). The Supreme Court later exploited a distinction between "require" and "permit" in concluding that Section 703(j) does not preclude "voluntary" quotas. *Weber*, 443 U.S. at 205-07. However, that distinction is highly questionable if the Court's liability theories functionally "require" such quotas. *See supra* text accompanying notes 58-78, 113-64. Moreover, the distinction for present purposes is overly technical. The point made in the text is that Section 703(j) reflects a broader principle, a principle compatible with the individualist model. Although Congress did not specifically contemplate the question of truly "voluntary" affirmative action (a question never in fact yet presented to the Supreme Court given the functional requirements of the Court's liability theories), it did contemplate and enact a general operating principle in Title VII, the disparate treatment prohibition.

[407]*See* Gold, *supra* note 76, at 533-49. At the time Title VII was debated in Congress, a decision was handed down under Illinois antidiscrimination legislation (the *Motorola* decision), holding employment tests generating adverse effects on minorities were unlawful under Illinois law. *See* 110 Cong. Rec. 9030 (1964). Section 703(h)'s preservation of "ability tests" was a response to this decision, one that rejected adverse impact, at least as such, as a theory of liability. The Supreme Court, in Griggs v. Duke Power Co., 401 U.S. 424 (1971), later interpreted Section 703(h) as preserving only job-related tests. As Professor Gold has demonstrated, however, the protection afforded ability tests in Section 703(h) is complete *absent* their use to intentionally discriminate. Gold, *supra* note 76, at 533-49. In particular, the principal proponents of Title VII represented to their colleagues in debate over the initial version of the Tower amendment (which would have totally immunized employment tests from challenge) that "nothing in the bill authorizes such action as in the *Motorola* case." 110 Cong. Rec. 13,504 (June 11, 1964) (remarks of Sen. Case). *See id.* (remarks of Sen. Humphrey). Moreover, the concern expressed by these proponents was with the potential for pretextual use of tests to engage in disparate treatment. *See id.* (remarks of Sen. Humphrey). The version of the Section 703(h) testing defense eventually enacted reflected this concern with pretextual use. *See* 110 Cong. Rec. 13,724 (1964).

Nevertheless, it is possible to read *Griggs* as consistent with the intentional discrimination rationale. *See supra* text accompanying notes 288-91. The absence of a reasonable

rejected group rights understandings of the antidiscrimination principle throughout the legislative history of the Act.[408] While it is quite true that Congress did not anticipate the precise features of the Court's later doctrines, it is not the case that it did not anticipate, and reject, the central features and functional implications of these doctrines.

Second, even if it were true that the Court's doctrines were unconsidered, the question would remain whether the policy of the Act supports them. It is perhaps the case that the abstract purpose of improving employment opportunities for minorities and women supports them, but this merely raises the problem of abstract purpose discussed above.

Third, disparate impact theory and affirmative action are not plausibly classified as instances of the common problem of the unconsidered case, unless they are understood as mere expressions of disparate treatment theory, for example, as aspects of an overenforcement strategy as discussed earlier.[409] If the Court's doctrines are understood and applied in terms of group rights—as means of recognizing a right in minority or female groups to proportional allocation of employment opportunity—they are instances of the provided for case; the individualist conception that permeates the language and legislative history of Title VII would preclude them. Even if they can be said to have been unconsidered in their precise features, the policy of the statute so conceived is hostile to group rights. If the doctrines are instead understood as instances of or inevitable consequences of overenforcement of the disparate treatment prohibition,[410] they are plausibly characterized as unconsidered cases at least arguably compatible with statutory policy. However, there is a significant implication to this characterization. It is that both doctrines would have to be severely constrained so as to reflect a disparate treatment enforcement strategy rather than an equal group-achievement strategy. In the terminology of the earlier discussion of overenforcement, the doctrines would have to be applied by reference to a process paradigm, rather than a distribution paradigm.[411]

---

relationship between preference on an ability test and actual job content is evidence of pretextual use of the text. Whether this is a viable reading of *Griggs*, however, is dependent upon the standard of validity imposed on testing. If more is required than a reasonable relationship, there is imposed, pro tanto, a prohibition of adverse effect on groups. And it is the latter prohibition that Congress rejected when it disapproved of the Illinois decision.

[408]The Clark-Case memorandum is illustrative. *See supra* note 350.

[409]*See supra* text accompanying notes 276-339.

[410]*See supra* text accompanying notes 276-339.

[411]*See supra* text accompanying notes 332-39.

3. The Section 703(a)(2) Counterargument.—The most persuasive support for disparate impact theory in the language of Title VII is Section 703(a)(2), because that provision appears to reference effects: an employer is not permitted to "limit, segregate, or classify his employees in a way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals race . . . ."[412] Indeed, the Court has relied on Section 703(a)(2) as justification for impact theory.[413]

Aside from the probable source of the language of the provision in a congressional purpose to preclude employer and union collusion in disparate treatment,[414] the Court's reliance is mistaken for three reasons. First, the language is in terms of tendencies and effects with respect to an individual, not with respect to a racial group. The Court has suggested that disparate impact theory protects individuals, so that group success under a neutral criterion does not preclude an individual member of the group from invoking disparate impact theory,[415] but the Court's argument is disingenuous: the individual cannot establish a *prima facie* case under the theory without making out group harm.[416] Absent an adverse effect of neutral criteria on the group, the theory is unavailable; adverse effects on the individual are irrelevant.

Second, the provision requires harm generated "because of" race, a causal notion implicating disparate treatment theory. For this language to support the disparate impact theory, it must be read as invoking a notion of correlation, not of causation: harm correlated with group status is prohibited. But this reading again ignores the focus of the language on the individual; the individual must not be harmed because of his race.

Third, the Court's reading ignores the legislative history taken as a whole. That history again is clear on the point that the language was understood to prohibit disparate treatment.[417] At best, the language, read in conjunction with that history, would support use of disparate impact theory as a device for reaching suspected pretextual use of neutral criteria, but this would again require confining the theory to an overenforcement strategy.[418] In particular, it would require a relatively relaxed version of the business necessity defense.[419]

---

[412]42 U.S.C. § 2000e-2(a)(2) (1982).

[413]Connecticut v. Teal, 457 U.S. 440 (1982).

[414]Gold, *supra* note 76, at 568-78.

[415]Connecticut v. Teal, 457 U.S. 440 (1982).

[416]P. Cox, *supra* note 12, at 7.01[2].

[417]*See* Gold, *supra* note 76, at 564-67.

[418]*See supra* text accompanying notes 332-39.

[419]*See* Rutherglenn, *supra* note 271, at 1312-29.

4. The Deference to Administrative Expertise Counterargument.— It is sometimes said that both impact theory and affirmative action doctrine properly rest on judicial deference to the views of the EEOC, as a matter of the traditional doctrine of deference to administrative agency expertise.[420] The difficulty with this view is that the traditional doctrine of deference, outside the context of Title VII, is confined to the views of agencies upon which Congress has conferred substantive rule making or adjudicative powers.[421] The EEOC enjoys neither power; it is an enforcement agency.[422] Application of the traditional doctrine to the EEOC is analogous to deferring to a prosecutor's office in construing a criminal statute. That the Court has chosen to ignore this point is not plausible evidence that deference is appropriate.[423]

5. The Ratification Counterargument.—The primary argument made by those advocates of the Court's doctrines who at least partially concede that the doctrines are not supportable by references to the 1964 legislation is that Congress ratified *Griggs* in the 1972 amendments.[424] If Congress ratified *Griggs*, it at least arguably prospectively ratified "voluntary" affirmative action because, as we have seen, the doctrines are so closely intertwined that "voluntary" affirmative action is implicit in disparate impact theory.[425]

The first difficulty with this argument is that it rests on a very slim reed. Congress did not address disparate impact theory in the 1972 *amendments*. Rather, the House and Senate *reports* addressed it in the context of making the argument that the EEOC's enforcement authority should be expanded. Specifically, the reports cite *Griggs* for the proposition that discrimination is a complex phenomenon requiring "expertise" for its assessment.[426] There is no indication that Congress

---

[420]*See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Blumrosen, *Response to Gold*, *supra* note 3, at 447.

[421]*See* American President Lines v. Federal Maritime Comm'n, 316 F.2d 419 (D.C. Cir. 1963); Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785 (2d Cir.), *aff'd*, 328 U.S. 275 (1946); *cf.* Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (regulation does not have force and effect of law absent express congressional delegation of substantive rulemaking authority). *But cf.* Skidmore v. Swift & Co., 323 U.S. 134 (1944) (agency interpretations entitled to respect).

[422]*See* 42 U.S.C. § 2000e-5 (1982).

[423]Nevertheless, the Court's conferral of substantive rule making authority on an enforcement agency to which Congress declined to give substantive rule making powers is consistent with the bureaucratization of Title VII. *See infra* text accompanying note 492.

[424]*See* Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982); Thomson, *The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold*, 8 INDUS. REL. L. J. 105 (1986).

[425]*See supra* text accompanying notes 58-78, 113-64.

[426]H.R. REP. No. 238, 92d Cong., 1st Sess. 8-9 (1971); S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971).

was either aware of or considered *Griggs*' implications, particularly as these did not become fully apparent until 1975, when the Court decided *Albemarle Paper Co. v. Moody*[427] and, perhaps, 1979, when the Court decided *United Steelworkers v. Weber*.[428] Moreover, although there were attempts in 1972 to ratify *Griggs* directly, these were ultimately rejected.[429] It is true that the conference report on the 1972 bill states, without referring to *Griggs*, that then current interpretations of Title VII are to control where the Act was not specifically modified by the 1972 amendments.[430] But this is a statement about the limited effect of the amendments, not an open-ended authorization for the Court to proceed down a road *Griggs* itself only ambivalently suggested, particularly in view of the fact that explicit attempts at confirming *Griggs* were rejected in the 1972 conference committee.[431]

The more fundamental objection to the ratification argument, however, is that it does not rely either upon a congressional enactment or upon legislative history as an aid to understanding of such an enactment. It relies, rather, upon legislative history, as such. Moreover, this objection would be necessary even if that legislative history were not ambivalent as an expression of approval of the Court's then and later doctrines. Congress does not enact legislative histories; it enacts statutes. The statute it has enacted, as that statute is relevant here, is the 1964 Act, not the ambiguous views of the writers of a 1972 legislative report.[432]

---

[427]422 U.S. 405 (1975). In *Albemarle*, the Court imposed a strict requirement of test validation, treating EEOC guidelines on the matter as de facto agency rules, despite the absence both of administrative rule making authority and the absence of compliance with the Administrative Procedure Act. *Griggs* certainly implied a group rights theory of antidiscrimination law, but *Albermarle* confirmed it by treating the business necessity/job relatedness defense in a fashion incompatible with a pretext theory of discrimination. It is no accident that Chief Justice Burger, the author of *Griggs*, dissented in *Albemarle*. 422 U.S. at 449.

[428]443 U.S. 193 (1979).

[429]*See* H.R. 1746, 92d Cong., 1st Sess. 8(c) (1971) (amending Section 703(h) testing defense); S. 2515, 92d Cong., 1st Sess. 4(a) (1971) (amending Section 706(g) to eliminate intentional discrimination as a condition to remedial relief). The bills discussed in the committee reports were not enacted. Gold, *Reply to Thomson*, 8 Indus. Rel. L. J. 117 (1986). The attempt in the House to codify *Griggs* was accepted in committee and defeated on the floor. *See* 117 Cong. Rec. 31,979-85, 32,088-32,113 (1971). The attempt in the Senate was successful, 118 Cong. Rec. 4944-48 (1972), but was dropped in conference. *See* Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for American Workers *reprinted in* 1972 U.S. Code Cong. and Admin. News 2179, 2183.

[430]118 Cong. Rec. 7166 (1972).

[431]*See supra* note 429.

[432]*See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977).

6. The Ratification By Silence Counterargument.—A version of the ratification argument, employed by the Court as a justification for adhering to its "voluntary" affirmative action precedent, is that Congress has "ratified" that precedent by failing to overturn it.[433] The initial difficulty with this argument is that it is difficult to take seriously. If the Court had an even relatively consistent record of adhering to its interpretations, one could plausibly understand this argument as an expression of a prudential policy of fostering and preserving settled expectations,[434] but the Court has no such record.[435] The second difficulty with the argument is that it rests on the questionable metaphor of a continuing dialogue between Court and Congress. The metaphor is questionable because, although the Court's decisions allocate the burden of legislative inertia, the Court does not control legislative agenda. There is no continuous dialogue between Court and Congress; there are instead sporadic, haphazard, unpredictable and typically isolated interactions.

The third difficulty is that the Court's decisions *do* allocate the burden of legislative inertia, and, in the present context, that burden is fatal. Neither of the chief interest groups with the organization and power to attempt a legislative assault on the Court's affirmative action edifice, civil rights groups or employer organizations, have any incentive to do so. The persons adversely affected by the edifice are isolated individuals.[436] Moreover, opposing political forces on the question of affirmative action are and have been for twenty years in equipoise: neither is sufficiently powerful either to legitimize voluntary affirmative action or to repeal it through legislation.[437]

E. On Understanding The Court's Interpretations: Nontraditional Theory

The point of the preceding section of this article was not that the Court's doctrines are illegitimate. Rather, the point was that the Court's doctrines are illegitimate, indeed, incomprehensible, within the perspective of a traditional understanding of judicial function in interpretation and application of legislation. The point of this section is to claim that a compromise theory of "voluntary" affirmative action is comprehensible and legitimate within an alternative perspective.

---

[433]Johnson v. Transportation Agency, 107 S. Ct. 1442, 1450 n.7, (1987).

[434]*See* E. Levi, An Introduction to Legal Reasoning 38 (1948).

[435]*See Johnson*, 107 S. Ct. at 1472-73 (Scalia, J., dissenting).

[436]*Id.* at 1475-76.

[437]*See* N. Glazer, *supra* note 6, at 215-17; Sherain, *The Questionable Legality of Affirmative Action*, 51 J. Urban L. 25, 41 (1973).

Perhaps the most direct means of approaching this alternative perspective is through Ronald Dworkin. Professor Dworkin claims that Title VII may be read either as prohibiting or authorizing "voluntary" affirmative action.[438] The Court is free to choose which of these alternatives is the best interpretation of the statute. The best interpretation is derived from a theory of "fit": the statute should be interpreted "to advance the policies or principles that furnish the best political justification of the statute."[439] The "best political justification" is a matter of judicial choice between conceptions of the concept of equality, but the choice should be one not incompatible with the provisions of the statute and compatible with the political climate of the times.[440] According to Professor Dworkin, both the individualist conception, one that would preclude voluntary affirmative action, and the group equality conception, one that would authorize voluntary affirmative action, equally fit Title VII on this test.[441] The choice then becomes a matter of sound political morality, the Court properly authorized voluntary affirmative action because it reflects the sounder version of political morality.[442]

It should be apparent that this argument assumes that Title VII does not provide an answer to the choice, that it enacts merely a "concept" and not a "conception" of equality.[443] It assumes, as well, that the Court would be bound to follow an individualist conception if Title VII had enacted such a conception. The first of these assumptions denies that Title VII clearly prohibits "voluntary" affirmative action. So it is important to examine the argument that it does not. The second assumption would become irrelevant if it is taken seriously and if the first assumption was refuted. The claim to be made below, however, is that it cannot be taken seriously because the method by which Professor Dworkin and others, including the Supreme Court, reach the first assumption ensures that statutes will not provide answers which bind the courts. The claim then, is that although Professor

---

[438]Dworkin, Principle, *supra* note 11, at 328; *cf.* Dworkin, Empire, *supra* note 193, at 394-97 (absent prejudice, political process may consitutionally seek egalitarian resource redistribution). In Professor Dworkin's terms, the alternatives are (1) promotion of economic equality and (2) banning all race-concious criteria.

[439]Dworkin, Principle, *supra* note 11, at 328-29. *See id.* at 146-77; Dworkin, Empire, *supra* note 193, at 225-58, 313-54.

[440]Dworkin, Principle, *supra* note 11, at 326-29.

[441]*Id.* at 328-29.

[442]*Id.*

[443]For Professor Dworkin, a "concept" is an abstract notion (such as equality) subject to differing understandings of what this "concept" requires. More concrete understandings are "conceptions." Concepts are uncontroversial; conceptions are controversial. *See, e.g.*, Dworkin, Empire, *supra* note 193, at 71.

Dworkin provides a rationale for the Supreme Court's interpretation of Title VII, the rationale, rather than its persuasive or unpersuasive character, is the important descriptive point. The rationale, as the subject of inquiry, explains the Court's interpretation not because it is persuasive, but because it tells us something important about the Court and about the Court's "conception" of its function.

1. The Rhetoric of Nontraditional Theory.—Although nontraditional theory is distinguishable from traditional theory in the expansive role it confers on courts in using statutes to further their policies, its rhetoric often justifies conclusions by reference to norms compatible with the traditional position. The argument in this subsection uses Dworkin's argument to illustrate the point that nontraditional theory nevertheless deviates from those norms.

Professor Dworkin's method for concluding that Title VII enacts merely a concept and not a conception is initially commonplace: (1) the language of the statute does not address the question of voluntary affirmative action; (2) the "institutional intention" of Congress reflected in legislative history may not be relied upon absent a clear legislative convention that this history was to be a part of the enacted text of the statute; and (3) there is no such thing as a reliable collective congressional intention that can be derived either from the statute or from its legislative history.[444]

It is possible to dispute each of these points, and they are disputed in the footnote.[445] The present objective, however, is to identify method.

---

[444]*Id.* at 321-26.

[445]Some of these points are discussed *supra* in text accompanying notes 391-437. The argument that there is no such thing as a collective psychological state of legislative intention is correct in some senses and not correct in others. It is surely correct if one means by it a collective, subjective motivation for passing a statute, DWORKIN, EMPIRE, *supra* note 193, at 315-16, or collective agreement about how the statute would be applied within a given factual scenario that had not been expressly contemplated at the time of enactment. But these possibilities do not exhaust the matter. There is such a thing as a collective understanding, even if in relatively abstract terms, of the policy or principle enacted. *See* J.W. HURST, DEALING WITH STATUTES 32-40 (1982). If there were not such a thing, the very notion of legislation would be implausible. *See* Cox, *supra* note 29, at 338-41.

The argument that legislative history may count as a statement of institutional intention only if there is a legislative convention making it so is too strong. Such a convention would certainly add weight to the statement, but the absence of a convention should not render the statement excludable. The absence of a convention merely renders the question of weight part of the interpretive agenda, so it must be determined whether the statement is a credible guide to understanding the policy or principle of the statute. Professor Dworkin seems to have realized this in arguing elsewhere that the statements of legislators are political acts that are a basis for deciding what interpretation of a statute makes it "best." DWORKIN, EMPIRE, *supra* note 193, at 313-54.

The curiosity important in Professor Dworkin's method is its quality of having and eating the relevant cake.[446] Professor Dworkin is simultaneously intent upon excluding evidence that might be marshalled in an argument against the conclusion that no conception was enacted, and upon insisting that the statute nevertheless binds the Court. He excludes the evidence of legislative history by claiming that, absent a firm convention under which congressmen understand that legislative history is a part of statutory enactment, such history may not be relied upon as evidence of an "institutional intention."[447] Moreover, he rejects the notion of a collective legislative intent apart from convention because there is no such thing as a shared psychological intent of the legislature.[448] In what sense, then, is the Court "bound" by the statute? It would apparently be bound in Dworkin's argument if the language of the statute specifically addressed the precise question of "voluntary" affirmative action. However, neither Section 703(a) nor Section 703(j) is, for Dworkin, sufficient for this purpose. Section 703(a)'s general prohibition of discrimination is insufficiently precise to constitute an express legislative contemplation of voluntary affirmative action, and Section 703(j) addresses merely "required," not "voluntary" preferences.[449]

---

[446]Arguably, this is a criticism that may be made of Dworkin generally. *See* Fish, *supra* note 375.

[447]Dworkin, Principle, *supra* note 11, at 325.

More specifically, Professor Dworkin dismisses that portion of the legislative history predating the adoption of Section 703(j), in which sponsors, managers and supporters of the Title VII argued that the Act would neither permit nor require race conscious programs, because the adoption of Section 703(j) establishes that Congress had no convention that would make these arguments a part of the statute. *Id.* The adoption of Section 703(j) certainly suggests that the congressmen did not trust the prior legislative history as a bar to an interpretation of the statute that would require race conscious programs (with, as it turns out, good reason). It does not establish either the absence of a convention or the irrelevance of the earlier history, except on the assumption that legislative history is inadmissable absent a very strong form of convention.

Professor Dworkin, however, is not alone in criticizing reliance on legislative history. *See* Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring). The plausibility of such reliance would seem, however, to be a matter of the weight to be assigned to history rather than its admissibility and to be a matter of the purpose for which it is used. The weight assigned is justifiably greater where the history recounts a full and intensive congressional debate than, for example, a committee report where it is not clear that the report became the subject of or came to the attention of the full body in debate. Similarly, a judicial purpose to clarify ambiguous statutory language is more justifiable than a purpose to rely on history as the source for a rule that finds no support in the language of the statute itself.

[448]Dworkin, Principle, *supra* note 11, at 322-24.

[449]*Id.* at 327. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979).

This analysis permits Dworkin to claim that the Court must engage in a "fit" analysis. Two conceptions equally "fit" the statute: the statute may be read to forbid all discrimination (the individualist conception) or may be read to permit benign discrimination (the group conception).[450] The latter possibility is grounded, ironically enough, on the claim that Congress intended to preserve employer discretion, in the sense that a policy of preserving employer discretion had wide political appeal at the time of enactment.[451] The former possibility is similarly grounded; color blindness rhetoric also had currency and political appeal at the time of enactment.[452]

What is interesting about this line of reasoning is what it leaves out. The first matter omitted is the question of characterization: in what sense can affirmative action be said to be "voluntary" and, therefore, not within Section 703(j)'s express prohibition of "required" preferences? Given the relationship between the Court's theories of liability, the employer incentives generated by these theories and employer-adopted race and gender preferences, affirmative action is "voluntary" only in the sense that it is not formally required.[453] Employer discretion is preserved, then, in the sense that employers may either engage in affirmative action or risk liability for race and gender imbalance in their work forces. The "fit" criteria Professor Dworkin advocates is of a peculiar sort, for the statute is made to "fit" a "chain" of interpretations[454] of a highly amended variety. This prior "chain" of interpretations could of course be used to justify affirmative action in an argument Professor Dworkin does not employ; judicial permission to engage in benign discrimination "fits" the "chain," even though it does not "fit" the statute as originally enacted. Adoption of this argument, however, would require a concession that the Court's "chain" of interpretations "changed" the statute; a concession neither Professor Dworkin nor other nontraditionalists can make without abandoning their claim of adherence to traditional norms.[455]

The second matter omitted is the relationship between the "conceptions" said to have had currency and appeal at the time of enactment, even though they were not enacted. In Professor Dworkin's view these conceptions are incompatible alternatives from which the Court must

---

[450]Dworkin, Principle, *supra* note 11, at 327-28.

[451]*Id. See* United Steelworkers v. Weber, 443 U.S. 193 (1979).

[452]Dworkin, Principle, *supra* note 11, at 328.

[453]*See supra* text accompanying notes 58-78, 113-64.

[454]*See* Dworkin, Principle, *supra* note 11, at 158-62 (invoking the notion of a chain of interpretations and a requirement that judges must adopt an interpretation that best fits this chain as a constraint on discretion).

[455]*See id.* at 160 (judge must interpret, not invent a legal history).

choose. This leaves out, however, the clear possibility that they may be reconciled. They are reconciled within the individualist conception; employer discretion is preserved by confining Title VII to a prohibition only of disparate treatment, as it is precisely the limited character of that prohibition that minimizes the intrusion of collective decision into private discretion.[456] The incompatibility between the conceptions arises only by virtue of the first matter left out: employer discretion has been antecedently confined through a prior "chain" of interpretation generating the Court's liability strategies. As Professor Dworkin fails to consider the meaning of "required" and "voluntary" and therefore fails to recognize the Court's responsibility for creating the phenomenon of "voluntary" affirmative action, he entertains the fiction that private employer conduct, and, therefore, a policy of preserving private discretion, is in issue. This argument, however, is a bootstrap. It amounts to a claim that employers should be permitted, in their discretion, to do what the Court's chain of interpretations compels them to do.

The third matter omitted is that there is a version of legislative intent between the polar extremes of a collective legislative will and a concrete expression through the language of a statute or of legislative convention.[457] The difficulty with Professor Dworkin's argument about collective psychological states (and with much realist analysis of legislative intent) is that it attacks a straw man.[458] It is indeed implausible that legislators share a common set of hopes, fears, and preferences about legislation or a common set of motiviations for voting for it. It is also implausible that even those legislators who think about the proposals before them share a common set of hypothetical factual scenarios to which they contemplate application of a statute. But this does not compel the conclusion that legislators merely share an abstract "concept." They can and do share relatively concrete conceptions.[459]

These conceptions do not "announce" their meaning or significance within the factual scenario presented to a court; the responsibility for interpretation and application is inescapably the court's. Nevertheless, both the language of the statute and its legislative history, even absent a legislative convention regarding such history, are evidence from which to build an understanding, and from which the understanding, once achieved, may be reasoned. It might be said that Professor Dworkin does not disagree with these assertions and that he merely asserts and supports one of a number of possible understandings, but he does

---

[456]*See supra* text accompanying notes 29-54.

[457]*See* Cox, *supra* note 29, at 329-58.

[458]*See* MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 771-75 (1966).

[459]*See* Cox, *supra* note 29, at 334-41.

disagree. He is intent upon delegitimizing the authority both of the language of the statute and of its legislative history as expressions of a conception, because he wishes to give the Court the discretion to choose between conceptions. This intention explains why legislative history, unless it satisfies Dworkin's test of admissibility, is excluded; why the consistent statements of sponsors of the legislation invoking the individualist model are converted by Professor Dworkin's argument into "the political climate of the times"; why Professor Dworkin gives Section 703(j) no force beyond "required" preferences; and why he declines to consider the question of just what content can be plausibly given to the distinction between required and "voluntary" preferences.

Professor Dworkin's ultimate point—that the Court is to choose between conceptions on the basis of its view of sound political morality—is correct in the sense that courts must choose between the traditional and nontraditional interpretive approaches and between the political moralities implied by these alternatives. It is, however, not correct as a claim that Title VII enacts no conception. Professor Dworkin's analysis, despite its appeal to "fit," is best understood as a choice of nontraditional theory. More specifically, his analysis best "fits" the proposition that statutes should be viewed as if they enact broad concepts and, therefore, are authorizations for the courts to select and implement preferred conceptions.[460]

2. Nontraditional Theory Viewed Functionally.—Professor Dworkin, however, is merely an example of nontraditional theory. Eschewing Dworkinian pyrotechnics, some have made the straight-forward claim that it does not matter what Congress thought in 1964 or even in 1972 because subsequent developments—post-enactment academic reformulations of appropriate policy or changes in zeitgeist—authorize the Court's interpretations.[461] Others would apparently reject the traditional notion that courts are bound by statutes, on the grounds either that statutes are incapable, as a descriptive matter, of binding courts,[462] or that statutes cannot keep pace with social, political and moral change. Therefore, courts should not, as a normative matter, be bound by original legislative understandings.[463] The present question is not the legitimacy or illegitimacy of these views. The point, rather, is that,

---

[460]*Cf.* M. SANDEL, *supra* note 166, at 135-42 (Dworkin's limited conception of individual rights permits largely unconstrained utilitarianism); Cotterrell, *Liberalism's Empire: Reflections on Ronald Dworkin's Legal Philosophy*, 1987 AM. B. FOUND. RES. J. 509, 515 (noting that Professor Dworkin's version of liberalism inevitably wins in his own interpretations).

[461]Fallon & Weiler, *supra* note 6, at 17-18.

[462]*Cf.* S. FISH, *supra* note 29 (community, not text, binds interpreters).

[463]*See generally* G. CALABRESI, *supra* note 11.

whatever the particular justification argument, nontraditional theories minimize the binding force of statutes and maximize the law and policy creation function of courts by treating statutes as open-ended conferrals of authority.

Indeed, it is possible to identify central features of nontraditional theory compatible with the Court's treatment of Title VII. First, central to nontraditional theory is a descriptive claim about the improbability of formalist theories of law, combined with an emphasis upon the independent responsibility of courts to interpret the meaning attributed to legislation.[464] Second, equally central to nontraditional theory is elevation of the judiciary to a preeminent status. This is a significant extension of the claim that courts have an independent responsibility to advance statutory purposes, because courts are not viewed merely as independent. They are instead viewed as keepers of a cultural heritage, of transcendant values, of a changing zeitgeist, even of our collective political morality.[465] Moreover, they are viewed not as the keepers of common law to be distinguished from statutory law, but rather as keepers of a legal fabric that includes elements of common law, statutes, principles and policies derived from statutes.[466] Third, nontraditional theory is careful to defend itself against the argument that its third feature renders it a tyrant. It is said not to be tyrannical because it is confined by the necessity of dialogue, the conventions of rational discourse within that dialogue, and by its supposed expertise in ascertaining and extrapolating from underlying fundamental values.[467]

Fourth, the passage of time is emphasized by nontraditional theory's approach to statutes. The basic notion is a diagnosis of rapid obsolescence: original legislative understandings, even if discoverable, are rendered irrelevant over time, so that statutes are to be employed in service of current judicial understandings of social need or judicially constructed principle.[468] Fifth, nontraditional theory insists that the fabric of the law has, at least in general, a politically neutral logical coherence for which the courts are responsible.[469] The fabric is coherent by reference to a political morality or moralities identified by courts,

---

[464]*See, e.g.*, Dworkin, Principle, *supra* note 11, at 131-37, 316-31; Dworkin, Empire, *supra* note 193, at 313-27.

[465]*See* G. Calabresi, *supra* note 11, at 91-119; Dworkin, Empire, *supra* note 193, at 176-266.

[466]*See* G. Calabresi, *supra* note 11, at 129-31.

[467]*See* G. Calabresi, *supra* note 11, at 111-114; Dworkin, Empire, *supra* note 193, at 397-99.

[468]*See generally*, G. Calabresi, *supra* note 11; Dworkin, Empire, *supra* note 193, at 348-50; Eskridge, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987).

[469]*See* G. Calabresi, *supra* note 11, at 96-101; Dworkin, Empire, *supra* note 193, at 397-99.

but the identification is politically neutral in the sense that it is not by reference to transient or even judicially preferred ideologies, but rather to fundamentals, derived from tradition or implicit in the fabric of law itself. The judicial function is, therefore, to incorporate statutes into this fabric, both in the sense that statutes are potential sources of development within the fabric, and in the sense that they are to be treated as serving public welfare ends compatible with the fabric.[470]

These features of nontraditional theory characterize the Court's interpretations of Title VII. The Court has eschewed close attention to text and to legislative history and instead embraced the most abstract of congressional purposes as a touchstone for decision—economic equality of groups.[471] It is not coincidental that this touchstone maximizes the Court's discretion to develop a regulatory apparatus in instrumental service of abstract purpose. Nor is it coincidental that this abstract purpose is a virtual restatement of a central tenet of a political morality that appeared and gained force after 1964.[472] The Court's justification for this process has included elements not merely of original and abstract congressional purpose, but of post-enactment political climate,[473] of appeals to the Court's responsibility for the "fabric of the law," and of the passage of time as a reason to deemphasize original understanding.[474]

There is, however, a final feature of nontraditional theory of which the Court's interpretations of Title VII is perhaps the best example. Nontraditional theory authorizes and legitimates bureaucracy, understood both as bureaucratic organization and as the "activist" agenda to which such organization is devoted. Consider an extreme version of traditional theory, legal formalism's[475] understanding of statutes. At

---

[470]*See* G. Calabresi, *supra* note 11, at 101-09. *Cf.* Dworkin, Principle, *supra* note 11, at 326-31 (court's task is to interpret so as to further the "best political justification" of the statute). *But cf.* Dworkin, Rights, *supra* note 29, at 111 n.1 (statutes enact policies, not principles).

It is apparent that this view would also authorize limiting, perhaps even "overruling," a statute thought to be out of keeping with the fabric. *See generally*, G. Calabrasi, *supra* note 11. *Cf.* Wellington, *supra* note 381, at 264 (advocating use of clear statement rules). It therefore arguably has a feature reminiscent of the traditionalist's preference for the common law.

[471]*See* United Steelworkers v. Weber, 443 U.S. 193, 228-30 (1979) (Rehnquist, J., dissenting) (criticizing the Court on this ground).

[472]*See* Fallon & Weiler, *supra* note 6, at 17-18.

[473]An example is the Court's reliance upon the 1972 legislative history. *See supra* text accompanying notes 424-32.

[474]*See* Johnson v. Transportation Agency, 107 S. Ct. 1442, 1458-59 (1987) (Stevens J., concurring); United Steelworkers v. Weber, 443 U.S. 193, 215 (1979) (Blackmun, J., concurring).

[475]"Formalism" means a general tendency to favor treating statutes as "rules" with

least in its perhaps caricatured form, formalism: (1) would insist upon adherence to original understanding as the sole legitimate "law";[476] (2) would confine law to the scope of that original understanding, so that the unprovided-for case is one not governed by law (and so, either an embarrassment or subject to a motion to dismiss);[477] (3) would reject the passage of time and changed conditions or political climate as justification for ignoring original understanding;[478] (4) would be centrally concerned about allocating legal decision-making authority, so that only specified institutions legitimately exercise such authority;[479] and (5) would eschew reference either to the consequences (whether good or bad) of adherence to original understanding or to flexibility in response to feedback about consequences in favor of a rigid adherence to that original understanding.[480]

Bureaucracy is not plausible under such a regime. This claim may at first appear surprising; it is the popular hallmark of the bureaucrat

---

relatively concrete and confined meanings (supplied particularly by a belief in the determinate character of the meaning of language) and to believe in the possibility of deduction from such rules. *See supra* text accompanying notes 50-54. However, it is not necessary to even an extreme version of the "traditional theory" as that label is used here that the person adopting it believe naively either in the capacity of statutory language to control decision or that courts are or should be merely passive conduits for legislative "will." *See, e.g.*, Easterbrook, *supra* note 385. Indeed, it is not necessary to traditional theory that common law method yield general rules or principles rigidly applied. It would be permissible for that method to be characterized as entailing particularized and fact dependent judgments. *Compare* Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 Iowa L. Rev. 1249 (1980) (attacking pragmatic resolution of particular cases and favoring adjudication by reference to general rules or principles) *with* Stone, *From Principles to Principles*, 97 L. Q. Rev. 224 (1981) (Atiyah's pragmatism is a process of formulating new principles). What *is* necessary to the understanding of traditionalism invoked here is a belief that an exercise of governmental power, including judicial power, must, if it is to be justified by reference to a statute, be derived from a relatively concrete expression of legislative judgment. This of course leaves open the possibility of alternative justifications, most obviously the principles of common law that would be controlling in the absence of a claim that a statute has relevance to a case. If one believes that these principles generally favor private ordering, or are compatible with individualistic liberalism as classically conceived, *see* R. Epstein, *supra* note 247; F. Hayek, *supra* note 31, at 148-61; or are economically efficient, *see* Easterbrook, *supra* note 385, the consequence is a position that so confines justifications of the exercise of governmental authority that it precludes administrative law as we know it.

[476]*See, e.g.*, Kelsen, *The Pure Theory of Law, Part II*, 51 L. Q. Rev. 517 (1935); A. Dicey, Introduction to the Study of the Law of the Constitution 183-203 (1915).

[477]*See, e.g.*, Easterbrook, *supra* note 385; Pound, *Spurious Interpretation*, *supra* note 385.

[478]*See, e.g.*, TVA v. Hill, 437 U.S. 153 (1978).

[479]*See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[480]*See, e.g.*, TVA v. Hill, 437 U.S. 153 (1978).

that he is an inflexible adherent to bureaucratic rules and, therefore, a quintessential formalist. But this inflexible adherence, to the extent that it in fact accurately depicts bureaucrats, is a feature of bureaucracy's observed behavior, not a rationale for or legitimating theory of bureaucracy.[481] Viewed institutionally, governmental bureaucracy could not survive in a formalist's legal world for two reasons: (1) The legitimacy of bureaucracy as an institution would be suspect, because broad delegations of rule making authority could not be traced to concrete legislative original understandings; and (2) the modern legitimating rationale for bureaucracy, that bureaucracies apply a flexible and pragmatic expertise to an evolving social, political and economic environment, would be suspect because the rationale is incompatible with all of the features of caricatured formalism noted above.[482]

Nontraditional interpretive theory legitimates bureaucracy in part, then, because it rejects the formalist obstacles to that legitimacy. There is, however, more to this matter than the mere removal of formalist obstacles. Nontraditional theory also legitimates by affirmatively asserting the moral imperative of an expanding, purposive, flexible and cybernetic law administered by institutions with open-ended authority.[483] Although it is true that the legitimating strategy of nontraditional authority is formally directed to courts as institutions, the reality is that most modern law, at least in volume, is bureaucratically formulated and applied. Courts, in interpreting and applying statutes, oversee a bureaucratic process. Moreover, courts are themselves transformed by the process nontraditional theory legitimates; they become bureaucracies both in the sense that their procedures become bureaucratized,[484] and in the sense that the interpretations they lay down have bureaucratic

---

[481]The legitimating rationale for the administrative state is that agencies are staffed with experts capable of flexibly responding to rapidly changing social conditions and of engaging in experimentation. *See, e.g.*, J. Landis, The Administrative Process 10-17, 98-99 (1938); Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L. J. 1487, 1495-1500 (1983). For an interesting critique of this and other rationales for bureaucracy *not* undertaken from an individualist perspective, see Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984).

[482]The general concern with administrative agency discretion, although it postulates alternative means of controlling that discretion, illustrates the incompatibility of the formalist stance with the administrative state. *See, e.g.*, Shapiro, *supra* note 481; Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975) [hereinafter Stewart, *Reformation*]; Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 Yale L.J. 1537 (1983).

[483]*See, e.g.*, B. Ackerman, *supra* note 293.

[484]*See e.g*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442 (1983); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. Pa. L. Rev. 777 (1981); Vining, *Justice, Bureaucracy and Legal Method*, 80 Mich. L. Rev. 248 (1981).

features.[485] Finally, although much of nontraditional theory purports to assign to courts the fundamental function of protection of individual rights as trumps of governmental policy, so that courts are viewed as counterweights to bureaucracy, it is not accidental that these rights are defined under it in a fashion compatible with the agenda of the "activist" state.[486] It is crucial to that agenda and to the preservation of such a state that courts eschew the limited, "reactive" role implied by formalism.[487]

Consider the typical post-New Deal regulatory scheme. Such regulatory schemes are characterized by a broad mandate to an administrative agency. The mandate often compromises contending political positions in the enactment process by declining to establish a concrete program. The administrative agency is to produce the program by absorbing contending political forces within a bureaucratic process.[488] Despite lip service to nondelegation doctrine and even an occasional

---

[485]Much commentary on the role of the judiciary in the context of administrative law conceives of courts as relatively passive mediators between bureaucratic agendas and "fundamental values," so they have the task of, for example, controlling administrative discretion. *See, e.g.*, L. Jaffe, Judicial Control of Administrative Action 569-75 (1965). This, however, understates the judicial functions actually assumed. Courts are not mere passive mediators; they are actively engaged in establishing and furthering bureaucratic agendas and in adjudicating polycentric disputes between multiple interests. *See, e.g.*, Chayes, *supra* note 484; Mashaw, *supra* note 176. This does not mean that there has been but a single, uniform tendency; the extent to which the courts have assumed activist roles has varied. *Compare* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (activist judicial review of rulemaking) *with* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (passive judicial review of rulemaking). *See* Chayes, *The Supreme Court 1981 Term Forward: Public Law Litigation in the Burger Court*, 96 Harv. L. Rev. 4 (1982); Damaska, *Activism in Perspective*, 92 Yale L.J. 1189 (1983).

[486]*See* Mashaw, *supra* note 176. It is important to recognize that the claim made in the text disputes the standard position that courts are institutions independent from the administrative state and charged with the responsibility of preserving the fundamental principles of the legal fabric from the intrusions of that state. Professor Dworkin, for example, advocates a version of that standard position in sharply distinguishing principle from policy. *See, e.g.*, Dworkin, Rights, *supra* note 29, at 22-28. Although the traditional view would support the standard position as a claim about what courts should do (via the device of relatively narrow construction of the scope of a statute), *see* Easterbrook, *supra* note 385, the claim in the text is that courts have in fact largely become integral actors within the administrative state, engaged in a process of establishing and furthering its agenda, despite occasional rear guard actions in keeping with the standard position. More importantly, the claim in the text is that nontraditional theory legitimates this phenomenon. *Cf.* M. Sandel, *supra* note 166, at 135-47 (Professor Dworkin's position so narrowly construes rights as to justify an expansive utilitarianism).

[487]*See* B. Ackerman, *supra* note 293.

[488]*See, e.g.*, Stewart, *Reformation*, *supra* note 482, at 1676-77; Shapiro, *supra* note 481, at 1505-07.

judicial recognition that the scheme enacts no clear resolution,[489] the general tendency has been to uphold such schemes.[490] In short, the typical regulatory scheme enacts abstract purposes and instructs the agency it creates to go forth, do good and avoid evil. The role of courts in the post-New Deal era has not been merely that of validating delegation of legislative authority, or of experimenting with administrative process to curb bureaucratic discretion. The courts have also gone far in establishing the substantive content of "doing good."[491]

It has been the contention here that Title VII is not the typical regulatory scheme, viewed, at least, from the perspective of a traditional stance. However, the methodology by which the Court has approached Title VII has transformed the statute into a bureaucratic instrument compatible with an activist model of the state. The difference is that it is the courts, rather than an expert agency, that have supplied the major element of the enforcing bureaucratic structure under Title VII. Consider, for example, the Court's elevation of the EEOC, an agency without congressionally conferred rule-making authority, into a *de facto* rule-making agency whose rules, however, are judicially applied selectively. The agency's rules are utilized as legitimating arguments when judicially applied; the rhetoric of bureaucratic expertise is employed as justification for a regulatory agenda constructed by the courts.[492] Consider also, the long tendency of the lower federal courts, only recently impeded by a shifting majority on the Supreme Court, to employ class action procedures as an instrument for implementing rather radical changes on a mass scale in employment procedures.[493] The form and scope of impact of such procedures is bureaucratic in the sense that they permit a thoroughgoing restructuring of social practices and

---

[489]*See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).

[490]*See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[491]Much administrative law commentary treats this process as a matter of controlling agency discretion, thus suggesting a judicial role of reaction to agency initiatives. *See* Stewart, *Reformation*, *supra* note 482; Shapiro, *supra* note 481; Rabin, *Legitimacy, Discretion, and the Concept of Rights*, 92 YALE L.J. 1174 (1983). Nevertheless, judicial reaction often establishes the substantive content of regulation and does so not merely by confining that content. *See*, note 485 *supra*.

[492]*See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 430 (1975).

[493]*Compare* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) *with* General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982). It is of course possible to view the Supreme Court's limitation of the class action device as a backing away from the bureaucratization theme and as a partial return to a more traditional stance on the permissible scope and character of adjudication. It is, however, also possible to view the phenomenon as abandonment of a device no longer needed, as the objectives of employing the device have been satisfied. *See* Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L.J. 313 (1984).

a means of accommodating multiple, contending interests. Consider, finally, the Court's liability theories and affirmative action theories. If the analysis of this article is correct, these constitute not a "reactive" scheme for adjusting disputes within a regime of private ordering, but an "activist" effort to redistribute employment through systematic reordering of private incentives. Indeed, the thrust of this discussion is that the Court has converted a statute that, when viewed from a traditional perspective, conferred a limited individual right within a regime of private ordering of employment into a statute that, when viewed from a nontraditional perspective, is an engine to achieve a particular end-state: a fair distribution of employment among race and gender groups.

V. Conclusion

The claim that the Court has bureaucratized Title VII should not be surprising. It is intimately related to the earlier claims made here that the Court has recognized a group right and de-emphasized the individualist conception of the antidiscrimination principle.

The individualist conception, the account of original legislative intent provided above, and the conception of the function of courts as limited to enforcement of privately formulated arrangements or to the reactive correction of deviations from governing norms are related. All are aspects of a legal landscape that emphasizes, indeed is premised upon, notions of the value of individual autonomy, the primacy of private ordering and of the skepticism about the capacity of government to define, let alone to effectively implement, the public good. The role of a court in confronting a statute is, on these premises, the highly limited one of enforcing original understanding and, therefore, of confining the statute's operation and impact on private ordering to that understanding. At most, that role might extend to mediating legislative design, any administrative structure created to implement the design, and the pre-existing and privately ordered state of affairs originally confronted by the legislature. Viewed from the baseline of this landscape, Title VII created and authorized enforcement merely of a limited individual entitlement. As the political justification for the Civil Rights Act at the time of its enactment was premised upon individualist norms, it is not surprising that both the text and legislative history of Title VII comport with this assessment.

There is, of course, an alternative landscape, one that has generally eclipsed its competitor. The alternative has been variously labeled "constructivist,"[494] "activist"[495] and "statist."[496] Its features are: (1) use of

---

[494]B. Ackerman, *supra* note 293, at 72.

[495]*Id.* at 1.

[496]Mashaw, *supra* note 176, at 1131.

governmental authority to order society in service of a publicly defined good; (2) implementation of this project through the rationalized processes of bureaucracy; (3) the blurring of private-public distinctions through the interrelated and interdependent character of private activity and bureaucratic processes and agendas;[497] and (4) a conception of courts not as enforcers of limited original understanding and not as merely mediators between public and private realms or between the legislature and the bureaucracies, but as prime actors both in establishing and in monitoring bureaucratic agendas.

Viewed from the perspective of this alternative landscape, Title VII's purpose of enhancing distributive equality is properly viewed as its meaning, for that purpose is both compatible with the expanded version of governmental function expressed in such a landscape and with a meaning subject to the implementing bureaucratic process implicit in that landscape. Moreover, recognition and enforcement of a group right is compatible with, perhaps is inherent in, the alternative landscape. Groups do not have rights in the sense of trumps of governmental interests or of private actions, but rather, in the sense of expressions of underlying, and overriding, governmental policy. The group is the administrative unit both of measurement and of implementation in an "administrative state."[498]

It may be said that this is putting the matter too strongly. An accurate depiction of the law of Title VII would not treat it either as expressing a "perpetrator" (individualist) perspective or a "victim" (bureaucratic) perspective,[499] but as an uneasy accommodation of both.[500] The law of Title VII (like, perhaps, American law generally) is more accurately characterized by oscillation between incompatible alternatives (or by "contradiction") than by a claim that it exhibits merely the characteristics of an "activist" or "statist" conception. There is much to be said for this view; it is a version of the claim earlier made here that Title VII is incoherent.[501] Moreover, it is a view supportable by reference to the rationalization that the group rights aspects of the Court's doctrine can be conceptualized as a strategy of overenforcement of the disparate treatment prohibition.[502] The claim

---

[497]There is in addition a phenomenon, independent of governmental compulsion, of private adoption of bureaucratic forms of organization. *See generally* O. Williamson, Markets and Heirarchies (1975).

[498]Mashaw, *supra* note 176, at 1153.

[499]*See* Freeman, *supra* note 2, at 1052.

[500]*Cf.* Damaska, *supra* note 485 (rejecting claim that American law can be explained by statist model and arguing that it is instead a complex combination of centralized and decentralized features).

[501]*See supra* text accompanying notes 154-65.

[502]*See supra* text accompanying notes 271-367.

that Title VII has been bureaucratized is not, however, dependent upon a finding that it has been wholly and coherently bureaucratized. The Court's interpretations have rendered it both incoherent and a chief example of the departure of the current legal landscape from the rhetorical individualist ethic often employed to legitimate it.

The difficulty is that bureaucracy, and the view of government and court that underlies it, has been imposed upon a statute that both expresses and is symptomatic of an individualist ethic. Distinct and incompatible ideologies therefore coexist in uneasy tension. The consequence is compromise, an unstable complex of legal norms that can legitimately be explained either as an instance of bureaucratic implementation of a state policy of redistribution (a group rights regime), or as an instance of judicial overenforcement of disparate treatment (a partially individualist regime). This consequence satisfies neither side of the debate between these ideologies. From the perspective of advocates of redistributive equality among groups, the compromise is an inadequate, indeed hypocritical instance of the perpetuation of racism and sexism.[503] From their perspective, such advocates are correct: it is unlikely that the compromise will substantially affect the phenomenon of the minority underclass both because it incorporates elements of meritocratic individualism that render it largely irrelevant to that underclass, and because the appropriation and redistribution of wealth necessary to any near-term elimination of the underclass is not contemplated by the compromise.[504] From the perspective of advocates of individualist ideology, the compromise is an impermissible denial of the ideal premised upon an alien conception of governmental functions. From their perspective, the individualists are also correct: the compromise recognizes and enforces a group right, understood as a redistributive policy of government, even if the limited character of this policy results merely in tokenism.

---

[503]*See* Freeman, *supra* note 2.

[504]*See* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78 (1986).