

# THE WORKPLACE IN A RACIALLY DIVERSE SOCIETY: PRELIMINARY THOUGHTS ON THE ROLE OF LABOR AND EMPLOYMENT LAW

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President Clinton stirred some hope, along with some cynicism, in his effort to initiate a “national conversation about race.”<sup>1</sup> Race unquestionably divides Americans—particularly black and white Americans—in their experiences and in their perceptions of the world, of social policy, and of each other.<sup>2</sup> Few question the need for a more honest discussion of racial divisions, their causes, and their potential cures. There is, on the other hand, good reason to question our ability to reach a societal consensus about what to do and to put a realistic plan into effect.<sup>3</sup> But

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1. See, e.g., *Clinton, at Meeting on Race, Struggles to Sharpen Debate*, N.Y. TIMES, Dec. 4, 1997, at A-1. I use the term “race,” and the corresponding terms “black” and “white” and “African-American” and “Anglo-American,” in accordance with conventional usage. At the same time, I recognize the telling critique of this terminology by Orlando Patterson, who argues for the substitution of “ethnicity” for “race,” “Afro-American” for “black” and “African-American,” and “Euro-American” for “white.” See ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS* x-xi (1997). I find his critique persuasive but do not wish in this essay to carry the baggage associated with bucking this particular set convention.

2. Much of the current debate over race can be characterized as one over optimism versus pessimism about our progress toward racial equality. The pessimistic view is perhaps most starkly expressed in ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992). See also DAVID SHIPLER, *A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA* (1997); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 60-82 (1993). Much more optimistic assessments are found in STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997), and PATTERSON, *supra* note 1. All of these major studies agree that there remains a serious racial divide, both in socioeconomic conditions and in attitudes; however, they disagree over the direction and scope of progress in recent decades. Clearly, there are major differences between black and white attitudes and beliefs about race.

3. Indeed, the racial divide is particularly manifest in different perceptions about the nature and seriousness of racial divisions and about appropriate measures to deal with these

perhaps, in part, the medium is itself the message, or the means itself the end. We would do much to heal racial divisions if people of different races, and particularly black and white citizens, had more conversations—about race and, perhaps more importantly, not about race—with each other. A “national conversation about race” may ultimately do less to improve race relations in this country than would millions of individual conversations among people of different races.

But where are those conversations to take place?

We live in a society that is still largely divided along racial lines, especially with respect to black and white citizens.<sup>4</sup> In spite of important progress toward desegregation, and particularly the dismantling of official barriers to integration, there continues to be significant racial separation in most spaces in our society. Even in areas with a significant black population, most citizens still live in neighborhoods that are occupied predominantly by people of their own race.<sup>5</sup> Largely as a result of housing

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issues. Public opinion data consistently show, for example, that “there is a massive gap dividing black and white perceptions of the prevailing racial climate.” Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781, 786 (1993). There are also wide differences in perceptions and opinions on issues of social policy that have a differential impact on blacks and whites.

4. The problems of segregation, racial inequality, and racial tension are greater with respect to African-Americans than any other group. Moreover, the most extensive data on segregation concerns black and white citizens. To the extent that I focus on this particular divide, it is because it seems to present the most difficult problems.

5. Assessments of residential segregation consist of both hard statistical measures of racial separation and isolation and polling data in which respondents report having neighbors of other races. By hard statistical measures, residential segregation has declined, but it continues to be significant. Massey and Denton found that in 18 northern major metropolitan areas, the average black resident lived in a neighborhood (defined as a census tract) that was 68.7% black in 1970 and 66.1% black in 1980. See MASSEY & DENTON, *supra* note 2, at 64. For southern metropolitan areas, the figure declined from 69.3% in 1970 to 63.5%. See *id.* By 1990, across 318 metropolitan areas, the average black person lived in a neighborhood that was 60% black and 29% white. See THERNSTROM & THERNSTROM, *supra* note 2, at 219.

Another standard measure of segregation is the “dissimilarity index”: the average percent of residents who would have to move in order to achieve an even distribution of the races throughout a metropolitan area. By that measure, Massey and Denton found that “dissimilarity” had declined in the 18 largest northern metropolitan areas from 84.5% in 1970 to 80.1% in 1980 to 77.8% in 1990. See MASSEY & DENTON, *supra* note 2, at 64, 222. In the 12 largest southern metropolitan areas, “dissimilarity” declined from 75.3% in 1970 to 68.3% in 1980 to 66.5% in 1990. See *id.*; see also Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23, 30-32 (1994) (showing modest declines in black-white residential segregation during the 1980s). Levels of segregation and isolation for other large minority groups, such as Hispanics and Asians, have consistently been much lower. See *id.* at 32.

Polling data supply another softer measure of segregation. In the Detroit

segregation, most public schools, even in areas with substantial black populations, are still attended predominantly by children of one race; indeed, it seems likely that racial segregation in public schools will increase in the near future, as the courts withdraw from the business of school desegregation.<sup>6</sup> Churches tend to be attended mostly by one race or another.<sup>7</sup> Perhaps least surprising, racially mixed families, though far more common than they once were, are still a rarity.<sup>8</sup>

Racial separation in many of these spheres has proven quite durable and resistant to change through legal intervention. In some cases, as with families, churches, and many other voluntary associations, deeply rooted rights of privacy and freedom of association guard against attempts to dictate desegregation, or even nondiscrimination.<sup>9</sup> In the crucial case of housing, the racial makeup of neighborhoods is typically the product of such complex and historically rooted forces, and of so many individual decisions over a long period of time, that laws against housing discrimination have made limited progress in changing overall patterns of segregation.<sup>10</sup>

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metropolitan area in 1992, 89% of black respondents and 70% of white respondents indicated that at least one family of the opposite race lived in their neighborhood. See Sigelman et al., *Making Contact? Black-White Social Interaction in an Urban Setting*, 101 AM. J. SOC. 1306, 1311 (1996). In national polls, the percentage of black respondents reporting that members of another race live in their neighborhood had risen from 66% in 1964 to 83% in 1994; for whites the increase has been more dramatic, from 20% in 1964 to 61% in 1994. See TERNSTROM & TERNSTROM, *supra* note 2, at 219. On the other hand, in the Detroit poll, only 26% of black respondents and 13% of whites claimed to have more than a few neighbors of the opposite race. See Sigelman et al., *supra* at 1312. Only 8% of black respondents and 5% of white respondents reported that they had ever visited the homes of neighbors of the other race. See *id.* at 1311. Sixty-six percent of whites and 57% of blacks who had some neighbors of the opposite race "hardly knew" those neighbors. See *id.* at 1312.

6. See GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 53-71 (1996). Orfield and Eaton report that urban public schools are now more racially imbalanced than they were prior to 1971, when the Supreme Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), authorized the use of busing to achieve school desegregation. See ORFIELD ET AL., *supra* at 53-55. At the same time, federal courts are becoming increasingly reluctant to enforce desegregation on the ground that school districts have achieved "unitary" status—i.e., that the districts have eliminated vestiges of past intentional segregation—notwithstanding the fact that a significant degree of de facto resegregation would certainly result from the return to neighborhood schools. See Davison M. Douglas, *The End of Busing?*, 95 MICH. L. REV. 1715, 1722-24 (1997) (reviewing ORFIELD ET AL., *supra*). As a result, racial isolation of black schoolchildren in many districts is likely to increase. See *id.* at 1724.

7. See PATTERSON, *supra* note 1, at 198-99.

8. See *id.* at 70.

9. See *infra* text accompanying notes 31-39.

10. There is much controversy over the causes of continuing patterns of residential segregation. Massey and Denton argue strongly for the predominance of racial factors over economic class. See MASSEY & DENTON, *supra* note 2, at 83-113. In particular, they stress

In several arenas, however, recent decades have brought greater progress toward integration. One is the military.<sup>11</sup> Another is higher education, in which legal pressures and voluntary integration efforts have dramatically changed the ethnic composition of student bodies on many campuses.<sup>12</sup> These are important successes, but necessarily limited in their impact on race relations in society at large. The military touches a relatively small portion of the population and, for many, during only a limited period of time. Higher education also occupies a fairly short phase of life for most of those who enjoy its privileges. Racial integration in these spheres of life is very important, and where it is threatened, as in the case of higher education, it calls for a vigorous defense.<sup>13</sup>

But the workplace is perhaps the most important sphere in which significant integration has taken place. A combination of legal pressures, primarily driven by Title VII of the Civil Rights Act of 1964, and voluntary efforts have made the workplace an arena of comparative integration.<sup>14</sup> Moreover, it is an arena in which individuals interact on a

the propensity of white homebuyers to move out of areas with significant black populations, *see id.* at 88-96, and the discriminatory practices of real estate agents and mortgage lenders, *see id.* at 96-109. Black homebuyers overwhelmingly prefer to live in integrated neighborhoods and typically prefer about a 50-50 mix; whites are increasingly willing to live in "integrated" neighborhoods, but they tend to define the desirable level of integration as about 80% white. *See* THERNSTROM & THERNSTROM, *supra* note 2, at 229. White attitudes toward residential integration, in particular, have improved significantly since the 1970s, but most whites still avoid the levels of integration that blacks find most attractive. *See id.*

11. The comparative success of racial integration of the armed forces is recounted in depth in CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, *ALL THAT WE CAN BE: BLACK LEADERSHIP AND RACIAL INTEGRATION THE ARMY WAY* (1996).

12. *See* THERNSTROM & THERNSTROM, *supra* note 2, at 389-91.

13. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (barring all racial preferences in University and Law School admissions absent a recent history of discrimination by the University itself); Brief for Amicus Curiae Charles Alan Wright, Douglas Laycock, and Samuel Issacharoff, in Taxman v. Board of Educ. of Piscataway, 91 F.3d 1547, 1562 (3d Cir. 1996) (defending the need for affirmative action in higher education), *cert. granted sub nom* Piscataway Twp. Bd. of Educ. v. Taxman, 117 S. Ct. 2506 (1997), *cert. dismissed*, 118 S. Ct. 595 (1997).

14. There has been significantly increased representation of non-whites (and women) in higher paid jobs following the enactment of Title VII. *See generally* HERBERT HAMMERMAN, *A DECADE OF OPPORTUNITY: AFFIRMATIVE ACTION IN THE 1970S* 5-9 (1984) (summarizing finding). These findings held in all employment sectors studied, including private and public sectors, unionized craft jobs, and higher education. *See id.* at 5. Thus, between 1970 and 1980, minorities made significant gains in representation in categories of officials and managers, professionals, technicians, sales jobs, clerical jobs, and craft jobs. *See id.* at 40. These gains have continued. For example, between 1983 and 1996, black employees increased their share of "managerial and professional" jobs from 5.6% to 7.4%; of "technical, sales and administrative support" jobs from 7.6% to 10.3%; and of "precision production, craft, and repair jobs," or skilled trades, from 6.8% to 7.9%. *See* U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 410-12 (1997) [hereinafter 1997

daily basis, often over years, within a common enterprise which necessitates, to varying degrees, trust and cooperation. The workplace is thus one of the very few settings in which adults spend a significant amount of time interacting intensively and constructively with others from different families, different neighborhoods, different religions, and, importantly, different racial and ethnic groups.

It is important not to overstate the success of workplace integration. African-American and Latino workers, in particular, remain disproportionately concentrated in low-paid and unskilled jobs.<sup>15</sup> One of the implications I draw from the role of the workplace in a racially diverse democratic society is the importance of continued efforts to integrate workplaces generally and, in particular, the higher levels of the workplace hierarchy. But it is in part the degree of progress so far that suggests that these continued efforts are likely to be worthwhile. I will argue here that one of the best things this society could do to promote racial cooperation and integration is to shore up and reinforce the ability of some critical sectors of society—in particular, the workplace—to serve as arenas of racially integrated discourse and constructive interaction.

In Part I of this essay, I hope to draw a convincing portrait of the workplace as a uniquely important forum for personal interaction across racial and ethnic lines. This is a portrait I have sketched before;<sup>16</sup> here, in Part II, I add some empirical support to that picture. I will discuss some of the ways in which labor and employment law does and could better support the integrative function of the workplace. It is important to note that the present essay offers only a preliminary sketch of some rather far-reaching implications. The overall conclusion that is beginning to emerge, but that clearly requires further development, is that many of the basic constitutive elements of a democratic society—freedom of expression, equal protection, due process, and even democratic governance itself—

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STATISTICAL ABSTRACT].

Both class action litigation and affirmative action programs, including those instituted in response to federal contract requirements, appear to have been major factors in securing these advancements. See HAMMERMAN, *supra* at 5. This is indicated in part by the greater progress seen among federal contractors. See *id.*

15. See FEDERAL GLASS CEILING COMM'N, U.S. DEP'T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 12 (1995). For example, among the occupations in which black employees were significantly overrepresented relative to the proportion of the work force (10.7%) are service occupations, where they make up 17.2% of the workers, particularly nurses' aides and orderlies (33.2%) and cleaning and building services (22.8%). See 1997 STATISTICAL ABSTRACT, *supra* note 14, at 412. Hispanic workers, who make up 9.2% of the work force, are also significantly overrepresented among service occupations (13.7%), especially private household workers (26.2%), maids and janitors (19.6%), and farm workers (37.3%).

16. See Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687 (1997).

have important functions within the workplace that have been underappreciated. These democratic elements help to support and enhance the role of the workplace as a crucial arena of constructive interracial engagement.

#### I. THE WORKPLACE AS A FORUM FOR CONSTRUCTIVE INTERRACIAL ENGAGEMENT

The workplace serves as an important intermediate institution in society.<sup>17</sup> It mediates between individuals and society as a whole, and it affords a space in which individuals cultivate some of the values, habits, and traits that carry over to their broader roles as citizens.<sup>18</sup> The workplace is one of the few organic communities of a human scale in which many members of society participate on a regular basis. As neighborhoods, families, and other intermediate communities and institutions, such as religious congregations, are battered and destabilized by the pressures of economic change and geographic mobility, the role of the workplace has become increasingly important in mediating between the individual and the larger society and in cultivating “civic virtues,” the habits, traits, and beliefs that make good citizens.<sup>19</sup>

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17. To characterize the workplace as an intermediate institution is to finesse an ambiguity in the literature. For many writers following Tocqueville, the workplace does not fit the classic profile of the intermediate institution because it is not a purely “voluntary association” and is an integral component of both labor and product markets. See, e.g., Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1715 (1988). The economic marketplace is part of the remote and heartless large-scale society—*gesellschaft*—that makes intermediate institutions so necessary. Yet while the workplace is obviously subject to economic and legal constraints to which many purely voluntary associations are not, it is more than a creature of the market. See *infra* text accompanying note 40. For Emile Durkheim, “occupational groups” of workers within firms were the ideal groups for bridging the increasing gap between the individual and social life. See EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* 378-82 (George Simpson ed. & John Spaulding & George Simpson trans., 1951). This split is explored somewhat further in Estlund, *supra* note 16, at 727-28.

18. For a discussion of the importance of intermediate institutions as “schools of democracy,” see ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 61 (Phillips Bradley ed. & Francis Bowen trans., 1945).

19. See Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 53-54 (1990) (“[T]he structure of experience within intermediary institutions is fundamental to the establishment of a free society . . .”); Thomas C. Kohler, *Individualism and Communitarianism at Work*, BYU L. REV. 727, 731-40 (1993) (observing that unions, in conjunction with other mediating institutions of American democracy, require and can instill the habits of decision, commitment, self-rule, and direct responsibility); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1531 (1988) (identifying the workplace as one of the many areas where the self-revisionary, dialogic engagement that underpins republican citizenship takes place); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1578 (1988)

In a society that is still struggling with racial division and separation, this mediating role has particular urgency. At work, and often nowhere else in their lives, adults regularly interact with others from diverse cultural, ethnic, and racial groups, working constructively toward common aims. The workplace is thus a crucial site for the forging of personal ties across lines that normally divide people—ties that help bind together a diverse society.

This picture of the workplace community is admittedly idealized. First, it understates the extent to which the workplace itself has suffered destabilization and fragmentation.<sup>20</sup> The substitution of “contingent workers” for full-time employees threatens to make workplace relationships far more transitory and fragile;<sup>21</sup> the growth of information technology that enables remote production and transmission of work product is making the very idea of a workplace anachronistic for some.<sup>22</sup> These developments pose a serious threat not only to the economic well-being of many citizens, but also to the ability of the workplace to fulfill its mediating role.

Second, this portrait obscures the instrumental and hierarchical nature of the typical workplace. The hierarchical structure of many organizations limits employee freedom of action and interaction, and particularly constrains interaction among managerial, professional, skilled, and unskilled segments of the work force. At least until robust forms of employee participation become widespread, aspirations for freedom and equality at work may appear fanciful.<sup>23</sup>

This idealized portrait also obscures the extent to which the workplace, like other intermediate institutions, can become an enclave of

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(remarking on the promise of workplace democracy as an outlet for self-determination).

20. See generally Kohler, *supra* note 19, at 735 (“The American work-life sphere has not been insulated from the trends toward fragmentation that have affected the other institutions of civil life.”).

21. See COMMISSION ON THE FUTURE OF WORKER MANAGEMENT RELATIONS, U.S. DEP’T OF LABOR & U.S. DEP’T OF COMMERCE, FACT FINDING REPORT 21-22 (1994) [hereinafter FACT FINDING REPORT]. For an excellent journalistic treatment of the erosion of workplace stability and security, see *The Downsizing of America*, N.Y. TIMES, Mar. 3-9, 1996 (exploring the changing nature of the modern workplace in a front-page series).

22. See generally JEREMY RIFKIN, THE END OF WORK: THE DECLINE OF THE GLOBAL LABOR FORCE AND THE DAWN OF THE POST-MARKET ERA (1995). Indeed, as his title suggests, Rifkin forecasts a more drastic decline of available work in the modern world. He foresees a dramatic shrinkage of the demand for labor as the service sector undergoes the same process of technological change experienced by agriculture and industry. See *id.* at 109-62. His primary prescriptions—a mandatory reduction in the normal workday and the expansion of the “social sector” of voluntary and charitable organizations—would entail a greatly reduced but still important role for work and workplace interaction in the “post-market” era. See *id.* at 221-93.

23. I take up briefly below the issue of workplace democracy and its relation to the mediating role of the workplace. See *infra* p. 58.

intolerance, exclusion, provinciality, and prejudice on the basis of race, sex, religion, and other salient lines of social division. But that is a problem that we have attacked, with considerable success, through the law. Title VII seeks to banish from the workplace private discrimination on the basis of race, sex, religion, and nationality, much as the Constitution does between the state and citizens. While the antidiscrimination mandate<sup>24</sup> does not reach all private institutions in the society, its extension to the workplace, and particularly the prohibition in hiring, firing, and promotions, is virtually uncontested.<sup>25</sup> It is worth pausing briefly to consider why this is so.

One of the epic legal developments of the twentieth century is the emergence of the equality principle and its extension into a growing circle of public and private institutions, including some of the classic intermediate institutions. The equality principle is mandated by the Constitution in public institutions, including schools, employment, housing, and public services,<sup>26</sup> and by statute in much of the private sector, including workplaces, educational institutions, places of public accommodation, such as hotels and restaurants, and the housing market.<sup>27</sup> Some proprietors of such institutions argued that these laws violated countervailing constitutional rights of private property, freedom of association, and privacy.<sup>28</sup> Their arguments were unsuccessful, however, and are rarely echoed today.<sup>29</sup> Currently, public support for equal opportunity in employment is nearly universal.<sup>30</sup>

The result was different with respect to other associations such as the family, religious institutions, political associations, private clubs, and

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24. In calling Title VII an "antidiscrimination mandate," I am glossing over the important question of the extent to which Title VII does or should permit "affirmative action" in employment. I will take up that question below. See *infra* pp. 63-71.

25. For one of the few academic critiques of this extension, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

26. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (schools); *Washington v. Davis*, 426 U.S. 229 (1976) (public employment); *Keith v. Volpe*, 858 F.2d 467 (9th Cir. 1988) (public housing); *Dowdell v. Apopka*, 698 F.2d 1181 (11th Cir. 1983) (public services).

27. See Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994) (equal employment); Title VI, 42 U.S.C. § 2000d (education); Title II, 42 U.S.C. § 2000a (fair housing); Title VIII, 42 U.S.C. § 3604 (fair housing).

28. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 244 (1964) (upholding equality in public accommodations under the Civil Rights Act of 1964 despite the proprietor's argument that the statute effected a taking by depriving him of the right to run his businesses and choose his customers as he wished).

29. But see EPSTEIN, *supra* note 25, at 262-63 (arguing for repeal of antidiscrimination laws restricting private contracts).

30. In one 1972 poll, for example, 97% of white respondents said that they believed blacks should have equal opportunities in employment. See THERNSTROM & THERNSTROM, *supra* note 2, at 500.



fraternal organizations. The limits of the equality principle in these institutions derive from a variety of sources: the state action doctrine, limits on congressional powers or the willingness to exercise them, and countervailing constitutional rights.<sup>31</sup> Some of these institutions function as enclaves of liberty and are constitutionally immune from laws promoting equality.<sup>32</sup> Just as the First Amendment protects many public expressions of intolerance, it also shields some intermediate institutions from government intervention aimed at furthering equality and allows them, in the name of liberty and freedom of association, to cultivate intolerance.

Both the extension and the limits of the equality principle suggest a judgment by legal and political actors about the role of various intermediate institutions in our democratic society. The fullest judicial articulation of these judgments is found in *Roberts v. United States Jaycees*,<sup>33</sup> in which the Court upheld application of a state nondiscrimination statute to a large private club that excluded women and rejected the club's freedom of association claim. In *Roberts*, the Court delineated two strains of the freedom of association protected by the Constitution: freedom of intimate association, protected for its intrinsic value "as a fundamental element of personal liberty," and freedom of expressive association, protected for its instrumental value "as an indispensable means of preserving other individual liberties."<sup>34</sup>

As to the freedom of intimate association, the Court explained that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the state."<sup>35</sup> The majority located the workplace, by way of contrast, at the other end of the "spectrum from the most intimate to the most attenuated of personal attachments."<sup>36</sup> The Court noted that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply

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31. See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

32. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248-49 (1994) (explaining that religious groups seem to receive constitutional protection from state control); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1377 (1981).

33. 468 U.S. 609.

34. *Id.* at 628.

35. *Id.* at 618-19 (citations omitted).

36. *Id.* at 620 (citing *Runyon v. McCrary*, 427 U.S. 160, 187-89 (1976) (Powell, J., concurring)).

to regulations affecting the choice of one's fellow employees."<sup>37</sup>

As for the freedom of expressive association, the majority noted: "according protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."<sup>38</sup> But it is collective effort in support of shared political, social, and cultural values and beliefs, not in support of shared economic objectives, that triggers these concerns in the *Roberts* analysis. Therefore, the typical workplace, as opposed to some religious and perhaps ideological employers, cannot claim the freedom of expressive association as a shield against the antidiscrimination mandate.<sup>39</sup>

The propriety of banning invidious discrimination in employment draws broad support from the Constitution, legal culture, and the popular will. However, it is a mistake to regard the workplace as a locus of wholly instrumental, market-driven behavior and relationships. While workplace relationships generally begin as "the most attenuated of personal attachments,"<sup>40</sup> they often become something more. The workplace spawns conversations, alliances, and friendships among individuals who would have no other point of connection—bonds that transcend family, neighborhood, and often, given the partial success of Title VII, racial and ethnic identity. The importance of these connections in a diverse but still divided society cannot be gainsaid.

Title VII and its limited gains have transformed the workplace into a particular and unique kind of mediating institution. The workplace best performs its mediating function *not* by "cultivating and transmitting shared ideals and beliefs"<sup>41</sup> among intimate associates, free from the intrusion of societal norms, but rather by convening strangers from diverse backgrounds and inducing them to work together toward shared objectives under the aegis of the equality principle. The workplace brings people together in a face-to-face laboratory of diversity, a microcosmic society that is subject to some of the same basic democratic constraints that govern society as a whole.

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37. *Id.* (citing *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945)).

38. *Id.* at 622.

39. *Cf. Eisgruber & Sager, supra* note 32, at 1311-12 (contrasting economic organizations with religious and other organizations animated by goals of intimacy, shared understanding, personal growth, or salvation).

40. *Roberts*, 468 U.S. at 620.

41. *Id.* at 618.

## II. SOME EMPIRICAL EVIDENCE OF THE INTEGRATIVE ROLE OF THE WORKPLACE

Thus far, I have drawn a highly idealized picture of the workplace and its potential role as a vanguard of integration in a racially diverse but still-too-segregated society. This essay is not the place for a survey of empirical evidence on this matter, but some data may be useful to carry skeptical readers to the next step.<sup>42</sup>

Increasingly since World War II, and particularly since the enactment of Title VII, whites and non-whites work side-by-side. This is especially true in public employment and among large private-sector employers that are most subject to governmental and judicial oversight in the form of federal contract requirements and large-scale litigation.<sup>43</sup> As a result, there is a considerable degree of interracial contact in the workplace, at least among working adults in areas with significant black populations. In one major study of the Detroit area, interracial conversations on the job were by far the most common occasion for interracial contact.<sup>44</sup> Indeed,

[f]or many white suburbanites and black city dwellers, work may be the main or even the only site of regular contact with members of the other race, whether as coworkers, customers, bosses, or employees . . . . Moreover, work-based relationships can, over the course of time, be transformed into social relationships and even enduring friendships.<sup>45</sup>

What good comes from these interracial contacts? The answer may seem obvious: interracial interaction, and especially friendship, is intrinsically good in a racially diverse society like ours. But this seemingly obvious proposition has been the object of extensive inquiry by social scientists.

A leading early theory of prejudice posited that negative stereotypes and hostility toward other racial groups flourished in ignorance and that close contact between members of different races improved racial understanding.<sup>46</sup> Segregation was thus as much the cause as the result of

42. The focus in this section—as it is to a lesser extent throughout this essay—is on relations between black and white citizens. That is because, first, the most significant racial tensions and divisions in modern society—and the most deeply rooted in American history—are those between black and white citizens. Second, there is much more empirical data on black-white interaction and separation than on other intergroup relations.

43. See HAMMERMAN, *supra* note 14, at 5-9. The proportion of minorities in jobs that require a high level of education remains much smaller, though still increasing along with the growing numbers of minorities obtaining college and advanced degrees. See *id.* at 8-9.

44. See Sigelman et al., *supra* note 5, at 1314.

45. *Id.* at 1315.

46. See GORDON ALLPORT, *THE NATURE OF PREJUDICE* (1954); GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (1944).

racial tension and division. The “contact hypothesis” set some conditions for positive racial interaction:

First, the contact should not take place within a competitive context. Second, the contact must be sustained rather than episodic. Third, the contact must be personal, informal, and one-to-one. Fourth, the contact should have the approval of any relevant authorities. Finally, the setting in which the contact occurs must confer equal status on both parties rather than duplicate the racial status differential.<sup>47</sup>

Needless to say, “[m]uch interracial contact does not meet these conditions.”<sup>48</sup> On the other hand, a good deal of on-the-job contact does appear to meet the basic conditions for positive interracial contact: it is generally cooperative rather than competitive;<sup>49</sup> it is sustained and often personal, informal, and one-to-one; it has the approval of managers and is often, though not always, in a context of equal status. Moreover, as observed above, interracial contacts on the job—because they are ongoing and frequent—can lead to “social relationships and even enduring friendships,”<sup>50</sup> in which the specified conditions for positive interracial contact are even more fully met.

The data does support the unsurprising proposition that interracial proximity is associated with interracial interaction.<sup>51</sup> That relationship is particularly strong in the case of workplace proximity. Working in a racially mixed workplace is associated with more significant interracial interactions—and, in particular, with the formation of interracial

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47. Mary R. Jackman & Marie Crane, “Some of my best friends are black . . .”: *Interracial Friendship and Whites’ Racial Attitudes*, 50 PUB. OPIN. Q. 459, 461 (1986); cf. THOMAS F. PETTIGREW, *RACIALLY SEPARATE OR TOGETHER?* 275 (1971) (“Prejudice is lessened when two groups (1) possess equal status, (2) seek common goals, (3) are comparatively dependent upon each other, and (4) interact with the positive support of authorities, laws, or customs.”). See generally H.D. FORBES, *ETHNIC CONFLICT* 22-24 (1997) (summarizing contact theory literature on the types of contact situations that reduce prejudice).

48. *Id.* Even some contact that *does* appear to meet the specified conditions has failed to yield consistently positive results in terms of racial attitudes. In particular, studies of the racial attitudes of schoolchildren in desegregated schools have yielded mixed results. See *id.* In part, I believe these results may point to a complicated relationship between racial orthodox thought on racial hierarchy and integration (which has shifted dramatically since the 1940s and 1950s toward racial equality), conscious racial attitudes (which in the absence of interracial experience may tend simply to reflect the prevailing orthodoxy), and interracial contacts (which may, like any interpersonal contacts, be both positive and negative). But this relationship is far too complex to explore in the present abbreviated context.

49. This assertion will bear closer examination below. See *infra* text accompanying notes 52-61.

50. Sigelman, et al., *supra* note 5, at 1315.

51. See *id.* at 1315-18 (presenting results and summarizing other studies).

friendships—than is, for example, living in a racially mixed neighborhood.<sup>52</sup>

However, the contact hypothesis goes further and posits that interracial contact of the specified sort has a positive effect on racial attitudes, on the demise of negative stereotypes, and on support for racial integration and equality. Has this aspect of the contact hypothesis been born out by the research? In general, the evidence suggests that significant interracial contacts among adults do, in fact, tend to be associated with more positive attitudes toward the other race.<sup>53</sup> In particular, a variety of significant and ongoing contacts between black and white adults of similar status tend to be associated with more positive beliefs and feelings of affinity toward members of the other race.<sup>54</sup>

It is important to note that these positive effects do not come out of discussions about race, racial attitudes, or race relations. They come out of ordinary, day-to-day social interaction in the context of common interests and experiences. The contact hypothesis has been subjected to repeated testing—some of which has yielded mixed results—and to serious

52. See Jackman & Crane, *supra* note 47, at 483-84. Whites who work in workplaces with a high proportion of black co-workers are twelve times more likely to have a black friend than are those with little workplace proximity to blacks, while whites who live in neighborhoods with a high proportion of black neighbors are only six times more likely to have a black friend than are those who do not live in proximity to blacks. See *id.* at 484. Similarly, 60% of whites who live, and have lived in the past, in proximity to significant numbers of black residents interact with their black neighbors; 80% of whites who work, and have worked in the past, in workplaces with significant numbers of black co-workers interact with those black co-workers. See *id.* at 483.

53. Sigelman and Welch acknowledge that prior empirical results had been mixed, perhaps in part because the data was based on situations of forced interaction, very limited interactions, artificially induced antagonisms, or other conditions that departed from the desiderata of the contact hypothesis. See Sigelman & Welch, *supra* note 3, at 781-82.

Only when blacks and whites of more or less equal status shared a wide variety of contacts did white hostility toward blacks abate—an idea that hearkened back to Allport's original formulation but provided little basis for optimism, since blacks and whites often have only minimal contact and typically do not interact as social equals.

*Id.* at 782 (citing Jackman & Crane, *supra* note 47). In their own major and more recent study, Sigelman and Welch:

consistently found that interracial friendships decrease blacks' perceptions of racial hostility and that interracial neighborhood contacts decrease whites' perceptions of hostility. Both interracial friendships and neighborhood contacts increase whites' desire for racial integration . . . . In some instances, the positive effects of interracial contact are modest, but even these modest effects, aggregated over millions of black and white Americans, have the potential to ease the prevailing climate of race relations. And in some instances, the positive effects of interracial contact are substantial.

*Id.* at 793.

54. See *id.*

criticism.<sup>55</sup> As a theory about ethnic conflict, it has limitations. Most importantly, the contact theory is highly individualistic and tends to underemphasize structural aspects of intergroup relations, power differences, and genuinely conflicting interests.<sup>56</sup> In a society such as ours, it would be unduly optimistic, even pollyanna-ish, to suggest that the answer to our racial troubles is more conversations, more cooperative interaction, and more friendship across racial lines. I want to make a more limited claim: more positive interracial interaction, while it is not *the* answer to our racial troubles, is clearly a *part* of the answer and is in any event intrinsically valuable.

The workplace is clearly one of the most important arenas of constructive interracial engagement in our society, both because of the amount of interracial interaction that takes place at work and because of the conditions under which it often occurs. The future of race relations, and the fate of our diverse society in this important respect, may depend to a significant degree on the ability of the workplace to play this mediating role among individuals who are otherwise separated along racial lines in many spheres of life.

### III. SOME IMPLICATIONS FOR THE LAW OF THE WORKPLACE

Supposing that the reader is convinced of the potential role of the workplace in a racially diverse democracy, what follows? In particular, what lessons are there for the law governing the workplace? I see a number of important lessons for the law of workplace equality, for workplace speech protections, for due process, and for democracy in the workplace. For the moment, I will note only the rather obvious parallel between these issues and some of the basic components of democratic self-governance. I hope the reasons behind the parallel will begin to emerge even in the abbreviated discussion that follows.

#### A. *Implications for Employment Discrimination Law*

The foregoing portrait of the workplace and its role in a racially diverse society suggests, at a minimum, that the existence of racially integrated workplaces is a matter of critical societal importance. Racially integrated workplaces are critical because they create arenas for continual, constructive social interaction among individuals of different racial groups in a society in which this is still too infrequent. Effective enforcement of employment discrimination laws is thus a minimum condition of progress

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55. See generally FORBES, *supra* note 47, at 14-41 (tracing the history of the contact theory and its empirical testing).

56. See *id.* at 27-28.

along these lines. But what should the employment discrimination laws mean with regard to "affirmative action," or preferences in favor of underrepresented racial minorities? I believe that society's powerful interest in interracial engagement supports some, though not all, forms of voluntary affirmative action.

Before elaborating on this claim, it is important to note that it differs from those that are usually made in favor of affirmative action in employment. The interracial engagement argument is not based on the importance of expanding economic opportunities for disadvantaged citizens, for it appeals to the interests of society as a whole, primarily outside the economic sphere. The argument is not based on the need to overcome the continuing effects of past discrimination, for it is forward-looking and does not turn on the admittedly complex causes of widespread *de facto* segregation.<sup>57</sup> The interracial engagement argument is also different from arguments based on the goal of diversity, for it is founded less on the salutary effects of diversity and difference within the particular workplace than on the spillover effects in the society at large. My argument is not about creating role models for achievement, for the consequences it seeks are in the present generation. Nor is this an argument about the need to serve particular job-related goals, such as gaining credibility in the minority community, an argument often made in support of integration of police forces.

The interracial engagement argument is not necessarily inconsistent with any of these arguments, and it is not offered as an alternative. But it is different. In a society that is torn by racial division and radical disjunctures between attitudes, beliefs, and experiences, particularly of black and white citizens, there is a compelling societal interest in creating and maintaining spheres of real integration, in which citizens of different racial identities are induced to interact constructively toward common goals, to explore commonalities and differences, to break down stereotypes, and to form personal bonds.

I want to emphasize, in particular, the difference between this claim and the diversity argument, with which it might be confused. Proponents of racial diversity argue that, in many contexts, an employer's ability to accomplish its goals is enhanced by a diverse work force. Racial and ethnic diversity is often viewed as a proxy for diversity of opinions, experiences, and beliefs. In an otherwise overwhelmingly white work force, minority employees introduce valuable differences into a setting of comparative homogeneity. But the diversity argument has some serious limitations. While there are undeniably group differences in attitudes and

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57. Cf. Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (calling for a shift from backward-looking, "sin-based" accounts of affirmative action to forward-looking accounts).

experiences, it is awkward, to say the least, to assume that each individual of another race carries those differences with her.<sup>58</sup> The more individualized the employment decision, the more possible and sensible it may seem to make individual inquiries into the supposedly “diverse” experiences and attitudes of the applicant, rather than to make assumptions based on membership in a particular racial category. Moreover, it is far from clear what the benefits of diversity are thought to be in many workplaces and jobs. In jobs that primarily involve the application of technical skills or physical abilities, the connection between diversity and an enhanced work product or service is often hard to discern. Indeed, the diversity argument has had rather little currency or judicial support outside the educational context, where it is fortified by claims of academic freedom in the selection of students and faculty.<sup>59</sup>

By contrast, my claim does not turn on any contribution to the employer’s products or services, nor on any assumption that individuals necessarily exhibit cultural or other group differences. The discovery of common experiences, problems, attitudes, and attributes across racial lines is at least as important as exposure to cultural differences. Further, discovering common ground is important, not because it contributes to the employer’s product or service, but because it fosters the weaving together of racial groups in society at large through the formation of individual bonds of familiarity and friendship.

What follows from this claim? The argument posits some largely overlooked societal benefits of racially integrated workplaces. To the extent that affirmative action in employment helps to produce more racially integrated workplaces, my argument adds another dimension to the debate over whether affirmative action should be permissible under Title

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58. The assumption that all members of a particular group share certain group attributes and attitudes resembles just the sort of stereotyping that undermines interracial understanding and communication. Deborah C. Malamud aptly expresses another aspect of the problem:

The most conventional arguments for diversity are arguments that each member of a group is a representative of that group’s cultural characteristics and viewpoints, and that the institution (or polity) is enriched by bringing these different cultures under the institutional umbrella. The problem with these arguments is that, as [K. Anthony] Appiah would suggest, they script the lives of diversity hires. For example, the black college student who is a jazz musician but switches to classical piano can be seen as ceasing to do his “job” for the institution.

Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1691 (1997) (book review).

59. See, e.g., *Taxman v. Board of Educ. of Piscataway*, 91 F.3d 1547, 1561 (3d Cir. 1996) (distinguishing educational cases, and their reliance on diversity, under the Equal Protection Clause as inapposite to the Title VII context).



VII and the Constitution.<sup>60</sup> Simply stated, it is one argument against a purely color-blind model of employment discrimination law, and for continuing to give some latitude to employment decisions that promote racial integration within a particular workplace or a particular level of the workplace hierarchy. But that is indeed too simple.

On the one hand, the compelling societal interest in creating arenas of constructive interracial engagement extends more broadly than many other interests asserted in support of affirmative action. It does not depend on the particular employer's goals or business needs or record of past discrimination, or on the particular nature of the job or the workplace. Given the depth of the racial divide and its overshadowing importance in the body politic, more constructive interracial engagement is better, wherever it takes place.

The seeming limitlessness of my claim is bound to provoke an outcry among those opposed to all forms of racial preferences. It may cause jitters even among many who support affirmative action, but are concerned about the institutionalization of racial categories and the social backlash against racial preferences. Giving all employers in all circumstances *carte blanche* to prefer minorities in hiring, promotions, or firing decisions is hardly the order of the day and is unlikely to promote interracial understanding.<sup>61</sup> This is precisely the point. The societal interest in

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60. Others have made similar arguments in support of workplace integration. Kathleen Sullivan, for example, has written about the need to shift from a backward-looking, "sin-based" rationale for affirmative action, the need to "look forward rather than back, justifying affirmative action as the architecture of a racially integrated future." Sullivan, *supra* note 57, at 27. The forward-looking justifications have in common that they "aspire to a racially integrated future, but none reduces to 'racial balancing for its own sake.'" *Id.* at 96. Similarly, Robin West, in her call for "a pragmatic liberalism," seeks to justify "integration as a form of social organization," and to justify affirmative action as a useful means of approaching that ideal. See Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 731-32 (1985); see also Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1082 (1995) ("The 'cross-membership' effect of antidiscrimination laws provides a theoretical foundation for the claim that affirmative action serves to combat discrimination more effectively than a mere non-discrimination policy.").

61. Richard McAdams, who approaches the problem of racial hierarchy very differently, recognizes that "the benefit of cross-membership"—a concept that overlaps with my claims on behalf of "constructive interracial interaction"—might "justify a very aggressive affirmative action program." *Id.* But he also recognizes some offsetting tendencies: "Conversely, affirmative action creates a 'common fate' for those of the same race and thus raises the salience of race. As critics of affirmative action have claimed, this fact may cause whites to identify themselves more fully with their race." *Id.* (citation omitted). He claims that "[a]ffirmative action likely has already had this effect, which offsets the positive effects of cross-membership . . . [a]ffirmative action has, so far, done little to integrate effectively American society." *Id.* I agree that affirmative action can have some of these negative consequences and that the societal interest in fostering constructive

constructive interracial engagement is *not* advanced by all forms of racial preferences for underrepresented minorities. The interracial engagement argument for affirmative action contains some important limits. I want to sketch some of those limits without suggesting that this societal interest can be translated into a fully operational standard for evaluating the legality of a particular program of racial preferences under Title VII or constitutional litigation.

First, the interest in fostering constructive interracial engagement in integrated workplaces can support affirmative action only in workplaces, or parts of the workplace, in which there is not already a significant degree of integration. Mine is not an argument for proportional representation; it does not justify preferences wherever there is less than proportional representation of the preferred group in a particular job category. Second, the interest in constructive interracial engagement cannot support—and indeed would reject—racial preferences among incumbent co-workers that impose a serious cost on identifiable individuals. Such preferences are highly likely to engender interracial resentment rather than constructive engagement.<sup>62</sup> So my argument tends to support the existing Supreme Court stance: layoff preferences are rarely permissible while hiring preferences are more often permissible under Title VII.<sup>63</sup>

More concretely, my claim here is not an argument for the kind of preference that cost Sharon Taxman her job in Piscataway, New Jersey.<sup>64</sup>

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interracial interaction does not support unlimited affirmative action. But the contact theory research provides at least some significant data to suggest that, on balance, workplace integration, which is certainly partly a result of affirmative action efforts, tends to foster interracial understanding and reduce hostility and negative stereotypes. See *supra* text accompanying notes 52-53.

62. Recall one of the conditions for the “contact hypothesis” was that the contact not be in a competitive context. See *supra* text accompanying note 47. The use of racial preferences among incumbent co-workers seems likely to contribute to racial identification and interracial competition. I want to make it clear that, in attending to white resentment as a possible limiting condition on affirmative action, I am not suggesting that white resentment or “backlash” is a permissible basis for limiting the enforcement of antidiscrimination laws generally. Limiting the scope of *remedial* decrees in the school or housing context because of anticipated white flight raises difficult issues that are quite different from those discussed here. See Paul Gewirtz, *Remedy and Resistance*, 92 *YALE L.J.* 585 (1983).

63. Compare *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979) (upholding under Title VII race-conscious hiring “designed to eliminate conspicuous racial imbalance in traditionally segregated job categories”) with *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 283 (1986) (striking down race-conscious layoffs used to preserve diversity in teaching faculty). As the Supreme Court stated in *Wygant*, “While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive.” *Id.* (citation omitted).

64. See *Taxman*, 91 F.3d at 1551 (describing the School Board’s decision to use racial preferences in its decision to layoff Sharon Taxman).

The workplace there was already integrated, and would have remained so if Taxman, instead of her black co-worker, had retained her job.<sup>65</sup> Indeed, my argument tends to support the Third Circuit's decision to strike down the preference in *Taxman*, which treated two incumbent co-workers differently on the basis of their race and imposed a large cost on an identifiable individual.<sup>66</sup> Preferences in that context seem more likely to undermine rather than foster the possibilities for constructive interracial engagement.<sup>67</sup> On the other hand, my argument is deeply at odds with the Third Circuit's conclusion in *Taxman* that affirmative action is justified only where it seeks to remedy the employer's own past discrimination.<sup>68</sup>

My argument may tend to support the Supreme Court's decision in *Johnson v. Transportation Agency*,<sup>69</sup> upholding the county's promotion of Diane Joyce to a position in which no woman had previously served. However, it may not. First, the argument presented here is premised upon the relative infrequency of other occasions for interracial interaction outside the workplace. This premise is not readily applicable to sex.<sup>70</sup>

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65. See *id.* at 1550-51. The employer sought to rely on the fact that the faculty of the Business Department, in which Taxman worked, was otherwise all white. See *id.* at 1551. The Third Circuit gave little attention to this claim because it concluded—wrongly, I think—that affirmative action could be justified only by the need to remedy the employer's own past discrimination, which was absent in *Taxman*. See *id.* at 1563 (“The Board admits that it did not act to remedy the effects of past discrimination.”). But even in my broader view of the legitimate interest in constructive interracial engagement, it is not clear that the racially based layoff fostered this interest unless it could be shown that interaction among teachers, or between teachers and students, was largely intradepartmental. Even if that were true, the countervailing tendency of layoff preferences to exacerbate racial tensions among co-workers would seem to offset this contribution.

66. See *id.* at 1564 (“[T]he harm imposed upon a non-minority employee by the loss of his or her job is so substantial and the cost so severe that the Board's goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion.”).

67. There is, in fact, anecdotal evidence to suggest that the race-based layoff (and of course the surrounding litigation) in *Taxman* has contributed to interracial tensions within the school district that had not previously surfaced. See Brett Pulley, *A Reverse Discrimination Suit Upends Two Teachers' Lives*, N.Y. TIMES, Aug. 3, 1997, at A1.

68. See *id.* at 1557 (“[W]e are convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute . . .”).

69. 480 U.S. 616 (1987).

70. On the other hand, one might make a parallel argument in the context of gender. In a society in which much interaction between the sexes is in the context of sexual or family relations—relations that may tend to perpetuate existing sex roles and sex stereotypes—and in which there continues to be wide differences in experiences and attitudes between men and women, it is important to foster the creation of peer relations across gender lines. The workplace, as it is constructed by Title VII and sexual harassment doctrine, forces individuals to interact with the opposite sex as co-workers and peers, thus contributing to the erosion of sexual stereotypes and assumptions about male dominance and superiority. However, this argument calls for development and examination in its own right and is not an easy analogue to the argument for racial interaction presented here.

Second, it is clear that preferences in promotions—because they treat co-workers differently on the basis of race or sex—may produce some of the same counterproductive tensions and resentments as do preferences in layoffs. Preferences among co-workers may tend to make racial identity more salient and to cultivate interracial competition, not cooperation. On the other hand, the goal of fostering arenas of constructive interracial engagement is best served by having not only integrated work forces, but also integrated layers of supervision and management. The evidence suggests that contacts that are based on equal status, or on status that inverts the prevailing racial hierarchy, are most likely to lead to more positive racial attitudes and relations.<sup>71</sup> Prohibiting all affirmative action preferences in promotions in workplaces in which most supervisory and managerial positions are filled through internal promotions may dramatically stall the progress of integration.

Promotions thus present the most difficult case for my analysis, just as they pose the most difficult problem in current affirmative action jurisprudence.<sup>72</sup> Current jurisprudence poses the question in terms of whether the preference “unnecessarily trammels the interests” of the non-preferred employees.<sup>73</sup> That is a hard question, the answer to which may be very context-specific with regard to promotions. Nothing in my analysis here suggests that it is the wrong question, nor provides an easier answer to that question. But it does support the “middle way” charted by decisions like *Johnson*,<sup>74</sup> as opposed to the rejection of racial preferences in all contexts.

Thus, the scope of the argument is limited in at least two ways: first, by the focus on “integration” rather than proportionality, and, second, by the concern with minimizing race-conscious decisions among incumbent co-workers. In addition, the argument implies limits on the *extent* to which minority applicants should be preferred and on the magnitude of any such preference even in hiring. Preferences that are very large and that result in the hiring of individuals who are manifestly less qualified, even though “qualified” in a threshold sense, do not necessarily contribute to the interest in fostering constructive interracial interaction. Such preferences are not necessarily wrong; they may sometimes be necessary to remedy past discrimination. But the interest in creating spheres of integration is

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71. See Jackman & Crane, *supra* note 47, at 476-79.

72. See Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Right of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189 (1992).

73. See *Johnson*, 480 U.S. at 616.

74. *Id.* at 642 (upholding an affirmative action plan “that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities”).

not clearly served by introducing manifestly less qualified minority employees into the workplace.

Indeed, it seems very likely that integration that arises through simple nondiscrimination and without racial considerations of any kind offers the best chance for constructive interracial engagement. However, where simple nondiscrimination has not resulted in significant racial integration, I would argue that, on balance, modest racial preferences among qualified applicants in hiring, and sometimes in promotions, advance the compelling societal interest in creating opportunities for constructive interracial engagement.

I might be accused of failing to follow my analysis through to its logical conclusion in two respects. First, if creating arenas of constructive interracial engagement is such a compelling societal interest, why does it not justify mandatory rather than the voluntary affirmative action that I have defended?<sup>75</sup> The easy answer is that such a claim cannot be reconciled with existing law, not to mention the current political climate. But that is too facile a response. In fact, I believe that any sort of nationwide legal mandate for affirmative action would itself polarize racial attitudes and exacerbate interracial competition and suspicion. Forcing affirmative action, in addition to nondiscrimination, on resistant and resentful employers is likely to be counterproductive.<sup>76</sup> Mandating affirmative action would also eliminate the experimental and provisional aspects of voluntary plans, which can be tested and modified in light of experience, including experience with the interracial workplace interactions that result. This feature of voluntary affirmative action serves incidentally as a safety valve that keeps potentially destructive resentments from building.

Second, the logic of my argument might seem to justify a preference for white employees in workplaces or jobs that are overwhelmingly occupied by minority employees. Would not the societal interest in creating arenas of integration be served by preferring white applicants for maintenance jobs, for example, that are currently filled almost exclusively by black employees? Such a preference might give those black employees—many of whom live most of their lives in overwhelmingly black neighborhoods—opportunities for constructive engagement with whites.<sup>77</sup> But I do not believe such preferences would be justified.

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75. By "mandatory affirmative action," I do *not* mean legal tests of discrimination, such as "disparate impact" theory, that arguably induce employers to engage in affirmative action in order to avoid liability and litigation.

76. Recall the claim that interracial contacts are likely to have positive effects where, among other conditions, they "have the approval of relevant authorities." Jackman & Crane, *supra* note 47, at 461.

77. This poses in the employment context a question taken up by courts in the housing

Jobs that are overwhelmingly occupied by non-white employees are almost invariably located at the bottom of the economic ladder. In these situations, preferring a white applicant would tend to produce a more integrated workplace, but only by denying a low-income and probably unemployed minority applicant a toehold in the active labor force. Such disadvantage cannot be justified under a statute whose primary objective is to ensure equal economic opportunity to members of historically disadvantaged minority groups.<sup>78</sup> Even at the hiring stage, the goal of workplace integration cannot justify discrimination against members of historically disadvantaged groups.

But if the purported goal of promoting constructive interracial interaction falls away in the face of an overwhelmingly minority work force and can never come to the aid of a white employee, is it anything more than a make-weight in support of “reverse discrimination”? Is it, after all, just a one-way ratchet—albeit a limited-purpose ratchet—in favor of “benign preferences”? In a sense, that is right. Society’s compelling interest in creating arenas of constructive interracial engagement is one of several reasons for maintaining an asymmetrical antidiscrimination doctrine against an increasingly powerful political and legal onslaught. Employment decisions that favor members of historically disadvantaged groups are not always justified even though their goals are inclusion, integration, and increased economic opportunity. However, these decisions are not of the same moral universe as discrimination that disfavors the historically disfavored, perpetuating minority exclusion and privileged white access to decent jobs and livelihoods.

Ultimately, the societal interest in creating arenas of constructive interracial engagement may not be easily translated into an operational test of the legality of particular affirmative action plans. This interest does not fit neatly into an analysis that seeks to insure a close link between the employer’s objectives and the means chosen. The promotion of

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context. *See United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988). The case concerned a plan for maintaining a racially integrated low-income housing complex by insuring that the percentage of minority occupants did not rise above the point at which “white flight” and resegregation would result. *See id.* at 1098. Due to the large number of minority applicants for public housing, qualified black applicants waited up to ten times as long as white applicants for an apartment. *See id.* at 1099. The court held that the integration plan violated housing discrimination laws notwithstanding its salutary goal of maintaining a racially integrated residential environment. *See id.* at 1100-01. Indeed, the court so held even though housing integration was among the express goals of the fair housing laws. *See id.* at 1101. The court determined that the goal of housing integration could not justify this kind of ongoing discrimination against minority applicants. *See id.* at 1102.

78. *See United Steelworkers v. Weber*, 443 U.S. 193, 202-04 (1979) (noting that a primary legislative purpose of Title VII was to open employment opportunities for black citizens).

constructive interracial engagement operates at a more abstract level in the debate: it is a reason to oppose legislation or referenda that ban all racial preferences and to oppose judicial restriction of affirmative action to narrowly remedial contexts. It is a reason to resist the use of racial preferences among incumbent co-workers, particularly in the context of layoffs. And it is a reason to regard with greater generosity and less suspicion the motives of employers—public and private—who adopt voluntary affirmative action plans. The societal interest in constructive interracial engagement, like the interest in overcoming past societal discrimination, may be too overarching to be useful in deciding particular cases. But it is far too important to ignore in the current debate over whether racial considerations in employment decisions are ever permissible.

*B. Implications for Freedom of Expression in the Workplace: On Discriminatory Harassment and Concerted Activity*

Racial integration within the workplace creates opportunities for constructive engagement that benefit society as a whole. However, the implications of my analysis are broader, for the law of the workplace affects the conditions for constructive interracial engagement in a variety of ways.

If the workplace is to serve effectively its important role in a racially diverse democracy, employees must have some degree of freedom of speech. People must feel reasonably free to speak their minds on what matters to them; to exchange opinions, beliefs, and experiences with co-workers; and to identify commonalities and explore differences. For many people, there is no other time or place in their lives in which they can talk about public issues, personal problems, and spiritual concerns with individuals from diverse backgrounds and perspectives. In particular, the workplace is the only realm of life in which many people have regular and constructive personal contact with individuals of another race. We have seen that this sort of regular and constructive personal contact is crucial for alleviating racial divisions.

There are two important dimensions to the legal status of freedom of speech in the workplace. First, what constitutional constraints are there on the government's regulation of workplace speech? The First Amendment is relevant to employee speech in the private sector only in the rather unusual case in which the government has purported to regulate employee speech. That seemingly unusual case, in the form of discriminatory harassment law, has recently attracted a good deal of attention.<sup>79</sup>

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79. My discussion of the harassment problem is borrowed heavily from the fuller

Ultimately more important, I think, is the second dimension of workplace freedom of speech: legal protections against employer regulation or suppression of employee speech.<sup>80</sup> I have written on both of these dimensions at some length and will keep my comments here brief.

### 1. The First Amendment and Hostile Environment Claims Under Title VII

The constitutional dimension of employee free speech rights has been put under a rare spotlight by the development of “hostile environment” doctrine under Title VII.<sup>81</sup> The theory is unexceptionable: the employer’s creation or toleration of a discriminatory hostile work environment is a form of discrimination in terms and conditions of employment. Constitutional questions arise, however, when the hostile environment claim rests primarily or entirely on speech. The fear of liability, and now of punitive damages, turns employers into government censors and poses a serious threat to employee freedom of expression. This genuine First Amendment question is rarely litigated, but deserves close attention. What does the foregoing vision of the role of the workplace in a racially diverse democratic society suggest about this controversy?

First, it calls for a more robust conception of the role of workplace speech in the constitutional scheme. The workplace can and should serve

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discussion in Estlund, *supra* note 16.

80. See Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101 (1995).

81. The growing literature expresses a broad spectrum of views. Some argue that virtually all regulation of verbal harassment violates the First Amendment. See, e.g., Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991); Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMM. 71 (1996). Others, while critical of harassment law on free speech grounds, allow for some regulation of speech under Title VII. See, e.g., KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 77-96 (1995); Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 SUP. CT. REV. 1 (1995); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995) [hereinafter Volokh, *Harassment Law*]; Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. REV. 1791 (1992) [hereinafter Volokh, *Freedom of Speech*]; Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment—Avoiding a Collision*, 37 VILL. L. REV. 757 (1992). Still others conclude that Title VII doctrine is entirely consistent with a proper understanding of the First Amendment. See, e.g., CATHARINE MACKINNON, *ONLY WORDS* (1993); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995); Mary Becker, *How Free Is Speech At Work?*, 29 U.C. DAVIS L. REV. 815 (1996); Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403 (1991).



as a kind of satellite domain of public discourse. Freedom of speech within the workplace plays a distinctive role in our society because the workplace itself is a comparatively integrated site for face-to-face interaction and cooperation. Co-workers must form working relationships and cooperate toward common aims despite diverse backgrounds.

The convergence of diversity and close engagement makes the workplace a unique intermediate institution and a crucial satellite domain of public discourse. But this same convergence of diversity and engagement makes unconstrained speech potentially explosive. Expression of hatred, contempt, or disrespect on the basis of race, sex, religion, or the like may inflict greater harm within the workplace than in the public square partly because of the close and ongoing personal engagement that the workplace compels. Such expression burdens the individual targets who must spend their working days, not a fleeting encounter, in this environment. As a consequence, such expression may undermine workplace equality and reinforce occupational segregation. Such expression may also poison the workplace as a forum for pluralistic exchange and destroy the possibility of constructive engagement. We might, following Robert Post, call this "the paradox of workplace discourse."<sup>82</sup>

Workplace diversity, enforced by the equality norm, constructs the workplace as a uniquely valuable setting for speech and as an important satellite forum for public discourse. The workplace can thus perform its function within the system of freedom of expression and maintain its unique role within a diverse society only if it is subject to some constraints of equality, civility, tolerance, and respect that foster reasoned deliberation. In other words, Title VII's restrictions on racial harassment, tempered by limited First Amendment constraints, are an integral component of constituting the workplace as an arena for *constructive* interracial engagement.

These observations do not resolve the paradox of workplace discourse, but they do call for a compromise between the no-holds-barred libertarian approach, which essentially prevails in the core of public discourse, and the approach embodied in current Title VII "hostile environment" law, under which nearly any employee speech or conduct that a complainant finds offensive may contribute to employer liability.<sup>83</sup>

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82. See ROBERT POST, *CONSTITUTIONAL DOMAINS* 119-78 (1995). I paraphrase, recognizing that Professor Post would not extend the idea of public discourse into the workplace at all. See Estlund, *supra* note 16, at 718-21.

83. See Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 *GEO. L.J.* 627 (1997). This is not to suggest that it is easy to make out a hostile environment claim. Nearly anything may *contribute* to a hostile environment, but the standard for liability is quite stringent. The plaintiff must show that "the workplace is

As I have argued elsewhere, the First Amendment should permit the government to impose certain constraints on the manner of expression, though not on the subject matter or viewpoint expressed, in workplace discourse. This compromise seeks both to recognize the importance of workplace discourse in promoting constructive interracial engagement and to give due weight to its distinctive nature and potential consequences.

## 2. Making Common Cause in a Diverse Work Force: The NLRA's Protections of Employee Speech

To enjoy any significant degree of freedom of expression, employees need protection not only against government-sponsored censorship but, more often, against employer censorship and retaliation against speech that seems to, or does, threaten employer interests. In a sporadic way, the law has come to recognize this need and to create a rudimentary system of freedom of expression in the workplace in the form of a patchwork of legal constraints against employer retaliation for various kinds of "protected" speech.<sup>84</sup> There are, for example, a variety of statutory and common law "whistleblower protections" that prohibit reprisal against employees who make complaints, bring charges, or participate in proceedings under various laws, including Title VII.<sup>85</sup> But the single most sweeping legal protection of employee speech in the private sector—and the most important in the present context—is section 7 of the National Labor Relations Act (NLRA), which gives employees the right to engage in "concerted activity for . . . mutual aid or protection."<sup>86</sup>

Section 7 of the NLRA applies not only to employees who are or seek to be represented by a union, but to almost all private-sector employees who act "in concert" with one or more co-workers on matters of shared concern.<sup>87</sup> The NLRA is rarely invoked by, and largely unfamiliar to,

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permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-67 (1986)). This does not resolve the constitutional problem, however, because liability-conscious employers have little choice but to ban all contributing speech and conduct; they cannot ban only that which threatens to cross the threshold for hostile environment liability. See Volokh, *Harassment Law*, *supra* note 81, at 567-68.

84. This "system of freedom of expression" is discussed in Estlund, *supra* note 16.

85. See 42 U.S.C. § 2000e(3).

86. 29 U.S.C. § 157.

87. For example, in *Washington Aluminum Co. v. NLRB*, 370 U.S. 9 (1962), the Supreme Court held that section 7 protected seven nonunion workers who walked off the job in protest of extremely cold temperatures in the workplace, and that their discharge thus violated section 8(a)(1) of the NLRA. See *id.* at 17.

nonunion employees outside the organizing context.<sup>88</sup> However, section 7 extends to employees at least formal free speech rights on issues of unionization and other forms of employee representation and on shared work-related grievances.<sup>89</sup> This statutory right is hemmed in by many limitations, including limitations on speech: some concerted expressive activity is illegal under the federal labor laws;<sup>90</sup> some is subject to state laws against trespass and libel;<sup>91</sup> and some is unprotected under section 7 if it is too disruptive of employer interests, as in the case of speech that “disparages” the employer’s product or service.<sup>92</sup> On the other hand, section 7 protects some rough, crude, and even abusive language inevitable in the highly emotional context of labor disputes.<sup>93</sup>

In some respects, the vision of employee speech rights in section 7 is in tension with harassment law under Title VII. For example, crude and insulting language may *both* represent part of a concerted effort by some workers to advance their shared interests *and* contribute to racial or sexual harassment.<sup>94</sup> One might resolve the conflict a bit formalistically by claiming that the subsequent enactment of Title VII simply trumps any conflicting manifestations of the older NLRA vision of workplace

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88. Indeed, my own casual inquiries suggest that the protections that section 7 affords nonunion employees are unfamiliar to almost all law students, including those beginning a course in labor law, to most lawyers, and even to many lawyers who practice “employment law.” The NLRA is widely regarded as a world unto itself, one that deals strictly with unions and collective bargaining.

89. *See, e.g., Eastex, Inc. v. NLRB*, 437 U.S. 556, 569-70 (1978) (holding that section 7 protects circulation of a newsletter urging support for the union and for an increase in the minimum wage and opposition to a state right-to-work provision); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (holding that employee solicitation of union activity on non-work areas of employer property during non-work hours was protected under section 7); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 507 (1978) (holding that section 7 protected employee circulation of union newsletter to co-workers in hospital cafeteria that was open to patients).

90. *See* 29 U.S.C. § 8(b)(4); *see, e.g., Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959*, Pub. L. No. 86-257, 73 Stat. 519.

91. *See, e.g., Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 202-03 (1978) (holding that union picketing of private property may be subject to state trespass prosecution); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 55 (1966) (holding that some concerted activity may be subject to state libel action).

92. *See NLRB v. Local Union No. 1229, Int’l Bd. of Elec. Workers*, 346 U.S. 464, 466-67 (1953).

93. *See Linn*, 383 U.S. at 58 (stressing that because “[l]abor disputes are ordinarily heated affairs, . . . [i]t is therefore necessary to determine whether libel actions in such circumstances might interfere with national labor policy”).

94. For example, this might occur where abuse is aimed at female or minority workers who oppose the union, cross a picket line, or otherwise support management; at a female or minority supervisor for conduct perceived as contrary to shared employee interest; or at a female or minority rival for union office. *See Bowman v. Heller*, Civ. A. No. 90-3269, 1993 WL 761159 (Mass. Super. Ct. July 9, 1993) (holding that sexually explicit campaign literature ridiculing female candidate for union office was harassment under state law).

discourse. Given the already long list of exceptions to section 7 rights, including the employer's recognized power under the NLRA to limit workplace discourse where necessary to maintain "production or discipline,"<sup>95</sup> it requires no great departure to allow the employer to restrict some workplace discourse—even that which would otherwise qualify for section 7 protection—in order to maintain an atmosphere of tolerance and equality.

However, the relationship between section 7 and Title VII is far more complex, particularly in light of the goal of fostering constructive interracial interaction. The protection of concerted activity within a racially integrated work force is perhaps the single most direct support the law can offer—beyond the fact of integration itself—to the role of the workplace in a racially diverse society. It is imperative that we do not lightly cast aside the NLRA's vision of employee solidarity and freedom from employer interference as a thing of the past. We should instead seek to reconcile that vision with the modern commitment to racial equality and integration.

The original NLRA, the Wagner Act of 1935, assumed largely homogeneous or racially segmented workplaces and did not aspire to combat the widespread employment discrimination and occupational segregation that produced that homogeneity or segmentation. On that assumption, it was fair to conclude that removing the threat of employer coercion and interference in worker activity would allow employees to unite and assert their shared interests. Once Title VII prohibited discrimination and segregation in employment, work forces became increasingly heterogeneous: women entered previously all-male workplaces, and minorities entered previously all-white workplaces. The resulting diversity produced clashes among workers, often in the form of racial and sexual harassment, that threatened to undermine not only progress toward equality but also feelings of solidarity, shared values, and common interests among workers.<sup>96</sup> Title VII's prohibition of discriminatory harassment recognizes those divisions among employees and calls upon the employer to intervene in the interest of equality for minority groups, including women, within the newly diverse workplace.

However, the NLRA's vision of worker solidarity suggests that we should be skeptical of the ability of employer intervention to cultivate healthier workplace relations. Employer intervention on behalf of new employees to protect them from co-worker harassment may instead

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95. *Republic Aviation Corp.*, 324 U.S. at 803.

96. Harassment often victimizes the pioneers—minorities or women—in a previously all-white or all-male workplace. See Linda S. Greene, *Sexual Harassment Law and the First Amendment*, 71 CHI.-KENT L. REV. 729, 733-34 & n.30 (1995) (citing numerous cases).

engender resentment and hostility. Indeed, some have suggested that taunting and verbal abuse of newcomers may sometimes be a “test,” passage of which may lay the groundwork for a stronger sense of community and acceptance and even more genuine social equality.<sup>97</sup> Of course, putting outsiders through this “test” can also cause tremendous pain, interfere with work performance, cause employees to leave the job and even the line of work, reinforce occupational segregation, and undermine equal economic opportunity.

We can see the New Deal perspective as adding a new element to the paradox of workplace discourse: unconstrained freedom of expression within a diverse workplace threatens to destroy the preconditions for rational and civil discourse, for workplace equality, *and* for solidarity and effective collective action on behalf of shared employee interests. At the same time, deputizing employers to constrain employee expression in support of civility and equality necessarily limits the freedom of interaction among employees and may engender divisions and undermine interracial solidarity. Where a threat of discipline hangs over every clash of opinion—and particularly where it hangs over some participants much more heavily than others—it is hard to see how workers can form a genuine community of interest.

The uneasy solution to this paradox, once again, lies in a compromise between unconstrained freedom for potentially abusive speech and an open-ended mandate for employer regulation of speech. Selective First Amendment limits on Title VII harassment liability, such as those I have proposed,<sup>98</sup> remove some of the legal pressures on employers to censor employee speech and give somewhat more room for the development of employee solidarity through open communication.

The larger point is that the NLRA and its vision of employee solidarity and concerted action should not be seen as a stumbling block to

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97. My colleague Jack Getman has observed this dynamic in a number of unionized workplaces in the early stages of integration of women or minorities or both. He suggests that letting workers deal with these tensions among themselves often produces a real sense of solidarity and community that may be undermined by introducing disciplinary sanctions and litigation. Assuming that this is a common dynamic, there are several features of the union workplace that may contribute to it. First, workers tend to stay in union workplaces longer for various reasons; the stability of the work force may contribute to the ability to work out tensions among workers. Second, unions depend on solidarity for their effectiveness; this may contribute to the need to overcome hostility and tensions among employees. Third, unions give employees a voice in workplace governance and in developing rules governing employee behavior; this may open the door to more productive ways of dealing with harassment. On the other hand, there are also many cases of egregious harassment, with some degree of union protection, in union workplaces. *See generally* Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 *TEX. J. WOMEN & L.* 9 (1995).

98. *See* Estlund, *supra* note 16, at 687.

workplace equality and integration. On the contrary, even the NLRA's limited promise of employee freedom of expression—freedom from employer suppression of most speech among workers on matters of shared concern—could be (if it were adequately enforced) a fundamental building block of interracial cooperation and community within the workplace. Many of the common concerns that can bring employees together in spite of their differences may be grievances against the common employer. Expression of those concerns, particularly if they become widespread, may encounter employer resistance and sometimes reprisals or threatened reprisals. Protecting concerted activity among employees in a diverse work force—with the overlay of Title VII's provisions against discrimination and exclusion on the basis of race—is perhaps the most direct legal support that current law offers to the mediating function of the workplace.

### C. *Implications for "Due Process" in the Workplace*

Most employees, and the overwhelming majority of nonunion private-sector employees, are subject to discipline and discharge at will. The classic formulation of employment-at-will—the employer's right to fire an employee for good reason, bad reason, or no reason at all—has been greatly eroded by the enactment of various wrongful discharge laws and doctrines, including most prominently the NLRA and Title VII. Most of those doctrines can be characterized as either anti-retaliation doctrines, designed to protect socially valued speech or conduct, or antidiscrimination doctrines, designed to prohibit adverse treatment on the basis of traits—usually immutable traits—or group membership. It is still fair to say that the typical at-will employment relationship is terminable for good reason or for no reason, but the right to discharge an employee for "bad reasons" is limited indeed.

But what remains of the at-will background rule continues to undermine and distort the application of the wrongful discharge doctrines.<sup>99</sup> This proposition has particularly important implications for the role of the workplace as an arena of constructive interracial engagement. I have argued that this role depends both on a vital minority presence in the workplace (which depends in turn on prohibiting invidious discrimination against minorities in hiring, firing, and promotions) and on a measure of freedom of expression and interaction within the workplace, free from employer reprisals. Both may be undermined by the at-will rule and the lack of a baseline requirement of fair treatment in discipline and

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99. This section borrows heavily from Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1996).

discharges.

An analogy may be helpful. Imagine a society whose citizens had free speech rights and equal protection rights but no due process rights. The government could imprison citizens, or banish them, for any reason or no reason at all without notice, hearing, or proof of the charges; but it could not punish citizens based on their criticism of the government or other protected speech, or on the basis of their race or sex. The citizen who believed she had in fact been punished for speaking against the government, or singled out on the basis of race or sex, could go to court and, if she could prove it, secure relief. How free would speech be in such a system? Without supporting protections of due process against arbitrary and unfair treatment, would the citizens feel free to challenge the regime without fear of retaliation? Would members of disadvantaged minority groups feel secure against discrimination?

The existing system of modified employment-at-will bears some resemblance to this strange regime. There is a sizable body of wrongful discharge law that prohibits employers from firing individuals on the basis of various "bad reasons." However, each of those laws places the burden of proving employer motive on the employee. In the typical at-will workplace, the employer has no obligation to give a "good reason" for discharge. In the at-will workplace—that is, without those basic guarantees of rationality, fairness, and process—both the anti-retaliation laws and the antidiscrimination laws stand on shaky ground.

The at-will background rule doubly undermines Title VII enforcement. Title VII, juxtaposed to the at-will background rule, places heavy and onerous burdens on employees. There is first the difficult burden of proving discriminatory motive.<sup>100</sup> That burden is even greater because most potential witnesses are also employed by the accused employer and may fear retaliation if they testify for the plaintiff or refuse to testify for the employer. To the extent that the protection of employees against employer retaliation is weakened by the at-will background rule, as I have argued it is, employees will be reluctant to come forward with complaints until they have quit or been fired, and will be reluctant to testify for co-workers or former co-workers who do complain.<sup>101</sup> The

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100. It is not enough for the plaintiff to show that the employer's proffered nondiscriminatory explanation for its decision was fabricated; the plaintiff must ultimately prove that the decision was in fact motivated by discriminatory factors. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

101. There is some empirical evidence for this proposition and for the corollary proposition that employees protected by "just cause" should be more willing to make complaints. Title VII complaints by *current* employees (as opposed to employees who have quit or been fired) are more frequent in union workplaces, where "just cause" is the rule, than in at-will workplaces. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1031-32 & n.145

result is to make it harder for employees to prove discrimination and correspondingly easier for employers—or, perhaps more often, biased supervisors—to minimize the presence of minorities in the workplace.

I want to explore another dimension of the problem of workplace equality in an at-will environment. The juxtaposition of the antidiscrimination laws and the at-will background rule not only undermines the efficacy of those laws, but also may contribute to perverse employer incentives and to divisive tensions between members of “protected groups,” such as women and minorities, and other employees.

Let us first look at the present legal landscape through the eyes of a prospective complainant who has been disciplined or discharged. In the at-will workplace, simple unfairness or arbitrariness in the decision gives no basis for relief. The at-will employee must plausibly claim unlawful discrimination (or retaliation) in order to secure an impartial review of her otherwise unappealable termination. Those who fit into one of the classes protected by antidiscrimination law—mainly women, minorities, older and handicapped workers—may consequently see and claim discrimination where there is simple garden-variety unfairness. Certainly, if they consult an attorney about their legal options, they will be encouraged to look for signs of discrimination. So the gap between the protections of the antidiscrimination laws and the non-protections of at-will employment may encourage employees to claim discrimination in response to perceived unfairness of any kind. Charges of discrimination, if they are seen as unjustified by other employees, are likely to be divisive and to provoke hostility.

How are employers likely to react to this legal landscape? Once they have hired a member of a protected group, they should seek to avoid obvious signs and statements of discrimination by managers and supervisors, and to engage in some defensive documentation and process to head off or defeat discrimination claims. In an otherwise at-will environment, we would expect litigation-conscious employers to give more process and more leeway, at least superficially, to employees in protected groups. It is thus increasingly rare to find “smoking gun” evidence of discrimination, or to find an employer who does not have some evidence—at least enough to muddy the waters—of a legitimate reason for an allegedly discriminatory firing or refusal to promote.

Defensive measures by employers will make it more difficult for employees to prevail even on meritorious discrimination claims, but they will hardly avert all litigation, particularly given the incentive for employees to perceive and claim discrimination. An accusation of discrimination is likely to provoke a vigorous and costly fight, at least in



close (i.e., most) cases. Such an accusation raises the temperature of an employment dispute and puts the moral reputation of the employer and its agents on the line. Far more than a claim of “no just cause” or the like, a claim of discrimination damages the prospects for an amicable resolution or a mending of the employment relationship.

To the extent that employers see some identifiable classes of employees—chiefly minorities and women—as posing the risk of a costly discriminatory discharge claims, a rational response is to discriminate illegally, but probably undetectably, at the hiring stage.<sup>102</sup> Perversely, the antidiscrimination laws—more specifically, the gap between the protection those laws afford to some and the lack of protection that employment-at-will affords to others—may thus increase the incentive to discriminate in hiring.

Let us look at this legal landscape from the standpoint of employees who are *not* members of a protected class.<sup>103</sup> However unwieldy existing remedies for discrimination may be for most employees, their availability to some may foster resentment by others. It may appear to some white co-workers that minorities are getting something they are not—that the employer, when dealing with minority employees (and women), is considering and reviewing adverse decisions more carefully, while they themselves remain subject to the unalloyed and merciless at-will regime. Employees who are not “protected” by the antidiscrimination laws may perceive fairness itself as a privilege from which they are excluded. The claim of “reverse discrimination” is a tempting response that reflects the victim orientation of wrongful discharge law and aggravates the dynamic of fragmentation and polarization.

The dynamics of harassment law in an at-will workplace poses these issues even more sharply because harassment complaints often directly pit co-workers against each other, almost invariably along lines of race or sex. In an at-will workplace, the litigation-conscious employer lacks sufficient incentive to act fairly and deliberately in response to a harassment complaint against a co-worker. The failure to discipline the accused co-worker may lead to a costly harassment suit; but the discipline or even

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102. See *id.* at 1024; see also Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1847 (1996) (developing this argument in the context of disparate impact law). The argument rests in part on the fact that, as Donohue and Siegelman have shown, the antidiscrimination laws are much more likely to be enforced at the discharge point than at the hiring point. See Donohue & Siegelman, *supra* note 101, at 984.

103. Although Title VII protects all employees against discrimination on the basis of race, see *McDonald v. Santa Fe*, 427 U.S. 273 (1976), it is clear that cases such as *Weber*, 443 U.S. at 193, and *Johnson*, 107 S. Ct. at 1442, make discrimination against certain groups—historically excluded and disadvantaged groups—easier to prove and harder to justify than discrimination against men and whites.

discharge of the accused, even if it is unfair and unfounded, does not ordinarily infringe on any legally enforceable right of the accused. Putting aside the potentially damaging impact on employee morale—which might well lead the employer to institute some forms of fair process—the threat of harassment liability introduces into the at-will workplace a powerful incentive to act on harassment complaints without due regard for the interests of the accused.

At the same time, an employer who perceives little threat of a harassment suit and is hostile to accusations of harassment may be tempted to get rid of the accuser. This would be illegal, but will often be hard to prove and easy to rationalize in the at-will workplace. This scenario may be especially prevalent in the most common setting for harassment complaints: the overwhelmingly white (or male) work force that is faced with the pioneers of integration. The juxtaposition of harassment law and the at-will background rule encourages arbitrary treatment of the accused, and it facilitates arbitrary treatment of the accuser.

A requirement of just cause for discharge and a fair process for enforcing it would help to realize the policies underlying each of the existing exceptions to employment-at-will, while responding to the concerns—both the valid concerns and those that are understandable but exaggerated—of those who do not normally qualify for any of those exceptions. Some reasonable system of procedural and substantive fairness for all employees faced with discipline or discharge may better foster equal treatment, and a perception of equal treatment, within a diverse work force than does the antidiscrimination regime. Complaints of unfair or arbitrary treatment could be heard without regard to the race of the employee and without escalating into more divisive charges of invidious discrimination that may tend to pit one group of employees against another.

As in the case of affirmative action, I hasten to disavow any claim that this is a sufficient justification for the abandonment of employment-at-will. The tendency of a regime of fair treatment for all to mitigate some of the unintended tensions and distortions that may otherwise follow from the antidiscrimination laws is only part of the picture that must be investigated in deciding upon the future of employment-at-will. But it is a largely overlooked piece of the picture that deserves consideration.

#### IV. CONCLUSION: WORKPLACE DEMOCRACY IN A RACIALLY DIVERSE SOCIETY

The vital role of the workplace in a racially diverse democracy arises from its construction, primarily by Title VII, as an intermediate institution that is subject to the antidiscrimination norm and that consequently brings

into direct, intense, and ongoing contact citizens who are usually divided along lines of race. I have argued that this workplace community best promotes constructive interracial interaction if it is governed by some of the same basic principles of engagement that govern our democratic society as a whole. After marching through the principles of equality, freedom of expression, and due process, it can come as no surprise that we arrive at workplace democracy.

The most complete fulfillment of the role of the workplace in a racially diverse democracy would require the introduction of democracy into the racially diverse workplace. The role of the workplace as a "school for democracy" has been explored by others.<sup>104</sup> The metaphor was invoked by key sponsors of the Wagner Act in support of collective bargaining, which continues to serve as the law's one answer—apart from the background rules of individual contract—to employee demands for participation and power in determining the terms and conditions of their working lives and livelihoods.<sup>105</sup>

The New Deal institution of collective bargaining has been transformed, along with the rest of society, as we have confronted the imperative of racial reconciliation. Unions that have embraced a diverse constituency have helped to promote greater equality, greater freedom of expression, more effective due process, and genuine democratic participation in the workplace. These unions not only help to cultivate opportunities for constructive interracial engagement within the workplace but also create an additional forum for constructive engagement within the union itself.<sup>106</sup>

This pleasing picture is marred, of course, by the seemingly relentless decline of collective bargaining and unionization, particularly in the private sector, to levels not seen since the Wagner Act was passed in 1935. The contributing factors are many and complex. Some of the responsibility lies with unions themselves, not all of which have responded effectively to changing economic realities or to the changing face of the work force. But among the factors contributing to the decline of organized labor is certainly the determined resistance with which many private-sector employers meet any whisper of unionization within their work forces.<sup>107</sup>

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104. On the importance of intermediate institutions as "schools of democracy," see 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 68-71 (J.P. Mayer & Max Lerner eds. & George Lawrence trans., 1966).

105. The framers of the Wagner Act self-consciously proclaimed its expansion of basic constitutional freedoms into the workplace. See Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 697.

106. Cf. Kohler, *supra* note 19 (on unions as effective mediating institutions).

107. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 105-18 (1990).

Employer resistance to unionization has been coupled in recent years with employer efforts to relax the strictures of section 8(a)(2) of the NLRA against employer-sponsored forms of employee participation. Employers contend that they are not opposed to worker participation; they are only opposed to the outmoded adversarial form of participation that unions represent. In the eyes of many in the labor movement, employers are opposed to any form of employee representation that they cannot control, and will not permit any nonunion form of employee representation to grow into a genuine source of employee power. But others who support democratization of the workplace believe that the time has come to permit greater experimentation with nonunion forms of employee involvement.<sup>108</sup>

Society's compelling interest in fostering constructive interracial engagement adds weight, I believe, to the arguments in favor of amending section 8(a)(2). Whether or not such organizations serve to increase employee power over terms and conditions of work, they seem quite likely to foster greater opportunities for constructive interracial engagement by increasing the range of issues over which discussions can have an impact, by necessitating compromise of conflicting group interests, and by creating time within the working day for deliberation over matters of shared concern. In short, even the mere forms of democracy may have value in cultivating cooperative relations within a racially diverse work force.

However, the opposite case could be made. Genuine, independent forms of employee representation promise the greatest contribution to interracial cooperation as well as to employee self-determination. Moreover, unionization has historically been the vehicle for introducing both the most effective forms of workplace due process, through "just cause" protections and grievance arbitration, and a more vital system of freedom of expression in the workplace.<sup>109</sup> Unionization can fortify several of the elements that I have argued are necessary to the ability of the workplace to foster constructive interracial interaction. If nonunion employee representation plans are destined to be shams, to enhance the employer's power to monitor and manipulate the work force, and to divert employee energies away from efforts to secure independent representation, then they might be counterproductive as well for interracial cooperation among employees.

As I have done at many points in this essay, I must disavow any claim that the interest in creating arenas for constructive interracial engagement resolves this major policy question. It simply contributes to the case in favor of democratization of the workplace and for creating some effective legal mechanism for collective employee representation and participation

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108. See, e.g., *id.* at 282-95, 307-11.

109. The vital connection between due process and free speech in the workplace, and the role of unions in fostering both, is explored in Estlund, *supra* note 80, at 101.

in workplace decisions. That may mean strengthening the enforcement of long-established protections for traditional concerted activity, including union organizing. It may mean lowering legal barriers to alternative forms of employee representation, or even mandating some form of employee representation. Above all, it means that the stakes in these debates are higher than is commonly believed. Workplace democratization would greatly enhance the crucial role of the workplace in promoting genuine integration and interracial understanding in the society.