

Anti-Discrimination Law in Peril?

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I. INTRODUCTION

In a society that professes allegiance to equal opportunity, direct evidence of discrimination is increasingly rare. In recognition of this fact, in 1973 the U.S. Supreme Court established a framework through which Title VII plaintiffs may prove discrimination claims with circumstantial evidence. Under the three-step minuet of *McDonnell Douglas Corp. v. Green*,² a plaintiff sets forth a prima facie case³ by showing that she is a member of a class protected by Title VII, that she applied for the position in question and was qualified, that notwithstanding her qualifications she was rejected, and that the employer continued to search for persons with like qualifications.⁴ The employer is then required to offer a legitimate, non-discriminatory reason for its action,⁵ after which the employee has an opportunity to establish pretext – that is to show that the employer’s justification is not credible or that it is a cover for discrimination.⁶ The assumption behind the showing of pretext is that an employer is best situated to know and to explain its action, and if the plaintiff proves that explanation to be false, then it is reasonable to infer that discrimination actually motivated the employer.⁷ Thus, in 1981, in *Texas*

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2. 411 U.S. 792 (1973).

3. The prima facie case was designed to eliminate the most common justifications offered by employers in failure to hire situations. *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

4. *McDonnell Douglas*, 411 U.S. at 802. In *McDonnell Douglas*, the Court expressed the final element of the prima facie case as “the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” *Id.* Plaintiffs most commonly satisfy this element by showing that the employer hired someone outside of the plaintiff’s class. *See, e.g., Burdine*, 450 U.S. at 253 n.6.

5. *McDonnell Douglas*, 411 U.S. at 802. The defendant’s burden is one of production, not of persuasion. *Burdine*, 450 U.S. at 254-55.

6. *McDonnell Douglas*, 411 U.S. at 804. The ultimate burden of proving discrimination rests on the plaintiff. *Burdine*, 450 U.S. at 253.

7. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (“[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration

Department of Community Affairs v. Burdine, the Supreme Court stated that a plaintiff may succeed in establishing discrimination “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”⁸

Over time, however, some courts began to question whether a showing of pretext was sufficient to establish discriminatory animus and began to require that plaintiffs produce additional evidence, or pretext-plus, in order to prevail.⁹ This additional requirement in effect undermined the *McDonnell Douglas* framework and made it extraordinarily difficult for plaintiffs to win employment discrimination cases based on circumstantial proof. Absent additional “direct” evidence of discriminatory motive, courts were prone to reject plaintiffs’ circumstantial claims at the summary judgment stage of the litigation process. In *Reeves v. Sanderson Plumbing Products, Inc.*, the Supreme Court sought to correct the imposition of a pretext-plus standard by clarifying that the prima facie case, combined with evidence of pretext, should be sufficient to get most discrimination cases to a jury – though a jury might still find in favor of the defendant.¹⁰ Although the Court left room for judges to consider defendants’ motions for summary judgment and judgment as a matter of law, at least one Justice thought that these motions should presumptively not be used to resolve pretext cases, given the fact-specific nature of discrimination claims and the issues of credibility that are frequently involved.¹¹ Indeed, this appears to be the overall tenor of the *Reeves* decision.¹² Yet, as Professor Natasha Martin’s excellent article in this volume demonstrates, a decade after *Reeves*, lower courts continue to employ procedural devices like summary judgment to reject plaintiffs’ claims.¹³ In so doing, they accept employer arguments, like the honest belief and same-actor defenses,¹⁴ which are ill suited for summary adjudication.¹⁵

. . . .”); accord *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).

8. 450 U.S. at 256.

9. See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

10. 530 U.S. 133, 147-49 (2000); see also *id.* at 154 (Ginsburg, J., concurring).

11. *Id.* at 154-55 (Ginsburg, J., concurring).

12. See *Reeves*, 530 U.S. at 147-54.

13. Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 331-35 (2010).

14. Under the honest belief defense, the question is not whether the defendant’s explanation is false but whether the defendant believed it to be true at the time of the challenged action. See, e.g., *Johnson v. AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005) (“[T]he proper inquiry is not whether [the defendant] was factually correct in determining that [the plaintiff] made the bomb threats. Rather, the proper inquiry is whether [the defendant] honestly believed that [the plaintiff] had made the bomb threats.” (emphasis omitted)). Under the same-actor defense, some courts will dismiss the plaintiff’s claims if the same person hired and fired the plaintiff. The theory driving this defense is that the decision maker would not have hired the plaintiff if he held discriminatory views. See, e.g., *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090,

In this short Essay, I explore the tendency of courts to summarily dismiss employment discrimination claims and consider whether the judicial skepticism, if not outright hostility, we are witnessing is limited to statutory actions under Title VII or is instead part of a broader movement against discrimination claims. In Part II, I suggest that between 1973, when *McDonnell Douglas* was decided, and 2009 societal beliefs about the prevalence of discrimination in the United States changed. In 1973, as the country emerged from the Jim Crow era, the presumption was one of widespread discrimination. Today, in so-called “post-racial” America, an opposite presumption seems to exist. I maintain that this shift influences the ways in which judges view discrimination claims. In Part III, I argue that judicial skepticism towards discrimination claims is not limited to statutory claims or the employment arena; a similar skepticism has emerged in the Supreme Court’s equal protection jurisprudence. In examining discrimination claims under the Equal Protection Clause, the Court has resorted to a type of analytical formalism, similar to what one sees in pretext cases, that thwarts a nuanced and contextual examination of discrimination claims and impedes greater understanding of the nature of discrimination. These changes in the Court’s equal protection jurisprudence coincide with shifting interpretations of Title VII – suggesting that it is not just pretext that is in peril but anti-discrimination law more generally.

II. FROM JIM CROW TO POST-RACE AMERICA

On June 11, 1963, in a radio and television address to the American people, President John F. Kennedy stated,

The [black] baby born in America today . . . has about one-half as much chance of completing . . . high school as a white baby born in the same place on the same day, one third as much chance of completing college, one-third as much chance of becoming a professional man, twice as much chance of becoming unemployed, about one-seventh as much chance of earning \$10,000 a year, a life ex-

1092 (9th Cir. 2005); *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996); *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 512 (1st Cir., 1996); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996). For critiques of these defenses, see *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 745 (7th Cir. 1999) (discussing some of the limitations of the same-actor defense); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1036, 1048 (2006) (using social psychology and implicit bias research to challenge assumptions underlying the honest belief and same-actor defenses).

15. See Martin, *supra* note 13, at 345-47, 350-77.

pectancy which is seven years shorter, and the prospects of earning only half as much.¹⁶

Importantly, President Kennedy explicitly acknowledged racism as a cause of these outcomes by pointing to the prevalence of segregation throughout the country and the tensions and safety threats it created.¹⁷ When faced with these challenges, Kennedy observed, "The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated."¹⁸

Fifteen years later, in *Regents of the University of California v. Bakke*, Justice Marshall pointed to continuing evidence of racial inequality, noting,

The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely \$110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.¹⁹

Like President Kennedy, Justice Marshall did not shy away from pointing to the role of racism in producing these outcomes, observing that "[t]he relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro."²⁰

16. President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (June 11, 1963), available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm> [hereinafter Kennedy Report].

17. *Id.*

18. *Id.*

19. 438 U.S. 265, 395-96 (1978) (Marshall, J., concurring) (footnotes omitted).

20. *Id.* at 396.

In 2009, the poverty rate for African Americans and Latinos is more than double that of Whites.²¹ The median income of African-American and Latino families is less than two-thirds that of white families.²² African Americans and Latinos tend to disproportionately occupy lower-paying and lower-status jobs,²³ and their unemployment rate is substantially higher than Whites.²⁴ In addition, African American and Latino men and women earn

21. In 2008, the poverty rate was 8.6% for non-Hispanic Whites, 24.7% for Blacks, 11.8% for Asians, and 23.2% for Hispanics. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 13 (2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf>. At the time this Essay was written, data for 2009 were not yet available. In addition, although the census bureau uses the term "Hispanic," I prefer the term Latino(a), as it is less Eurocentric and potentially more reflective of the diverse origins of persons falling within this category.

22. *Id.* at 5, 6 tbl.1. Analysis of wealth reveals an even larger gap between Whites and people of color in the United States. The median net worth of households maintained by Whites is more than ten times that of households maintained by Blacks. COUNCIL OF ECON. ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 316 tbl.B-33 (2003), available at http://www.gpoaccess.gov/USBudget/fy04/pdf/2003_erp.pdf; MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 68 (2006). Moreover, although "[m]iddle-class Blacks earn seventy cents for every dollar earned by middle-class Whites, they possess fifteen cents for every dollar of wealth held by middle-class Whites." *Id.* at 7-8.

23. In 2008, African Americans and Latinos constituted 11% and 14%, respectively, of employed persons. Yet they represented only 8.3% and 7.1%, respectively, of employees in management and professional occupations. In contrast, they constituted 15.9% and 20.2% of employees in service occupations; 11.5% and 12.2% of employees in sales and office occupations; 6.9% and 25% of employees in natural resource, construction, and maintenance occupations; and 14.5% and 20.4% of employees in production, transportation, and material moving occupations. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2008, at 14 tbl.6 (2009), available at <http://www.bls.gov/cps/cpsrace2008.pdf> [hereinafter LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2008]; see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY, 2007: INTRODUCTION fig.4, <http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2007/introduction.html> (2007 data on composition of private sector work force by job category) [hereinafter JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY, 2007].

24. In 2008, the unemployment rate was 5.2% for non-Hispanic Whites, 10.1% for Blacks, 4% for Asians, and 7.6% for Hispanics or Latinos. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2008, at 5 tbl.1 (2008), available at <http://www.bls.gov/cps/cpsrace2008.pdf>. For commentary on the effects of the recent economic recession on African Americans, see Allison Linn, *Black Worker's Crisis May Linger After Upturn*, available at http://www.msnbc.msn.com/id/34068710/ns/business-economy_at_a_crossroads/print/1/displaymode/1098/.

less than three-quarters of white men's median annual earnings,²⁵ and African Americans and Latinos are almost twice as likely as Whites to drop out of high school.²⁶

Although the statistical evidence of racial inequality is almost as alarming today as it was in 1963 and 1978, the inference drawn from the data is vastly different. Instead of identifying discrimination as a likely cause of observed disparities, some contemporary Americans seem more inclined to look for other justifications or explanations.²⁷ This inclination not only shapes reactions to statistical information, but it also affects judicial assessments of individual discrimination claims under Title VII. As Professor Martin points out, instead of permitting an inference of discrimination after a showing of pretext, some courts still require that plaintiffs produce additional evidence and persuasion.²⁸ Instead of allowing juries to weigh the probative value of comparative "qualification" evidence, stray remarks, and the honest belief and same-actor defenses, courts accept employer-offered justifications at face value.²⁹ In short, instead of a willingness to implement the goals of

25. In 2006, black men earned 72.1% of white men's median annual earnings, Latino men earned 57.5%, black women earned 63.6%, and Latina women earned 51.7%. Infoplease, *The Wage Gap, by Gender and Race* (2007), <http://www.infoplease.com/ipa/A0882775.html> (citing U.S. Current Population Survey and the National Committee on Pay Equity).

26. According to the Center for Labor Market Studies at Northeastern University, approximately 6.2 million students in the United States between the ages of sixteen and twenty-four in 2007 dropped out of high school. While the dropout rate for Whites was 12.2%, it was 27.5% for Latinos and 21% for Blacks. See CNN.com, 'High School Dropout Crisis' Continues in U.S., Study Says (May 5, 2009), <http://www.cnn.com/2009/US/05/05/dropout.rate.study/index.html>.

27. See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 208 (2003). As Professor Bonilla-Silva notes,

In the eyes of most whites . . . evidence of racial disparity in income, wealth, education, and other relevant matters becomes evidence that there is something wrong with minorities themselves; evidence of minorities' overrepresentation in the criminal justice system or on death row is interpreted as evidence of their overrepresentation in criminal activity; evidence of black and Latino underperformance in standardized tests is a confirmation that there is something wrong (maybe even genetically wrong) with them.

Id. at 208. To be sure, there are likely multiple reasons for racial disparities. For an overview of alternative and arguably neutral explanations, see Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, GEO. L.J. (forthcoming 2010) (noting that "some of what produces disparate life outcomes is personal, local, community-based, cultural, or perhaps environmental"). Given the persistence of certain racial disparities across time, one cannot, however, avoid concluding that one factor driving disparate results is racism.

28. Martin, *supra* note 13, at 326.

29. *Id.* at 327.

anti-discrimination law, today we are witnessing judicial resistance and backlash.

Several factors contribute to this result. First, the United States is forty-five years removed from the era of state-sanctioned segregation.³⁰ In 1963, segregation was not viewed as a distant practice created and perpetuated by prior generations. It was a part of most Americans' lived experiences and active memories. In addition, at that time, racial lines and racial barriers were sharply defined. People were deemed Black or White, and where one stood in the socio-economic hierarchy was largely determined by that racial classification. Moreover, the meanings attributed to Blackness and Whiteness were not veiled by political correctness but rather were thrust openly into public discourse and public spaces. In that context, the influence of racism could hardly be denied.

Times, however, changed. The United States moved from a generation defined by images of fire hoses, police dogs, stridently racist public officials, and de jure segregation. As society changed, so too did the nature of discrimination. What was once blatant became more subtle and nuanced. Instead of using "Whites Only" employment ads and other practices designed to totally exclude particular groups from the workplace or specific job categories, employers began to engage in intra-group screening and preferencing to determine who would be included and excluded.³¹ That is, rather than excluding *all* women or *all* Blacks, employers began to hire a subset of women or of African Americans – those who dressed,³² talked,³³ and behaved in a certain way³⁴ or who had a certain lightness or darkness to their skin tones.³⁵

30. In a study of employment discrimination cases, Ruth Colker notes that, in the years immediately following passage of Title VII (1967-1972), appellate court interpretations of the statute were more pro-plaintiff than they are today, suggesting that resistance to discrimination claims has increased over time as decision makers more frequently assume that the nation has moved beyond its racist past. See Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 259-61 (2001).

31. As Professors Barbara Flagg, Mitu Gulati, and Devon Carbado have noted in their scholarship on identity performance, all-white institutions and job categories are now suspect and presumably no longer tolerated by the market. See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995).

32. See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1111, 1113 (9th Cir. 2006) (rejecting claims of bartender who was discharged for refusing to wear makeup); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231-33 (S.D.N.Y. 1981) (rejecting claim of woman who wanted to wear a braided hairstyle).

33. See, e.g., *Fragante v. City & County of Honolulu*, 888 F.2d 591, 596-99 (9th Cir. 1989) (rejecting plaintiff's claim of accent discrimination).

34. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255-58 (1989) (acknowledging claim based on gender stereotyping).

In addition to the passage of time and changes in the nature of discrimination, since 1963 racial lines and barriers have become more permeable, and status as a result of race has become less fixed. Indeed, there is evidence of racial progress.³⁶ For example, although the rate of black poverty continues to be much higher than that of Whites,³⁷ poverty among African Americans is lower than it was in 1959.³⁸ Although black family incomes are still less than those of Whites, the median income level of black families has increased over the last two decades.³⁹ And while Blacks disproportionately occupy lower-status occupations, some Blacks have ascended to the ranks of the professional class.⁴⁰ Successful African Americans and other people of color are now

35. For analysis of intra-group distinctions based on skin tone, see Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); Trina Jones, *The Case for Legal Recognition of Colorism Claims*, in SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS 223 (Evelyn Nakano Glenn ed., 2009). For examination of the difficulties plaintiffs encounter in proving intra-group claims, see Trina Jones, *Intra-Group Preferencing: Problems of Proof in Colorism and Identity Performance Cases*, 34 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2010).

36. While there has been measurable progress for some African Americans, in most categories, African Americans still lag behind Whites. See SAMUEL ESTREICHER AND MICHAEL HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW 4-5 (2004) (describing “two black Americas” – one that is on the path to economic prosperity and one that continues to face significant barriers to economic opportunity); OLIVER & SHAPIRO, *supra* note 22, at 1-32, 92-97 (1995) (detailing advances by African Americans while pointing to substantial racial gaps in wealth and the fragility and marginality of the black middle class). In addition, a recent study funded by The Brookings Institute and the PEW Charitable Trusts found that, while income inequality in the United States has been increasing across the board, the situation is particularly grave for African Americans, whose children are likely to be less economically mobile than the children of Whites and are likely to have less family income than their parents. JULIA B. ISAACS, ISABEL V. SAWHILL, & RON HASKINS, THE BROOKINGS INST. & PEW CHARITABLE TRUSTS, GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA 5, 27-32, 71-79 (2008), available at http://www.economicmobility.org/assets/pdfs/Economic_Mobility_in_America_Full.pdf.

37. See *supra* note 21.

38. In 2008, the poverty rate for black families was 24.7%, and, in 1959, when data are first available, it was 55.1%. U.S. Census Bureau, Historical Poverty Tables – People, Current Population Survey, Table 2: Poverty Status of People by Family Relationship, Race, and Hispanic Origin: 1959 to 2008, available at <http://www.census.gov/hhes/www/poverty/histpov/hstpov2.xls> (last visited Jan. 25, 2010).

39. DENAVAS-WALT ET AL., *supra* note 21, at 5.

40. LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2008, *supra* note 23; see also JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY, 2007, *supra* note 23.

visible in all segments of American society, from politics and business to education, entertainment, and sports.

These changes have influenced beliefs about the prevalence of discrimination and the appropriateness of various measures to secure equal opportunity. In the legal realm, a noticeable shift began to occur as early as 1978, when members of the U.S. Supreme Court began to adopt colorblindness both as an ideology and as an analytical tool in evaluating discrimination claims. To be sure, colorblindness, the idea that governments should treat people the same regardless of their race,⁴¹ predates 1978. In 1896, in his famous dissent in *Plessy v. Ferguson*, Justice Harlan used colorblindness in an attempt to improve the plights of Blacks when he observed, “But in view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens.”⁴² Dr. Martin Luther King, Jr., similarly employed colorblindness as a means to counter racial oppression when he proclaimed, “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin, but by the content of their character.”⁴³ And it was the remedial use of colorblindness that caused President Kennedy to state in June of 1963 that African Americans “have a right to expect that the law will be fair, that the Constitution will be colorblind.”⁴⁴

By the mid-1970s, however, colorblindness became less of a proactive tool for social change and more of a mechanism for validating the status quo.⁴⁵ This transformation can be seen in the various Supreme Court opin-

41. Colorblindness is premised on the belief that race – viewed largely as skin color or phenotype – lacks meaning in the sense that racial groups are not genetically wired to have certain moral, behavioral, or intellectual proclivities. Because race is irrelevant, colorblind proponents argue that we should not notice racial differences. Rather, we should view individuals as individuals and treat everyone the same. In short, we should be blind to color differences. For thoughtful examinations of colorblindness, see T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991).

42. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Importantly, Justice Harlan’s vision of colorblindness did not ignore the reality of racial differences and racial hierarchy. Indeed, in the text preceding this famous language, he explicitly states,

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Id.

43. Dr. Martin Luther King, Jr., *I Have A Dream*, Address at the March on Washington for Jobs and Freedom (Aug. 28, 1963).

44. Kennedy Report, *supra* note 16.

45. For more detailed discussion of this transformation, see Barnes, Chermirsky & Jones, *A Post-Race Equal Protection?*, *supra* note 27. See also BONILLA-

ions in *Regents of the University of California v. Bakke*, where members of the Court vigorously debated the question of whether public entities can lawfully use race to secure greater inclusion of historically excluded racial groups.⁴⁶ In the ensuing seventeen years, the commitment to colorblindness gained traction as members of the Court expressed increasing resistance to the use of race-conscious affirmative action measures.⁴⁷ Seemingly embedded in the Court's commitment to colorblindness was the notion that such measures were unnecessary in a society that had already made, and presumably would continue to make, substantial racial progress.⁴⁸ Indeed, it is argua-

SILVA, *supra* note 27 (explaining how colorblindness is used to justify contemporary racial inequality).

46. 438 U.S. 265 (1978). The Court was sharply divided over this question. *Id.* Although he concluded that the government can lawfully use race in a very narrowly defined set of circumstances, *id.* at 311-16, Justice Powell observed that because the Constitution protects all persons equally, all racial classifications are suspect and must be subject to "the most exacting judicial examination." *Id.* at 291. He noted that "[i]t is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.* at 295 (emphasis omitted). In dissent, Justices Brennan, White, Marshall, and Blackmun asserted that the government can consider race in efforts to achieve equal opportunity, observing that colorblindness "must be seen as aspiration rather than as description of reality. . . . [W]e cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." *Id.* at 327 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting). With this underlying premise, these Justices would have applied a less exacting level of review, or what has become known as intermediate scrutiny, to race-conscious programs. *Id.* at 359. Justices Stevens, Burger, Stewart, and Rehnquist decided the case under Title VI and refused to reach the constitutional question. *Id.* at 411-12 (Stevens, J., concurring in the judgment in part and dissenting in part). In interpreting Title VI, they adhered to colorblindness, noting that "[r]ace cannot be the basis of excluding anyone from participation in a federally funded program. . . . [U]nder Title VI it is not 'permissible to say "yes" to one person; but to say "no" to another person, only because of the color of his skin.'" *Id.* at 418.

47. *See, e.g.,* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (holding that generalized assertions of past racial discrimination could not justify racial quotas in the awarding of public contracts); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (applying strict scrutiny to federal, state, and local programs using racial classifications).

48. To be sure, other objections to the use of race-conscious measures have been raised. Some argue that these measures stigmatize people of color; others believe that they reinforce ways of thinking that produced racial discrimination in the past. *See, e.g.,* *Adarand*, 515 U.S. at 239 (Scalia, J., concurring) ("To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."); *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) (expressing concerns about the stigmatic effect of affirmative action).

bly this belief that led Justice O'Connor to observe in 2003, in *Grutter v. Bollinger*, that “[we] expect[] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”⁴⁹

Importantly, since the election of Barack Obama as the first black U.S. President, Americans seem to have moved one step beyond colorblindness to what has been termed “post-racialism.”⁵⁰ Briefly, post-racialists believe that the United States is beyond race: that racism is largely a relic of the past as evidenced by America’s pronounced racial progress.⁵¹ Interestingly, for some people, post-racialism appears to be the fulfillment of colorblindness. Instead of aspiring *to be* blind to color differences, post-racialists believe that Americans *are* in fact colorblind. Because a majority of Americans no longer see race, we are no longer a racist society. Any remaining racism is rare and limited to a few isolated bigots or radical fringe groups. One practical consequence of a commitment to post-racialism is the belief that governments – both state and federal – should not tolerate race-based decision making or the adoption of race-based remedies, except to remedy specifically identifiable instances of past or current discrimination.

The present climate does not bode well for plaintiffs asserting claims of racial discrimination. Because these claims are premised on the continuing presence of racism, they are now counter to society’s normative beliefs. Thus, it is not surprising that they are met with suspicion and skepticism. If judges believe that discrimination is rare and aberrant, then they will perceive no need to probe deeply an employer’s justifications, even when those justifications are specious and proved false. Rather, a burden will be placed on plaintiffs to come forth with additional proof to counter the colorblind, post-

49. 539 U.S. at 343.

50. For detailed discussion of post-racialism, see Barnes, Chemerinsky & Jones, *supra* note 27. See also Trina Jones & Mario L. Barnes, *Post-Racial? The U.S. Is Not Ready to Drop Safeguards*, L.A. DAILY J., Aug. 28, 2009, at 1, 9 (using events in the summer of 2008 – including the Birther Movement, the confirmation hearings of Justice Sonia Sotomayor, the arrest of Harvard Professor Henry Louis Gates, and the brouhaha at health care town halls – to demonstrate that the United States is not post-racial).

51. See, e.g., John A. Powell & Jason Reece, *The Future of Fair Housing and Fair Credit: From Crisis to Opportunity*, 57 CLEV. ST. L. REV. 209, 211 (2009) (referring to post-racial America as a place “where race doesn’t represent a significant barrier to opportunity” but criticizing the claim as “just another iteration of the ‘color-blind’ approach to dealing with race in our society”); Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503, 503-04 (2009) (describing post-racialists as subscribing to the beliefs “that America’s racist history is a thing of the past” and “that complaints of racism lack merit, and measures to remedy past and current exclusionary practices are no longer necessary”); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594 (2009) (“[P]ost-racialism in its current iteration is a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies . . .”).

racial presumption. Oddly, this presumption is not supplied by law and is counter to 400 years of U.S. history and abundant evidence of continuing racial inequality.

III. UNEQUAL PROTECTION: SIGNS OF DISTRESS IN CONSTITUTIONAL CASES

Over the last thirty years, while retreating from a commitment to equal opportunity in statutory claims under Title VII, courts have simultaneously backed away from this commitment in other areas of law. This trend is most notable (and disturbing) in cases alleging discrimination under the Fourteenth Amendment's Equal Protection Clause.⁵² As I demonstrate below, in these cases the Supreme Court has both limited the types of claims plaintiffs can bring and employed a more restrictive evaluative method. Neither development augurs well for plaintiffs of color.

In 1976, two years before *Bakke*, the Supreme Court decided *Washington v. Davis*, a case involving the legality of a written examination administered to applicants for positions with the District of Columbia police department.⁵³ The plaintiffs argued, in part, that the test was unconstitutional because a higher percentage of Blacks failed it than Whites.⁵⁴ In rejecting the plaintiffs' claims, the Court held that the Equal Protection Clause requires proof of intentional discrimination.⁵⁵ Thus, equal protection claims based solely upon disparate impact,⁵⁶ without a showing of purposeful discrimination, are no longer cognizable.⁵⁷

52. The Fourteenth Amendment states, in part, "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

53. 426 U.S. 229, 233-34 (1976).

54. *Id.* at 233.

55. *Id.* at 242. The Court observed,

[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id. (citation omitted).

56. Disparate impact cases are based largely upon statistical proof. Plaintiffs attempt to show that a defendant's use of facially neutral criteria disproportionately affects people of color and is not justified by business needs. Importantly, disparate impact claims do not require proof of intent.

57. The Court noted that impact evidence is not wholly irrelevant, stating, [A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears

Davis has been widely criticized by legal scholars for the Court's failure to account for the changing nature of discrimination.⁵⁸ In an era where discriminators have become more discrete and sophisticated and where smoking guns are rare, intent is hard to prove. In addition, a growing body of scholarship suggests that much discrimination is subconscious and based on implicit bias.⁵⁹ Thus, an important way to detect this bias is by reference to statistically significant disparities – the sort of proof that the Court seems to discount in *Davis*. The Court's failure to recognize these changing circumstances has, in effect, limited the avenues of relief for plaintiffs relying upon statistical proof, making it much harder for these plaintiffs to prevail.

While reducing the usefulness of impact evidence in equal protection cases,⁶⁰ the Court has increased defendants' burdens in intent cases by subjecting race claims to the highest level of judicial review: strict scrutiny. As noted in Part II, in 1978 the Court was divided over whether strict scrutiny should apply to all racial classifications, including those designed to redress the effects of historical discrimination leveled at people of color.⁶¹ In 1989, however, a majority of the Court held that strict scrutiny applies to all racial classifications imposed by state and local governments, regardless of their purpose.⁶² In 1995, the Court extended this holding to the federal government.⁶³

Although the application of strict scrutiny is desirable in cases involving invidious discrimination, it is devastating in cases involving affirmative action. In order to satisfy strict scrutiny, a classification must serve a compelling state interest and be narrowly tailored to that end. This standard is so difficult to meet that it has frequently been characterized as "strict in theory,

more heavily on one race than another. It is also not infrequently true that the discriminatory impact [–] in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires [–] may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on non-racial grounds.

Davis, 426 U.S. at 242.

58. Perhaps the most influential critique of the case is Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

59. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006) (discussing the results of tests measuring implicit association bias); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498-1528 (2005) (examining studies in which subjects exhibited unconscious racial bias).

60. Disparate impact claims are still available under Title VII. 42 U.S.C. § 2000e-2(k) (2006).

61. See *supra* note 46.

62. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1989).

63. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 235-37 (1995).

but fatal in fact.”⁶⁴ Indeed, before *Grutter v. Bollinger*, a 2003 affirmative action case involving the University of Michigan Law School,⁶⁵ few policies tested under strict scrutiny survived.

Though practical realities dictate that progressives work within the Court’s existing analytical framework (for example, by advocating for the application of a different level of scrutiny for affirmative action measures or by attempting to show how various objectives satisfy strict scrutiny), the framework itself should not go unquestioned. As I point out below, the framework is a heuristic, an analytical shortcut, which the Court uses as a substitute for more detailed and critical evaluation of discrimination cases. In this way, its use is as frustrating as the procedural and analytical shortcuts courts employ in pretext cases.⁶⁶

Briefly, the Supreme Court’s approach to constitutional equal protection claims has been increasingly formulaic. Racial classifications are subject to strict scrutiny; gender classifications are subject to intermediate scrutiny;⁶⁷ class,⁶⁸ sexuality,⁶⁹ age,⁷⁰ and disability⁷¹ classifications are subject to rational basis review.⁷² As noted earlier, few policies survive strict scrutiny. In contrast, legislation tested under rational basis review is presumptively legitimate and is likely to be upheld.⁷³ Strict scrutiny, thus, may set the bar too high – invalidating too much legislation – whereas rational basis review may set it too low, not filtering enough. To be sure, use of a tiered review structure is presumably efficient and increases predictability. However, this may

64. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J. concurring), *overruled by Adarand Constructors, Inc.*, 515 U.S. 200; *City of Richmond*, 488 U.S. at 552 (Marshall, J., dissenting) (quoting *Fullilove*, 448 U.S. at 519).

65. 539 U.S. 306, 311 (2003).

66. Martin, *supra* note 13, at 325.

67. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (testing a differential age requirement for the sale of beer to men and women under intermediate scrutiny). Under intermediate scrutiny, a classification must further an important governmental objective, and the means employed must be substantially related to achievement of that goal. *Id.*

68. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44, 62 (1973).

69. See *Romer v. Evans*, 517 U.S. 620, 624, 629 (1996); *Lawrence v. Texas*, 539 U.S. 558, 579-80 (2003) (O’Connor, J., concurring).

70. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-15 (1976).

71. See *Ala. Bd. of Trs. v. Garrett*, 531 U.S. 356, 366 (2001); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

72. Distinctions based upon these factors are presumptively legitimate.

73. See, e.g., *Murgia*, 427 U.S. at 312-16 (rejecting challenge to Massachusetts’ law requiring that uniformed police officers retire at age fifty); *Rodriguez*, 411 U.S. at 37-44, 54-55 (using rational basis review to reject challenge to Texas system of funding public schools); *Cleburne*, 473 U.S. at 321-27 (finding unconstitutional the application of a city ordinance to require a special use permit for group home for mentally disabled persons).

be done at the expense of critical analysis. All of this is to say that the Court in recent decades has been so seemingly obsessed with determining applicable review levels that it has failed to articulate clearly and consistently the goals of equal protection and to develop a coherent theory of discrimination. Instead of focusing its attention on the main attraction (what constitutes discrimination and the goals of equal protection), the Court has been distracted by a sideshow (review levels).

Interestingly, several Justices have also questioned the soundness of a tiered analytical framework. For example, in *Craig v. Boren*, Justice Powell observed that many had viewed the framework as “a result-oriented substitute for more critical analysis.”⁷⁴ In *City of Cleburne v. Cleburne Living Center*, Justice Marshall also expressed doubt about the wisdom of the three-tiered approach to equal protection claims.⁷⁵ He noted,

The formal label under which an equal protection claim is reviewed is less important than careful identification of the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. . . . The lessons of history and experience are surely the best guides as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. . . . In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, “a page of history is worth a volume of logic.”⁷⁶

Importantly, the Court need not rely upon a tiered framework: nothing on the face of the Fourteenth Amendment or in its history requires this mode of analysis. In addition, as Suzanne Goldberg has pointed out, the framework does not hold up in application.⁷⁷ At times the Court has applied a more robust version of rational basis review,⁷⁸ and at times it has applied a more robust version of intermediate scrutiny.⁷⁹ Moreover, strict scrutiny has produced different outcomes in comparable cases.⁸⁰

74. 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring).

75. 473 U.S. at 478 (Marshall, J., dissenting).

76. *Id.* (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

77. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004). See also Jack M. Balkin, Plessy, Brown, and Grutter: *A Play in Three Parts*, 26 CARDOZO L. REV. 1689, 1727 (2005) (noting the lack of consistent application of strict, intermediate, and rational basis review in various cases).

78. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 580 (2003).

79. See, e.g., *United States v. Virginia*, 518 U.S. 515, 531-34 (1996).

80. Compare *Grutter v. Bollinger*, 539 U.S. 306, 329-33 (2003) (permitting the use of race in college admissions to secure diversity), and *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722-25 (2007) (disallowing voluntary

In light of the foregoing, one might reasonably ask why the Court adheres to the tiered framework and the use of formulas. The more cynical among us might suggest that the framework provides the Justices with cover. It gives the appearance of neutrality and consistency across cases and creates a sense of distance between judicial preferences and judicial decision making. In other words, it allows judges to appear even handed and to escape responsibility for making what are, in essence, value judgments; the formula, as opposed to the judges, supposedly dictates results. Judges do not have to explain their reasoning, just the application of the formula.

As suggested earlier, this analytical approach is deeply problematic, for it thwarts meaningful, or context-based, discussion of concepts like discrimination. In earlier cases like *Brown*, *Loving*, and even *Bakke*, the Court seemed to struggle with history and the ways in which various classes have been and are currently situated in U.S. society. More recent decisions, except for the dissents, seem void of contextual analysis, and words like discrimination seem to lack real meaning. More precisely, several members of the current Supreme Court seem to define racial discrimination as the making of any distinction regardless of the reason for it and without considering the position of those making the decision and those potentially affected by it.⁸¹ This posi-

consideration of race in public primary and secondary school desegregation plans). Although *Grutter* involved higher education and *Parents Involved* concerned primary and secondary education, there was little reason to believe, before the *Parents Involved* decision, that the diversity rationale of *Grutter* would not support the desegregation efforts of public school districts. For discussions of the seemingly paradoxical outcomes in these cases, see Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 939-40, 979-84 (2008) (arguing that the majority's reasoning in *Grutter* could have been used to support a different outcome in *Parents Involved* had the Supreme Court not chosen to employ a more robust and less deferential form of strict scrutiny in *Parents Involved*); Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 OHIO ST. L.J. 1321, 1321-23, 1343-59 (2008) (examining how *Grutter* came to be used to undermine voluntary desegregation in *Parents Involved*).

81. Professor Angela Harris argues that the word discrimination has become ambiguous as the current Supreme Court struggles with the tension between the "social embrace of anti-racism" and the reality of "white economic anxieties, continued racial prejudice . . . and the enormity of our racial past." She notes,

Discrimination carries two distinct connotations: to disadvantage, and to distinguish between. As the twentieth century ends, the Supreme Court has increasingly conflated these two meanings, moving toward the view that for the state to explicitly take account of race at all is the central harm of racism – or, in any case, the central prohibition embedded in the equal protection clause. This shift confirms the illegitimacy of the old racial order, at least in the South. Yet, because this view of discrimination also renders suspect government programs aimed at benefitting nonwhites, it provides a bulwark against the kind of thoroughgoing change that would dislodge political and social elites.

tion ignores that a contextual understanding of discrimination necessarily entails examination of the power dynamic that enables one group to subordinate another.⁸² Failure to recognize the latter has produced pernicious consequences. An acontextual view is arguably what allowed Chief Justice Roberts to write, presumably with a straight face, “[T]he way ‘to achieve a system of determining admission to the public schools on a nonracial basis,’ is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁸³ It is also what allowed Justice Scalia to write, in *Adarand*, that

[t]o pursue the concept of racial entitlement – even for the most admirable and benign purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of the government, we are just one race here. It is American.⁸⁴

And it is what allowed Justice Thomas to conclude that “there is a ‘moral [and] constitutional equivalence[]’ between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.”⁸⁵

IV. CONCLUSION

Recent developments call into question whether individual lawsuits are an effective means of countering discrimination. As Professor Natasha Martin has demonstrated, in disparate treatment cases under Title VII, courts have readily accepted questionable employer defenses and used procedural devices like summary judgment to prevent cases from going to juries where more nuanced and contextual analysis might occur. To be sure, some of the problem, at least in the lower courts, may be due to docket pressures experienced by district court judges. Yet, to the extent this is true, the question remains as to why judges have chosen to manage their dockets by disproportionately rejecting discrimination claims. The disproportionate loss rate of discrimina-

Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2003 (2000).

82. For a critique of what has been described as the anti-classification approach to discrimination, see John A. Powell & Stephen Menendian, *Parents Involved: The Mantle of Brown, The Shadow of Plessy*, 46 U. LOUISVILLE L. REV. 631 (2008).

83. *Parents Involved*, 551 U.S. at 748 (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300-01 (1955)).

84. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

85. *Id.* at 240 (Thomas, J., concurring) (quoting *id.* at 2120 (Stevens, J., dissenting)).

tion plaintiffs, as compared to plaintiffs in other types of cases,⁸⁶ suggests that something more is afoot.

In this Essay, I have argued that the problems plaintiffs face have been exacerbated, if not fueled, by society's commitment to colorblindness and post-racialism, both of which are premised on a belief that racism is no longer pervasive. This belief puts pressure on plaintiffs to come forth with direct evidence of discrimination, evidence that is hard to come by given the subtle ways in which discrimination is practiced today. In a society that professes allegiance to an anti-discrimination norm, persons desiring to discriminate are unlikely to leave a trail. Other discriminators may be led by unconscious bias, which may be equally hard to detect. The difficulties plaintiffs face are not limited to Title VII but extend to constitutional claims where, in recent decades, the Court has restricted the theories under which plaintiffs can sue and has curtailed the use of affirmative action by subjecting race-based measures to strict scrutiny. All of these developments have made it difficult for individual plaintiffs to prevail in both statutory and constitutional claims.

86. See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 710 (2007); Memorandum from Joe Cecil & George Cort to Honorable Michael Baylson 6, 9 (Apr. 17, 2007) (on file with The Federal Judicial Center), available at <http://ftp.resource.org/courts.gov/fjc/sujufy06.pdf> (showing that in 2006 the national average for summary judgment grants was 70% in civil rights cases and 73% in employment discrimination cases – the highest for federal civil cases); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889 (2006) (showing that plaintiffs have the most difficulty winning in race and national origin discrimination cases); John Golmant, *Analysis and Perspective: Statistical Trends in the Disposition of Employment Discrimination Cases*, Empl. Discrimination Rep. (BNA) No. 20, at 602, 604 & app. A (Apr. 30, 2003) (From 1992-2000, “an overwhelming majority of judgments in [employment civil rights] cases disposed during pretrial were for the defendant, [and] a significantly smaller majority . . . of the judgments in cases disposed during trial were for the defendant.”); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPL. RTS. & EMPLOY. POL’Y J. 547, 566 (2003) (showing that employment discrimination plaintiffs fare poorly on appeal, with a 7% reversal rate when defendants win at trial compared to a 42% reversal rate when plaintiffs win at trial); Colker, *supra* note 30, at 253-56 (finding that defendants are much more likely than plaintiffs to prevail in appellate litigation under the ADA and that plaintiffs in ADA cases tend to fare worse than Title VII litigants); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560-61 (2001) (showing that plaintiffs in employment cases win only 18.7% of the time in bench trials, compared with success rates of 43.6% and 41.8% for insurance and personal injury cases, respectively); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (finding that “defendants prevail in more than [93%] of reported ADA employment discrimination cases decided on the merits at the trial court level” and in 84% of cases that are appealed and available on Westlaw).

The way forward is unclear. To the extent that the apparent backlash against discrimination claims is due to docket pressures, an infusion of resources into the court system to reduce caseloads and case backlogs is unlikely given our current economic crisis. In any event, such measures would be inadequate if the real problem is judicial skepticism about the underlying merits of discrimination claims. One might admonish judges to adhere more faithfully to summary judgment standards and encourage plaintiffs' lawyers to make greater use of social science experts to counter employer defenses, as Professor Martin has done. I wonder, however, if these measures are adequate to meet the challenge presented. Scholars have written volumes about the complexities of discrimination, and I suspect that many plaintiffs' lawyers are quite good and have not fallen asleep on the job. Yet, as the last decade of litigation under Title VII has demonstrated, lower court judges pretty much do what they want to do.

Perhaps it is time for progressives to return to the drawing board and to reconsider the arguments that have been used and the means that have been employed to secure equality. Maybe it is time to revisit fundamental questions like whether the goal is equality of opportunity, equality of outcomes, or equality of access to a minimum standard of living. Progressives must also carefully consider whether litigation is an effective mechanism for achieving the desired goal. Recent history demonstrates that individual cases are subject to a sort of particularization that tends to cloak the structural forces leading to inequality. In addition, plaintiffs in individual lawsuits are ill equipped to deal with the broader social forces that feed resistance to discrimination claims. Should future battles therefore be played out in the legislature and on the field of public opinion? Although the answers to these conceptual and strategic questions are unclear, this sort of reflection is critical because progressives are swimming against the tide, and, as always, the tide is winning. Not only is pretext in peril, but it also seems that all of anti-discrimination law is.

