The Fundamental Nature of Title VII

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"If President Lincoln's [emancipation] proclamation was designed to end physical slavery, it would seem that the recent order of President Roosevelt [establishing the Fair Employment Practice Committee] is designed to end, or at least curb, economic slavery."[1]

I. INTRODUCTION

During the summer of 1963, the bill that would eventually become the Civil Rights Act of 1964 simmered in House Judiciary Subcommittee No. 5, a special body constructed to bypass hurdles which had doomed previous attempts to enact civil rights legislation.[2] Meanwhile, on the streets of America, people took the fight over equality into their own hands. In May, Eugene "Bull" Connor turned fire hoses and attack dogs loose on peaceful protesters in Birmingham, Alabama. In August, more than 200,000 demonstrators gathered for the March on Washington for Jobs and Freedom. The next month, a bomb exploded in a Birmingham church killing four little girls. In late November, the bill formally left the Subcommittee and was delivered to the House for a vote. Two days later, President John F. Kennedy was assassinated in Dallas, leaving President Johnson to oversee the eventual passage of the statute.

The Civil Rights Act of 1964, including Title VII, is a statute born of a very specific historical moment. America in the 1950s and 1960s was a country in the throes of racial upheaval. Freedom rides; lunch counter sit-ins; the Montgomery bus boycott; the Little Rock 9; James Meredith's admission to Ole Miss, accompanied by 25,000 federal troops; and the events of the summer of 1963 all set the stage for legislation guaranteeing freedom of dignity for African-Americans. The Civil Rights Act of 1964 emerged as the legislative answer to these calls for equality. Title VII of the Act, the key provision guaranteeing equality of opportunity in employment, was added by Subcommittee No. 5 during that tumultuous summer. The Civil Rights Act, including the employment equality provision, gave life to basic, fundamental principles upon which our Constitution and overall systems of laws are based and which the country demanded.

Recently, the United States Supreme Court has been moving to categorize Title VII as a tort. In a series of cases decided between 2009 and 2013, the Court used tort principles to interpret anti-discrimination statutes and described them as federal torts.[3] This characterization misunderstands the

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[1] *F.D.R.'s Executive Order*, N.Y. AMSTERDAM STAR-NEWS, July 5, 1941, at 14.

[2] *See* John G. Stewart, *The Senate and Civil Rights*, *in* THE CIVIL RIGHTS ACT OF 1964, at 149, 156–57, (Robert D. Loevy ed., 1997); Joseph L. Rauh, Jr., *The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963–1964*, *in* THE CIVIL RIGHTS ACT OF 1964, *supra* at 49, 56–58.

[3] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524–25 (2013) (applying a but-for standard of causation to Title VII actions); Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011) (referring to Title VII as a federal tort); Gross v. FBL Fin. Servs.,

fundamental nature of Title VII and the Civil Rights Act as a whole. Title VII is not a tort statute, designed to provide compensation for personal injury. Title VII is a statute that protects the right to own and use one's own labor free from discrimination in order to provide meaningful economic opportunity and participation. This characterization of Title VII's fundamental nature emerges from a study of the history of the Civil Rights Act, in general, and Title VII, in particular. It is also consistent with the treatment of employment discrimination in international law.

This characterization of Title VII's fundamental nature leads to several implications for the "tortification" debate. The most important implication relates to theories of statutory interpretation; it insists that Title VII be given a broad interpretation, rather than a narrow, textual interpretation, therefore, rejecting the tortification of Title VII. A robust reading of Title VII fits the historical context of Title VII as one element of the Civil Rights Act of 1964; recognizes the importance of the constitutional norm codified by Title VII; and is consistent with the human rights approach to anti-discrimination law found in international law. In addition, understanding Title VII as a statute guaranteeing economic opportunity and participation suggests some interesting ideas for migration between tort law and Title VII. Specifically, the tort law concept of duty can establish a baseline requirement for Title VII that an employer create a workplace providing meaningful economic opportunities for all.

Part II of this Article briefly describes the current debate over the tortification of Title VII and concludes that the main problems with tortification turn on theories of statutory interpretation, increasing the "intent" requirement and making "cause" more difficult to show. Part III of this Article establishes the fundamental nature of Title VII as a statute protecting economic opportunity and full participation using three different types of analyses. The "elements approach" places Title VII in context and argues that it cannot be interpreted in isolation because it is only one element of the Civil Rights Act of 1964. The "super-statute approach" argues that Title VII embodies the fundamental principle, originally found in the Thirteenth Amendment to the U.S. Constitution, that individuals have the right to own and use their own labor free of discrimination, in order to have meaningful economic opportunity. The "human rights approach" shows that international law also categorizes and interprets employment nondiscrimination provisions in this way. Part IV of this Article discusses the implications of Title VII's fundamental nature to the debate over the migration and conflict between torts and civil rights law.

Inc., 557 U.S. 167, 176 (2009) (maintaining employer's discrimination must be the but-for cause of the adverse action).

II. THE TORTIFICATION DEBATE

During the last five years, the United States Supreme Court has ignited a debate about the extent to which Title VII should be treated as a tort for purposes of judicial interpretation. The Court has done this in a trio of cases: *Gross* (a 2009 Age Discrimination in Employment Act case);[4] *Staub* (a 2011 Uniformed Services Employment and Reemployment Rights Act case);[5] and *Nassar* (a 2013 Title VII retaliation case).[6] The so-called tortification of Title VII presents two major doctrinal issues: a shift in how intent must be proved and changes in the way that causation is understood. These have been accompanied by a move to a very textualized interpretation of the statute. Each of these cases has in effect narrowed the scope of Title VII protection without explicitly stating that Title VII was or should be contracted. Instead, the Supreme Court has focused on the need to use tort doctrine to interpret Title VII, with the natural result being that cases are harder for plaintiffs to prove and win.

Title VII's original prohibition against employment discrimination reads:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[7]

Significantly, the statute has never defined what it means "to discriminate . . . because of" a person's membership in a protected category.[8]

In the early days of Title VII, the United States Supreme Court decided *Griggs v. Duke Power*, in which it judicially created the doctrine of disparate

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[4] *Gross*, 557 U.S. 167.

[5] *Staub*, 131 S. Ct. 1186.

[6] *Nassar*, 133 S. Ct. 2517.

[7] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2 (2012)).

[8] *See* 42 U.S.C. § 2000e-2(a) (2012); 42 U.S.C. § 2000e-2(a) (1964). *But cf.* Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. 2000e(k) (2012)) (defining "because of sex" for the protected category of sex to include discrimination on the basis of pregnancy).

impact as a way of proving discrimination.[9] This doctrine prohibits practices that are neutral on their face, and even neutral in terms of intent, if they have a discriminatory impact on a protected class and are not job related.[10] The Supreme Court justified this doctrine by arguing "the objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[11] The early Supreme Court took a broad view of the purpose of Title VII and its language; it did not make an attempt to parse the text. Instead, it looked at the purpose of the legislation, finding it was meant to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[12] In reaching this conclusion, the Court relied on *Gaston County v. United States*, a voting rights case that struck down the institution of literacy tests for voter registration on the ground that the test would abridge the right to vote indirectly on the account of race, due to the history of inferior schooling available to African-Americans.[13] The creation of the disparate impact doctrine in employment discrimination embodied an approach to understanding discrimination that had a significant impact on civil rights jurisprudence.[14]

In the trio of tortification cases, Professor Sandra Sperino argues that the Court has embraced a "new textualist philosophy," in which the Court will look to the words of a statute, rather than its legislative history, in determining how to interpret the statute.[15] She demonstrates, in *Gross* and *Nassar*, that when the Court must determine how to define "because of," "the Court adds a new textualist canon to discrimination jurisprudence—unless Congress directs otherwise, the default meaning of words is a tort meaning."[16] Professor Sperino argues that *Gross* is strongly textual because it relies on the plain meaning of "because of" to equate that phrase with the tort doctrine of "but-

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[9] Griggs v. Duke Power Co., 401 U.S. 424, 431–33 (1971) ("If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited").

[10] In 1991, Congress codified disparate impact as a form of discrimination and amended Title VII to define the burden of proof in disparate impact cases. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k) (2012)).

[11] *Griggs*, 401 U.S. at 429–30.

[12] *Id.* at 431.

[13] Gaston Cnty. v. United States, 395 U.S. 285, 287, 297 (1969).

[14] *See generally* Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225 (1976) (examining the disparate impact doctrine which created a new avenue for bringing claims under Title VII).

[15] *See* Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107, 1116–20 (2014) [hereinafter Sperino, *Let's Pretend*].

[16] *Id.* at 1119–20.

for" causation.[17] In *Nassar,* Professor Sperino asserts the Court equates "because of" with "but for" and does so because of a narrow, textual, and tort-based reasoning.[18] In reaching these conclusions, the Court did not look at the purpose of Title VII; it relied on two non-employment discrimination cases, multiple restatements of torts, dictionaries, and tort treatises to reach its decision.[19] In *Staub,* the Court makes this move explicit, stating: "We start from the premise that when Congress creates a federal tort it adopts the background of general tort law."[20] Professor Sperino notes a similar move to the use of textualist arguments when the Court imports a requirement of proximate cause into discrimination statutes.[21] She concludes, "[t]hus, the story of the tort label is entwined with the rise of textualism," and "the Justices can use tort law to find a specific meaning to particular statutory words or ideas."[22] This textualist approach causes problems for plaintiffs in the doctrinal areas of intent and causation under Title VII because the cases are harder to prove and win.

A. *Intent*

In *Staub,* the Supreme Court dealt with the proof of intent in a "cat's paw" case in which an allegedly discriminatory act of a subordinate ends up affecting the employee through the actions of a supervisor who is relying on the subordinate's action (usually a performance review) to make an employment decision. The case was brought as a disparate treatment case in which the plaintiff alleged intentional discrimination (as opposed to a disparate impact type case described above).[23] In most previous disparate treatment cases, the Court focused only on the motive or animus of the defendant; however, Professor Charles Sullivan has argued that the Court added to the plaintiff's burden in this case by also requiring the plaintiff to establish intent in the same way that a tort plaintiff establishes intent in an intentional tort case.[24] Under tort law, a plaintiff proves intent either by showing the defendant desired that his action would cause the consequences of his act or he acted with the knowledge or belief that the consequences were substantially

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[17] *See id.* at 1114–15, 1119–21.

[18] *See id.* at 1120.

[19] *See* Univ. of Tex. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524–25 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175–78 (2009).

[20] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011).

[21] *See* Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1217–20, 1229–30 (2013) [hereinafter Sperino, *Statutory*]; Sandra F. Sperino, *Discrimination Statutes, The Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 20, 27, 31 [hereinafter Sperino, *Discrimination*].

[22] Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1066–67 (2014) [hereinafter Sperino, *Tort*].

[23] *Staub*, 131 S. Ct. at 1189.

[24] *See* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1439–41 (2012).

certain to result from it.[25] Tortifying intent under Title VII means that a plaintiff now must show both motive (motive to treat an employee differently because of his race, etc.) and intent (the defendant either wants different treatment to result or acts with knowledge or belief that it is substantially certain to result).[26]

Professor Sperino criticizes the Court's approach, arguing that "because of" refers to causation, not intent, so plaintiffs should be able to proceed without proving tort-type intent for Title VII or other equal employment statutes.[27] She also argues, using a variety of tort examples, that if tort-based intent is the proper doctrine to use in Title VII then intent in disparate treatment cases can now be proved without showing animus or motive—an easier standard than traditionally required under Title VII jurisprudence.[28]

B. *Causation*

In the tortification cases, the Supreme Court has also turned to tort principles of causation in interpreting the phrase "because of." The Court has done this by incorporating the notion of "but-for" causation into employment discrimination jurisprudence and by adding the torts requirement of proximate cause. These are new moves because, as described above, courts had traditionally focused on either animus (for disparate treatment cases) or effects (for disparate impact cases). The cases signal a shift away from employment discrimination jurisprudence and towards tort jurisprudence.

In *Gross*, the Supreme Court stated that for cases arising under the Age Discrimination in Employment Act (ADEA), "because of" means "but for."[29] In other words, a plaintiff must prove that, if the plaintiff was not a member of the protected class, the defendant would not have taken the adverse employment action.[30] This approach contrasts with the ability of Title VII plaintiffs, established in the Civil Rights Act of 1991, to prove so-called mixed-motive cases in which a plaintiff may prevail by showing that the protected category was a motivating factor for the discrimination even if other reasons for the adverse employment action existed.[31] The Court reasoned that Congress could have specified that the mixed-motive standard found in the Civil Rights Act of 1991 applies to the ADEA, as well as Title VII, but it did

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[25] *See id.* at 1453–55.

[26] *See id.*

[27] *See* Sperino, *Let's Pretend*, *supra* note 15, at 1121–22.

[28] *Id.* at 18–19.

[29] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009).

[30] *Id.*

[31] In mixed-motive cases, once a plaintiff has shown that the protected characteristic was a motivating factor, the defendant can still limit the remedies available to the plaintiff by showing that it would have taken the same action even in absence of the protected characteristic. *See* Sperino, *Tort*, *supra* note 22, at 1060, 1071.

not.[32] The Court then turned to tort law, instead of employment discrimination law, to determine the meaning of "because of."[33]

In *Nassar*, a Title VII retaliation case, the Court also said that a plaintiff must establish "but-for" cause.[34] As Professor Sperino shows, the Court used "textbook tort law" to require "but-for" cause in proving "because of."[35] This shift is problematic because it relies on tort law, instead of established discrimination law, to define cause. Professor Sperino also argues that, even from a torts perspective, it is problematic because it ignores other possible ways of showing cause-in-fact under tort law, such as a substantial factor.[36]

In *Staub* (the cat's paw case), the Court furthered the tortification of causation in discrimination cases by importing the tort notion of proximate cause into employment discrimination laws.[37] In tort law, a plaintiff must prove both cause-in-fact and proximate cause. Proximate cause is defined as the subset of cases for which there is cause-in-fact and the Court believes it is fair to hold the defendant liable.[38] The purpose of the proximate cause requirement is to provide a double-check of fairness within the tort system. In *Staub*, the Court said that the use of subordinate intent is necessary but not sufficient.[39] The supervisor must also have intent because the discriminatory performance evaluation is not an adverse employment action.[40] The Court characterizes the intent requirement as a proximate cause requirement, similar to the requirement found in tort law, apparently because it would not be fair to hold the employer responsible.[41] Professor Sperino criticizes this move because proximate cause does not "fit" Title VII cases because the employment discrimination statutory framework already balances the fairness objectives of proximate cause through specific statutory requirements.[42] Professor Sullivan suggests that the proximate cause requirement has been incorporated by the Supreme Court to prevent the use of "cognitive bias" evidence in discrimination cases.[43] Regardless of the reason behind the

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[32] *See Gross*, 557 U.S. at 177.

[33] *See id.* at 177–78.

[34] Univ. of Tex. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

[35] *See* Sperino, *Tort*, *supra* note 22, at 1066.

[36] *Id.*

[37] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1192 (2011).

[38] David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1681–82 (2007).

[39] *Staub*, 131 S. Ct. at 1194.

[40] *See* Sullivan, *supra* note 24, at 1440–41.

[41] *Id.* at 1457–58.

[42] Sperino, *Discrimination*, *supra* note 21, at 6, 51–54; *see also* Sperino, *Tort*, *supra* note 22, at 1074–75.

[43] Sullivan, *supra* note 24, at 1478 ("One exercise of practical politics [of proximate cause] might be for the Supreme Court to hold that a showing that cognitive bias caused an adverse employment action in fact does not suffice for liability. Rather, a plaintiff must show that the employer consciously factored a prohibited consideration into the decision in question.").

Court's shift, the addition of proximate cause clearly adds a new, tort-based requirement to the plaintiff's prima facie case.

III. UNDERSTANDING THE FUNDAMENTAL NATURE OF TITLE VII

The Supreme Court mischaracterizes the nature of Title VII when it uses tort principles to interpret it and limit its reach. Title VII is properly understood as a statute that guarantees the right of individuals to use their own labor to have meaningful economic opportunity. Three different analytical frameworks support this understanding of Title VII's fundamental nature: the elements approach argues that Title VII cannot be interpreted independently of the rest of the Civil Rights Act of 1964; the super-statute approach argues that Title VII rests on the constitutional principle found in the Thirteenth Amendment that each individual has the right to use his or her labor in order to have meaningful economic opportunity; and the human rights approach looks to international law to show that discrimination in employment is a violation of human rights because it discriminatorily denies meaningful economic opportunity.

A. *The Elements Approach*

When the Supreme Court approaches Title VII as a tort and uses tort principles to define its language, the Court fails to recognize that Title VII cannot be fully understood in isolation. It is only one part of the overall civil rights landscape. The prohibition against discrimination *in employment* is only one of the elements in a larger guarantee of equality in society found in the civil rights statutes.

When Congress passed the Civil Rights Act of 1964, it addressed a broad spectrum of discrimination and tried to guarantee equality in society by regulating most aspects of civil society. Title I of the Civil Rights Act addressed voting. Title II, the most controversial provision at the time, prohibited discrimination in public accommodations. Title III tackled discrimination in public facilities. Title IV and Title IX addressed discrimination in public education. Title VI addressed programs receiving federal money and, finally, Title VII prohibited discrimination in employment.

Nor was the Civil Rights Act of 1964 the only anti-discrimination statute passed during that time. In 1965, the Voting Rights Act created a comprehensive framework to ensure that African-Americans and others were not disenfranchised due to their race. Three years later, Congress passed the Housing Rights Act, also known as the Civil Rights Act of 1968, to prohibit discrimination in the sale, rental or financing of housing.

This series of civil rights laws, taken together, are sometimes referred to as "the second reconstruction."[44] Scholars argue that the 1950s and 1960s witnessed massive changes in society and laws that essentially rewrote or redefined the Constitution to better guarantee equality for African-Americans and other minorities.[45] Freedom rides and sit-ins, organized by the Congress on Racial Equality (CORE), began to take place in 1947 and were in full force by the 1960s. Meanwhile, the United States Supreme Court decided *Brown v. Board Of Education* in 1954, ordering schools nationwide to desegregate. In 1957, the nation witnessed the Little Rock Nine integrate Arkansas schools. Five years later, 25,000 federal troops deployed to Oxford, Mississippi to protect James Meredith as he became the first African-American to attend the University of Mississippi.

The summer of 1963 saw a series of events that provided the back drop to the passage of the Civil Rights Act of 1964. In May, Bull Connor turned fire hoses and let attack dogs loose on peaceful protesters. Video and photographs of these events greatly affected the population at large and its views on whether the government needed to act to better ensure equality. In August, the March on Washington took place, highlighted by Martin Luther King Jr.'s "I Have a Dream" speech. Again, the public perception of the need for civil rights legislation, as well as politicians' awareness of the growing strength of the civil rights movement, created the opportunity for the Civil Rights Act to go forward. In mid-September, a Birmingham Church was bombed, killing four innocent, little African-American girls and further turning people in favor of governmentally-guaranteed equality. Finally, in November, the assassination of President John F. Kennedy provided President Johnson with the support of the country to finish the work started by the late President.

The purpose of this very brief history lesson is to show that Title VII can only be truly understood and correctly interpreted when it is read in conjunction with the surrounding events, both socially and legislatively. The prohibition against discrimination in employment is only one element of a larger program to provide equality and full participation of African-Americans in all aspects of society. This larger guarantee, this larger purpose, needs to provide the backdrop for interpretation of Title VII.

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[44] *See, e.g.*, BRUCE ACKERMAN, 3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 127–225 (2014); U.S. House of Representatives, *The Civil Rights Movement and the Second Reconstruction, 1945–1968*, HISTORY, ART & ARCHIVES, http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/ (last visited Oct. 9, 2014), *archived at* http://perma.cc/FV8N-RWPL.

[45] For a description and critique of "constitutional moment" analysis, see WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES 61–65 (2010) [hereinafter ESKRIDGE, REPUBLIC]; *see also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1272 (2001) [hereinafter Eskridge, *Super*] (critiquing Ackerman's description of the "second reconstruction" constitutional moment).

B. *The Super-Statute Approach*

William Eskridge and John Ferejohn established the concept of a "super-statute" to explain why all statutes are not created equal and why some must be given preeminence over others.[46] In their seminal article, they argue that "super-statutes occupy the legal terrain once called 'fundamental law,' foundational principles against which people presume their obligations and rights are set, and through which interpreters apply ordinary law."[47] In addition to addressing fundamental or foundational ideas, a super-statute:

> (1) [S]eeks to establish a new normative or institutional framework for state policy and
> (2) [O]ver time does 'stick' in the public culture such that
> (3) [T]he super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.
>
> Super-statutes are typically enacted only after lengthy normative debate about a vexing social or economic problem . . . . The law must also prove robust as a solution, a standard, or a norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture.[48]

In practice, super-statutes are construed liberally and purposively.[49] Ordinary rules of construction may not be applied.[50] When there are conflicts with other statutes, the super-statute will trump an ordinary statute and the ordinary statute will be read or evaluated in light of the super-statute.[51]

Eskridge and Ferejohn developed the super-statute theory as a way to understand why courts treat certain statutes differently from others and to explain the outcome of certain cases that seem incorrect when subject to ordinary canons of statutory construction. In this way, it is primarily a descriptive theory. They identify a variety of statutes as super-statutes and suggest the foundational principles on which those statutes are based. They identify the Civil Rights Act of 1964, and Title VII in particular, as a super-statute based on the foundational principle of nondiscrimination.[52] Eskridge and Ferejohn also suggest the normative view that super-statutes should be viewed as quasi-constitutional law deserving of greater deference.[53] Further,

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[46] *See* Eskridge, *Super*, *supra* note 45, at 1215–17 (defining super statutes and noting their effect on courts' interpretation of the law).
[47] *Id.* at 1216.
[48] *Id.* (numerical formatting added).
[49] *Id.* at 1222.
[50] *Id.* at 1216.
[51] *Id.*
[52] Eskridge, *Super*, *supra* note 45, at 1237.
[53] *Id.* at 1271.

super-statutes can be used to create positive rights flowing from constitutional guarantees.[54]

The super-statute framework is most persuasive and useful when a specific statute can be traced to a constitutional principle. Thus, the analysis provided by Eskridge and Ferejohn can be built upon usefully by focusing on Title VII specifically and by identifying a fundamental principle different than nondiscrimination. A thorough understanding of the history of Title VII suggests that Title VII is a super-statute based upon the fundamental principle that each individual has the right to use his or her labor in order to have meaningful economic opportunity. This fundamental principle has its roots in the Thirteenth Amendment to the United States Constitution, which states that "[n]either slavery nor involuntary servitude . . . shall exist within the United States."[55] The connection between Title VII and the Thirteenth Amendment, as a class-based tool of empowerment, begins with the legislative history of Title VII and proceeds backwards in time, through the New Deal, to show its connection to the Thirteenth Amendment.

1. *Title VII*

Much has been written about the legislative history of the Civil Rights Act of 1964. To a large extent, that story focuses on the strategy needed to overcome legislative rules that prevented a civil rights bill from getting out of a drafting committee and to overcome a filibuster waged by conservative forces. Less attention has been focused on the more specific legislative history of Title VII, especially its origins. An examination of the legislative history of Title VII shows that its substantive provisions and structure reflect the fundamental principle of equality of economic opportunity, which had been developing for almost a century in the United States.

The version of the Civil Rights Act circulating in early 1963 did not include a prohibition against discrimination in employment. It only addressed discrimination in public accommodation, voting, and education. The Leadership Conference on Civil Rights (Leadership Conference), an influential group of fifty labor and religious organizations, and especially its members from the labor movement, lobbied hard for the inclusion of a Fair Employment Practices Committee (FEPC) in the bill.[56] The Kennedy Administration was reluctant to include FEPC (or broad accommodation protection) in the Civil Rights Act because it feared that such a bill would not get enough Republican support to overcome a filibuster.[57] By mid-June, the FEPC was still not in the bill, but Vice President Johnson indicated some

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[54] *See* ESKRIDGE, REPUBLIC, *supra* note 45, at 46 (discussing President Roosevelt's New Deal programs).

[55] U.S. CONST. amend. XIII, § 1.

[56] *See* Rauh, *supra* note 2, at 52–60.

[57] *Id.* at 54.

flexibility on its inclusion if public support was mobilized in its favor.[58] Walter Reuther, President of the United Auto Workers, and others worked towards mobilizing that support.

Meanwhile, the bill was sent to House Judiciary Subcommittee No. 5, a specially created subcommittee chaired by Representative Emanuel Celler, designed to circumvent the existing committee rules which had previously prevented a civil rights bill from getting through the congressional committee structure. Hearings on the bill continued throughout the summer, and Peter Rodino agreed to offer an FEPC amendment in Subcommittee No. 5, but the amendment he put forward was a fairly weak provision dealing only with government contracts and relying on persuasion not legal suits to enforce the equality guarantee.[59] In August, 200,000 demonstrators attended the March on Washington, giving the legislation new inspiration. On September 25, 1963, Pete Rodino offered a retooled Title VII, establishing the Equal Employment Opportunity Commission (EEOC) and providing for private lawsuits.[60] According to John G. Stewart, the top legislative assistant to Senator Hubert Humphrey during passage of Civil Rights Act, it was the influence of the Leadership Conference on Subcommittee No. 5 that led to the inclusion of the EEOC.[61] The AFL-CIO played a key role in particular because it refused to support the bill unless it had strong equal employment opportunity provisions.[62]

In late September, the Subcommittee reported a strong bill out to the full judiciary committee, in defiance of the wishes of the Administration. In late October, the full Judiciary Committee and President Kennedy put together a compromise bill, but one which still included the fair employment provisions. In late November, the bill moved to the House floor with no assurance that it would pass. Then, on November 22, President Kennedy was assassinated. Vice president Johnson pushed the bill forward to its eventual passage.

As this legislative history shows, Title VII emerged from the idea of the FEPC and was championed by a coalition of civil rights leaders, including labor leaders, in the judiciary subcommittee. The FEPC and the Leadership Conference, in turn, have their origin in the FEPC established by President Franklin Roosevelt in 1941, as explored in the next section. Title VII and its predecessor, the FEPC, reflect the fundamental principle of equality of economic opportunity.

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[58] *Id.* at 54–55.

[59] *See* CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 35 (1985).

[60] *Id.*

[61] *See* Stewart, *Senate*, *supra* note 2, at 156–57.

[62] *See id.* at 157; John G. Stewart, *The Civil Rights Act of 1964: Strategy*, *in* THE CIVIL RIGHTS ACT OF 1964, *supra* note 2, at 192.

2. *Title VII and Roosevelt's Fair Employment Practices Committee*

Between 1941 and 1945, the United States federal government had the FEPC dedicated to providing equal employment opportunity for African-Americans and others in federal employment.[63] This little known agency provided the substantive framework, the activist leadership, and the philosophical principles for what would eventually become Title VII of the Civil Rights Act of 1964. An analysis of the origins of the FEPC, its substantive operations, the principles on which it was based, and its legacy show that Title VII had its basis in the fundamental principle that each individual has the right to use his or her labor in order to have meaningful economic opportunity.

a. *Origins of the FEPC*

During the late 1930s and early 1940s, the United States economy grew as a result of job creation spurred by World War II.[64] African-Americans, unfortunately, did not share in the benefits of the recovery. In fact, nonwhite job placements actually fell from 5.4% in 1940 to 2.5% in 1941.[65] Many industries and most American Federation of Labor (AFL) craft-based unions were closed to African-Americans.[66] In northern cities, the African-American unemployment rate ranged between forty and fifty percent and nationwide eighty-seven percent of this population lived below the poverty line.[67] In order to address this problem, in 1940, African-American groups, led by A. Philip Randolph, founder of the Brotherhood of Sleeping Car Porters (BSCP), and others, started organizing protest meetings and began to publicly demand equality in America's defense industries.[68]

Intense lobbying continued into 1941, resulting in the introduction of a congressional bill in March that would create a commission to investigate and prohibit discrimination.[69] The Office of Production Management, which oversaw government contracts with defense industries, sent a nonbinding letter

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[63] About eighty percent of the FEPC's work focused on Black Americans, but they also dealt with discrimination against Mexican-Americans, Japanese-Americans, Jews and Seventh Day Adventists. *See* MERL E. REED, SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT'S COMMITTEE ON FAIR EMPLOYMENT PRACTICE, 1941–1946, at 231–66 (1991).

[64] *See id.* at 13.

[65] LOUIS RUCHAMES, RACE, JOBS, & POLITICS 12 (1953).

[66] *Id.* The Congress of Industrial Organizations (CIO), on the other hand, organized entire industries and welcomed African-American members. *See id.* at 10.

[67] ANTHONY S. CHEN, THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941–1972, at 35 (2009). Twice as many African-Americans lived in poverty as white Americans.

[68] *See* RUCHAMES, *supra* note 65, at 9.

[69] *Id.* at 15.

to defense contractors urging them to eliminate discriminatory bans.[70] African-American leaders found these efforts disingenuous and inadequate, and Randolph began to organize a "March-on-Washington Committee," planning to bring 50,000–100,000 African-Americans to the nation's capital on July 1, 1941.[71] Fearing the effect of such a demonstration on America's reputation during wartime, first lady Eleanor Roosevelt, New York City Mayor Fiorello La Guardia, and others met with Randolph to try to persuade him to cancel the march. Randolph refused and even suggested that a preliminary march would occur in New York City on June 27, 1941.[72] President Roosevelt finally agreed to a personal meeting with Randolph, in which he promised the appointment of a committee including the Secretary of War and Secretary of the Navy to resolve the problem.[73] Randolph remained dissatisfied and promised that "the March will go on."[74] President Roosevelt relented. On June 24, 1941, a draft executive order was circulated to Randolph and Walter White of the NAACP. Following brief negotiations, a revised draft was approved and on June 25, 1941, President Roosevelt issued Executive Order 8802, which banned discrimination in government and defense industries.[75] The National Negro Congress called the Executive Order "'a great step forward' in the Negro people's struggle for a 'complete democracy.'"[76] Randolph reportedly described it as "the most significant document since the Emancipation Proclamation."[77] Echoing the sentiment, the *Negro Handbook* called it "the most significant move on the part of the Government since the Emancipation Proclamation . . . ."[78]

b. *Substance and Operation of the FEPC*

Located in the Office of Production Management, the FEPC began operation on July 18, 1941. President Roosevelt appointed a six person committee, including the two leaders of the AFL and the Congress of Industrial Organization (CIO); an African-American lawyer and alderman in Chicago; the chairman of the executive board of the BSCP; a leading industrialist of Jewish descent; and a liberal, southern newspaper publisher who had been active in anti-lynching and poll tax issues.[79] To address discrimination within the government, Roosevelt sent a letter to all heads of federal departments and agencies forbidding discrimination on the basis of

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[70] *Id.*
[71] *Id.* at 17.
[72] *Id.* at 18.
[73] *Id.* at 19–20.
[74] RUCHAMES, *supra* note 65, at 20.
[75] *Id.* at 20–22.
[76] *Id.* at 23.
[77] *FD's Order Kills Defense Bias*, CHI. DEFENDER, July 5, 1941, at 1.
[78] RUCHAMES, *supra* note 65, at 22–23.
[79] *Id.* at 24–25.

race, religion, or national origin.[80] To address discrimination in private employment, the FEPC decided to hold hearings in each major geographic region of the country during its first year of existence to determine the scope of discrimination.[81] These hearings also addressed discrimination within particular sectors, and the FEPC responded to discrimination by issuing directives to individual employers and trade unions.[82] During this time period, the FEPC was able to "stage several high-profile hearings, adjust thousands of individual complaints of discrimination, and establish an unparalleled infrastructure within the federal bureaucracy for addressing discrimination . . . ."[83]

The FEPC ran into political trouble in its second year of operation, especially when it began to hold hearings in the South.[84] In July 1942, the FEPC was transferred to the War Manpower Commission (WMC), as a way to restrict its activities.[85] In January, 1943, Paul McNutt, the person in charge of the FEPC within the WMC, suspended planned hearings about discrimination in the railroad industry.[86] The FEPC fell into a state of "suspended animation," unable to perform its duties because of political opposition, lack of financial support, and a series of resignations.[87] This stalemate continued until May 27, 1943, when Roosevelt issued Executive Order 9346 establishing what has come to be called the "second FEPC."[88]

Executive Order 9346 established a new FEPC as an independent agency reporting solely to the President.[89] During the period between May 1943 and Roosevelt's death in 1945, the FEPC did some of its best work, although the results were far from perfect. In Alabama ship yards, for example, the FEPC ordered promotions for twelve African-Americans into welder positions previously unavailable to them because of their race. The order resulted in a small riot and the deployment of Army soldiers. Further negotiations led to an agreement that included the establishment of segregated shipways where African-Americans could be promoted into skilled trade jobs, from which they had previously been barred.[90]

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[80] *Id.* at 26.

[81] *Id.* at 27.

[82] *Id.* at 35–56 (describing directives to directors or officers of companies or unions to comply with the Executive Order, collect data or to change their advertising). *See generally* REED, *supra* note 63, at 21–76 (providing an in-depth discussion of the first year of operation of the FEPC).

[83] CHEN, *supra* note 67, at 38.

[84] *Id.* at 39.

[85] *See* RUCHAMES, *supra* note 65, at 46; *see also* REED, *supra* note 63, at 77–116.

[86] RUCHAMES, *supra* note 65, at 50.

[87] *Id.* at 53–55.

[88] *Id.* at 56.

[89] *Id.* at 57; *see also* REED, *supra* note 63, at 117–43, 206–30 (describing the role of regional offices during this time period).

[90] RUCHAMES, *supra* note 65, at 58–59.

Progress in the railroad industry was particularly difficult, but the FEPC did eventually issue an order directing all railroads to "'cease and desist' from 'discriminatory practices affecting the employment of Negroes.'"[91] In an advertisement in the *New York Times* and other major newspapers, the BSCP said the directive "has done more to restore the belief of Negro Americans in the genuineness of their country's democratic faith and aspiration than anything that has happened since the President issued his original anti-discrimination order in June, 1941."[92] Unfortunately, implementation of the directive ran into political criticism and industry opposition, and it was never fully realized.[93] At the same time, the NAACP under the leadership of Charles Hamilton Houston was litigating *Steele v. Louisville & Nashville Railroad Co.*, challenging the refusal of white railroad firemen unions to represent black railroad firemen in a nondiscriminatory way.[94] Houston pursued cases before both the FEPC and in the federal courts, recognizing that the two routes could be used to strengthen each other.[95] When the plaintiffs prevailed in *Steele*, Houston saw the victory as a vindication for the work of the FEPC and justification for the creation of a permanent FEPC.[96]

The FEPC was also able to settle a variety of transit worker cases,[97] and play a role in the integration of the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers (IBB) on the West Coast.[98] The settlement in these industries illustrated how the issues confronted by the FEPC were not just about race but were also very much about class and labor relations. In the transit worker cases (arising in Chicago, Los Angeles, and Philadelphia), the resistance to equal employment opportunity did not correlate with racism or public opinion.[99] Instead, it turned upon the prevailing labor-management relations and whether "[u]nion officials approved of the move and were secure enough to squelch the few verbal objections offered by white workers."[100] In the case of the West Coast IBB the FEPC by itself was ineffective in moving the AFL Union away from its discriminatory "auxiliary union" system for African-Americans or swaying recalcitrant employers and shipbuilders, such

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[91] *Id.* at 66.

[92] *Id.* at 67–68.

[93] *Id.* at 68–71. The biggest political threat came from a special committee investigation, organized by southern Congressman Smith, into the legitimacy of the FEPC's authority, threatening the agency's appropriation money. *Id.* at 73–86; *see also* REED, *supra* note 63, at 145–72 (detailing various political challenges to the FEPC).

[94] Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 193– 94 (1944).

[95] Deborah C. Malamud, *The Story of* Steele v. Louisville & Nashville Railroad: *White Unions, Black Unions, and the Struggle for Racial Justice on the Rails*, *in* LABOR LAW STORIES 55, 78–80 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

[96] *Id.* at 97.

[97] RUCHAMES, *supra* note 65, at 100–20.

[98] REED, *supra* note 63, at 267–317.

[99] RUCHAMES, *supra* note 65, at 118.

[100] Joseph E. Weckler, *Prejudice Is Not the Whole Story*, PUB. OPINION Q. 126, 128 (1945).

as Kaiser.[101] The AFL and employers simply ignored its orders.[102] The situation only changed when a coalition including the Urban League in Portland, the NAACP in San Francisco, and the CIO in Los Angeles challenged the discriminatory union practices in court and won.[103]

In *James v. Marinship Corp.*,[104] the Supreme Court of California ruled that neither a union nor an employer enforcing a union contract could both arbitrarily exclude African-Americans from membership and maintain a closed shop agreement (requiring union membership for employment) because that combination was contrary to the public policy of California.[105] The Supreme Court of California stated the union's "asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living."[106] The court stated that public policy prohibited discrimination based on race and stated further:

> In addition to these persuasive analogies, we have an express statement of national policy in Executive Order No. 9346 of the President of the United States, issued on May 27, 1943. This order declares that it is the policy of the United States to encourage full participation in the war effort of all persons regardless of race, creed, color, or national origin, that there should be no discrimination in the employment of any person in war industries because of such, and that it is the duty of all employers and all labor organizations to eliminate discrimination in regard to terms and conditions of employment or union membership because of race, creed, color, or national origin.[107]

The FEPC hearings and publicity no doubt influenced the outcome of the lawsuit, and the outcome of the lawsuit "forced the boilermakers for the first time to begin negotiating in earnest with the FEPC."[108]

President Roosevelt's death in April, 1945, coupled with the winding down of the war, led to the eventual demise of the FEPC.[109] Supporters found it difficult to convince Congress to authorize appropriations for the agency.[110] President Truman did not support the FEPC, refusing to let the FEPC issue a directive regarding the D.C. transit agency and decreasing the FEPC's funding.[111] In December 1945, President Truman issued Executive Order

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[101] REED, *supra* note 63, at 306–17.
[102] *Id.*
[103] *Id.*
[104] *James*, 155 P.2d 329, 342 (1944).
[105] Although decided under California law, the California court refers to and uses reasoning similar to *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), discussed below.
[106] *James*, 155 P.2d at 335.
[107] *Id.* at 340.
[108] REED, *supra* note 63, at 310, 315.
[109] *Id.* at 321–43.
[110] RUCHAMES, *supra* note 65, at 122–36.
[111] *Id.* at 132.

9664, which limited the power of the agency to fact-finding and prohibited the issuance of cease and desist orders.[112] On June 28, 1946, the FEPC issued its final report.[113] In 1946, Congress formally abolished the FEPC. Although the House of Representatives voted to create a new FEPC in 1946, the bill was rejected in the Senate.[114]

c. *The Principles Underlying the FEPC*

The importance of the FEPC goes beyond the modest results described above. Why else would A. Philip Randolph have compared Executive Order 8802 to the Emancipation Proclamation?[115] The reason lies in the fundamental nature of the principles underlying the FEPC. As the *Amsterdam News* editorial proclaimed in 1941: "If President Lincoln's proclamation was designed to end physical slavery, it would seem that the recent order of President Roosevelt is designed to end or at least curb, economic slavery."[116] The FEPC gave life to the fundamental principle that individuals have the right to own and use their own labor, free of discrimination, in order to have meaningful economic opportunity.

A contemporary *Washington Post* editorial arguing in favor of FEPC legislation argued that there is "nothing more fundamental to a democratic society than equality of economic opportunity . . . ."[117] Public opinion polls from the time show that people favored the legislation because "[a]ll men [are] created equal" and that "equal opportunity is 'one of [the] basic precepts of our democracy.'"[118] Support for legislation was highest when the legislation was described as protecting a qualified person from being denied a job because of their race, religion, color, or nationality.[119] These highlight the importance of meaningful economic opportunity as the principle underlying the FEPC legislation efforts, rather than an amorphous idea of racial equality.

Randolph described the purpose of FEPC legislation not as the elimination of bias or racial prejudice, but as the elimination of discrimination. He focused not on changing attitudes but on changing discriminatory acts and their effects. In a letter to the editor of the *New York Times*, responding to their anti-FEPC editorial, he wrote:

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[112] *Id.* at 134.

[113] *Id.*

[114] *See* Robert D. Loevy, *Introduction: The Background and Setting of the Civil Rights Act of 1964*, *in* THE CIVIL RIGHTS ACT OF 1964, *supra* note 2, at 14–15.

[115] *See* RUCHAMES, *supra* note 65, at 23; *see also FD's Order Kills Defense Bias*, *supra* note 77, at 1.

[116] *F.D.R.'s Executive Order*, *supra* note 1, at 14.

[117] *Disembodied Spirit*, WASH. POST, Feb. 25, 1950, at 10.

[118] CHEN, *supra* note 67, at 49.

[119] *Id.* at 60.

> While it is true [that] discrimination is hard to prove, it does not follow that it involves the question of subjective intent. You are confusing prejudice with discrimination. Prejudice, racial, religious or national is subjective, and involves intent. It is an emotion or feeling, a state or attitude of mind. It is an inner condition. Not so with discrimination. Discrimination, racial, religious or what not, is an objective practice, which can be seen, heard, and felt. . . . FEPC is not designed to abolish prejudice but to eliminate discrimination.[120]

The purpose of the FEPC, then, according to Randolph, focused more on economic empowerment and participation than elimination of racial bias.[121]

The broader group of FEPC supporters also focused on economic participation, not simply racial discrimination. As one commentator described it:

> The bloc was interracial, interfaith, and truly nationwide in scope. It targeted not just Jim Crow segregation in the South but also employment discrimination all across the country; not just discrimination against African Americans but also discrimination on the basis of religion, ethnicity, or national origin. The breadth of the bloc marked a substantial departure from racial politics in earlier years, when race advancement organizations were the primary lobbies, and when lynching and poll taxes topped their legislative agenda. . . . The politics of fair employment, by contrast, displayed national dimensions. After all, job discrimination was not only prevalent in the South; it was extensive throughout northern labor markets and implicated northern employers and their unions. Labor market discrimination also affected religious and ethnic minorities living in northern cities, not just African Americans in the South.[122]

The fundamental principle underlying the FEPC and Title VII, then, is not just non-discrimination but full economic participation, unimpaired by discrimination.

Steele v. Louisville & Nashville Railroad Co. formed another important piece of the landscape developed at this time. In that case, the NAACP sued the Brotherhood of Locomotive Firemen and Engineers (the Brotherhood) which served as the exclusive bargaining representative between the railroad and the workers under the terms of the Railway Labor Act. At the time, the majority of railroad firemen were white, with a significant minority of African-Americans, all of whom the Brotherhood excluded from membership in the union. The NAACP brought suit when the Brotherhood sought to amend the collective bargaining agreement between the Brotherhood and the railroads "in such manner as ultimately to exclude all Negro firemen from the

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[120] A. Philip Randolph, Letter to the Times, *Passage of FEPC Bill Urged*, N.Y. TIMES, Jan. 29, 1946, at 24.

[121] *See id.*

[122] CHEN, *supra* note 67, at 41.

service."[123] In a unanimous decision, the Supreme Court found for the plaintiffs and found that the union had a duty "to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."[124] The Court stated the duty owed was:

> [A]t least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . .[125]

The Court based its reasoning upon the fact that, as the exclusive representative for workers in negotiating the collective bargaining agreement, a union controls the economic opportunities available to workers.[126] If the union is not required to represent all workers, "the minority would be left with no means of protecting [its] interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed."[127] The Court stated that, while a union is free to make trade-offs that have unfavorable effects on some workers, the rationale for the differential treatment must be relevant to the job.[128] It went on to state, "Here the discriminations based on race alone are obviously irrelevant and invidious."[129] Finally, it concluded that:

> In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction.[130]

Steele is significant, then, because it recognizes that the opportunity to meaningful economic participation cannot be abridged by the private actions of a union or employer on the basis of race discrimination. In a unanimous opinion, the Court essentially created a new cause of action in federal courts—not specified in the language of either the National Labor Relations Act or the Railway Labor Act—allowing workers to bring suit when the union breached its duty of fair representation. It created a mechanism for enforcing an

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[123] Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 195 (1994).

[124] *Id.* at 204.

[125] *Id.* at 202.

[126] *Id.* at 200–01 (quoting J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (decided under the National Labor Relations Act)).

[127] *Id.* at 201.

[128] *Steele*, 323 U.S. at 203.

[129] *Id.*

[130] *Id.* at 207.

affirmative right implied in the statutes, without which African-Americans and other workers would have been arbitrarily denied the right to work.

Professor David Engstrom has argued that the choice of the FEPC model, a commission with authority to mediate disputes and issue cease-and-desist orders, also reflects the recognition that issues of class were at the heart of the civil rights movement.[131] He argues that the FEPC model allowed both the civil rights movement and the labor movement "a measure of control over the pace and substance of racial change."[132] The CIO favored the FEPC because, as a group of industrial unions, it organized all workers, not just skilled trades.[133] The FEPC made black workers in northern industries, such as auto, steel, and meat packing, a core part of its organizing effort even as it realized that there would be racial issues to address.[134] According to Walter Reuther, president of the United Auto Workers, the FEPC model, based on conciliation and negotiation, would allow unions to navigate the difficulties of integrating unions in the 1940s.[135] The FEPC would allow labor to "sweat this [race relations] thing out," by providing time to figure out how to ensure the fundamental right of full economic participation to people of all races.[136]

Civil rights groups, on the other hand, were focusing not just on challenging public, Jim Crow discrimination, but also exclusion from private labor markets.[137] According to Engstrom, the FEPC allowed these groups to convince legislators and the public that its goal was to eliminate the public harm associated with private discrimination, rather than to compensate individuals.[138] The NAACP argued that the FEPC model ensured the constitutionality of fair employment laws because the model was narrowly tailored to vindicate a *public* right because "[p]ublic welfare requires the elimination of discrimination, not the payment of damages."[139] Civil rights groups could convincingly argue that the FEPC created a new structure that was good for everyone because it ensured full economic participation and opportunity. It was not about rewarding a few plaintiffs with monetary damages but rather about guaranteeing the fundamental right to use one's own labor to have meaningful economic opportunity.

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[131] *See generally* David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071 (2011).

[132] *Id.* at 1075.

[133] *Id.* at 1109.

[134] *Id.*

[135] *Id.* at 1112.

[136] *Id.* at 1113.

[137] Engstrom, *supra* note 131, at 1114.

[138] *Id.* at 1120–21.

[139] *Id.* at 1120.

d. *The Legacy of the FEPC*

The FEPC provided the basis for Title VII in several other important ways. Following the dissolution of the FEPC by President Truman, various groups came together to pursue federal FEPC legislation. These groups included the Leadership Conference on Civil Rights and the United Auto Workers. These groups became instrumental in the inclusion of Title VII in the Civil Rights Act of 1964. Furthermore, the FEPC set the agenda for how the country would think about civil rights and employment: as something the government should address as part of the New Deal regulatory model.[140]

3. *The Civil Rights Section of Roosevelt's Justice Department*

The FEPC and its underlying principles have their origin in Roosevelt's broader New Deal vision of meaningful economic opportunity. At the start of the twentieth century, African-Americans had made little progress in securing economic equality, even though organizations such as the NAACP and the National Urban League (founded in 1910 to secure more and better jobs) existed for this purpose.[141] The ameliorative, concessionary approach taken by such groups during World War I had not been successful in achieving these goals.[142] Following World War I, the African-American population found itself still subject to lynching, Jim Crow laws, peonage, and high unemployment.[143] The National Urban League changed tactics, becoming more confrontational.[144] In 1925, A. Philip Randolph founded the Brotherhood of Sleeping Car Porters, which quickly became the most powerful African-American labor organization.[145] The depression and its aftermath saw the emergence of wide-scale African-American campaigns, including the "buy-where-you-can-work" movement, and increased African-American voting.[146] In the 1930s, Roosevelt, recognizing the importance of this emerging population, moved to include African-Americans in New Deal employment opportunities.[147] By 1935, three million blacks (20% of the black labor force) were employed in New Deal relief projects.[148]

In 1939, Attorney General Frank Murphy created the Civil Liberties Unit within the Criminal Division of the United States Department of Justice for the

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[140] CHEN, *supra* note 67, at 33, 41–44.

[141] *See* RUCHAMES, *supra* note 65, at 7–9; *see also* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 260–67 (2011).

[142] RUCHAMES, *supra* note 65, at 8–9.

[143] *Id.* at 9.

[144] *Id.*

[145] *Id.*

[146] *Id.* at 10; *see also* Carle, *supra* note 141, at 270–75.

[147] Loevy, *supra* note 114, at 12.

[148] *Id.*

"aggressive protection of fundamental rights inherent in a free people."[149] From the beginning, the Civil Liberties Unit focused on the protection of labor rights and economic security, viewing that as core to its mission.[150] In its earliest days, it helped the United Mine Workers receive recognition as the union representative for coal miners in Harlan County, Kentucky, and protected labor and speech in New Jersey and California.[151]

In 1941, the unit changed its name to the Civil Rights Section (CRS). The CRS began to focus more on protecting African-Americans by bringing cases addressing voting rights, lynching, police brutality, peonage, and involuntary servitude. By concentrating on the last two, the CRS found a way to meld its original labor focus with its new focus on civil rights. The peonage cases "offered the CRS a way to join labor and race rights, to protect African Americans in a politically palatable way, and to build on doctrinal strengths."[152] The peonage cases were politically palatable because the abuses were so egregious that even Southern whites were willing to condemn them. The CRS viewed the Thirteenth Amendment as an available doctrinal path to attack these problems because it had not been closed off by the courts like the Fourteenth Amendment.[153]

Cases brought by the CRS typically involved agricultural workers in the South trapped in a variety of different, abusive labor relationships. As many African-Americans left the South to find employment in the North and other workers began to experience greater freedom, white farmers needed to find new ways to control African-American labor.[154] They turned to methods such as share cropping, debt peonage, and violence to maintain an unfree work force.[155] While illegal, whites were able to utilize these practices because of their complete control of the legal and political system in the South.[156] As one academic summarized, "for the 29 percent of African Americans who stayed in the rural South as late as 1950, much remained the same seventy-five years after the end of chattel slavery."[157] The CRS responded to complaints from African-Americans who characterized this oppression as both racial and economic.[158] African-Americans complained explicitly about violations under the Thirteenth Amendment,[159] and complained of being held "under

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[149] RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 111 (2007).
[150] *Id.* at 116–17.
[151] *Id.* at 118.
[152] *Id.* at 124.
[153] *Id.* at 112, 124, 129–38.
[154] *Id.* at 55–60.
[155] GOLUBOFF, *supra* note 149, at 60–66.
[156] *Id.* at 57.
[157] *Id.* at 52.
[158] *Id.*
[159] *Id.* at 130.

slavery."[160] A typical case from this period involved hundreds of young African-American workers held in peonage on Florida sugar plantations.[161]

Over time, the CRS expanded its efforts beyond those held in debt peonage to other situations. In 1948, it helped pass an amendment to the Anti-Peonage Act to facilitate this work.[162] The amendment changed the terms of the statute to remove the phrase "slave trade" and include "involuntary servitude."[163] The purpose of this change was to "enable prosecutors to use a single statute to attack non-debt-based involuntary servitude."[164] Broadening the scope to involuntary servitude cases allowed the CRS to pursue more than traditional debt peonage cases.[165] It eventually began to address cases that involved "virtual slavery," featuring other types of coercion and oppressive conditions, as well as cases focusing on women in domestic work.[166]

The choice of cases pursued by the CRS was linked institutionally to the FEPC, as well as to other federal New Deal agencies. The National Labor Relations Board and the War Labor Board covered African-American industrial workers but not those in agricultural or domestic work.[167] The CRS also saw less need to focus on organized labor because employers were no longer as likely to engage in the types of criminal violence that initially drew its attention.[168] Finally, the CRS believed that the FEPC provided some protection, even if inadequate, to industrial workers, while agricultural and domestic workers had none.[169]

The work of the CRS relied explicitly on the Thirteenth Amendment while also evidencing the same fundamental, positive rights underlying the FEPC.

> [T]he CRS used the Thirteenth Amendment to extend to some of the most destitute black workers affirmative New Deal protections for personal security, labor rights, and rights to minimal economic security. . . . Its civil rights practice accepted an affirmative responsibility to challenge economic exploitation as well as racial discrimination.[170]

By doing so, it sought to ensure that African-Americans controlled and could profit from their own labor.[171] In 1947, Robert Carr, Executive

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[160] *Id.* at 56.
[161] GOLUBOFF, *supra* note 149, at 139–40.
[162] *Id.* at 150.
[163] *Id.*
[164] *Id.*
[165] *Id.* at 145–50.
[166] *Id.* at 160–66.
[167] GOLUBOFF, *supra* note 149, at 113.
[168] *Id.* at 126.
[169] *Id.* at 128–29.
[170] *Id.* at 11.
[171] *Id.*

Secretary to President Truman's 1946 Committee on Civil Rights, wrote a report on the work of the CRS.[172] In it he observed that:

> [T]he CRS expanded the Thirteenth Amendment from focusing on individual employment relationships to mandating the elimination of legal obstacles to African American free labor writ large. The CRS lawyers used the Thirteenth Amendment to deepen what had been the New Deal's equivocal commitment to free labor within a unified national economy.[173]

African-Americans were forced to rely on the Thirteenth Amendment to secure these economic rights because they had been left out of many of the other New Deal statutes.[174] The Thirteenth Amendment allowed the CRS to guarantee "a version of the economic rights to minimal living standards" that the New Deal statutes offered to industrial workers.[175] The CRS wanted to make it clear that the Thirteenth Amendment serves "as a basis for a positive, comprehensive federal program—a program defining fundamental civil rights protected by federal machinery against both state and private encroachment."[176] Thus, the work of the CRS provides the link between Title VII, through the FEPC and other New Deal statutes, to the Thirteenth Amendment.

4. *The Thirteenth Amendment (1864) and the Anti-Peonage Act (1867)*

The Thirteenth Amendment to the United States Constitution reads:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.[177]

Although the undoubted aim of the Amendment included the abolition of chattel slavery as it existed before the Civil War, it sought to accomplish much more than that. Fully studied and properly understood, the Amendment "is a positive guarantee against both race discrimination and the exploitation of

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[172] *See generally* ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947) (providing a detailed history of the CRS).

[173] GOLUBOFF, *supra* note 149, at 142–43.

[174] The National Labor Relations Act did not apply to agricultural or domestic workers. *Id.* at 29.

[175] *Id.* at 143.

[176] CARR, *supra* note 172, at 36.

[177] U.S. CONST. amend. XIII.

workers."[178] This understanding of the Thirteenth Amendment, which became the basis for the work of the CRS during the New Deal and eventually formed the ideological basis for the work of the FEPC and Title VII, can be seen through the intent of the Framers of the Thirteenth Amendment, the passage of implementing legislation (the Anti-Peonage Act of 1867), and a pair of cases decided under that statute. According to this view, the Thirteenth Amendment incorporates "an anti-subordination model of equality, based not solely on equal treatment, but instead recognizing that both racial equality and economic rights are necessary for true equality."[179]

Professor Lea VanderVelde has undertaken detailed analysis of the legislative history of the Thirteenth Amendment.[180] In summarizing the overall intent of the Framers, she writes:

> The evidence suggests that the thirteenth amendment was animated by a conception of labor reform broader than the elimination of racial servitude which was its catalyst. By abolishing slavery and involuntary servitude, the framers of the thirteenth amendment sought to advance both a floor of minimum rights for all working men and an unobstructed sky of opportunities for their advancement. One of the primary principles that led the Radicals to oppose slavery was a desire to improve the condition of the working man. From this perspective, race slavery was objectionable not only for its pernicious racism, but also as the most obvious and brutal violation of the free labor principle. The thirteenth amendment was a milestone in the elimination of racial oppression, but it was also a milestone in the elimination of labor subjugation.[181]

The Framers saw the link and sought to address the connection between "economic exploitation and race, and to establish the right to work free of economic exploitation."[182] In doing so, they recognized that the right to work for wages, free of coercion, and to engage in the economy were fundamental human rights, which must be available to all individuals.[183] The institutions of slavery and involuntary servitude frustrated these objectives for both slaves and white workers with whom they competed. In abolishing these institutions,

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[178] Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 266 (2010).

[179] *Id.* at 258–59.

[180] *See generally* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989) [hereinafter VanderVelde, *Labor*]; Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855 (2007).

[181] VanderVelde, *Labor*, *supra* note 180, at 495 (footnote omitted); *see also* Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393 (2012).

[182] Zietlow, *supra* note 176, at 263.

[183] *Id.* at 258.

the Thirteenth Amendment created a positive right to work under fair conditions.[184]

This same legislative intent led to the passage of the Anti-Peonage Act a few years later.[185] The statute prohibited peonage, defined as "the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise . . . ."[186] The Act obviously reached beyond slavery, to include a variety of other abusive labor relationships, including those that had been entered into voluntarily.[187] Sponsors of the bill favored this broad approach because voluntariness was not as important as "whether the resulting condition was degrading to workers and employers," peonage was "very much like slavery," and the abolition of peonage would elevate the status of all low wage workers (citing the rise in wages and improved work conditions for peons in New Mexico following the abolition of peonage there).[188] This broad approach to the implementing statute reflected the government's desire to provide affirmative protection and its free labor ideology, both of which were prevalent in the Thirty-Ninth Congress.[189] In *Clyatt v. United States*, the Supreme Court upheld the statute, emphasizing the broad power of Congress under the Thirteenth Amendment to reach private conduct because "the Thirteenth Amendment names no party or authority, but simply forbids slavery and involuntary servitude, [and] grants to Congress power to enforce this prohibition by appropriate legislation."[190]

Two cases illustrate the application of the statute and its relationship to this understanding of the Thirteenth Amendment. The first, *Bailey v. Alabama,* arose when Lonzo Bailey was convicted of fraud under an Alabama statute which made it a crime to enter into a contract for service, with intent to defraud the employer, by receiving money up front in exchange for service and then refusing to perform the service. Because refusal to perform the service (or refund the money) was prima facie evidence of intent to defraud, the debtor/employee had to work for the lender/employer until the debt was paid off or face criminal prosecution.[191] Typically, the rate of pay was insufficient for the laborer to both live and save enough to pay off the debt, resulting in the choice of long-term compelled labor or being jailed.[192] The

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[184] *Id.* at 268.

[185] Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. § 1581 and 42 U.S.C. § 1994 (2012)).

[186] *Id.*

[187] For an analysis of the importance of reaching voluntary relationships, see Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1629–37 (2012).

[188] Zietlow, *supra* note 176, at 291 (quoting debates recorded in the *Congressional Globe*).

[189] Soifer, *supra* note 187, at 1622, 1636.

[190] Clyatt v. United States, 197 U.S. 207, 216 (1905).

[191] Bailey v. Alabama, 219 U.S. 219, 229–30 (1911).

[192] *Id.* Another fairly typical "involuntary servitude" situation arose for those workers sentenced to pay a fine for fraud or other petty crimes. A surety would pay the fine and

Supreme Court characterized this as involuntary servitude in violation of the Anti-Peonage Act because the state "may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt."[193]

In its opinion, the Court emphasized the broad nature of the Thirteenth Amendment, stating:

> The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude.[194]

The Court explained the fundamental importance of the Amendment, saying that involuntary servitude is prohibited because "[t]here is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."[195]

In 1944, during the New Deal era, the United States Supreme Court decided the case of Emmanuel Pollock.[196] In that case, the plaintiff borrowed $5 from his employer and agreed to work off the debt. He was convicted of fraud when he failed to perform his end of the bargain and was fined $20 for each dollar of debt. When he defaulted on the fine, the lower court required him to work off the $105 debt, at a rate of less than nine cents a day.[197] The Supreme Court struck down the state statute, which criminalized fraud in relation to an employment contract that linked debt to service. In doing so, the Supreme Court clearly articulated the purpose of the Thirteenth Amendment. It said, "The undoubted aim of the Thirteenth Amendment as implemented by the Anti-peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."[198] The Court emphasized that free labor is essential because, without equal opportunity for all workers to quit and change employers, the working conditions for all workers will be depressed.[199] In this view, equal opportunity and fair competition are essential for providing all workers with decent

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bind the worker to a labor contract to pay off the fine, usually at an unconscionably low rate. If the worker quit, the worker would be sued for breach of contract and assessed more court costs and fines. Another surety would pay those charges and bind the worker to yet another contract for labor. *See* United States v. Reynolds, 235 U.S. 133, 146–47 (1914) (striking down this arrangement because it kept workers "chained to an ever-turning wheel of servitude")

193 *Bailey*, 219 U.S. at 244.

194 *Id.* at 241.

195 *Id.* at 245.

196 Pollock v. Williams, 322 U.S. 4 (1944).

197 *Id.* at 14–15. It would require approximately three years to work off the debt.

198 *Id.* at 17.

199 *Id.* at 18.

working conditions. And it is the Thirteenth Amendment to the U.S. Constitution that creates this principle as central and fundamental to the U.S. legal system.

C. *The Human Rights Approach*

Thus far, this Article has shown how Title VII is properly understood as a statute that guarantees meaningful economic opportunity and participation by focusing on domestic law. International law also supports the argument that employment discrimination statutes are not mere torts. They occupy a special place in international law as human rights statutes. International law recognizes a hierarchy of laws, including two special types of law: *jus cogens* (often called peremptory norms) and customary international law. Of these, *jus cogens* is the most indelible; it exists apart from and does not depend on the consent of a state.[200] In 1969, the Vienna Convention on the Law of Treaties defined *jus cogens* or a peremptory norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[201] Customary international law, on the other hand, depends upon long term, widespread legal recognition and compliance with a principle.[202] Many of the principles defined as *jus cogens* or customary international law are principles that might also be termed "human rights."[203] In international law, rights or freedoms categorized as human rights enjoy "*enhanced* or *special* legal status and protection, over and above that provided by the ordinary domestic criminal or civil law."[204] These three interrelated concepts (*jus cogens*, customary international law, and human rights) are all implicated in a discussion of the nature of employment discrimination laws.

"Human rights" may be somewhat difficult to define and commentators might debate over what is included in that term, but human dignity serves as

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[200] *See* Connie de la Vega, *Jus Cogens*, *in* 3 ENCYCLOPEDIA OF HUMAN RIGHTS 301, 301 (David P. Forsythe ed., 2009).

[201] Vienna Convention on the Law of Treaties art. 53, May 22, 1969, 1155 U.N.T.S. 331.

[202] de la Vega, *supra* note 200, at 301.

[203] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 642 (8th ed. 2012) ("It is now generally accepted that the fundamental principles of human rights form part of customary international law . . . ."); *see also* Erika de Wet, Jus Cogens *and Obligations* Erga Omnes, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 541, 544–45 (Dinah Shelton ed., 2013) [hereinafter THE OXFORD HANDBOOK]. *Jus cogens* norms derive "from a higher order of norms established in ancient times and which the laws of man or nations cannot contravene." *Id.*

[204] Dawn Oliver & Jörg Fedtke, *Human Rights and the Private Sphere—the Scope of the Project*, *in* HUMAN RIGHTS AND THE PRIVATE SPHERE 3, 4 (Dawn Oliver & Jörg Fedtke eds., 2007).

the generally accepted organizing principle for human rights.[205] In the Universal Declaration of Human Rights, "dignity serves both to indicate the foundation of rights in the Universal Declaration (the status of equal and inherent human worth) and also to highlight some of the normative implications . . . ."[206] Two possible sources for human rights exist: positive law (those rights enshrined within a legal system) and natural law.[207] The latter source, grounded in ethics and morality, is said to exist independent of positive law and emanate from a higher order. Natural law is seen as "a universal and absolute set of principles governing all human beings in time and space."[208] Different ethical traditions likely disagree about the outer parameters of natural law, but human dignity "represents the intersection of a variety of different ethical traditions, each of which provides a distinct grounding for the human rights listed in the [Universal Declaration of Human Rights and which] converge on a limited and general affirmation of the equal moral worth of all human persons."[209] Thus, human dignity, including equality and nondiscrimination in general, sits at the core of international human rights.[210]

1. *Employment Discrimination, Meaningful Economic Opportunity, and Human Rights*

Within international law, the right to be free from employment discrimination in order to have meaningful economic opportunity is rightfully considered a human right.[211] Discrimination can be understood as a human rights violation because it singles out people based on a group characteristic that is typically core to a person's identity (such as race or religion). In

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[205] MALCOLM N. SHAW, INTERNATIONAL LAW 267 (6th ed. 2008).

[206] Paolo G. Carozza, *Human Dignity*, *in* THE OXFORD HANDBOOK, *supra* note 203, at 345, 347.

[207] SHAW, *supra* note 205, at 266.

[208] *Id.*

[209] Carozza, *supra* note 206, at 349.

[210] Equality and nondiscrimination are recognized in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter. CRAWFORD, *supra* note 203, at 644 tbl. 29.1; *see generally* WOUTER VANDENHOLE, NON-DISCRIMINATION AND EQUALITY IN THE VIEW OF THE UN HUMAN RIGHTS TREATY BODIES (2005) (discussing the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families).

[211] Maria L. Ontiveros, *Employment Discrimination*, *in* HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES 195, 196–98 (James A. Gross & Lance Compa eds., 2009).

addition, although discrimination is unrelated to the ability to perform a job, it ends up impacting economic equality, educational equality, and how groups are viewed by others. As the International Labor Organization observed:

> Very often those who suffer racial or ethnic discrimination are very poor. Centuries of unequal treatment in all spheres of life, combined with persistent and deep ethnic socio-economic inequalities, explain their low educational and occupational attainments. Lower achievements, in turn, make them vulnerable to ethnic stereotyping, while social and geographic segregation perpetuates ethnic inequalities, reinforcing perceptions of "inferiority" or "distastefulness" by majority groups.[212]

The opportunities to be judged by one's real abilities and to attain one's full potential coincide with notions of human dignity and thus form the bases for this human right.

Because of this, several treaties classify employment discrimination as a violation of human rights. The Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations, states that discrimination constitutes a violation of human rights. In addition, the right to own your labor, in order to have meaningful economic opportunity, is also a human right. According to the Declaration of Philadelphia, which established the principles of the International Labor Organization, "all human beings, irrespective of race, creed or sex, have the right to pursue . . . their material well-being . . . in conditions of freedom and dignity, of economic security and equal opportunity."[213] In addition, the opposite of owning your own labor and being able to profit from it is akin to slavery, and the "right not to be a slave is the most basic of all human rights."[214]

2. Jus Cogens *and Customary International Law*

Although there is not complete agreement on the list of *jus cogens* rights, all major commentators include a prohibition against slavery on the list.[215] The

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[212] DIRECTOR-GENERAL, INT'L LABOUR ORG., EQUALITY AT WORK: TACKLING THE CHALLENGES 24 (2007).

[213] Constitution of the International Labour Organisation Instrument of Amendment, Annex. art. II, *opened for signature* Oct. 9, 1946, 4 U.S.T. 188, 15 U.N.T.S. 35.

[214] Todd D. Rakoff, *Enforcement of Employment Contracts and the Anti-Slavery Norm*, *in* HUMAN RIGHTS IN PRIVATE LAW 283, 283 (Daniel Friedmann & Daphne Barak-Erez eds., 2001); *see also* Ontiveros, *supra* note 211, at 197–98 (linking the characterization of employment discrimination as a human rights issue to American chattel slavery and the treatment of Dalits in India).

[215] CRAWFORD, *supra* note 203, at 595–96; de la Vega, *supra* note 200, at 301; de Wet, *supra* note 203, at 543.

list also typically includes a prohibition on "racial discrimination."[216] Lists of customary international law, including the *Restatement (Third) of Foreign Relations Law of the United States*, include a prohibition on slavery or slave trade, and either systemic racial discrimination,[217] or the more general principle of non-discrimination.[218] For the most part, *jus cogens* rights and customary international law norms reside in the treaties that protect them and the court decisions that implement them.[219] In this way, international law norms include rights and principles that are given special treatment and are valued above regular civil and criminal law. These principles include the principles found in Title VII: nondiscrimination in employment and the right to meaningful economic participation.

IV. IMPLICATIONS FOR MIGRATION AND CONFLICT BETWEEN TORTS AND CIVIL RIGHTS LAW

Title VII is not just a tort. It is a statute based on the principle that individuals have the right to own and use their own labor free of discrimination in order to have meaningful economic participation. It cannot be read or understood in isolation. It is part of the larger Civil Rights Act of 1964 and has its origins in the Thirteenth Amendment to the United States Constitution prohibiting slavery and involuntary servitude. It also fits within the international law framework, which views freedom from employment discrimination and the right to meaningful economic participation as a human right.

This perspective on Title VII has two major implications in an analysis about the conflict and migration between torts and civil rights law. First, it provides reasons that the current Supreme Court's tortification approach, including its textualist approach and doctrinal moves, is incorrect. Second, it suggests the possibility of migrating torts law into Title VII in a different way—one that recognizes the fundamental nature of Title VII. It suggests that Title VII creates not just a prohibition against discrimination but rather an affirmative duty for employers to provide a workplace with meaningful economic opportunity for all workers.

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[216] CRAWFORD, *supra* note 203, at 596; de la Vega, *supra* note 200, at 301; de Wet, *supra* note 203, at 543. This is sometimes phrased as "systemic forms of racial discrimination." CRAWFORD, *supra* note 203, at 595.

[217] CRAWFORD, *supra* note 203, at 642–43 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987)).

[218] SHAW, *supra* note 205, at 275 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987)).

[219] For a full compilation of these treaties and their interpretations, see generally VANDENHOLE, *supra* note 210.

A. *The Tortification Debate*

According to Eskridge and Ferejohn, super-statutes address particularly vexing social or economic problems for which there has been a lengthy normative debate and create a new normative or institutional framework that "sticks" in public culture.[220] The Supreme Court's tortification of Title VII may have occurred because the problem of employment discrimination is indeed vexing, and the majority of the current Court may not like the normative framework established by Title VII, even though it has indeed "stuck" in popular opinion. Tortification provides an oblique way for the Court to cut back on Title VII's protection without directly admitting that it is doing so. The fact that there is so much resistance to tortification is not surprising, given that Title VII reflects principles found in our Constitution and in international human rights norms. The fundamental nature of Title VII provides some specific reasons why the Court's textualist approach and doctrinal moves are incorrect.

1. *Statutory Interpretation*

Considering Title VII's fundamental nature provides insight into how Title VII should be interpreted. Under the elements approach, Title VII cannot be interpreted independently of the rest of the Civil Rights Act of 1964 or other contemporaneous statutes and the social situation at the time. Early, seminal cases decided under Title VII, such as *Griggs v. Duke Power*—which established disparate impact—might well have been decided differently under a textualist approach. The outcome in *Griggs*, as well as other structural discrimination cases, rests on finding discrimination based on a "mix of intentional, negligent, and unconscious motives and actions."[221] In order to reach the conclusion, there had to be a "dialogue about the purposes of employment discrimination law, how protected traits limit people within modern workplaces, or whether Congress meant to reach these types of claims."[222] This dialogue situates employment discrimination within the larger context of societal discrimination and the fight for full social equality, rather than in a debate about the dictionary meaning of certain words. Such an outcome is justified given the context of Title VII as just one element in the Civil Rights Act and the historical background leading to its passage.

According to Eskridge and Ferejohn's descriptive theory, super-statutes are generally construed liberally and purposefully in order to give effect to their underlying foundational principles.[223] A narrow, textualist approach that limits the purpose of the statute misunderstands the importance of the issue

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[220] Eskridge, *Super*, *supra* note 45, at 1216.
[221] Sperino, *Tort*, *supra* note 22, at 1088.
[222] *Id.*
[223] Eskridge, *Super*, *supra* note 45, at 1249.

addressed in a super-statute and the manner in which Congress has incorporated the will of the governed in passing the statute. Building on this work, Eskridge and Ferejohn moved from a descriptive theory of super-statutes to a normative theory of constitutional law called "A Republic of Statutes." Under this theory, certain statutes should be recognized as transforming constitutional baselines and creating new governance structures and norms, such that they guide the evolution of constitutional law.[224] They recognize the Civil Rights Act as one of these statutes. Given the quasi-Constitutional or small "c" constitutional nature of the Civil Rights Act, it deserves a broad interpretation, not a narrow, textualist one.

Applying this analysis to Title VII, any interpretation of Title VII must facilitate the principle of full economic participation, free of discrimination, found in the Thirteenth Amendment. Its interpretation must not be constrained by reference to definitions found in dictionaries or tort treatises when these interpretive moves serve to frustrate Title VII's fundamental nature. When looking at how to interpret the specific language of Title VII, general principles of equality and participation, not narrow principles of tort law, must be the guiding force.

Finally, an international law, human rights approach to Title VII also shows the problems of a narrow, textualist approach to the statute. In general, human rights are special and universal; they may not be abandoned or ignored by a state. Under the doctrine of *jus cogens*, certain rights, such as the rights to be free of racial discrimination, may not be derogated by judicial interpretation unless they are replaced with adequate protection. To the extent these rights are covered in a treaty or a convention, such as the prohibition on employment discrimination, a state may not interpret a statute to evade enforcement of the treaty.[225] Finally, even in the absence of a treaty, violations of human rights principles recognized as customary international law, such as racial discrimination, are said to violate international law.[226] When the Supreme Court takes a narrow, textualist view of Title VII, ignores its nature as a human rights statute, interprets the statute as a tort, and then uses narrowly constructed tort principles to foreclose protection from employment discrimination, the Court's approach runs contrary to international human rights principles.

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[224] ESKRIDGE, REPUBLIC, *supra* note 45, at 6–9.

[225] See, for example, the opinions of the International Labor Organization and the Inter-American Court of Human Rights which found that the United States Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), violated various treaty obligations. Maria L. Ontiveros, *Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers*, 2009 U. CHI. LEGAL F. 103, 133–34 & nn.171–72.

[226] CRAWFORD, *supra* note 203, at 642–43.

2. *Title VII's Doctrinal Issues*

Given Title VII's fundamental nature and underlying purpose, the doctrinal moves made by the Supreme Court are also problematic. In interpreting the prohibition not to "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin,"[227] the Supreme Court imported "intent" and "cause," as these terms are understood in tort doctrine, into the "because of" language for certain claims. Neither of these moves fit the fundamental nature of Title VII.

In looking at intent, the Supreme Court has read both a requirement of motive or bias *and* a showing of tort-type intent (desiring an outcome or acting with knowledge that the outcome is likely to occur) into intentional discrimination claims. The Court has done this as a way to require that an adverse employment practice was done because of discrimination. Although motive or bias may be part of the requirement, there is no need to additionally require intent in terms of desiring an outcome or acting with knowledge that the outcome is likely to occur. Cat's paw and other cases will be incorrectly screened out by this requirement. In *Staub,* the plaintiff experienced an economic loss because of the racial animus of the supervisor charged with giving the evaluation, even if the employer who acted upon the evaluation did not intend to discriminate against Staub.[228]

At a more basic level, the intent requirement misunderstands Title VII's fundamental nature because it views discrimination as the discrete, willful act of a particular individual rather than an economic effect or outcome experienced by a worker. As A. Philip Randolph said over fifty years ago, the statute seeks to eliminate discrimination when it occurs.[229] It does not matter if the employer intended it to occur or whether the plaintiff can show that intent. It only matters that it happened. The requirement of motive or bias ensures that the discrimination is because of a prohibited reason. The statute requires no more than that.

In addition, the Supreme Court requirement that "because of" means "but for" also runs counter to the fundamental purpose of Title VII. As the history of Title VII and the Civil Rights Act of 1964 shows, employment discrimination is multi-faceted and complex. To require a plaintiff to prove that race was the but-for cause of the adverse employment actions means that only the most obvious types of discrimination will be able to be proved. Mixed-motive cases, in which other factors also influenced the outcome, may be screened out. This requirement will not allow for the ability of all employees to have full, meaningful economic participation because discriminatory road blocks will be excused if they were a cause, but not the but-for cause.

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[227] 42 U.S.C. § 2000e-2(a) (2012).
[228] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1189–90 (2011).
[229] Randolph, *supra* note 120, at 24.

Finally, the newly added requirement of proximate cause is also unnecessarily limiting. Proximate cause is defined as the subset of actions for which there is cause-in-fact and when the Court finds that it is fair to hold the defendant responsible. It is essentially a double check, a balancing of politics and policy, to make sure that the defendant should be held liable. The balancing of politics and policy in the area of employment discrimination is particularly complex and dependent upon a variety of factors. When passing Title VII, Congress performed this balance and did so by drawing upon the history of regulating discrimination in employment and lessons learned under the FEPC and in the context of the rest of the Civil Rights Act. It set up an elaborate framework including administrative processes, statutory defenses, as well as exclusions and proof structures meant to balance the interests of employers, employees and society. There is no need for courts to add an additional check, especially if the check is done based on torts doctrine. If courts do so, they run the risk of misinterpreting and incorrectly limiting Title VII.

3. *A Better Approach*

Title VII's fundamental nature suggests a better approach to dealing with doctrinal and interpretive issues than the tortification approach adopted by the Supreme Court. "Discrimination because of race" should be viewed as a single operative phrase and not be parsed into tort based elements. In addition, the phrase should be read broadly and contextually, not literally. This approach would shape discrimination discourse in three ways. Significantly, it shifts the focus away from a requirement to identify a bad actor with discriminatory intent and instead looks at the obstacles to full economic participation in the workplace.

First, courts would be free to focus on and accept proof of structural or systemic discrimination. This interpretation would allow for the introduction of cognitive bias theories and similar evidence explaining the ways in which "discrimination because of race," "discrimination because of sex," etc. deny full economic participation of protected groups in the contemporary workplace. This approach fits with the contextual or elements approach to interpreting Title VII, as well as the super-statute approach, because it recognizes the ways in which society currently orders opportunities for economic participation. Rather than focusing on discrete acts of the employer, it would require courts to examine systemic practices that deny full economic participation.

Second, this approach would embrace and expand upon current disparate impact analysis because it recognizes that discrimination can be experienced as a practice or effect, not just as the result of an intentional act. Because this approach looks to the larger social context of economic opportunity, it is not constrained by a requirement to be "color-blind" when evaluating the construction of the employer's policy. As a result, it would evaluate

affirmative action policies on whether they ensure equal economic opportunity, rather than focusing on whether they are facially neutral.

Finally, it would provide an approach to reach the myriad of ways in which full economic participation is hampered because of race in conjunction with other factors. Mixed-motive cases would recognize that the presence of racial discrimination should equate with an actionable discrimination claim, even if other factors also contributed to the adverse employment action. This analysis respects the complexity of how discrimination operates in American society.

B. *Migration of Tort Law into Title VII: Creating an Affirmative Duty*

The Supreme Court's tortification moves, described above, focus on discrete doctrinal elements of torts (intent and causation). For the reasons described above, those moves run contrary to the fundamental nature of Title VII. A different type of tortification could be imagined, though, which embraces the fundamental nature of Title VII and its underlying principles. Using this approach, Title VII would be seen as creating an affirmative duty to have a workplace that provides meaningful economic opportunity. Creating this affirmative duty would ensure that Title VII worked as a class-based statute, as well as a civil rights statue, a result consistent with the fundamental nature of Title VII.

Torts law is a broad field, with arguably few consistent principles.[230] A traditional view of torts, though, could be said to encompass three types of torts: strict liability; intentional torts; and negligence.[231] While it may be somewhat difficult to fully "map" the traditional Title VII causes of action onto these types of torts,[232] this section examines the possibility of tortifying Title VII with one concept central to the tort of negligence: duty. Negligence is the failure to meet a duty of care. For a plaintiff to prevail, she must establish that the defendant owed her a duty and that the defendant breached the duty. To complete the tort of negligence, the plaintiff must also prove that the breach caused an injury (proving both cause-in-fact and proximate cause) and establish damages.

The duty of care in the tort of negligence varies depending upon a number of factors. The relationship between the plaintiff and defendant can affect the duty owed. For example, a land owner owes a different duty of care to a trespasser than to a paying customer. The status of the defendant can also change the duty owed. For example, a common carrier, such as a bus company, likely owes a higher duty of care to a passenger than an individual does when driving a friend to the same destination. The duty of care can also turn on the type of negligence alleged. For example, the duty owed in a

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[230] Sperino, *Tort*, *supra* note 22, at 1082–83.
[231] *Id.* at 1072.
[232] *Id.* at 1073–74.

medical malpractice case is set to that of a reasonable doctor, not a reasonable person.

If the Court decided to treat Title VII like a negligence tort, what might the duty of care look like?[233] The duty could be to "not discriminate." Such a duty, though, would likely not integrate the fundamental principles embodied in Title VII because it does not define "discriminate." To a large extent, the problems with the Court's tortification cases come about from the way the Court applies tort principles of intent and cause when trying to determine if discrimination occurred. In addition, this duty does not track the specific constitutional and human rights principles found in Title VII.

A better approach would be to base the duty owed under Title VII on the fundamental principle underlying Title VII—individuals have a right to own and use their own labor free of discrimination in order to have meaningful economic opportunity. Creating this affirmative duty fits with the New Deal origins of Title VII. As part of the New Deal, President Roosevelt declared a Second Bill of Rights in which he argued that "the state has an affirmative obligation to create conditions for individual flourishing, which is a precondition for the operation of a robust democracy that meets the needs of all relevant groups in our society."[234] His programs relied on the government providing affirmative protection of rights, rather than on protecting individuals from actions of the government. The program essentially established affirmative duties that would be protected by the government. The FEPC choice also focused on creating workplaces where all employees have a right to meaningful economic opportunity, rather than a model providing for individual damages.[235] Finally, *Steele* talked explicitly about creating a duty of fair and meaningful opportunity that cannot be breached by a union discriminating on the basis of race. If Title VII is a tort, the duty is for employers to provide the opportunity for meaningful economic opportunity.

This affirmative duty also fits with Title VII's origins in the Thirteenth Amendment because the Amendment both creates and authorizes the creation of affirmative duties. Section 1 of the Amendment stating that "'neither slavery nor involuntary servitude . . . shall exist' is a positive guarantee against both race discrimination and exploitation of workers."[236] As Todd A. Rakoff suggested, the anti-slavery norm could be viewed as:

> Embodying a more positive freedom, as encapsulating a human power to start life afresh. What is essentially wrong with slavery, on this view, is its

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[233] For a recent essay suggesting an answer to that question, see Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1381 (2014) (arguing that employment discrimination law imposes a duty of care on employers to avoid decisions that undermine social equality).

[234] ESKRIDGE, REPUBLIC, *supra* note 45, at 98.

[235] Engstrom, *supra* note 131, at 1120.

[236] Zietlow, *supra* note 176, at 266 (footnote omitted) (quoting U.S. CONST. amend. XIII, § 1).

> immutable categorization of people and its concomitant denial of opportunity. Or, to bring the matter closer to the modern workplace, on this view the point of quitting is not just to get out from under bad circumstances. The point is to begin something new, to make something more of oneself. Quitting one's job, rightly seen, is not a negative act; it is the first step in pursuing an affirmative and culturally valued course of conduct.[237]

Professor James Gray Pope calls this positive rights approach to the Thirteenth Amendment the "free labor approach" because it focuses on the way in which the free labor system (the right to quit and to find other employment) operates in opposition to slavery and involuntary servitude.[238] This vision is one of opportunity and meaningful participation. As he summarizes, "the free labor approach centers on the creation and sustenance of an alternative to slavery; workers must enjoy not only the right to walk away from their employers, but also all rights that are essential to participation in the free labor system."[239]

Section 2 of the Amendment gives Congress authority to enforce the Amendment with legislation by creating positive rights and duties. As one sponsor of the Amendment stated about Section 2, "Congress shall have power to secure the rights of freemen to those men who had been slaves."[240] In describing the duty flowing from Thirteenth Amendment, the Framers "believed that the right to engage in the economy was a fundamental human right."[241] Creating a duty to provide a workplace where there is meaningful economic opportunity furthers these principles.

International law principles also support an affirmative duty. This duty arises from either obligations placed on the state or obligations placed on private parties. In looking at obligations imposed on the state, some treaties contain negative obligations prohibiting the state from interfering with the exercise of rights. Others place positive obligations on the state requiring it to take affirmative steps to protect certain rights.[242] The American Convention on Human Rights (ACHR) Article 1 provides the positive requirement for state actors to set up a system to protect human rights violations.[243] The Inter-American Commission, the tribunal that enforces this Convention, has held that governments have a duty to respect, protect, ensure, and promote the rights. The duty to promote is a positive obligation that includes "a duty to foster conditions such that the individual may access and benefit from the

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[237] Rakoff, *supra* note 214, at 293.

[238] James Gray Pope, *A Free Labor Approach to Human Trafficking,* 158 U. PA. L. REV. 1849, 1851 (2010).

[239] *Id.* at 1859.

[240] CONG. GLOBE, 39th Cong., 1st Sess. 1115, 1124 (statement of Rep. Cook).

[241] Zietlow, *supra* note 176, at 258.

[242] Dinah Shelton & Ariel Gould, *Positive and Negative Obligations*, *in* THE OXFORD HANDBOOK, *supra* note 203, at 562, 562–63.

[243] *Id.* at 573.

right."[244] Creating a tort duty, then, to allow for meaningful economic opportunity, free of discrimination, fits neatly within the obligations under international human rights law.

One complication with the above analysis arises regarding the question of whether private parties can have an affirmative duty under international human rights law. For many years, the prevailing rule was that human rights law only created duties for state actors.[245] The major exception to this rule has been the prohibition against slavery which creates a duty on individuals with regard to their conduct.[246] This approach to slavery mirrors the unique nature of the Thirteenth Amendment in United States constitutional law as a part of the Constitution that creates positive rights against private conduct.[247] Recently, commentators and activists have begun to question the traditional rule and argue that private actors must also necessarily be covered by international human rights guarantees.[248] Although this principle is not yet firmly established in international law, given the connection between the abolition of slavery and the duty to provide meaningful economic opportunity, this duty is a sensible next step in applying human rights obligations to private parties.

If Title VII was read as a tort, the prohibition against discrimination could be read as an affirmative guarantee of equality of economic opportunity. That guarantee would be informed by the context of the statute—both the other elements of the Civil Rights Act and the international understanding of the fundamental nature of nondiscrimination. It would also be informed by the origins of Title VII in the FEPC, the work of the CRS, and the Thirteenth Amendment. The proper duty owed by employers would be to provide a workplace where all employees have a right to meaningful economic opportunity. This duty would focus on both class and race, just as the Framers of the Thirteenth Amendment envisioned.

V. CONCLUSION

First year law students learn that the law of torts is used to compensate individuals for personal injuries, caused intentionally or negligently by others (or occasionally on the basis of strict liability). Typical torts cases involve physical injuries caused by automobile accidents, medical malpractice, or a defective product, although some torts involve injuries to personal dignity, reputation, or property. The purpose of the tort system is to compensate deserving plaintiffs and also to deter certain types of behavior. At common law, no tort exists for injuries caused by discrimination, although some employment discrimination plaintiffs allege negligent or intentional infliction

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[244] *Id.* at 575.

[245] ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 91 nn.10–11 (1993).

[246] *Id.* at 95.

[247] Rakoff, *supra* note 214, at 284–85.

[248] CRAWFORD, *supra* note 203, at 655–56. For a justification of this position, see CLAPHAM, *supra* note 245, at 89–133.

of emotional distress. Depending upon the situation, victims of sexual harassment sometimes bring claims for assault, battery, or wrongful imprisonment. These tort claims, however, are not the gravamen of the employment discrimination complaint.

Perhaps this is because the tort system is not set up to remedy the type of injury suffered by a discrimination plaintiff and is not well-suited to deter discriminatory conduct. Discrimination in employment, especially when that discrimination is based on race, has a long, complex history in the United States. In many ways, its roots go back to the institution of slavery in the American South, an institution linked to both class and race. When Congress abolished slavery with the Thirteenth Amendment, it set about to establish a system of free labor in the United States. Ideally, all individuals would own their labor and have the opportunity for meaningful economic participation in the American economy.

The reality of American society made it difficult for that goal to be obtained. Over the next 150 years, civil rights groups, labor groups, and the government worked slowly, haltingly to attain that goal. They used statutes and litigation through the early part of the twentieth century, followed by more litigation and a new administrative framework during Roosevelt's New Deal. These efforts eventually lead to the passage of Title VII of the Civil Rights Act of 1964. Its provisions reflected the resolution of the century long debate over how to guarantee meaningful economic opportunity, free of discrimination for African-Americans. Our debate and the development of our law were mirrored by debate and development in international law of ways to provide for free labor and nondiscrimination around the world, resulting in the development of human rights protection for these principles.

Title VII, then, is not a tort. It is a statute embodying a basic and irrevocable principle—the principle that an individual not only owns her own labor but also has the opportunity to use that labor through meaningful economic participation, free of discrimination. Moves by the U.S. Supreme Court to treat Title VII as a mere tort and to limit its protection by adding tort requirements of intent and causation and by giving the statute a narrow, textualist interpretation frustrate the statute's basic principle.

If tort law must be imported into Title VII, a better approach is to borrow the concept of duty. Title VII could be said to create an affirmative duty on employers to provide a workplace where all individuals have the opportunity for meaningful economic participation. This concept of duty fits well with the elements approach, the super-statute approach, and the international human rights approach to understanding Title VII's fundamental nature. Each of these approaches incorporates the idea of the government creating affirmative duties to protect full participation and meaningful economic opportunity. Such a duty could be the next step toward the elimination of economic slavery.