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Labor Goals and Antidiscrimination Norms: Employer Discretion, Reasonable Accommodation, and the Costs of Individualized Treatment

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INTRODUCTION

The Americans with Disabilities Act (ADA)[1] envisions a workplace markedly different from the one that organized labor has long endeavored to construct. While the statute mandates individualized treatment for disabled employees, organized labor has traditionally sought to limit the decisionmaking discretion of employers—and thus their ability to provide such treatment.

The ADA's vision of the workplace is rooted in what the Supreme Court has identified as the fundamental principle underlying antidiscrimination law in general and employment-discrimination law in particular: the notion that everyone should be treated as an individual. "At the heart of the Constitution's guarantee of equal protection," the Court has declared, "lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[2] And what the Constitution commands of government, Title VII of the Civil Rights Act of 1964[3] commands of private employers.[4]

The ADA shares this commitment to individualized treatment but goes significantly further in implementing it. The statute's main ambition, of course, is to dismantle the barriers that prevent individuals with disabilities from fully integrating into the workplace (and other domains of society) and thereby to guarantee such individuals equal employment (and other) opportunities.[5] To accomplish this mission, the ADA indirectly promotes individualized treatment by

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1. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.).

2. Miller v. Johnson, 515 U.S. 900, 911 (1995) (citations and internal quotation marks omitted); *cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978) (opinion of Powell, J.) (holding that, to pass constitutional muster, an affirmative-action program in the university-admissions context must "treat[] each applicant as an individual in the admissions process").

3. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2000e17 (2006)).

4. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978) (explaining that Title VII forbids employers to "treat[] . . . individuals as simply components of a racial, religious, sexual, or national class"); *see* Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 434 (2006) (identifying "denying protected group members individualized treatment" as one of two "traditional forms of status discrimination" proscribed by Title VII).

5. *See* 42 U.S.C. § 12101(a)(5) (2006) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other

prohibiting employers from making various employment decisions based on an employee's disability,[6] just as Title VII prohibits them from making such decisions based on an employee's race or sex. But unlike Title VII, the ADA also directly mandates individualized treatment for individuals with disabilities by affirmatively requiring employers in certain circumstances to "accommodate" such individuals based on an assessment of each person's unique needs and capacities, rather than relying on stereotypes about people with disabilities or assumptions about which personal qualities are essential for a given job.[7]

Whereas the ADA mandates individualized treatment in the workplace, organized labor has traditionally been wary of such treatment and has sought to constrain employers' discretion to engage in it. Labor law itself has no ambitions beyond enabling employees to freely choose whether or not to unionize.[8] But organized labor *does* have more substantive goals, and labor law provides an essential means of realizing them.

Consider the National Labor Relations Act (NLRA),[9] which guarantees "the right of employees to organize" with one another so that they can "bargain collectively" with their employers over "terms and conditions of employment."[10] Though an unquestionably important goal, securing these rights by no means represents organized labor's ultimate aim. Rather, recognizing that "a single employee [is] helpless in dealing with an employer," the movement has historically viewed collective action as a means of limiting the power of employers and thus

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opportunities . . . ."); *id.* § 12101(a)(7) ("[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.").

6. *Id.* § 12112(b)(1).

7. *Id.* § 12112(b)(5)(A); *see* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 434 (2000) ("The ADA supplements these universal access requirements, which aim at removing barriers that impede access by the most numerous classes of people with 'disabilities,' with a general requirement that *all* people with 'disabilities' receive *individualized* treatment."); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 47 (2000) (observing that the ADA views "differential and individualized treatment [a]s necessary for the establishment of equal opportunity for people with disabilities"); Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 526 (1998) (describing the ADA as a "new paradigm of individualized treatment").

8. *Cf.* Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 658 (2010) ("[L]abor law neither favors nor disfavors unionization, instead allowing employees to decide which form of bargaining they prefer . . . .").

9. Pub. L. No. 74-198, 49 Stat. 452 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

10. 29 U.S.C. §§ 151, 158(d) (2006).

of protecting employees from "arbitrary and unfair treatment."[11] Only by curtailing such treatment can organized labor realize its more familiar policy objectives—enhanced job security and predictability, higher wages, more generous benefits, and better working conditions. Organized labor thus regards arbitrary treatment as the primary threat to employee well-being, and the NLRA equips employees to counter this threat by augmenting their bargaining power vis-à-vis their employers.[12]

Organized labor has used this enhanced bargaining power to lobby for workplace policies that protect employees from arbitrary treatment by cabining employers' decisionmaking discretion and requiring them to treat all their employees equally. And yet, employers cannot provide the individual treatment that the ADA mandates without exercising significant discretion. That is, without the discretion to depart from or modify generally applicable workplace policies, employers cannot attend to each employee's unique situation—the central command of the ADA.[13] The ADA can implement its antidiscrimination norms, then, only by undermining traditional labor goals. While promising to integrate individuals with disabilities into the workplace, the ADA threatens to subvert a significant source of job security and predictability: generally applicable policies that constrain employer discretion and thereby guarantee equal, nonarbitrary treatment for all employees.

This result would not be so disconcerting from a labor perspective if employers could be trusted to exercise their discretion beneficently. But labor has never been so sanguine, instead regarding employer discretion as a force prone to abuse. Although employers might exercise their discretion to, say, allow an overburdened parent to work from home notwithstanding a general workplace policy forbidding telecommuting, they might just as readily use their power to reward complaisant employees and oppress less amenable ones. So it is with the discretion conferred by the ADA. It will often be unclear whether a given employee is

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11. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (citing Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921)).

12. *See, e.g.*, Samuel Issacharoff, Book Review, 104 HARV. L. REV. 607, 609 (1990) (identifying as "the critical positive features of unions" both "protecting individuals from arbitrary treatment and providing the means for their participation in the central productive activity of their lives"); *see also* Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 69 (1988) ("A common assumption . . . is that many unions will not favor legislation protecting employees against arbitrary treatment by employers because it will eliminate or detract from one of the unions' prime selling points in their efforts to organize the unorganized.").

13. *See* Miller, *supra* note 7, at 520 ("The individualized treatment mandated by the ADA means that employers must exercise judgment in determining how to respond to a particular applicant or employee."); Robert A. Dubault, Note, *The ADA and the NLRA: Balancing Individual and Collective Rights*, 70 IND. L.J. 1271, 1280 (1995) (observing that the ADA "gives the employer considerable discretion as to the accommodation ultimately implemented").

entitled to an accommodation under the ADA and, if so, precisely what accommodation will be appropriate in the circumstances. Employers will consequently enjoy significant discretion in responding to accommodation requests, discretion they can exploit to buy employees' acquiescence and punish dissent just as easily as they can use it to alleviate employees' burdens. Employers can, in other words, be more or less accommodating for reasons extrinsic to the ADA itself—indeed, for wholly illegitimate reasons or for no reason at all. It is this kind of arbitrary treatment that labor has traditionally attempted to forestall.

By exposing the tension between labor's goal of limiting employer discretion and the ADA's accommodation requirement, this Article offers a new take on a perennial debate. Employment-law scholars have long disputed the exact nature of the ADA's accommodation requirement and, in particular, its relationship to earlier antidiscrimination mandates. According to one scholarly camp, the requirement radically departs from traditional antidiscrimination norms—not simply prohibiting employers from deliberately excluding members of a disadvantaged social group from the workplace, but also forcing employers to redistribute employment opportunities to those individuals and to bear the costs of doing so.[14] According to another camp, the differences between the ADA's accommodation requirement and traditional antidiscrimination norms are largely superficial. While the accommodation requirement makes its redistributive mission explicit, these scholars contend, other antidiscrimination norms—especially Title VII's "disparate-impact" theory—similarly require employers to bear the costs of redistributing employment opportunities to members of disadvantaged social groups.[15]

As this Article shows, neither camp has it quite right. On the one hand, it seems incontrovertible that the ADA's accommodation requirement and aspects of Title VII have similar redistributive effects. On the other hand, even if aspects of Title VII effectively impose accommodation requirements that are functionally equivalent to the ADA's, the ADA's accommodation requirement challenges labor's goal of cabining employer discretion in a way that Title VII does not. Specifically, in contrast to Title VII, the ADA typically requires employers to make *retail* accommodations rather than *wholesale* ones—to fashion individualized exceptions to generally applicable workplace policies and practices on a case-by-case basis rather than to revise the policies and practices for all employees. (Though, to be sure, this is only a generalization: Title VII mandates some retail

14. *See, e.g.*, Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307, 310-11, 358 nn.21-22 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 2-4, 9 (1996).

15. *See, e.g.*, Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004).

accommodations, while the ADA mandates some wholesale ones.) Although scholars have previously noted the largely retail nature of the accommodations mandated by the ADA,[16] they have generally failed to appreciate, as this Article makes apparent, that such accommodations undermine labor's traditional goal of constraining employer discretion.[17]

The tension between labor's goal of limiting employer discretion and the ADA's accommodation requirement by no means represents the only conflict between labor law and employment-discrimination law. But to date, labor and employment-law scholars have been concerned primarily with the effects of employment-discrimination law on labor's means—that is, the methods it uses to advance its agenda (namely, collective action).[18] This Article, by contrast, considers how employment-discrimination law affects labor's ends—that is, the substantive goals it ultimately seeks to achieve (whether or not through collective action). Foremost among these goals is limiting employers' discretion in order to prevent them from treating their employees arbitrarily (and thus from undermining job security and predictability). This Article examines the ways in which employment-discrimination law can both advance and impede this goal—how it can both constrain and augment employer discretion. In doing so, this Article develops a distinctive analytical framework for understanding the relationship

16. *See infra* note 104. Indeed, this feature of the ADA is often touted by the statute's supporters as one of its main virtues. *See, e.g.*, Karlan & Rutherglen, *supra* note 14, at 3-5.

17. To be sure, labor-law scholars have noted the potential conflicts between the ADA's accommodation requirement and specific requirements in labor-law statutes, such as the NLRA's collective-bargaining requirement. *See, e.g.*, Ann C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 U. MIAMI L. REV. 567 (1994); Jerry M. Hunter, *Potential Conflicts Between Obligations Imposed on Employees and Unions by the National Labor Relations Act and the Americans with Disabilities Act*, 13 N. ILL. U. L. REV. 207 (1993); Robert W. Pritchard, *Avoiding the Inevitable: Resolving the Conflicts Between the ADA and the NLRA*, 11 LAB. LAW. 375 (1995); Dubault, *supra* note 13. But beyond these doctrinal tensions, no scholar appears to have explored in any sustained way the deeper, conceptual conflict between the ADA's commitment to individualized treatment and labor's overarching goal of limiting employer discretion.

18. *See, e.g.*, JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 148-84 (2005); Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687 (1997); James Brudney, *Reflections on Group Action and the Law of the Workplace Symposium: The Changing Workplace*, 74 TEX. L. REV. 1563 (1996); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685 (2008); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992).

between labor law and employment-discrimination law and for addressing specific controversies arising at the intersection of labor goals and antidiscrimination norms.

Normatively, this Article suggests that we should reconsider the ADA's commitment to individualized treatment in light of that commitment's costs for labor goals. To be sure, because labor goals and antidiscrimination norms are incommensurable, it is difficult to imagine a conclusive case for privileging one over the other, and this Article will not attempt to provide one. Nevertheless, there are good reasons to reconcile the ADA's accommodation requirement to labor's goal of limiting employer discretion, rather than vice versa. The most significant is the different status each principle occupies within the respective movement promoting it. Whereas limiting employer discretion is an essential prerequisite for realizing all of labor's ultimate objectives, the ADA's accommodation requirement is but one means (to be sure, a very effective one) of realizing the disability-rights movement's goal of providing disabled individuals with equal employment opportunities. Labor can no more abjure constraining employer discretion as a policy objective than it can disclaim promoting job security or augmenting employee benefits; the former and the latter goals go hand in hand. There are, by contrast, other ways of providing disabled individuals with employment opportunities, beyond the ADA's accommodation requirement, that need not augment employer discretion—most notably, disparate-impact liability. If such alternatives are available, and if affording employees individualized treatment necessarily enhances the risk of arbitrary treatment and undermines some of the essential preconditions for job security and predictability, then we should reconsider how the ADA's accommodation requirement attempts to integrate individuals with disabilities into the workplace. At the very least, we should look for ways to limit the amount of discretion employers must exercise in providing the individual treatment that the ADA mandates. And amid calls by scholars to extend the ADA's model of individualized treatment to other employment-discrimination statutes, as well as to workplace regulation more generally, this Article suggests that we should think twice.

The Article proceeds as follows. Part I begins by explaining why one of the labor movement's central goals has been to curtail the common law rule of "at-will" employment, according to which employers enjoy nearly absolute discretion to fire an employee at any time and for any reason—and thus have considerable power to treat their employees arbitrarily. It then shows how Title VII broadly accords with labor's overarching goal of cabining employer discretion.

As Part II demonstrates, the ADA's accommodation requirement conflicts with this goal. And, notwithstanding a strong scholarly consensus to the contrary, Part II defends the Supreme Court's decision in *US Airways, Inc. v. Barnett*[19] as resolving this conflict in a way that furthers labor goals by encouraging employers

19. 535 U.S. 391 (2002).

to adopt objective, discretion-constraining workplace policies—which, incidentally, might promote both the ADA's and Title VII's antidiscrimination norms as well.

Part III applies the framework developed in the previous Parts to a question that continues to divide the federal courts of appeals: whether the ADA can ever require an employer to reassign a disabled employee to a particular position in violation of the employer's policy of filling that position with the most qualified candidate (a so-called *competitive-assignment policy*).[20] This Part argues that an employer should be allowed to refuse to reassign a disabled employee to a particular position under its competitive-assignment policy if, but only if, the policy actually limits the employer's discretion. This will be the case only when the policy identifies the "most qualified" candidate according to objective, rather than subjective, criteria.[21]

Finally, the Conclusion briefly considers other contemporary debates that implicate the conflict between employment-discrimination law's commitment to individualized treatment and labor's goal of limiting employer discretion. The Conclusion then identifies the theory of disparate impact as an alternative way of advancing the former without undermining the latter.

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20. *Compare* EEOC v. United Airlines, Inc., 693 F.3d 760, 764 (7th Cir. 2012) (holding that the ADA sometimes demands more of employers than simply allowing disabled employees to compete for positions on the same basis with nondisabled employees); Duvall v. Ga.-Pac. Consumer Prods., L.P., 607 F.3d 1255 (10th Cir. 2010) (same); Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (en banc) (same); *and* Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998) (en banc) (same), *with* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007), *cert. dismissed*, 552 U.S. 1136 (2008) (holding that the ADA never requires an employer to prefer a disabled employee to a more qualified candidate).

21. The distinction between objective and subjective criteria is admittedly vague. In the context of disparate-impact challenges under Title VII, however, the Equal Employment Opportunity Commission and courts routinely employ the distinction and have developed distinct standards for each category. *See infra* Subsection I.B.2; *see also* Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479 (1996). The idea seems to be that an objective criterion provides a basis for appraising a job applicant's aptitude or a current employee's performance that is independent of the employer's personal judgment, whereas a subjective criterion necessarily requires the employer to exercise judgment in order to apply it. Thus, while the paradigmatic example of an objective criterion is a mechanically scored multiple-choice test, the paradigmatic example of a subjective criterion is an interview in which the employer must form a judgment regarding whether an applicant would be a "good fit" at the firm. Other employment practices can be arrayed on a spectrum between these two poles. Insofar as objective criteria provide a more or less mechanical way of evaluating employees, they limit employer discretion. Note, however, that even an objective criterion can be "arbitrary" if it bears little or no relation to the job qualities for which it purports to select. This shows that, although constraining employer discretion may be necessary for combating arbitrary treatment, it is not sufficient.

One caveat is in order before turning to these arguments. This Article refers throughout to "labor goals"—particularly the goal of limiting employer discretion. While the term reflects the central role organized labor has historically played in curtailing the at-will rule, it should not be taken to suggest that unionization and collective bargaining are the only means of restricting employer discretion. Nor should it be taken to suggest that the tension identified in Part II between the ADA's accommodation requirement and the goal of limiting employer discretion arises only in unionized workplaces. Especially since an ever-shrinking share of the workforce belongs to unions,[22] we should be careful not to overlook the myriad ways in which employees have managed to limit employer discretion even without the advantages of unionization—and thus the myriad ways in which antidiscrimination norms can conflict with labor goals even in nonunionized workplaces. Accordingly, while this Article takes as the paradigmatic cases of discretion-constraining policies those enshrined in collective-bargaining agreements, its conclusions ultimately apply with equal force to all workplace policies that genuinely cabin employer discretion. Put another way (and to repeat), this Article is concerned with labor's traditional ends, whether or not they are realized through labor's traditional means.[23]

I. Labor Goals and Title VII

The tension between employment-discrimination law's commitment to individualized treatment and labor's goal of constraining employer discretion is not inevitable. On the contrary, both the "disparate-treatment" and "disparate-impact" theories of liability under Title VII of the Civil Rights Act of 1964 are structured in a way that at least avoids enhancing employer discretion and that may even help to constrain it. Before confirming Title VII's consistency with labor goals, however, those goals must be articulated more precisely. Section I.A argues that we can understand the labor movement primarily as a response to the common law rule of "at-will" employment and the arbitrary treatment to which the rule renders employees vulnerable. As labor sees it, by limiting employer discretion, policies such as "for-cause" termination and seniority rights help to curb arbitrary treatment and promote fairness in the workplace. This, in turn, establishes an essential precondition for the realization of labor's ultimate goals: greater job security and predictability, higher wages, better working conditions,

22. *See* Bureau of Labor Statistics, Union Members—2012, at tbl.3 (2013), http://www.bls.gov/news.release/pdf/union2.pdf (finding that only 11.3% of workers belonged to a union in 2012, with public-sector workers having a union-membership rate of 35.9% and private-sector workers having a rate of only 6.6%); Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. Times, Jan. 23, 2013, http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth .html?ref=stevengreenhouse&_r=0.

23. This Article thus differs from previous scholarship considering the narrower, doctrinal question of how the ADA applies in unionized workplaces. *See* sources cited *supra* note 17.

and so on. Section I.B then shows how Title VII avoids augmenting employer discretion, advancing its antidiscrimination norms without subverting labor goals.

A. *"At-Will" Employment, Employer Discretion, and Labor Goals*

In seeking greater job security, higher wages, and better working conditions for employees, labor has had to surmount a formidable hurdle: the common law rule of "at-will" employment. According to what is reputed to be the original statement of the rule in American law, "a general or indefinite hiring is *prima facie* a hiring at will . . . . [I]t is an indefinite hiring and is determinable at the will of either party . . . ."[24] What the rule means in practice is that, barring an agreement to the contrary, employers "may dismiss their employe[e]s at will . . . for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."[25] A corollary of the laissez-faire principle of freedom of contract, the at-will rule confers nearly unfettered decisionmaking discretion on employers.

The at-will rule has traditionally been criticized for granting employers despotic power over their employees. For example, dissenting from an early state-court decision endorsing the rule, one judge lamented that it would permit an employer to fire an employee "solely for the purpose of injury to another, or hold the threat over the employe[e] *in terrorem* to fetter the freedom of the employe[e], and for the purpose of injuring an obnoxious party."[26] The employee would thus feel compelled to obey his employer's every command, however unreasonable, lest he incur "the wrath of [his] employer by dismissal from service."[27] According to a more recent state court decision, because it completely subjects employees to the predilections of their employers, the at-will rule is fundamentally incompatible with "the single most important objective of the workforce: job security"—that is, "the assurance that one's livelihood, one's family's future, will not be destroyed arbitrarily."[28]

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24. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (Albany, N.Y., J.D. Parsons, Jr. 1877). For one account of the historical development of the at-will rule in American law, including the role played by Wood's treatise, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

25. Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds by* Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).

26. *Id.* at 542 (Freeman, J., dissenting).

27. *Id.* at 543-44.

28. Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1266 (N.J. 1985) (holding that an employment manual's terms could displace the usual presumption of at-will employment). Defenders of the at-will rule typically respond to such charges by denying the premise that the doctrine affords employers unbridled discretion. In a free labor market, they contend, an employer will be unable to assemble and retain

Organized labor and its allies have picked up on these themes. Early advocates of unionization, for instance, compared employer/employee relations under the at-will rule to a "dictatorship" and contrasted them with the self-rule of democracy.[29] Some contemporary scholars of the labor movement contend that the rule compromises employees' "freedom" by rendering them wholly "dependent" on their employers[30] and that it turns the employment relationship into "a dominant-servient relation rather than one of mutual rights and obligations."[31]

The various critics of the at-will rule all sound the same refrain: the rule grants employers the power to treat their employees "arbitrarily"—that is, based purely on their whim, rather than on those of an employee's characteristics that bear on her ability to perform the job. There are myriad reasons to condemn such treatment. For one thing, it can involve outright cruelty, as when an employer fires an employee or assigns her especially undesirable work tasks simply from spite.[32] But even when arbitrary treatment is not so malicious, it can nevertheless offend fundamental moral principles, such as political freedom[33] and social

a sufficient workforce—and thus to achieve her economic objectives—if she acquires a reputation for arbitrarily firing or otherwise mistreating her employees. *See, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 967-68 (1984). This response, however, assumes that employees have complete information—particularly concerning the legal regime governing the employment relationship. And yet, many studies show that employees generally overestimate their legal rights under an at-will regime. *See, e.g.*, Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 126-146 (1997).

29. Robert F. Wagner, *The Ideal Industrial State—As Wagner Sees It*, N.Y. TIMES, May 9, 1937, § SM8 (Magazine), at 23 ("Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship.... But let men know the dignity of freedom and self-expression in their daily lives, and they will never bow to tyranny in any quarter of their national life.").

30. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967).

31. Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 78 (2000); *see id.* at 68 ("[T]he premises of the [at-will rule] are quite clear; the employer has sovereignty except to the extent it has expressly granted its employees rights. The doctrine thus expresses and implements the subordination of workers to those who control the enterprise. . . . Their terms and conditions of employment can be changed in any way at any time and they can be dismissed without reason and without notice.").

32. *Cf.* Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 10 (2010) ("Consistent with their exploitation critique, these advocates presented at-will employment as enabling arbitrary, malicious, and even socially harmful employer behavior.").

33. According to the most prominent contemporary exposition of the classical republican theory of freedom-as-"nondomination," one person dominates another—and thus renders her unfree—insofar as he (1) possesses "the capacity to interfere"

equality.[34] And if an employer frequently makes important employment decisions purely from whim, or if she institutes policies that utilize opaque or arbitrary criteria, she will sow uncertainty among her employees, preventing them from forming stable expectations regarding their employment.[35]

The surest way to prevent employers from treating their employees arbitrarily—and thus from subjecting their employees to these undesirable consequences—is to limit the at-will rule and the significant discretion it affords employers. Because the at-will rule is the default common law rule governing employer/employee relationships,[36] employees who do not belong to unions must generally rely on other common law doctrines or statutory protections to avoid the rule's application in particular cases. Fortunately for such employees, state courts and legislatures have developed a number of doctrines that displace the at-will rule in certain circumstances and limit employer discretion.[37] Each of these doctrines, however, is typically only as strong as the particular factual circumstances of the individual employee invoking it. Whether an employee handbook imposes binding obligations on an employer, for example, depends on the

(2) "on an arbitrary basis" (that is, "at his pleasure" and "without reference to the interests, or the opinions" of the other person) (3) in the other's "choices." PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 52, 55, 62 (1997). As the traditional criticisms of the at-will rule make clear, the rule grants employers such dominating power over their employees—regardless of whether they exercise that power on any particular occasion.

34. *See* Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 231-36 (2013).

35. This will be especially true in an age where "[f]lexibility and mobility . . . have replaced predictability and stability as core values in business organization." Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 516 (2006).

36. *See* Lisa J. Bernt, *Finding the Right Jobs for the Reasonable Person in Employment Law*, 77 UMKC L. REV. 1, 7 (2008); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1097 (1989).

37. *See, e.g.*, Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Ct. App. 1981) (noting a variety of facts from which the jury could find for-cause protections to be "implied in fact," including a course of dealing between an employer and its employees and the employer's acknowledged policies); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 387 (Conn. 1980) ("[P]ublic policy imposes some limits on unbridled discretion to terminate the employment of someone hired at will."); Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1256 (Mass. 1977) (finding an employment contract to contain an "implied covenant of good faith and fair dealing" that prohibits especially arbitrary treatment); Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1258 (N.J. 1985) (treating an employee-handbook provision permitting employers to fire their employees only for "cause" as contractually binding).

handbook's particular terms, how the handbook was promulgated to the employees, and so on.[38] Each doctrine therefore promises only patchwork protection against arbitrary treatment.

Unionized workers, by contrast, have a potentially more robust weapon in their arsenal: the NLRA and its requirement that the employers of unionized workers "bargain collectively" with unions over "terms and conditions of employment."[39] Unlike the common law and statutory doctrines available to nonunionized workers, this requirement protects unionized workers from arbitrary treatment regardless of the facts of their individual relationships with their employers. To be sure, any protection afforded by collective-bargaining rights is indirect: rather than impose specific substantive constraints on employers' discretion, the NLRA empowers unionized employees to negotiate on a more equal footing with their employers.[40] But organized labor has used its collective-bargaining power to induce employers to accept meaningful limits on their discretion.[41] Most significant, "collective-bargaining agreements" almost always include "for-cause" provisions, which permit employers to fire employees only for legitimate reasons.[42] They also typically require that, before firing an employee, an employer afford her the protections of "industrial due process," including notice of the charges against her, a hearing at which she can attempt to rebut those charges, and an ultimate decision based on the merits of her individual case yet consistent with the dispositions of similar cases.[43] Faced with these formidable constraints on their discretion, employers have less opportunity to subject their employees to the kind of arbitrary treatment that can characterize the employment relationship under the at-will rule.

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38. *See, e.g.*, *Woolley*, 491 A.2d 1257.

39. 29 U.S.C. § 158(d) (2006).

40. *See* Bales, *supra* note 18, at 746-47.

41. To note the victories labor has achieved through collective bargaining is by no means to deny the NLRA's shortcomings. Indeed, according to most labor-law scholars, the NLRA has failed to adequately facilitate organizing and collective bargaining and to adapt to changes in the modern workplace and labor market. *See, e.g.*, KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004); Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983). But even if the NLRA falls short of some ideal measure, it still affords unionized employees more protection than they would enjoy under the at-will rule.

42. *See* EDWIN BEAL, EDWARD WICKERSHAM & PHILIP KIENAS, THE PRACTICE OF COLLECTIVE BARGAINING 259-60 (4TH ed. 1972).

43. *See* Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 611-12; Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 136-38 (1995).

Many collective-bargaining agreements further limit employer discretion by instituting seniority systems, which "allot[] to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase."[44] Proponents adduce many justifications for seniority systems, including respecting employees' reliance interests,[45] rewarding employees' "faithful service,"[46] and inducing employees to invest in the creation of "firm-specific human capital."[47] All of these benefits, however, supervene on one essential feature of seniority systems: their guarantee of nearly absolute job security against employer caprice. Especially when an employer must lay off some of its employees because of an economic downturn or technological change (and thus need not show "cause" for any particular termination decision),[48] seniority systems "militate against personal retaliation or preference."[49] More generally, within the limits of "sufficient-ability" clauses (also called "relative-ability" clauses),[50] seniority systems require employers to make job-assignment, pay, and promotion decisions based solely on objective calculations of job tenure rather than more subjective criteria.[51] Because they constrain employer discretion so significantly, seniority systems are a paradigmatic safeguard against arbitrary treatment[52]—and a paradigmatic departure from the at-will rule.

44. Cal. Brewers Ass'n v. Bryant, 444 U.S. 598, 605 (1980).

45. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 66-67 (1990).

46. Caroline Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 UCLA L. REV. 177, 196-97 (1975).

47. Margaret M. Blair, *Firm-Specific Human Capital and Theories of the Firm*, *in* EMPLOYEES AND CORPORATE GOVERNANCE 58, 75 (Margaret M. Blair & Mark J. Roe eds., 1999).

48. *See* Benjamin Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1535 (1962) ("More than any other provision of the collective agreement, . . . seniority affects the economic security of the individual employee covered by its terms. In industries characterized by a steady reduction in total employment the employee's length of service is his principal protection against the loss of his job.").

49. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 808 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (internal quotation marks omitted).

50. Under a sufficient-ability clause, an employer must favor a more senior employee over a more junior one for a position only if the senior employee can perform the position at least as well as the junior one. *See id.* at 844.

51. *See* Susan Gardner & James F. Morgan, *The Supreme Court to Decide: Seniority Rights or Reasonable Accommodation Under the Americans with Disabilities Act (ADA)*, 52 LAB. L.J. 234, 235 (2001) (arguing that "the length of time an employee is associated with a particular company, division, or position provides a fair, objective alternative criterion for making" employment decisions).

52. *See* Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1016 n.74 (1989) ("Competitive seniority is a

Organized labor, of course, does not seek to eliminate all employer discretion. It recognizes the quixotic nature of such a quest, as well as the fact that discretion can be used to benefit, as well as harm, employees. But it also recognizes that discretion is especially likely to be abused—and especially likely to be harmful—in certain core domains of employer decisionmaking, such as hiring and firing employees, making job assignments and promotions, and setting wages. The National Labor Relations Act accordingly treats these domains as "mandatory" subjects of collective bargaining, in that employers may not set policies regarding them unilaterally, but rather must negotiate over them with employees' union representatives.[53] By focusing on particularly high-stakes employer decisions, organized labor can protect employees from the most consequential forms of mistreatment without dissipating its attention and resources trying to prevent every minor misfortune an employer might visit on her employee.

In promoting seniority systems and the other worker protections typically enshrined in collective-bargaining agreements, labor unions do not regard curbing employer discretion as their ultimate objective or something to be pursued for its own sake. Rather, unions' professed ultimate objective is to improve the lot of workers—to guarantee them a degree of job security and predictability, raise their wages, enhance their benefits, and ameliorate their working conditions. Constraining employer discretion is by no means sufficient to achieve these goals. For example, although promoting predictability and reducing uncertainty for workers is one of labor's cardinal aims,[54] unions cannot eliminate all sources

hard-fought and much-prized achievement of the labor movement. It serves as a bulwark against employer favoritism, protecting individuals against arbitrary treatment, and also protecting their ability to organize collectively."); Carl Gersuny, *Origins of Seniority Provisions in Collective Bargaining*, 33 LAB. L.J. 518, 519 (1982) (arguing that "[s]eniority is germane to due process because its implementation serves to restrict management's capacity for applying arbitrary and capricious criteria in making invidious distinctions among employees").

53. *See* 29 U.S.C. § 158(d) (2006) (requiring employers to bargain collectively with the representatives of unionized workers "with respect to wages, hours, and other terms and conditions of employment"); *id.* § 159(a) (referring to "rates of pay, wages, hours of employment, or other conditions of employment"). The Supreme Court has viewed these provisions as outlining only the broad contours of the mandatory-bargaining terrain. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958). The National Labor Relations Board bears responsibility for filling in the regulatory landscape, based partly on the practices of particular industries. *See* Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979). Both the NLRB and the lower courts have now had the opportunity to classify myriad employer policies as either "mandatory" or "permissive" subjects of collective bargaining. *See* 1 THE DEVELOPING LABOR LAW 1263-1362 (John E. Higgins, Jr. et al., eds., 5th ed. 2006).

54. *Cf.* Arnow-Richman, *supra* note 32, at 27-28 ("Most collective bargaining agreements create a process for selecting workers for layoff ('last in, first out') and provide affected workers with recall and transfer rights. They thus offer workers a modest degree of predictability about job loss.").

of uncertainty simply by limiting employer discretion; economic recessions, industrial dislocations, and corporate mergers can all upend employees' most settled expectations.

But while limiting employer discretion may not be sufficient for achieving labor's ultimate objectives, it is undoubtedly necessary. We need only consider the employment relationship under the at-will rule to realize that, insofar as employers enjoy significant discretion in setting workplace policies, they can thwart employees' expectations, depress their wages, curtail their benefits, and neglect their working conditions with relative impunity—especially when the market in which an employer operates is less than fully competitive. Though organized labor obviously has ambitions beyond constraining employer discretion, that imperative remains a necessary prerequisite for achieving all of the movement's other objectives, and thus an essential labor goal in its own right.[55]

B. *Title VII's Consistency with Labor Goals*

Given its considerable victories over the at-will rule and arbitrary treatment in the workplace, we would expect labor to oppose policies that significantly enhance employer discretion. As this Section will show, labor has had little to fear from Title VII, which has managed to implement its commitment to individualized treatment without augmenting employer discretion in the process.[56] To be sure, Title VII's antidiscrimination norms are both narrower and broader than the labor goals enshrined in the for-cause, due process, and seniority provisions of collective-bargaining agreements. They are narrower because they stop well short of imposing a genuine for-cause requirement, permitting employers to hire and fire employees for even the most arbitrary reasons, just not for certain discriminatory ones. They are broader because they proscribe some forms of discrimination that cannot be fairly described as arbitrary treatment, such as the "rational" use of accurate race- and sex-based stereotypes. Nevertheless, insofar

55. *Cf.* Anthony Herman, *Wrongful Discharge Actions After* Lueck *and* Metropolitan Life Insurance*: The Erosion of Individual Rights and Collective Strength?*, 9 INDUS. REL. L.J. 596, 601 n.18 (1987) ("[T]he only *immediate* benefit that unions legitimately can offer in organizing campaigns is the end to discriminatory and arbitrary treatment, generally improved working conditions, protection against unjust termination, and a measure of participation in workplace decisionmaking, *viz.*, industrial democracy. In the long term, unions legitimately can promise improved wage and benefit levels, provided that a greater percentage of workers opt for unionization.").

56. Indeed, in some respects, Title VII goes out of its way to protect the achievements of the labor movement—even at significant cost to its own objectives. Most notably, even as the statute subjects unions to the same basic prohibitions of discrimination that employers must heed, see 42 U.S.C. § 2000e-2(c) (2006), it insulates seniority systems—as we have seen, one of the labor movement's signal contributions—from disparate-impact challenges. *See id.* § 2000e-2(h); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 353-54 (1977) (holding that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination").

as it constrains, rather than amplifies, employer discretion, Title VII promotes its antidiscrimination norms without impeding traditional labor goals.[57]

1. Disparate Treatment

Title VII's prohibition of "disparate-treatment" discrimination is broadly consistent with labor's goal of limiting employer discretion, even if it does relatively little to actually further that aim. An employer commits disparate-treatment discrimination when he "simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical . . . ."[58] By proscribing such conduct, Title VII indirectly promotes individualized treatment, forbidding employers to base employment decisions on generalizations about the members of certain social groups to which employees belong (which, in turn, directs employers' attention to employees' other, more distinctive qualities).[59]

At first glance, this aspect of Title VII might seem to *increase* the risk of arbitrary treatment in the workplace. For if employers may no longer rely on certain generalizations, then they might instead judge employees based on individual traits that have no bearing on job performance—that is, arbitrarily. On this view, the ideal of individualized treatment is in tension with labor's attempt to guarantee equal, nonarbitrary treatment for all employees. The concern, however, is misplaced. Regardless of whether the prohibition of disparate treatment encourages employers to focus more on employees' individual qualities, it does not grant

57. This is not to suggest that the converse is also true—that the labor movement promotes its goals without undermining antidiscrimination norms. On the contrary, in some socioeconomic conditions, policies designed to protect job security can harm the employment opportunities of the very socially marginalized groups that employment-discrimination law seeks to protect. *See* Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73 (2007).

58. *Teamsters*, 431 U.S. at 335 n.15.

59. Notwithstanding its frequent deployment by courts, *see supra* notes 2-4 and accompanying text, the notion of treating someone as an individual is notoriously slippery. For one thing, as a number of commentators have observed, we think it perfectly permissible (and even necessary) in many contexts to judge people based on generalizations and other heuristics. *See, e.g.*, Kasper Lippert-Rasmussen, *"We Are All Different": Statistical Discrimination and the Right to Be Treated as an Individual*, 15 J. ETHICS 47 (2011). But for purposes of this Article, it is enough to note that, when courts invoke the ideal of individualized treatment, they seem to have in mind something along the lines suggested in the main text: regarding a person as a unique individual with her own distinctive traits rather than simply as a fungible member of a particular social group. *See, e.g.*, Kiyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 COLUM. J. GENDER & L. 143, 186 (1999) (describing as "the core principle of Title VII" the notion that "[i]t is unfair to exclude the whole category of one gender without a case-by-case evaluation of an individual job applicant").

them any more discretion to act on their assessments of those qualities than they would have in the absence of Title VII. That is, it does not augment employer discretion beyond the baseline level. If, for instance, an employer is subject only to the at-will rule, Title VII will in no way enhance her already considerable discretion to treat employees arbitrarily based on their individual characteristics. If, by contrast, an employer is bound by a workplace policy that constrains her discretion in awarding promotions (say, a seniority system), she will not have to modify or depart from that policy in order to comply with the prohibition of disparate treatment; the policy will continue to be just as constraining as before.

Not only does the prohibition of disparate treatment avoid increasing employer discretion, but it may even limit such discretion by precluding certain grounds on which employers might otherwise base employment decisions. To be sure, the ban by no means imposes a for-cause requirement on employers, since it "does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions."[60] But the Supreme Court overstated the point when it declared Title VII "[t]he *converse* . . . of 'for cause' legislation."[61] On the contrary, Title VII resembles for-cause requirements insofar as it proscribes certain bases of decision and thus constrains employer discretion; it differs from such requirements in proscribing only a limited number of illegitimate bases of decision, rather than *every* illegitimate basis—an admittedly significant difference, but one of degree rather than kind.

All that said, given the method for proving disparate treatment, Title VII's ban on the conduct ends up constraining employer discretion less in practice than it might initially seem to promise. In *McDonnell Douglas Corp. v. Green*,[62] the Supreme Court articulated a burden-shifting framework for adjudicating disparate-treatment claims. To meet his "initial burden . . . of establishing a prima facie case of . . . discrimination" under this framework,[63] a plaintiff who alleges that he was rejected for a job because of a protected characteristic will typically have to "demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought."[64] By eliminating these two reasons as possible explanations for his rejection, the plaintiff justifies an inference, rebuttable by the defendant, that he was rejected for a discriminatory reason.[65] Drawing this inference from

60. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(a).

61. *Price Waterhouse*, 490 U.S. at 239 (emphasis added).

62. 411 U.S. 792 (1973).

63. *Id.* at 802.

64. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

65. *Id.*; *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) ("Establishment of the prima facie case in effect creates presumption that the employer unlawfully discriminated against the employee.").

the plaintiff's prima facie case is in tension with the at-will rule, which contemplates an expansive range of reasons, both legitimate and illegitimate, on which an employer might base a given employment decision. Indeed, the Court has justified this inference based on the dichotomous assumption that employers usually act either for cause or for discriminatory motives.[66] Whether or not this assumption is empirically sound, it departs from the presuppositions of the at-will rule.

Practically, however, the other steps of the *McDonnell Douglas* burden-shifting framework prevent Title VII's prohibition of disparate treatment from becoming a genuine for-cause requirement. The defendant can rebut the plaintiff's prima facie case simply by articulating a nondiscriminatory reason—however capricious or irrational—for the challenged employment decision.[67] This low hurdle reflects the main premise of employment at will—to wit, that employers may fire or take other adverse action against their employees for any reason or no reason at all.[68] And though the burden then reverts to the plaintiff to show the

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66. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when 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 only with some reason, based his decision on an impermissible consideration such as race." (citation omitted)).

67. *McDonnell Douglas*, 411 U.S. at 802-03; *see, e.g.*, Forrester v. Rauland-Borg Corp., 453 F.3d 416, 418 (7th Cir. 2006) ("[T]he question is never whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason *was* his reason: not a good reason, but the true reason."); *cf.* Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam) (invoking the *McDonnell Douglas* framework to hold that "implausible," "silly," "fantastic," and "superstitious" explanations can rebut a prima facie case of discriminatory use of peremptory challenges by a prosecutor).

    But note that, however arbitrary, the employer's professed reason must have some evidentiary basis, such that it creates a genuine issue of material fact as to whether the employer actually discriminated. *See Burdine*, 450 U.S. at 254-55. The employer's reason must also be sufficiently specific. *See, e.g.*, Iadimarco v. Runyon, 190 F.3d 151, 166-67 (3d Cir. 1999) (holding that defendant's assertion that the successful candidate was simply "the right person for the job" was "not a race-neutral explanation at all, and allowing it to suffice to rebut a prima facie case of discriminatory animus is tantamount to a judicial repeal of the very protections Congress intended under Title VII").

68. It is for precisely this reason that many scholars argue that the at-will rule makes it so hard for discrimination plaintiffs to prevail that it virtually vitiates Title VII's protections. *See, e.g.*, William R. Corbett, *The "Fall" of* Summers, *the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305

defendant's asserted nondiscriminatory reason to be a mere "pretext,"[69] this opportunity proves to be a very limited one.[70] By making it relatively difficult for discrimination plaintiffs to carry their ultimate burden of proof, these practical features of Title VII litigation preserve a significant realm of employer discretion, though not quite so expansive a realm as afforded by the at-will rule.

Even as it balks at imposing a genuine for-cause requirement, Title VII's prohibition of disparate treatment also goes beyond the traditional labor goal of limiting employer discretion in order to curb arbitrary treatment, proscribing certain employment practices that cannot be fairly described as arbitrary. Most notably, the Court has interpreted the statute to prohibit employers from relying on even accurate race- and sex-based stereotypes,[71] which many scholars believe can sometimes promote business efficiency.[72] This rule reflects the obvious fact

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(1996); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177 (2003); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996); Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351 (2001).

69. *McDonnell Douglas*, 411 U.S. at 804-05.

70. This is so for at least three reasons. First, courts generally accept even suspect reasons, such as "personal animosity," as nonpretextual. *See* Derum & Engle, *supra* note 68, at 1182 (arguing that courts' focus on personal animosity as the source of interpersonal conflict at work reflects "an ideological commitment to employment at will"); Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1016, 1020 (1997). Second, to count as pretext, an employer's proffered reason must be not only false, but deliberately so—an outright lie rather than an honest mistake. *See, e.g.*, *Forrester*, 453 F.3d at 419 ("A pretext . . . is a deliberate falsehood. An honest mistake, however dumb, is not . . . ." (citations omitted)); Johnson v. AT&T Corp., 422 F.3d 756, 762 (8th Cir. 2005). Third, even if the plaintiff manages to show the defendant's asserted reason to be a pretext, such a showing typically *permits* the jury to conclude that the defendant unlawfully discriminated but never *compels* it to do so; the plaintiff still retains the ultimate burden of proving that the defendant discriminated against her, which means showing that the defendant did in fact base its decision on one of the characteristics that Title VII proscribes. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-48 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

71. *See* L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).

72. *See* Stewart Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228 (1986); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1628 (1991). *But see* Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219, 1223 (1992) (arguing that, while statistical discrimination might be efficient in the short run, it is inefficient in the long run because it creates "disincentives for optimal acquisition of human capital").

that Title VII's paramount purpose is combating discrimination, not curtailing all arbitrary treatment. And yet, the former goal is undoubtedly consistent with the latter, for, as we have seen, excluding certain considerations from employer decisionmaking in no way enhances employer discretion and may even curb it. In these respects, the antidiscrimination norms embodied in Title VII's prohibition of disparate treatment broadly accord with labor's goal of limiting employer discretion.[73]

2. Disparate Impact

The other primary basis for liability under Title VII—so-called disparate-impact liability—is even more congenial to labor's traditional goal of limiting employer discretion. Indeed, whereas the prohibition of disparate treatment seems in practice merely to avoid augmenting employer discretion, the prohibition of disparate impact actually restricts such discretion by proscribing certain arbitrary employment practices outright.

Unlike claims of disparate treatment, claims of disparate impact do not allege that an employer acted with discriminatory intent, but rather "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."[74] To make out a claim of disparate impact under Title VII, then, a plaintiff must show that a facially neutral employment practice has a disproportionate adverse impact on the members of a group who share a particular protected characteristic.[75] The burden then shifts to the employer to defend the employment practice as "job related for the position in question and consistent with business necessity."[76] Because of this "business-necessity" defense, Title

73. This Subsection has ignored another way of establishing disparate-treatment liability under Title VII: the "mixed-motives" theory. An employer is liable under this theory whenever a protected trait "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2006). An employer, can, however, avoid liability for *damages* if he shows he would have taken the same action anyway. *Id.* § 2000e-5(g)(2)(B). For purposes of this Article, it is enough to note that the mixed-motives theory cabins employer discretion even more significantly than the *McDonnell Douglas* framework, holding employers liable whenever a protected trait was a "motivating factor" for their decision, even if it did not amount to a "but for" cause of that decision.

74. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

75. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

76. *Id.* Technically, if the employer meets its burden of showing the challenged employment practice to be "job related" and "consistent with business necessity," the plaintiff still has an opportunity to identify some "alternative employment practice" that would similarly achieve the employer's objectives without producing a disparate-impact but that the employer nevertheless refuses to adopt. *Id.* § 2000e-2(k)(1)(A)(ii), (k)(1)(C). This third prong, however, proves much less significant in practice than the first two.

VII's disparate-impact prong ends up "requir[ing] . . . the removal of artificial, arbitrary, and unnecessary barriers to employment"—at least "when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[77] It thus advances labor's goal of limiting employer discretion to engage in arbitrary treatment by compelling employers to replace at least some arbitrary employment practices with fairer ones, a requirement that benefits all workers, not just members of protected classes.[78]

Consider, for example, one type of employment practice that is often the target of disparate-impact challenges: scored employment tests. The Supreme Court has held that employment tests that produce a disparate impact violate Title VII "unless they are demonstrably a reasonable measure of job performance."[79] The Equal Employment Opportunity Commission (EEOC), in turn, has promulgated a set of elaborate guidelines identifying various methodologies for validating professionally developed employment tests as sufficiently job-related.[80] An employer thus cannot successfully invoke the business-necessity defense to justify an employment test that produces a disparate impact without demonstrating in some detail that the test selects and excludes workers based on job-relevant qualities. And employers face a similar burden when attempting to defend against disparate-impact challenges to non-numeric, but still objective,[81] hiring criteria (such as educational attainment, professional experience, and licensing requirements).[82] As with validating employment tests, scrutinizing hiring criteria helps

77. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

78. *Cf.* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 258 (2011) ("[D]isparate impact analysis does not require employers to forgo business benefits in the interests of racial diversity, but uses racial impact as a warning sign that should trigger scrutiny of the rationality or fit between means and objectives with respect to the employment practice in question."); *id.* at 296 ("Ideally, disparate impact doctrine encourages employers to use selection devices suited to measuring the performance characteristics required in particular jobs, without litigation."); *id.* at 300 (arguing that disparate impact encourages "employers to scrutinize their traditional practices and consider the adoption of alternatives that are both better suited to select employees based on job performance requirements *and* produce less severe disparate impact").

79. *Griggs*, 401 U.S. at 436; *see* Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) ("[D]iscriminatory tests are impermissible unless shown, by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." (citation and internal quotation marks omitted)).

80. *See* Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. § 1607 (2011).

81. Once again, in this context, a criterion is "objective" insofar as an employer can apply it without having to exercise her judgment. *See supra* note 21.

82. As the Third Circuit has explained in explicating the Supreme Court's various precedents on the business-necessity defense, employers may not use "rough-cut measures of employment-related qualities" as hiring criteria, but "rather . . . must

to curb arbitrary treatment in the workplace by constraining employer discretion, compelling employers to evaluate job applicants based on job-related qualities rather than extraneous ones.

Given how closely courts scrutinize scored tests and other objective hiring criteria that produce a disparate impact, we might worry that Title VII's disparate-impact theory has the unintended consequence of incentivizing employers to adopt more subjective criteria, thereby enhancing employer discretion. If employers risk liability (or at least litigation) under Title VII by using objective criteria that might not adequately measure job-related qualities (and thus might not satisfy the business-necessity defense), they might turn to subjective criteria instead. Subjective criteria are less amenable to the kinds of methodologies used to validate objective criteria like scored tests and thus less are likely to be exposed as insufficiently job-related and consistent with business necessity. And because subjective criteria afford employers more decisionmaking discretion than do objective criteria, Title VII might end up impeding, rather than promoting, the labor goal of curtailing arbitrary treatment in the workplace.[83]

This concern is undoubtedly legitimate. At least in theory, however, it is somewhat allayed by the Supreme Court's decision to recognize disparate-impact challenges to subjective employment practices—that is, practices that leave important employment decisions largely to employers' discretion.[84] By requiring

tailor their criteria to measure those qualities accurately and directly for each applicant." El v. Se. Penn. Transp. Auth., 479 F.3d 232, 240 (2007).

83. Subjective employment practices might undermine not only labor goals, but also antidiscrimination norms. Many scholars argue that racial and other kinds of bias can be unconscious as well as conscious. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). And, as the Supreme Court has observed, subjective decisionmaking practices facilitate the expression of unconscious bias more readily than objective ones do. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) (citing "the problem of subconscious stereotypes and prejudices" as one reason to apply Title VII's disparate-impact theory to subjective employment practices); *see also* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Krieger, *supra*; Lawrence, *supra*; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 484-89 (2001).

84. *See Watson*, 487 U.S. at 990-91 ("If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply."). The Court noted that subjective employment practices are also amenable to disparate-treatment challenges. *See id.* at 988-89. A leading treatise notes that, "[a]s a practical matter, plaintiffs often proceed under both [disparate-treatment and disparate-impact] theories." 1 BARBARA

employers to defend their subjective employment practices as well as their objective ones,[85] Title VII's disparate-impact theory could potentially dampen any perverse incentives it might otherwise create for employers to prefer the former kinds of practices to the latter, thereby rendering itself more consistent with labor's goal of limiting employer discretion.

Indeed, this feature of Title VII's disparate-impact theory could in principle help to advance, rather than merely avoid hindering, that goal. In deciding whether a subjective employment practice is nevertheless job-related and consistent with business necessity, courts consider a number of factors. These factors concern the degree to which the subjective practice incorporates some of the safeguards inherent in objective ones, such as whether the practice requires the relevant decisionmaker to follow certain articulated guidelines and standards in exercising her discretion.[86] The more closely a subjective employment practice resembles an objective one, the more likely it is to survive a disparate-impact challenge. An employer's surest bet of avoiding disparate-impact liability is thus to eschew employment practices that treat employees arbitrarily or that indirectly facilitate such treatment—that is, to limit her own discretion.[87]

Although disparate-impact challenges to subjective employment practices thus have the potential to promote labor goals, they tend not to do so in practice. Plaintiffs rarely bring such challenges, and even when they do, the challenges rarely succeed.[88] We should thus not exaggerate the ability of Title VII's disparate-impact theory to curb employer discretion. But this Article does not maintain

T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 254 (4th ed. 2007).

85. Indeed, subjective employment practices may be *harder* for employers to defend than objective ones. *See Watson*, 487 U.S. at 991-92 (plurality opinion) (worrying that employers will rarely be able to validate subjective employment practices as job-related and consistent with business necessity).

86. *See* 1 LINDEMANN & GROSSMAN, *supra* note 84, at 258-64 (noting that courts consider such factors as "whether the decision is pursuant to a professional job analysis," "whether raters operate under specific safeguards and guidelines," "whether selection criteria are based on observable behaviors or performances," "whether the evaluator is a member of the plaintiff's protected group," "whether viable objective criteria are available," and "whether the employer provides notice of job opportunities").

87. This salutary effect is undermined somewhat by the fact that courts tend to accord employers a little more leeway to use subjective criteria when making decisions regarding "white collar" jobs as opposed to "blue collar" jobs, a significant lacuna in Title VII's protections. *See id.* at 256-57. For criticism of this differential treatment of the two classes of jobs, see Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982); and David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57 (1998).

88. *See, e.g.*, Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB.

that the disparate-impact theory perfectly accords with labor goals. Rather, it makes the comparative claim that the theory better accords with labor goals than does the ADA. And as we shall see, even if the disparate-impact theory ends up limiting employer discretion less than it might initially seem to promise, the ADA affirmatively *requires* employers to exercise discretion.[89] Relative to the ADA, then, Title VII's disparate-impact theory helps to advance labor's goal of eliminating arbitrary employment practices by restraining employer discretion.

Title VII's disparate-impact theory, of course, imposes no freestanding duty on employers to revise arbitrary employment practices; any such duty is triggered only by the plaintiff's showing of a race- or sex-based disparate impact and the employer's failure to satisfy the business-necessity defense. As in the case of Title VII's disparate-treatment theory, then, the disparate-impact theory seeks above all to combat discrimination (and its effects), not to constrain employer discretion for its own sake. But to realize even this more limited ambition, the theory requires employers to scrutinize and defend their employment practices to a greater extent than they would have to under an unmodified at-will rule—a requirement that helps to advance labor's goal of curbing arbitrary treatment by limiting employer discretion.

II. Labor Goals and the ADA

Ever since its enactment, commentators have debated whether the Americans with Disabilities Act merely extends the antidiscrimination norms enshrined in Title VII to another disadvantaged social group or whether it instead promulgates a novel set of norms to combat a novel form of discrimination.[90] While acknowledging the significant functional similarities between the ADA and aspects of Title VII, this Part argues that the ADA differs from Title VII in an important, yet underappreciated, respect: the degree to which it stands in tension with the traditional labor goal of cabining employer discretion. In particular, whereas Title VII's disparate-impact prong usually mandates *wholesale* revisions of employment policies for all employees, the ADA frequently requires employers

& EMP. L.J. 433, 435 (2012) ("My research suggests that . . . . cases challenging subjective employment practices were very uncommon even prior to the *Wal-Mart* decision. An average employer's litigation risk in connection with such claims was so vanishingly small during the 2005-2011 time frame that I surmise that few employers adopted measures or altered their behavior to address this litigation risk."); *cf.* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 746 (2006) ("[T]here is no question that the intentional discrimination framework can serve to challenge subjective employment practices, and there is very little to gain, and much to lose, by resorting to the disparate impact framework."). The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* made it even more difficult to bring such challenges by tightening the requirements for certifying nationwide class actions challenging subjective employment practices. 131 S. Ct. 2541 (2011).

89. *See infra* Section II.A.

90. *See supra* notes 14-15.

to make *retail* accommodations for individual employees—that is, ad hoc exceptions to the policies on a case-by-case basis. Because employers cannot make such accommodations without exercising significant discretion, Section II.A contends, the ADA's accommodation requirement is in tension with traditional labor goals. As Section II.B explains, this tension came to a head in *US Airways, Inc. v. Barnett*,[91] where the Supreme Court seemed decisively to vindicate labor goals over the ADA's accommodation requirement. Normatively, Section II.C tentatively defends *Barnett*'s resolution of the tension between the ADA's accommodation requirement and labor goals, emphasizing the ways in which the decision protects discretion-constraining workplace policies while acknowledging the costs it imposes on disabled employees and job seekers.

A. *The Tension Between the ADA's Accommodation Requirement and Labor Goals*

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability."[92] The statute defines "discrimination" to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of [her] disability."[93] Like Title VII's prohibition of disparate treatment based on race and other protected characteristics, these provisions simultaneously promote individualized treatment and constrain employer discretion by proscribing a particular ground on which employers might otherwise make employment decisions. But unlike Title VII, the ADA proceeds to define a "qualified individual" as "an individual who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires."[94] It further defines "discrimination" to include not only disparate treatment based on disability, but also an employer's "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless . . . the accommodation would impose an undue hardship on the operation of the [employer's] business."[95]

While the ADA's accommodation requirement might initially seem to herald an abrupt break with earlier employment-discrimination laws, it turns out to be functionally similar to certain aspects of Title VII. In particular, as Christine Jolls convincingly argues, Title VII's disparate-impact prong also imposes an accommodation requirement on employers insofar as it "requires employers to incur special costs in response to the distinctive needs . . . of particular, identifiable

91. 535 U.S. 391 (2002).

92. 42 U.S.C. § 12112(a) (2006 & Supp. II 2009).

93. *Id.* § 12112(b)(1).

94. *Id.* § 12111(8) (emphasis added).

95. *Id.* § 12112(b)(5)(A).

demographic groups of employees . . . and imposes this requirement in circumstances in which the employer has no intention of . . . 'discriminating against' the group in the canonical sense."[96] Both Title VII and the ADA thus compel employers to bear the costs—subject to the "business necessity" and "undue-hardship" defenses, respectively—of revising existing employment practices in order to accommodate the members of disadvantaged social groups in the workplace. Both, moreover, impose these costs by at least somewhat circumscribing employer discretion: just as Title VII's disparate-impact theory sometimes requires an employer to jettison employment practices she would otherwise retain, so the ADA's accommodation requirement sometimes forces an employer to hire individuals she would otherwise reject—namely, any "qualified individual with a disability" who requests a "reasonable accommodation" that would not impose an "undue hardship" on the employer's business operations.[97]

Though significant, this latter similarity between the two statutes is not the end of the story. Unlike Title VII's disparate-impact prong, the ADA's accommodation requirement frequently mandates *retail* accommodations for individual employees rather than *wholesale* accommodations for entire workforces—an individualized approach that enhances employer discretion. As we have seen,[98] the typical Title VII disparate-impact claim seeks to compel the employer to revise the challenged employment practice not just for the individual plaintiff or even the other members of her protected class, but for all the workers to whom it applies.[99] After losing a disparate-impact challenge to an employment test, for instance, an employer will often have to design a new test, not simply adjust the plaintiff's individual score.[100]

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96. Jolls, *supra* note 15, at 648; *see id.* at 645, 652-66.

97. According to one commentator, because its accommodation requirement frequently compels employers to modify their workplace policies, "the ADA cuts into the discretion of employers to run their workplaces as they see fit perhaps more than other antidiscrimination statutes." Alex B. Long, *"If the Train Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 494 (2006).

98. *See supra* notes 79-82 and accompanying text.

99. *See, e.g.*, 1 LINDEMANN & GROSSMAN, *supra* note 84, at 228 ("Most of the adverse impact cases involving nonscored objective criteria deal with employer policies or practices, as opposed to single, isolated decisions.").

100. *See id.* at 221-22 ("Remedies that focus on reformulating tests and test criteria 'to minimize any racially disparate impact within the framework of designing a valid and comprehensive' test are clearly favored over minority preferences." (quoting Allen v. Ala. State Bd. of Educ., 164 F.3d 1347, 1352-53 (11th Cir. 1999))). Other typical remedies in testing cases are similarly wholesale in that they affect everyone who takes the test, not just members of protected groups. *See id.* at 219 (observing that courts in testing cases have ordered such remedies as "lowering the cutoff score of a test so as to include larger numbers of minorities or women in the passing group" and "requir[ing] employers to choose from among candidates within the same test-score range (banding) rather than by strict rank-order").

The ADA, by contrast, usually mandates a more individualized response.[101] Rather than accommodate a disabled employee by revising a generally applicable workplace policy, an employer will typically craft an exemption that applies to the employee alone. Such an approach is explicitly contemplated by both the ADA itself[102] and the EEOC's enforcement guidelines,[103] and is taken for granted in the scholarly literature.[104] That approach is, moreover, a product of procedure as well as substance. The EEOC has interpreted the ADA to require employers to engage in an "interactive process" with disabled employees requesting accommodations, during which the parties attempt to identify possible accommodations that will address the employee's needs without unduly disrupting the employer's

101. To be sure, like Title VII, the ADA prohibits disparate-impact discrimination. *See* 42 U.S.C. § 12112(b)(6) (2006). But this provision has been largely overshadowed by the ADA's accommodation requirement. *See* Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 864 (2006) ("Under the Americans with Disabilities Act (ADA), individual claims to accommodate specific impairments in particular jobs have all but eclipsed a coherent theory of disability-related disparate impact law.").

102. *See, e.g.*, 42 U.S.C. § 12111(9) ("The term 'reasonable accommodation' may include ... job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.").

103. *See, e.g.*, 29 C.F.R. app. § 1630.2(o) (2011) (identifying a wide range of potential accommodations among which employers may choose, including permitting "an individual who is blind to use a guide dog at work," permitting "an employee with a disability that inhibits the ability to write ... to computerize records that were customarily maintained manually," and providing personal assistants such as page turners and travel attendants).

104. *See, e.g.*, Bagenstos, *supra* note 15, at 836 ("When I speak of a requirement of 'accommodation,' I mean a requirement, like the one in Title I of the ADA, that employers make *individualized* changes in facially neutral rules, structures, or tasks to enable a protected class member to perform a given job and produce as much output as non-accommodated coworkers." (emphasis added)); Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 974-76 (2004) (contrasting the individualized character of accommodations under the ADA with the class-based character of affirmative action); Karlan & Rutherglen, *supra* note 14, at 13 ("ADA cases are likely to be intensely context-specific."); *id.* at 14-16 (noting the "retail" nature of accommodations under the ADA, in contrast to the "class-based" approach of disparate-impact claims and affirmative action); Michael Ashley Stein et al., *Accommodating Every Body*, 82 U. CHI. L. REV. (forthcoming 2014) (manuscript at 52), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2315271 ("Claims for accommodation usually proceed in the following way: individuals advance individual claims and, when successful, those claims result in employers granting one-time exceptions to otherwise standard rules and policies.").

business.[105] Like many of the illustrative accommodations enumerated in the statute and the EEOC's regulations, the "interactive process" assumes that an employer will retain the generally applicable policy at issue and specially exempt the disabled employee.

Unlike Title VII, then, the ADA's accommodation requirement ends up directly mandating individualized treatment for disabled employees. It requires employers not just to eschew disability-based disparate treatment or to revise policies that have an adverse disparate impact on disabled employees as a class, but to attend to every (qualified) disabled employee's unique needs and to tailor workplace policies accordingly so that every (qualified) disabled employee can fully participate in the workplace. This vision of individualized treatment reflects at least two unique features of disability-based discrimination. First, whereas race- and sex-based discrimination is typically the product of (conscious or subconscious) prejudice against the members of fairly well-defined social groups, disability-based discrimination tends to stem from (frequently visceral) reactions to the particular disabilities of particular individuals—this employee's blindness or that one's paralysis.[106] In order to counteract disability-based discrimination, then, we cannot simply forbid employers to rely on group-based stereotypes; we must also prod them to look beyond the most immediate manifestations of an employee's disability to the employee's other, job-related qualities.

Second, the disability-rights movement has historically emphasized the role played in disability-based discrimination by unreflective assumptions regarding how workplaces and jobs should be structured.[107] The category "disabled," on this view, is socially constructed, in the sense that whether a particular individual falls within that category depends not only on facts about her biology, but also on how society has decided over time to design workplaces and to specify the particular qualifications for any given job.[108] If disability-based discrimination is as much a product of societal insensitivity as personal prejudice, then one particularly effective way of remedying such discrimination is to force employers to reflect on the decisions they make in structuring their workplaces and how those decisions systematically exclude particular individuals—precisely what the ADA's accommodation requirement seeks to accomplish. Such an approach is also normatively appealing insofar as it makes literal the promise of individualized treatment underlying all of antidiscrimination law.[109]

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105. 29 C.F.R. app. § 1630.9; *see, e.g.*, Tobin v. Liberty Mut. Ins. Co., 433 F.3d 100, 109-10 (1st Cir. 2005).

106. Miller, *supra* note 7, at 520-21.

107. *See* Bagenstos, *supra* note 7, at 423-36; Stein et al., *supra* note 104 (manuscript at 6-7). *But see* Stein, *supra* note 15, at 587 (arguing that at least some other forms of discrimination are also the product of similar assumptions).

108. *See* Bagenstos, *supra* note 7, at 423-36.

109. *See supra* notes 2-4 and accompanying text.

But despite its virtues, the ADA's accommodation requirement is in tension with traditional labor goals. To implement the retail accommodations mandated by the statute, employers must exercise discretion, departing from generally applicable workplace policies and treating some of their employees differently than others.[110] Although such discretion is exercised in the name of promoting the ADA's antidiscrimination norms, it increases the risk of arbitrary treatment in the workplace.

We might initially think otherwise. Even if the ADA requires employers to exercise discretion in crafting individualized exceptions to generally applicable workplace polices, it might not thereby enhance their ability to engage in arbitrary treatment. This might be so because of both the *kinds* and *number* of exceptions the ADA licenses.

The kinds of exceptions licensed by the ADA—exceptions that are legally mandated rather than optional—might not be particularly likely to undermine discretion-constraining policies and thus might not especially threaten the labor goal of curtailing arbitrary treatment. For any discretion an employer must exercise in making an exception would seem to be strictly circumscribed by the ADA's legal regime, thereby preventing the employer from mistreating the disabled employee requesting the exception, let alone other employees.

Moreover, the ADA licenses only one general category of exceptions to generally applicable workplace polices—to wit, exceptions mandated by the statute's accommodation requirement. After an employer makes an ADA-mandated exception to a workplace policy, the policy continues to apply to all her other employees—no additional exceptions are permitted—and thus appears to continue to constrain her discretion with respect to them. Because it channels employers' discretion to make exceptions to generally applicable workplace policies through a highly detailed legal regime, and because it provides only one basis for making those exceptions, the ADA's accommodation requirement seems not to jeopardize labor goals after all.

There are, however, at least two reasons to doubt this Pollyannaish picture. First, it assumes that the ADA's requirements are more or less transparent, such that it is usually obvious whether an individual qualifies for an accommodation under the statute. But in fact, nearly every accommodation decision requires the decisionmaker to exercise judgment. And because a relatively small fraction of all accommodation requests will be litigated, it is the employer, rather than a judge or EEOC official, who will often be the ultimate decisionmaker. Is an individual's

110. This is not to suggest that all accommodation mandates necessarily require employers to exercise discretion. For example, the Family and Medical Leave Act (FMLA) imposes an accommodation mandate on certain employers by requiring them to give eligible employees who are unable to work due to a "serious health condition" up to twelve weeks of unpaid leave annually. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601, 2611-2619 (2006). But because the FMLA defines its mandated accommodation with great specificity—viz., twelve weeks of unpaid leave—employers need not exercise significant discretion in complying with it.

impairment a "disability"?[111] Is the individual "qualified" for the position?[112] Would the accommodation she requests be "reasonable"? Would the accommo-

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111. As amended in 2008, the ADA defines "disability" primarily to mean "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A) (2006 & Supp. II 2009). "Major life activities," in turn, "include, *but are not limited to*, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working," as well as "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* § 12102(2)(A)-(B) (emphasis added). Finally, the statute provides that the question of whether an impairment "substantially limits" a "major life activity" should be answered "without regard to the ameliorative effects of mitigating measures such as—(I) medication, medical supplies, equipment, or appliances, low-vision devices[,] . . . [and] prosthetics . . . (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications"; however, "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity." *Id.* § 12102(4)(E)(i)-(ii). Despite their seeming detail, all these provisions raise almost as many questions as they answer. And while the EEOC has promulgated guidelines to fill many of the interpretive gaps, *see* 29 C.F.R. § 1630.2-.3 (2011), they cannot possibly anticipate every scenario employers are likely to confront. Nor can they even eliminate the need for employers to exercise discretion in those scenarios they do manage to foresee.

112. As noted, the ADA forbids an employer to discriminate against only "a *qualified* individual on the basis of disability." 42 U.S.C. § 12112(a) (emphasis added). It defines a "qualified individual with a disability," in turn, as "an individual who, with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires." *Id.* § 12111(8) (emphasis added). Rather than attempt to define ex ante what features of a particular job constitute its "essential functions," the statute leaves that definitional issue largely to employers' discretion. Indeed the statute provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." *Id.* To be sure, as with the question of when an impairment constitutes a "disability," *see supra* note 111, the EEOC has promulgated guidelines for identifying the "essential functions" of a job, *see* 29 C.F.R. § 1630.2(n). But once again, the guidelines will not resolve every case and thus will not eliminate employers' discretion to decide which employees are eligible for accommodations. Nor will courts. Though they do not reflexively accept employers' statements of the essential functions of particular jobs, they do tend to defer substantially to those statements on the ground that defining the essential functions of a job is a business decision that courts are ill-suited to second-guess. *See, e.g.*, Rehrs v. Iams Co., 486 F.3d 353 (8th Cir. 2007). The upshot is that employers enjoy substantial discretion to set the

dation, though reasonable, nevertheless impose an "undue hardship" on the employer's business operations? None of these questions are binaries; each admits of degree. When faced with an accommodation request, then, employers must exercise judgment at each step of the analysis, assessing how likely the individual would be to satisfy each of the ADA's criteria in court.[113] To be sure, in some cases, the answers will be obvious, leaving the employer with no real discretion. But in most cases, the resolution of at least one of the prongs will be unclear, such that the employer will have to exercise her best judgment.

As the criticisms of the at-will rule demonstrate, with the discretion to exercise judgment comes the potential for abuse. In particular, while scrupulous employers will exercise their discretion under the ADA in conformity with the statute's purposes,[114] more capricious employers might use their discretion to reward and punish employees and job applicants based on arbitrary factors. Consider just two possible scenarios that illustrate the risks. Imagine a workplace with a policy categorically forbidding telecommuting. Now suppose an employee requests an ADA accommodation permitting her to work from home. Assuming the employee is not obviously a "qualified individual with a disability" within the meaning of the ADA, the employer will enjoy some discretion in deciding whether to grant her request. And even if she is obviously qualified and disabled, the employer will still enjoy discretion to shape the accommodation's precise contours—to determine how many hours a week she may work from home, what equipment she will be given to facilitate the telecommuting, and so on. The employer could exploit this discretion to effectively extort the employee's acquiescence in some other workplace matter (say, the employer's unpopular plan to shorten lunch breaks).

Or suppose the employer receives the same accommodation request from an employee whom she finds irritating or who has criticized some of her previous decisions. The employer could deny the accommodation (or, if the employee is obviously qualified and disabled, manipulate the accommodation to make it less generous) as a way of spiting or punishing the employee.[115] Needless to say, this

essential functions of a job and thus to determine the likelihood that disabled individuals will receive accommodations for that job—discretion that is expressly contemplated by the ADA and preserved by courts.

113. And even when it is clear that an employee is entitled to *some* accommodation, if multiple accommodations would do, the EEOC's regulations explicitly provide that "the employer providing the accommodation has the ultimate discretion to choose between effective accommodations." 29 C.F.R. app. § 1630.9.

114. *See* 42 U.S.C. § 12102(4)(A) ("The definition of 'disability' . . . shall be construed in accordance with the following: . . . The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.").

115. One potential check on this kind of chicanery is the ADA's antiretaliation provisions. *See* 42 U.S.C. § 12203(a) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated

is precisely the kind of arbitrary treatment that the at-will rule licenses and the labor movement has long sought to combat.

The first reason to think that the ADA's accommodation requirement enhances employer discretion thus concerns the kinds of exceptions to generally applicable workplace policies that the statute typically licenses. Far from being carefully circumscribed by clearly defined legal criteria, an exception made pursuant to the ADA often requires the employer to exercise considerable judgment in interpreting those criteria, thereby augmenting the employer's discretion.

The second reason, in contrast, concerns the number of exceptions licensed by the ADA's accommodation requirement. Although the ADA formally authorizes only one general category of exceptions (i.e., those mandated by the statute itself), it may have the effect of also promoting other, non-disability-related exceptions. Once employers grant their disabled employees accommodations under the ADA, they may begin to grant similar accommodations to their nondisabled employees as well (assuming there is no collective-bargaining agreement or other legal barrier blocking them from doing so). Indeed, some scholars regard the ADA's potential to encourage employers to adopt more flexible workplace policies for all employees, disabled and nondisabled alike, as one of its most salutary consequences.[116] Once an employer accommodates a disabled employee by allowing her to telecommute, for instance, the employer may be more inclined to make similar exceptions to a general policy requiring workplace attendance for other employees who, though not disabled within the meaning of the ADA, wish for whatever reason to occasionally work from home. While this increased flexibility promises significant benefits for nondisabled employees, it entails what the labor movement would regard as a significant cost: undermining a generally applicable workplace policy designed to constrain the discretion of employers and thus their ability to engage in arbitrary treatment.

But would labor really be concerned about this type of spillover effect? After all, if employers are prompted to permit some of their nondisabled employees to telecommute after being compelled by the ADA to allow their disabled employees

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in any manner in an investigation, proceeding, or hearing under this chapter."); *id.* § 12203(b) ("It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this chapter."). But, of course, the ADA will not always prohibit the practice opposed or protect the right exercised, nor will most accommodation requests lead to formal EEOC proceedings or litigation. *Cf.* Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (per curiam) (raising without deciding the question of whether Title VII protects an employee from retaliation only when the employee "opposes" a practice that is in fact proscribed by Title VII or also when the employee "reasonably believes" in "good faith" that the practice violates Title VII).

116. *See, e.g.*, Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839 (2008); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311 (2009).

to do so, they would in that case be exercising their discretion to *benefit* the non-disabled employees, not to *harm* them. Would the traditional labor critique of the at-will rule really condemn this beneficent exercise of discretion?

It would—for at least two reasons. First, although employers undoubtedly can (and often do) exercise their discretion to benefit their employees, labor has been unwilling to blindly trust that they will do so. Labor has instead viewed discretion as a force prone to abuse, just as likely to be turned against employees as to be exercised in their favor.[117] Accordingly, labor has advocated policies that seek to limit most discretion in the "core" areas of employer decisionmaking[118]—even at the cost of preventing employers from helping particular employees in particular cases. When employers are spurred by the ADA to relax policies designed to constrain their discretion, labor is at the very least ambivalent: recognizing the potential benefits for employees but also fearing the potential abuses.

Second, even assuming that employers would exercise their enhanced discretion only to benefit their nondisabled employees, labor would still have cause for concern. For employers could use their enhanced discretion to help employees arbitrarily, for reasons of favoritism rather than merit. And when one employee is arbitrarily singled out for special benefits, the other employees (who may be just as deserving) are harmed—though admittedly not as severely as if they had suffered some adverse employment action, such as a demotion or pay cut. To be sure, a policy permitting telecommuting or other accommodations could seek to prevent this kind of harm by constraining an employer's discretion to implement it. It could, for example, permit any employee who satisfies certain well-defined criteria to work from home for up to twenty hours each week. But even policies with well-defined criteria can be flexible in practice.[119] And even those that seem less flexible cannot define away all discretion; like the ADA's various provisions, the eligibility criteria and other terms of the policy must still be interpreted. Rather than take the gamble that employers will exercise this discretion in a nonarbitrary manner, labor has traditionally preferred to limit the risk of arbitrary treatment by limiting discretion. It thus might not be so quick to embrace the ADA's potential to proliferate workplace accommodations as an unmitigated boon for employees.

117. *See, e.g.*, Berne C. Kluber, Comment, *FLSA Exemptions and the Computing Workforce*, 33 HOUS. L. REV. 859, 911 (1996) ("An economist for the AFL-CIO, Markley Roberts, has stated that '(w)e are very, very leery about employers having the right to set flexible hours because the temptation is almost irresistible to do that in a way that benefits the employer.'" (quoting Peggy Roberson, *Rudy Labors to Amend Law to Avert Cash Hit on City*, CRAIN'S N.Y. BUS., May 22, 1995, at 25)).

118. *See supra* note 53 and accompanying text.

119. *See, e.g.*, Erin L. Kelly & Alexandra Kalev, *Managing Flexible Work Arrangements in US Organizations: Formalized Discretion or "A Right To Ask"?*, 4 SOCIO-ECON. REV. 379 (2006) (finding that most "flexible work arrangements" (such as flextime) merely "formalize discretion," rather than eliminate it, and consequently allow employers to decide whether to permit particular employees to utilize such programs, resulting in limited and unequal access).

Of course, whether the ADA will actually augment employer discretion in any given workplace depends on the ex ante baseline level of discretion there—that is, the level of discretion that would obtain irrespective of the ADA. At one extreme, a workplace might be governed by an unadorned at-will rule, in which case the ADA will give the employer new ways to exercise her discretion (and thus new ways to engage in arbitrary treatment) but will not increase the overall amount of discretion at her disposal. At the other extreme, a workplace might be governed by a collective-bargaining agreement that specifies nearly every facet of employer/employee relations, in which case the ADA will enhance the employer's discretion considerably, for the reasons noted in this Section. Along this spectrum lie workplaces with varying mixes of rigid and flexible policies—and thus varying levels of employer discretion. Whether the ADA will raise the baseline level of discretion (and if so, by how much) will vary accordingly from workplace to workplace, as will any threat posed by the statute to traditional labor goals. But what is clear is that the retail accommodations mandated by the ADA will raise the baseline level of discretion—and thus the risk of arbitrary treatment—in every workplace more than the wholesale accommodations mandated by Title VII's disparate-impact theory.

It bears emphasis that the contrast drawn in this Section between Title VII and the ADA is a generalization. Not all accommodations under the ADA are retail, and not all accommodations under Title VII are wholesale. Indeed, many of the accommodations expressly contemplated by the ADA, such as the physical restructuring of workplaces, alter working conditions for all employees—disabled and nondisabled alike—and would seem to require employers to exercise little discretion.[120] And while a successful Title VII disparate-impact claim usually leads the employer to revise the challenged employment practice for all employees, courts sometimes permit individualized exemptions instead.[121] In some cases,

120. *See, e.g.*, 42 U.S.C. § 12111(9)(A) (2006) ("The term 'reasonable accommodation' may include . . . making existing facilities used by employees readily accessible to and usable by individuals with disabilities . . . ."); 29 C.F.R. app. § 1630.2(o) (identifying as a reasonable accommodation "making employer provided transportation accessible").

121. For example, courts have found "no beard" policies to have an impermissible disparate impact on black men, who are more prone to a skin condition that prevents them from shaving. Yet rather than require employers to jettison such policies, courts usually allow them to exempt black male employees while retaining the policies for other employees. *See* Jolls, *supra* note 15, at 655, 699 & n.55.

Title VII also requires employers "to reasonably accommodate" their employees' religious practices, 42 U.S.C. § 2000e(j), a requirement that seems to entail the kinds of retail accommodations that are typical under the ADA. The requirement proves relatively insignificant in practice, however, since it is subject to an "undue-hardship" defense, see *id.*, which the Supreme Court has interpreted to protect employers from having to bear anything more than "de minimis" costs. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

then, Title VII will threaten traditional labor goals as acutely as the ADA. Nevertheless, because a much greater proportion of its required accommodations are retail rather than wholesale, the ADA enhances employer discretion much more significantly than Title VII, posing a commensurately greater threat to traditional labor goals.

B. *Addressing the Tension:* US Airways, Inc. v. Barnett

How should we reconcile the ADA's accommodation requirement with traditional labor goals? Which should take precedence when the two conflict—when, for example, an employer would have to exercise significant discretion in order to implement a particular accommodation, potentially undermining a generally applicable policy designed precisely to curb such discretion? The Supreme Court confronted this dilemma in *US Airways, Inc. v. Barnett*[122] and came down decisively on the side of the traditional labor goal of limiting employer discretion. In that case, the plaintiff requested reassignment to another position as an accommodation for his physical disability. His employer ultimately denied the accommodation, claiming that it assigned employees to the position desired by the plaintiff according to a seniority system and that other employees had greater seniority rights and thus a greater entitlement to the position.[123] Although the ADA provides for "reassignment to a vacant position" as one possible reasonable accommodation,[124] the Court held that, in a conflict between a seniority system and an accommodation requested under the ADA, "the seniority system will prevail in the run of cases. . . . [T]o show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not 'reasonable.'"[125]

The Court seems to have viewed the case as presenting a conflict between the ADA's accommodation requirement and the traditional labor goal of cabining employer discretion. It concluded that the latter should generally trump the former. According to the Court, despite having been adopted unilaterally by the employer rather than through collective bargaining with a union, the seniority system provided employees with considerable benefits, including many of the benefits that organized labor has traditionally ascribed to such systems: "job security and an opportunity for steady and predictable advancement based on objective standards," as well as "an element of due process, limiting unfairness in personnel decisions."[126] As we have seen,[127] seniority systems secure these benefits by constraining the decisionmaking discretion that employers enjoy under the

122. 535 U.S. 391 (2002).

123. *Id.* at 394-95.

124. 42 U.S.C. § 12111(9)(B).

125. *Barnett*, 535 U.S. at 394; *see id.* at 403, 406.

126. *Id.* at 404 (citations and internal quotation marks omitted).

127. *See supra* notes 45-52 and accompanying text.

at-will rule, replacing employees' fears of employer arbitrariness with "expectations of consistent, uniform treatment."[128] The Court worried that employers would frustrate these expectations if they had to depart from their seniority systems in order to comply with the ADA's accommodation requirement. More specifically, requiring employers even to consider accommodations that would violate their seniority systems "would substitute a complex case-specific 'accommodation' decision made by management for the more uniform, impersonal operation of seniority rules."[129] Due to "its inevitable discretionary elements,"[130] the accommodation decision threatens to reintroduce into the workplace the very arbitrariness that seniority systems seek to curb, a threat the Court was unwilling to tolerate, even for the sake of the ADA's antidiscrimination norms.

Even as it vindicated traditional labor goals, the Court recognized that a seniority system—especially one adopted unilaterally by an employer—might not deliver all the benefits in practice that it promises in theory. It thus qualified its holding to allow an ADA plaintiff to demonstrate that a particular seniority system does not, in fact, significantly constrain employer discretion. As the Court put it, a plaintiff may "show that special circumstances warrant a finding that, despite the presence of a seniority system . . . the requested 'accommodation' is 'reasonable' on the particular facts."[131] The Court's two (non-exhaustive) examples of such "special circumstances" confirm the Court's concern with preserving seniority systems' discretion-constraining effects. In one example, "the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference."[132] In the other, "the [seniority] system already contains exceptions such that, in the circumstances, one further exception [for the disabled employee] is unlikely to matter."[133] Because the employer in each scenario enjoys significant discretion despite the existence of a seniority system, requiring it to perform the "complex case-

128. *Barnett*, 535 U.S. at 404.

129. *Id.*

130. *Id.* at 405.

131. *Id.*

132. *Id.* Arguably, this exception applied in *Barnett* itself. As Justice Souter noted in his dissent:

> US Airways apparently took pains to ensure that its seniority rules raised no great expectations. . . . With US Airways itself insisting that its seniority system was noncontractual and modifiable at will, there is no reason to think that Barnett's accommodation would have resulted in anything more than minimal disruption to US Airways's operations, if that.

Id. at 423-24 (Souter, J., dissenting) (citation omitted).

133. *Id.* at 405 (majority opinion).

specific" accommodation analysis mandated by the ADA would increase the risk of arbitrary treatment marginally, if at all. Only when a seniority system applies consistently and uniformly will it truly limit employer discretion and thwart arbitrary treatment, and only then, according to the Court, must the ADA's anti-discrimination norms yield to traditional labor goals.

C. *Evaluating* Barnett's *Resolution of the Tension Between the ADA and Labor Goals*

One can read the Court's decision in *Barnett* either narrowly or broadly. On the narrow reading, only a bona fide seniority system can trump the ADA's accommodation requirement; accommodations that require employers to make exceptions to other kinds of workplace policies will usually be reasonable.[134] On the broad reading, *Barnett* requires the ADA's accommodation requirement to yield to all workplace policies that constrain employer discretion, at least in most instances. The Court's reasoning supports, if not compels, the broad reading, for seniority systems are not the only policies that provide "job security and an opportunity for steady and predictable advancement based on objective standards" and "an element of due process, thereby limiting unfairness in personnel decisions" and creating "expectations of consistent, uniform treatment."[135] Other policies typically enshrined in collective-bargaining agreements, such as for-cause requirements and industrial-due-process protections, realize these benefits as well. Though emblematic of labor's assault on the at-will rule, seniority systems are but one way of cabining employer discretion and thus preventing arbitrary treatment in the workplace.

Assuming the broad reading is the correct one, did the Court in *Barnett* get it right? Did it correctly respond to the tension between the ADA's accommodation requirement and labor's goal of limiting employer discretion? There are at least three reasons to think it did.

First, the decision helps to call our attention to a broader range of costs that nondisabled employees must bear when their employers accommodate disabled employees under the ADA. Many scholars have recognized that the ADA's accommodation requirement imposes significant costs not only on employers[136] but also on nondisabled employees.[137] This recognition, however, has extended

134. *See, e.g.*, EEOC v. United Airlines, Inc., 693 F.3d 760, 764 n.3 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (tentatively adopting this reading).

135. *Barnett*, 535 U.S. at 404 (citations and internal quotation marks omitted).

136. *See, e.g.*, Jolls, *supra* note 15, at 645.

137. *See, e.g.*, Seth D. Harris, *Re-Thinking the Economics of Discrimination:* U.S. Airways v. Barnett, *the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123 (2003); Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties,"* 68 MO. L. REV. 863, 905-11 (2003); Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and*

only so far. In particular, scholars tend to focus narrowly on the economic costs that an accommodation imposes on the nondisabled employees in the particular workplace where the accommodation is made[138] or, somewhat more broadly, on the labor-market effects of accommodations on general wage and employment levels.[139] Insofar as scholars look beyond the economic costs of accommodations, they do not go much further than legal costs, such as the degree to which accommodations infringe nondisabled employees' contractually guaranteed rights.[140] Indeed, in *Barnett* itself, Justice O'Connor would have condemned accommodations that require employers to violate their seniority systems only when the systems legally bind the employers, such that they create legal entitlements for employees.[141]

As the *Barnett* majority reminds us, however, accommodations can affect nondisabled employees not just by displacing them from more desirable positions or violating their contractual rights, but also by altering the character of their relationships with their employers.[142] Specifically, *Barnett* emphasizes the tendency of certain accommodations to undermine policies that constrain employer discretion, increasing the risk of arbitrary treatment in the workplace. Though this consequence of the ADA's accommodation requirement might also have implications for nondisabled employees' economic well-being (especially their job security), it is not strictly economic but relational. Indeed, it concerns the power employers enjoy over their employees and employees' vulnerability to the whims of their employers. And though legally binding workplace policies will constrain employer discretion most significantly, even policies adopted unilaterally by employers can have similar effects to the extent that employers follow

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Their Coworkers, 34 FLA. ST. U. L. REV. 313 (2007). *But see supra* note 116 and accompanying text (noting that ADA accommodations might benefit nondisabled employees as well).

138. *See, e.g.*, Harris, *supra* note 137 (applying "internal labor market theory" to determine in what circumstances an accommodation to a seniority system imposes economic costs on the other employees who participate in the system); Porter, *supra* note 137 (arguing that an accommodation that affects a nondisabled employee should be deemed unreasonable only if it results in the termination of the employee).

139. *See, e.g.*, Jolls, *supra* note 15, at 688-95.

140. *See, e.g.*, Long, *supra* note 137, at 905-11 (arguing that an accommodation should be deemed unreasonable not only if it results in "adverse employment action" for another employee, but also if it violates another employee's contractual rights).

141. *See* US Airways, Inc. v. Barnett, 535 U.S. 391, 408-11 (2002) (O'Connor, J., concurring).

142. *Cf.* Nicole Buonocore Porter, Martin*izing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 562-71 (2013) (arguing that an accommodation would be unreasonable if it would "fundamentally alter the employer-employee relationship," but defining that relationship not in terms of employer discretion but in terms of more amorphous notions of a proper workplace order).

them (a qualification *Barnett* recognizes). Accommodations can accordingly enhance employer discretion even when they violate no employee's legal entitlements. In considering the extent to which accommodations expand employer discretion, *Barnett* presents a fuller accounting of the costs of the ADA's accommodation requirement for nondisabled employees.[143]

Second, even as it condemns accommodations that undermine discretion-constraining workplace policies, *Barnett* might bolster other accommodations that do not have such an effect. To endorse *Barnett* is not to deny that the decision precludes certain kinds of accommodations and thus at least somewhat impedes the ADA's goal of integrating disabled individuals into the workplace. This regrettable consequence, however, might be partly offset by the decision's potential to temper employee opposition to other kinds of accommodations.

Scholars have documented a backlash against the ADA—hostility by nondisabled employees and society more generally to the benefits conferred on disabled individuals by the statute, particularly its accommodation requirement.[144] Although it is unclear which accommodations provoke the most hostility, it seems plausible that nondisabled employees will not resent all accommodations equally. Specifically, employees might resent accommodations that undermine discretion-constraining policies in core areas of employer decisionmaking more than ones that do not, since, as we have seen, such policies limit employers' ability to treat their employees arbitrarily and thus engender expectations of fair, objective treatment.[145] When an accommodation thwarts these expectations, it will likely elicit significant resentment from the employees who harbored them and thereby undermine employee solidarity—particularly between disabled and nondisabled employees. When, by contrast, an accommodation requires an exception to a policy that already affords the employer considerable discretion (even in a core area of employer decisionmaking), it will be less likely to frustrate em-

143. Whereas *Barnett*'s reasoning calls our attention to the ADA's effects on relationships between employers and their employees, some scholars have considered the statute's effects on relationships between disabled and nondisabled employees. *See, e.g.*, Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 93 GEO. L.J. 399 (2006) (considering the "hedonic costs" for nondisabled employees of accommodating individuals with mental illnesses).

144. *See* Symposium, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1 (2000).

145. *Cf.* Cheryl L. Anderson, *Ideological Dissonance, Disability Backlash, and the ADA Amendments Act*, 55 WAYNE L. REV. 1267, 1315 (2009) (pronouncing mandatory reassignment to be an "especially controversial" accommodation, since, "[b]y granting individuals with disabilities the right to an open position, even if there are other, more qualified individuals the employer ordinarily would choose, the ADA in effect creates a straight-forward preference for individuals with disabilities").

ployee expectations and thus less likely to incite employee resentment and undermine solidarity.[146] By precluding accommodations that undermine discretion-constraining policies, then, *Barnett* might mitigate one major source of backlash against the ADA, putting those accommodations it does not condemn on a firmer footing.

Third, insofar as employers generally seek to avoid having to make accommodations under the ADA, *Barnett* might incentivize them to adopt more objective workplace policies, a salutary result for all employees. Read broadly, *Barnett* holds that an accommodation will generally be unreasonable if it would require an employer to violate a policy designed to constrain (and that in fact constrains) her decisionmaking discretion. Thus, insofar as an employer institutes policies that limit her discretion, she can to a considerable extent avoid the ADA's accommodation requirement. In this respect, *Barnett* obviously promotes labor goals, incentivizing employers to adopt objective policies that limit their ability to treat their employees arbitrarily. More subtly, it also promotes non-ADA antidiscrimination norms, for numerous psychological studies have shown that discretionary workplace policies, such as highly subjective hiring criteria, facilitate the expression of subconscious biases and stereotypes regarding racial minorities and women, undermining equality of opportunity for those groups.[147] By incentivizing employers to adopt more objective workplace policies, *Barnett* might help to advance one of Title VII's main purposes.

Weighing against these possible benefits, of course, is *Barnett*'s potential to preclude a fair number of accommodations as unreasonable and thus to undermine the ADA's purpose of integrating disabled individuals into the workplace. Whether we endorse *Barnett* will thus depend on whether we prioritize labor's goal of limiting employer discretion or the ADA's commitment to individualized treatment. Because the values at stake are incommensurable, it is impossible to provide a definitive argument for privileging one over the other. Even after tallying all the costs and benefits of the competing approaches, we will still have to decide as individuals and a society which value we deem more important. That said, this Part has identified a number of costs imposed by the ADA's accommodation requirement and has adduced a number of reasons for approving *Barnett*'s attempt to mitigate those costs. These considerations should cause us to question our support for the accommodation requirement. And even if we ultimately decide that the requirement's costs to labor goals are worth it, we will at least have reached a more considered judgment on the issue.

146. *Cf.* Harris, *supra* note 137, at 135 n.59, 156 nn.137-138 (citing psychological studies purporting to show that frustrating expectations of fair treatment harms employee morale).

147. *See supra* note 83; *see also* Stacy M. Hickox, *Transfer as an Accommodation: Standards from Discrimination Cases and Theory*, 62 ARK. L. REV. 195, 244-47 (2009) (presenting social-science research data to show that subjectivity in hiring and promotion decisions can allow bias to influence those decisions).

Moreover, though labor's traditional goal of limiting employer discretion and the antidiscrimination norms underlying the ADA's accommodation requirement are incommensurable, it is worth noting an asymmetry between the two that militates in favor of privileging the former over the latter, rather than vice versa, when they conflict. Constraining employer discretion is, as we have seen, the sine qua non of the labor movement. Unless their discretion is cabined, employers will continue to be able to treat their employees arbitrarily, thus preventing labor from realizing its goals of augmenting employees' wages and benefits, improving their working conditions, and enhancing their job security. Labor, in other words, cannot achieve any of its policy objectives unless it manages to significantly limit employer discretion.

The ADA's accommodation requirement does not occupy a comparable status within the disability-rights movement. While the requirement might be a particularly direct means of achieving the movement's ambition of integrating people with disabilities into the workplace, there are other ways of realizing this ambition without augmenting employer discretion. Specifically, like Title VII, the ADA has a provision proscribing employment practices that have a disparate impact and that cannot be justified by business necessity.[148] Though this provision has been largely overshadowed by the accommodation requirement, it could potentially prove just as effective in increasing employment opportunities for people with disabilities. Indeed, some disability-law scholars have argued that it may be *more* effective in advancing the ADA's mission than the accommodation requirement, since it would modify jobs and workplace policies more extensively and thereby uproot entrenched norms that exclude people with disabilities.[149] And whereas the accommodation requirement enhances employer discretion, the disparate-impact theory constrains it, since that theory requires employers to make wholesale accommodations for all their employees rather than retail accommodations for individual employees.[150]

This is not to deny the considerable obstacles to revitalizing the ADA's disparate-impact theory. Most significant, in the Title VII context, the Supreme Court has recently cast doubt on both the theory itself and on class actions as the primary procedural mechanism for bringing disparate-impact challenges.[151] If these hurdles are insurmountable, then we will indeed have to confront the conflict between the ADA's accommodation requirement and labor's goal of limiting

148. *See supra* note 101.

149. *See* Stein & Waterstone, *supra* note 101, at 893-921.

150. *See supra* Subsection I.B.2.

151. *See infra* note 203 and accompanying text (discussing the Supreme Court's decision in *Ricci v. DeStefano*); *supra* note 88 (discussing the Court's decision in *Wal-Mart Stores, Inc. v. Dukes*). For a discussion of the other impediments to bringing successful ADA disparate-impact challenges, see Nathaniel Garrett, Note, Hendricks-Robinson *as Crowbar: Removing the Certification Bar to Disability-Based Employment-Discrimination Class Actions*, 58 STAN. L. REV. 859, 860 (2005).

employer discretion. But if they can be overcome in the ADA context, then a galvanized disparate-impact theory might promote the ADA's antidiscrimination norms at least as well as the accommodation requirement and without incurring the same costs to labor goals.

Also counting against *Barnett* is the decision's potential to relegate disabled individuals to precisely those workplaces that most offend traditional labor goals. Under *Barnett*, an ADA plaintiff is more likely to prevail on her accommodation claim insofar as she seeks an accommodation from a workplace policy that does not constrain employer discretion. The fewer discretion-constraining policies an employer has, the more accommodations she will have to make under the ADA. Although this might incentivize employers to institute more objective workplace policies, it also might have the perverse effect of consigning disabled employees to the employers who enjoy the most discretion. Because such employers have fewer discretion-constraining policies and thus fewer grounds for resisting proposed accommodations as unreasonable, they will, on average, end up having to accommodate more disabled employees than will employers who enjoy less discretion. But it is, of course, the unconstrained employers whom organized labor has traditionally regarded as the greater threat to employees' job security. To the extent that it still permits disabled individuals to be integrated into the workplace, *Barnett* might very well channel them into the worst kinds of workplaces from the perspective of labor goals.

Our assessment of *Barnett* will thus also depend on the extent to which we think labor goals are subject to distributional constraints—in particular, the extent to which we think it is permissible to promote labor goals for the majority of workers even at the expense of excluding some identifiable subset of workers (here, disabled ones) from those very same benefits. Although we cannot eliminate *Barnett*'s potential to channel disabled employees to those employers who enjoy more discretion, it is worth noting one feature of the ADA that might mitigate the more deleterious effects of such channeling. Once the ADA integrates a disabled employee into any workplace, even one where the employer enjoys considerable discretion, it does not leave the employee wholly subject to the employer's whim. Recall that the statute forbids employers to "discriminate against a qualified individual on the basis of disability."[152] And it defines "discrimination" to include not just failing to make a reasonable accommodation,[153] but also, following Title VII, "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of [her] disability."[154] By imposing some restrictions on the manner in which employers may treat their disabled employees, the ADA's ban on disability-based disparate treatment protects disabled employees from at least

152. 42 U.S.C. § 12112(a) (2006 & Supp. II 2009).

153. *Id.* § 12112(b)(5)(A).

154. *Id.* § 12112(b)(1).

some particularly egregious forms of arbitrary treatment—even in workplaces where the employers otherwise have nearly unfettered discretion.[155]

Nevertheless, the ADA cannot completely insulate disabled employees from all the hazards of at-will employment simply by proscribing disparate treatment because of disability. Thus, *Barnett* might end up exposing disabled employees to more of those hazards than they would otherwise face were the ADA's accommodation requirement more frequently permitted to trump discretion-constraining workplace policies. While there are good reasons to think that this is a cost worth paying for the sake of safeguarding and promoting discretion-constraining policies, it remains a cost nonetheless—a cost proponents of labor goals must forthrightly acknowledge.

III. Reassignment and Employer Discretion

The previous two Parts developed a framework for thinking about the relationship between labor goals and antidiscrimination norms. Part I identified one of the labor movement's primary goals—limiting employer discretion to prevent arbitrary treatment—and demonstrated the ways in which Title VII broadly promotes that goal. Part II then explained how the ADA tends to have the opposite effect, requiring employers to exercise discretion in implementing ad hoc, case-by-case accommodations. To illustrate the doctrinal relevance of this framework, this Part applies it to an issue that continues to divide the federal courts of appeals: whether the ADA can ever require an employer to reassign a disabled employee to a position in violation of a competitive-assignment policy—that is, a policy of filling the position with the "most qualified" candidate.

This Part argues that reassignments that violate competitive-assignment policies can be "reasonable accommodations" within the meaning of the ADA, and that a *Barnett*-like presumption against such reassignments is inappropriate. *Barnett*'s rationale seems to warrant a presumption only against accommodations that undermine discretion-constraining employment policies in the vast majority of cases, such as accommodations to seniority systems. Unlike the typical seniority system, however, many competitive-assignment policies use vague, subjective criteria to identify the most qualified candidate, thereby *enhancing* employer discretion rather than constraining it. Accordingly, whereas *Barnett* requires a plaintiff to rebut the presumption that a seniority system limits employer discretion, in a case involving a competitive-assignment policy, a plaintiff should merely have to make an initial showing that the policy uses vague, subjective criteria to define merit. By making this showing, the plaintiff reveals the policy to be the kind that, at least on its face, does little to limit employer discretion and, consequently, stands little to lose from being subjected to the ADA's accommodation requirement. The burden should then shift to the employer to show that, despite its use of subjective criteria, the policy actually does constrain employer discre-

155. The same is true, of course, of employees who belong to groups that are protected under other employment-discrimination statutes, such as Title VII.

tion, such that departing from it would impose an "undue hardship" in the circumstances by, say, unsettling employees' legitimate expectations or prompting nondisabled employees to request additional accommodations.

Although this resolution of the reassignment controversy broadly accords with proposals made by a number of other scholars, and thus will often yield similar results in particular cases, it nevertheless differs in fundamental respects. Some scholars, for example, would also have courts distinguish more carefully among different kinds of competitive-assignment policies. But they leave the distinguishing solely to employers attempting to prove their undue-hardship defense, rather than employees attempting to show a proposed accommodation to be prima facie reasonable. They also suggest few bases of distinction beyond the degree to which an accommodation disrupts an employer's business operations.[156] Other scholars have proposed distinguishing between objective and subjective assignment criteria, but they either follow Justice O'Connor's concurrence in *Barnett* in deeming objective only those criteria that create legally enforceable rights[157] or focus exclusively on how the distinction might serve antidiscrimination norms rather than labor goals.[158] In contrast to these proposals, this Part situates the reassignment controversy in the broader conflict between labor's goal of limiting employer discretion and the ADA's commitment to individualized treatment, offering a more theoretically grounded analysis of competitive-assignment policies and their suitability for accommodations under the ADA.

A. *The Reassignment Controversy*

The courts of appeals that have confronted the reassignment controversy fundamentally disagree at the levels of both statutory text and policy. The textual disagreement centers on the provision of the ADA that identifies "reassignment to a vacant position" as one possible reasonable accommodation.[159] On one reading, espoused by the Eighth Circuit (and, until recently, the Seventh Circuit), this provision would require employers merely to *consider* the application of a disabled employee seeking reassignment to a particular position as a reasonable accommodation on an equal, nondiscriminatory basis with the applications of nondisabled employees.[160] The reassignment provision, on this view, instructs

156. *See, e.g.*, Cheryl L. Anderson, *"Neutral" Employer Policies and the ADA: The Implications of* US Airways, Inc. v. Barnett *Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 37-43 (2002).

157. *See* Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After* U.S. Airways, Inc. v. Barnett, 45 ARIZ. L. REV. 931, 979-83 (2003).

158. *See* Hickox, *supra* note 147, at 244-47.

159. 42 U.S.C. § 12111(9)(B) (2006).

160. *See* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480 (8th Cir. 2007), *cert. dismissed*, 552 U.S. 1136 (2008); EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000), *overruled by* EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012).

employers that they must consider reassignment to a vacant position as a possible accommodation before firing a disabled employee—that they have not fully discharged their obligations under the ADA simply by attempting to modify the disabled employee's current position.[161] Contrary to this interpretation, the Tenth and D.C. Circuits have reasoned that, had Congress intended to require only equal consideration, it could have explicitly so provided; yet it deliberately chose the word "reassignment," and "the core word 'assign' implies some active effort on the part of the employer."[162] Moreover, because the ADA already contains another provision prohibiting employers from treating the disabled unequally,[163] interpreting the reassignment provision to require only equal consideration would render that provision superfluous.[164]

The primary disagreement among the circuits, however, is one of policy. The Tenth Circuit, for instance, maintains that reading the ADA's reassignment provision to require only equal consideration would render the provision an "empty" promise.[165] In contrast, the Seventh Circuit once reasoned that a more expansive reading would threaten to "convert a nondiscrimination statute into a mandatory preference statute."[166] No one, the Seventh Circuit acknowledged, disputes that "requiring employers to clear away obstacles to hiring the best applicant for a job, who might be a disabled person or a member of some other statutorily protected group," falls within the ADA's core mission of guaranteeing equal employment opportunities for people with disabilities.[167] But "requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group" seems to go well beyond that mission, amounting to "affirmative action with a vengeance."[168] The Eighth Circuit has embraced this argument, declaring that "the ADA is not an affirmative action statute" and, consequently, that it cannot require employers to prefer disabled employees over more qualified nondisabled employees.[169]

161. *Humiston-Keeling, Inc.*, 227 F.3d at 1027-28. This argument anticipated the one propounded by Justice Scalia in his *Barnett* dissent. *See* US Airways, Inc. v. Barnett, 535 U.S. 391, 414-15 (2002) (Scalia, J., dissenting).

162. Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc); *see* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164 (10th Cir. 1999) (en banc).

163. 42 U.S.C. § 12112(a) (2006 & Supp. II 2009).

164. *Smith*, 180 F.3d at 1164-65; *Aka*, 156 F.3d at 1304.

165. *Smith*, 180 F.3d at 1167.

166. *Humiston-Keeling, Inc.*, 227 F.3d at 1028; *see id.* ("[T]he [ADA] is not a mandatory preference act.").

167. *Id.*

168. *Id.* at 1028-29.

169. Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 484 (8th Cir. 2007), *cert. dismissed*, 552 U.S. 1136 (2008).

This "affirmative action" rhetoric loses some of its force once we recognize the various limits that the ADA and the EEOC's enforcement guidelines impose on the reassignment duty. As summarized by the Tenth Circuit, these limits include the following: an employer need not create a new position for a disabled employee seeking reassignment; the position to which the disabled employee wishes to be reassigned must be "vacant," which will not be the case if it is currently occupied by another employee or if another employee has a contractual or seniority-based right to it; the disabled employee must be minimally "qualified" for the position within the meaning of the ADA; reassignment is not required if it would constitute a promotion; and reassignment, like any other accommodation, must not impose an "undue hardship" on the operation of the employer's business.[170] Nevertheless, despite these limits, to adopt the Tenth and D.C. Circuits' position—to be willing in principle to require an employer to reassign a disabled employee to a position in violation of its competitive-assignment policy—would be to impose a significant obligation on employers.

B. Balancing Labor Goals and Antidiscrimination Norms in Reassignment Cases

Whatever the intrinsic merits of each position espoused by the courts of appeals, neither can withstand the Supreme Court's decision in *Barnett* unscathed. On the one hand, the Eighth Circuit professes (as the Seventh Circuit once professed) a desire to prevent the ADA from becoming a "mandatory preference statute" or a form of "affirmative action." And yet, despite the Eighth Circuit's protestation that the Seventh Circuit's prior position was "bolstered by" *Barnett*,[171] *Barnett* actually repudiated it. The Court declared that "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal"; consequently, "[t]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable.'"[172] The Seventh Circuit recently recognized as much, overruling its prior precedent in light of *Barnett* and adopting the Tenth and D.C. Circuits' position.[173]

On the other hand, the Tenth and D.C. Circuits' position seems to imply that reassignment in violation of a competitive-assignment policy will always be reasonable, at least in principle, regardless of how the policy actually identifies the "most qualified" candidate. In adopting that position, the Seventh Circuit has

170. *Smith*, 180 F.3d at 1170. For further exposition of these limits, *see id.* at 1170-78.

171. *Huber*, 486 F.3d at 484.

172. US Airways, Inc. v. Barnett, 535 U.S. 391, 397, 398 (2002).

173. *See* EEOC v. United Airlines, Inc., 693 F.3d 760, 764-65 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013).

drawn the same lesson.[174] *Barnett*'s rationale, however, demands closer scrutiny of such policies to determine whether they actually constrain employer discretion, such that employees form expectations of fair, predictable treatment.

Therefore, to assess the appropriateness of an accommodation that would require an employer to reassign a disabled employee in violation of the employer's competitive-assignment policy, courts should consider whether the policy uses objective or subjective criteria to identify the most qualified candidate. In particular, an ADA plaintiff seeking reassignment should bear the initial burden of showing that the employer's competitive-assignment policy uses subjective criteria, rendering it the kind of policy that, at least on its face, affords the employer significant discretion and consequently engenders few expectations among employees of fair, predictable treatment. This would mean that the accommodation would be reasonable "in the run of cases."

At that point, the burden should shift to the employer to show that, despite using subjective criteria, the policy nonetheless cabins employer discretion and that the proposed reassignment would consequently impose an "undue hardship" on its business operations in the particular circumstances.[175] Although the undue-hardship defense has traditionally been assumed to contemplate only an accommodation's financial costs and logistical hurdles, employers should be allowed to show that the accommodation will augment their discretion as well; indeed, from a labor-goals perspective, they should be encouraged to do so. To make such a showing, an employer might argue that the accommodation will unsettle employees' legitimate expectations or that it will prompt nondisabled employees to request additional accommodations. Both of these consequences would further erode discretion-constraining policies and thus enhance employers' ability to treat their employees arbitrarily. By allowing employers to assert such considerations as a defense to proposed accommodations, we can reinforce the incentives *Barnett* creates for employers to institute and follow objective workplace policies.

At neither step of the foregoing analysis should courts equate "objective" selection criteria strictly with legally binding ones.[176] Even if a selection policy is not legally enforceable, it can still be objective in the sense that it significantly constrains employer discretion—a fact *Barnett* recognized in the context of seniority systems.[177] So restricting the definition of "objective" criteria would be especially

174. *See id.* at 764, 765 n.3.

175. *Cf. Barnett*, 535 U.S. at 401-02 (endorsing a burden-shifting framework whereby the plaintiff first shows that the requested accommodation seems reasonable "on its face" and the employer then shows that the accommodation would impose an "undue hardship" in the circumstances).

176. *Contra* Befort, *supra* note 157, at 979-83 (deeming "objective" only those selection policies that create legally enforceable rights).

177. *Barnett*, 535 U.S. at 394.

unfortunate given the inexorable decline in the number of unionized workplaces,[178] which tend to have the most legally enforceable policies, in the form of collective-bargaining agreements. If we want to promote the labor goal of curbing arbitrary treatment for all employees, both unionized and nonunionized (and *Barnett* suggests we should), then we must attend to the details of employers' selection procedures, without relying on overbroad proxies.

To be sure, once we move beyond the notion of legal enforceability, the distinction between objective and subjective selection criteria becomes vague. At one extreme, an employer might use numeric criteria, such as the number of words an employee can type per minute, or a score on a professionally developed test—measures of merit that leave the employer with almost no discretion and that should generally not be subverted by the discretionary accommodation decision required by the ADA. At the other extreme, an employer might specify no criteria at all, trusting the assignment decision to a manager's "gut feeling" about the candidates. Because such a policy already leaves the employer with nearly unfettered discretion, subjecting the employer to the ADA's accommodation requirement will neither enhance the employer's discretion further nor frustrate employees' expectations of fair treatment.

Between these two extremes lies a vast range of competitive-assignment policies, including those that specify rather rigorous minimum qualifications for the position but then leave the ultimate assignment decision to the employer's discretion. For example, under the assignment policy at issue in the earlier Seventh Circuit decision considered in the previous Section, the employer's director of human resources would first screen the applicants for an accounting position, identifying the strongest ones based on fairly objective criteria, such as education, accounting experience, and math skills.[179] A supervisor would then interview the screened applicants, ultimately choosing one for the position based on her subjective sense of who was the best among them.[180] In cases involving such policies, the framework developed in this Article suggests that reassignment will often be a reasonable accommodation, since the accommodation decision will often be no more subjective than the employer's discretionary judgment regarding who among a group of minimally qualified candidates is the "most qualified."[181]

178. *See supra* note 22 and accompanying text.

179. *See* EEOC v. Humiston-Keeling, Inc., 54 F. Supp. 2d 798, 804-05 (N.D. Ill. 1999).

180. *See id.*

181. This assumes, of course, that the interview stage is an arbitrary process, simply because it employs subjective criteria. If an interview process employs more objective procedures, such as multiple interviewers and well-defined rubrics, then a disabled employee will typically not be able to meet her burden of showing the reasonableness of an accommodation that would disrupt or bypass that process. And even when an interview process uses subjective criteria, the employer will still be able to attempt to show as part of its undue-hardship defense that the process nevertheless limits its discretion in practice.

Given the significant variation among competitive-assignment policies, a presumption of reasonableness in favor of accommodations that violate such policies is inappropriate. But so too is a *Barnett*-style presumption of unreasonableness.[182] Whereas seniority systems almost always cabin employer discretion and therefore engender expectations among employees of fair and predictable treatment, a significant proportion of competitive-assignment policies leave employer discretion relatively unconstrained. Indeed, many such policies are designed precisely to *preserve* employer discretion.[183] Disabled employees should thus be permitted to demonstrate that their employers' competitive-assignment policies are the kinds of policies that, on their face, do little to curb decisionmaking discretion, and, consequently, that would not be significantly undermined by the ADA's accommodation requirement.

Though we might worry that courts lack the institutional capacity to scrutinize employers' selection policies, or that such an inquiry is unmanageable, this concern should not be dispositive. For one thing, as a doctrinal matter, *Barnett*'s holding and rationale require a more nuanced approach to evaluating the discretion-constraining effects of employment policies (and thus the "reasonableness" of violating them in the name of the ADA's accommodation requirement). Moreover, asking courts to examine employers' selection policies and to distinguish between objective and subjective criteria is not asking them to engage in an enterprise that is completely alien to them. As we have seen,[184] in the context of disparate-impact challenges under Title VII, courts regularly distinguish among numeric, nonnumeric (but still objective), and subjective selection criteria, and the EEOC has developed elaborate guidelines for evaluating each kind. The same is true for challenges to private employers' affirmative-action programs.[185] To implement this Article's proposed solution to the reassignment controversy, courts need not perform any inquiries that they are not already performing in other employment-discrimination cases.

Indeed, courts also regularly perform such inquiries in assessing the reasonableness of accommodations under the ADA itself. For example, to determine whether it is reasonable to require an employer to modify its attendance policy in order to accommodate a disabled employee, courts focus on the degree to which the policy constrains the employer's discretion in setting its employees'

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182. *But see* Anderson, *supra* note 156, at 34-37 (observing that, when read broadly, *Barnett* creates a presumption that *any* accommodation that would violate a neutral employer policy is presumptively unreasonable).

183. *See* Befort, *supra* note 157, at 981 (noting that such policies often "vest subjective decision-making authority in the employer"); *see also* ELKOURI & ELKOURI, *supra* note 49, at 845 (noting that employers include "sufficient ability" clauses in collective-bargaining agreements in order to preserve discretion to select those applicants they deem most qualified).

184. *See supra* Subsection I.B.2.

185. *See* Jessica Bulman-Pozen, Note, Grutter *at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1424-33 (2006).

work schedules. Thus, when an attendance policy requires regular attendance or full-time work or sets a particular start time, courts usually deem compliance with the policy to be an "essential job function" and hold either that the disabled employee is not "qualified" for the position[186] or that altering the schedule would not be a "reasonable" accommodation.[187] When, by contrast, the attendance policy permits the employer to set flexible work schedules, courts will usually hold a modified work schedule to be a reasonable accommodation.[188] Assessing competitive-assignment policies according to the framework outlined in this Section would little complicate the already fact-intensive inquiries that courts must undertake in assessing the reasonableness of other proposed accommodations.[189]

Finally, this Section's argument might seem to imply that *any* policy that significantly limits employer discretion should trump the ADA's accommodation requirement, that employers should *never* be required to violate neutral, discretion-constraining policies in order to accommodate a disabled employee. Such an implication would indeed be unacceptable, for some of the most typical, unobjectionable accommodations under the ADA require employers to exercise considerable discretion.[190] But as we have seen, not all policies that incidentally constrain employer discretion are meant to advance the traditional labor goal of curbing arbitrary treatment in the workplace. On the contrary, rather than attempting to eliminate all employer discretion, organized labor has focused on certain core areas of employer decisionmaking, such as hiring and firing employees, making job assignments and promotions, and setting wages; hence the NLRA's treatment of these areas as "mandatory" subjects of collective bargaining.[191] It is in these areas that organized labor has perceived the greatest threat of arbitrary treatment and has sought most to cabin employer discretion.

Organized labor's focus on these core areas of employer decisionmaking should inform the application of the ADA's accommodation requirement. In particular, if a requested accommodation implicates a policy governing one of

186. *See, e.g.*, Schierhoff v. Glaxosmithkline Consumer Healthcare, L.P., 444 F.3d 961, 966 (8th Cir. 2006) (equating an employee's non-attendance with an "inability to perform [the] job" for purposes of the Missouri Human Rights Act, a state statute that parallels many of the ADA's requirements).

187. *See, e.g.*, Mulloy v. Acushnet Co., 460 F.3d 141, 153 (1st Cir. 2006).

188. *See, e.g.*, EEOC v. Convergys Mgmt. Grp., Inc., 491 F.3d 790, 796-97 (8th Cir. 2007).

189. State courts employ a similar kind of analysis to determine whether the provisions of employee handbooks constitute binding contracts. *See, e.g.*, Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 286 (Iowa 1995) (outlining a "highly fact-intensive inquiry").

190. *Cf.* Anderson, *supra* note 156, at 39 (noting that the vast majority of accommodations require employers to depart from "neutral" workplace policies); Long, *supra* note 137, at 896 (same).

191. *See supra* note 53 and accompanying text.

these areas—an area that, in a unionized workplace,[192] would be a mandatory subject of collective bargaining—the ADA's accommodation requirement should trump the policy (subject to the "undue-hardship" defense) only if the employer already exercises significant discretion in that area. Outside the core areas of employer decisionmaking, by contrast, the ADA's accommodation requirement should more frequently trump neutral employment policies (again, subject to the "undue-hardship" defense), regardless of the degree to which the policies constrain employers' discretion. Enhancing employer discretion in these non-core areas poses little risk of facilitating the kind of arbitrary treatment permitted by the at-will rule.[193]

192. It bears emphasis that this Article's proposed solution to the reassignment controversy is in no way limited to unionized workplaces governed by collective-bargaining agreements. Once again, an ever-shrinking share of the workforce belongs to unions. *See supra* note 22 and accompanying text. Accordingly, a workplace policy counts as "objective" so long as it constrains employer discretion, regardless of whether it is enshrined in a collective-bargaining agreement. And such a policy falls within a "core area" of labor's concern so long as it *would be* a mandatory subject of collective bargaining were it instituted in a unionized workplace, even if it is in fact instituted in a nonunionized workplace. Putting these two strands together, a workplace policy should generally trump the ADA's accommodation requirement if and only if it (1) is objective and (2) is the kind of policy that would be a mandatory subject of collective bargaining in a unionized workplace, irrespective of the type of workplace in which it is actually instituted.

193. One implication of this Article's proposed resolution of the reassignment controversy is that it renders the ADA's accommodation requirement vulnerable to changing employment practices. This is true because, as employers adopt more objective workplace policies, fewer accommodations will be reasonable. Consider the fact that many employers have begun to "objectify" previously subjective employment practices. For example, whereas employers have traditionally relied on their own subjective judgments regarding applicants' personalities, many now administer professionally developed personality tests, which purport to measure personality and character traits, such as honesty and integrity, based on applicants' answers to objective questions. *See, e.g.*, Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77 (1993), *superseded*, 862 P.2d 148 (Cal. 1993) (discussing a privacy challenge to a personality test used by Target Stores). From the perspective of labor goals, this development is potentially salutary; because personality tests replace employers' intuitive impressions of applicants' personalities with a more objective assessment, they limit employer discretion (to the extent, of course, that employers actually honor the results). But, in so doing, they mitigate one potential source of arbitrary treatment and thus, per this Article's framework, largely insulate one significant employment practice from the ADA's accommodation requirement.

Conclusion

The ADA reassignment controversy is not the only issue in employment-discrimination law that pits labor goals against antidiscrimination norms. Some of Title VII's less central aspects also provoke the conflict, even if core cases of disparate treatment and disparate impact largely do not. Take the Pregnancy Discrimination Act of 1978, which amended Title VII to prohibit discrimination because of pregnancy.[194] Does this prohibition require employers to provide "light duty" to their pregnant employees?[195] To accommodate mothers currently breastfeeding their infants?[196] To allow mothers to work part time?[197] Beyond the PDA, numerous employment-law scholars have advocated the adoption of more flexible workplace policies so that all employees—but particularly women—might enjoy a greater degree of work/life balance.[198] Are such proposals advisable? All of these debates turn partly on the desirability of having employers craft individualized exemptions to generally applicable, discretion-constraining workplace

194. 42 U.S.C. § 2000e(k) (2006) (providing that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work").

195. *Compare* Urbano v. Cont'l Airlines, Inc., 138 F.3d 204 (5th Cir. 1998) (holding that an employer did not have to provide pregnant employees light duty if it did not provide that same accommodation to other employees injured off the job), *with* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1199-2000 (10th Cir. 2000) (holding the opposite).

196. *Compare* Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491-92 (D. Colo. 1997) (holding that an employer need not permit a breastfeeding employee to work part time), *with* Fortier v. U.S. Steel Grp., No. 01-CV-2029, 2002 WL 1797796, at *3 (W.D. Pa. June 4, 2002) (holding that an employee had stated a claim under the PDA by alleging that she was subject to an adverse employment action after she expressed an intention to breastfeed).

197. *See, e.g.*, Gleklen v. Democratic Cong. Campaign Comm., 199 F.3d 1365 (D.C. Cir. 2000) (holding that an employer did not violate the PDA by firing an employee who asked to work part-time in order to care for her child, when the employer put forward reasonable and nondiscriminatory reasons for requiring the employee to work full time).

198. *See, e.g.*, Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081 (2010); Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834 (2002); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000); Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 ME. L. REV. 261 (2003). *But see* Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219 (2011) (arguing that universal protections designed to promote work/life balance might undermine antidiscrimination protections for disadvantaged social groups, particularly women).

policies—a facet of the debates that employment-law scholars have largely overlooked and that a focus on labor goals helps to illuminate.

More generally, a number of scholars have touted the ADA's model of individualized treatment and advocated extending it to other areas of employment-discrimination law, including Title VII.[199] Other scholars have argued that all work-capable individuals who require a reasonable accommodation to be able to work should be eligible for the ADA's accommodation requirement.[200] In light of this Article's analysis of the ADA's accommodation requirement, we have good reason to question such proposals. For we have now seen that implementing the ADA's vision of individualized treatment carries a considerable cost: augmenting employers' decisionmaking discretion and thus increasing the risk of arbitrary treatment in the workplace. Faced with this prospect, nondisabled employees are likely to resent attempts by their employers to accord individualized treatment to their disabled coworkers, thus undermining employee solidarity. Nonarbitrary treatment and employee solidarity are the benefits that the labor movement has traditionally sought to secure for workers, yet these are also the very benefits that individualized treatment jeopardizes. If the ADA model entails such costs for labor goals, then we should be reluctant to extend that model to other areas of employment-discrimination law. At the very least, we should be cognizant of these costs before trading the categories of disparate treatment and disparate impact for a retail regime of individualized accommodations.

To be clear, this Article should not be taken as a categorical condemnation of the vision of individualized treatment underlying the ADA's accommodation requirement. This vision remains an attractive one in many respects, and it can be implemented to a considerable degree without undermining labor goals. For one thing, we have seen that according employees individualized treatment does not create a significant risk of arbitrariness when the treatment departs from certain kinds of generally applicable workplace policies. This is particularly true for policies that, in a unionized workplace, would not be mandatory subjects of collective bargaining, which organized labor has regarded as less essential to constraining employer discretion.[201]

In addition, individualized treatment can be implemented in more or less objective ways, and the more objective the means of implementation, the less discretion the employer must exercise. For example, rather than attempt to determine whether a particular individual meets a generalized statutory definition

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199. *See, e.g.*, Diller, *supra* note 7, at 47 ("If differential and individualized treatment is necessary for the establishment of equal opportunity for people with disabilities, it may also be necessary for other groups, including women and minorities."); Karlan & Rutherglen, *supra* note 14, at 40-41 ("The fact that traditional prohibitions on discrimination and innovative forms of affirmative action can coexist under the ADA suggests that the same may be true for employment discrimination law more generally.").

200. *See, e.g.*, Stein et al., *supra* note 104.

201. *See supra* notes 53, 193 and accompanying text.

of "disability," the Social Security Administration employs a detailed matrix-like "grid" to assess individuals' ability to perform various jobs and thus their eligibility for disability insurance.[202] We could imagine a similarly rigid regime for determining whether a person is disabled for purposes of the ADA's accommodation requirement, which might limit the discretion employers must exercise to implement the requirement and thus any attendant risk of arbitrary treatment. Of course, rendering individualized treatment more objective in this manner also makes the treatment less individualized; a "grid" will be under- and over-inclusive in many respects, thus forgoing some of the benefits of a more tailored approach. But by recognizing that individualized treatment is a matter of degree, and that we can realize many of the benefits of such treatment without having to afford employers broad discretion to implement it, we might strike a better balance between antidiscrimination norms and labor goals.

Notwithstanding these qualifications, it remains the case that the ADA's vision of individualized treatment fundamentally conflicts with organized labor's goal of cabining employer discretion. A commitment to individualized treatment arguably lies at the heart of all of antidiscrimination law. But whereas disparate-treatment antidiscrimination norms seek to realize the promise of individualized treatment indirectly, by excluding as bases of decision those characteristics that are most likely to call attention to a person's membership in some socially disfavored group, the ADA's accommodation requirement takes that promise more literally, directly mandating individualized treatment.

Between these two strategies lies the theory of disparate impact, which effectively imposes an accommodation requirement on employers but implements the requirement at the level of groups rather than individuals. While this aggregate focus precludes the precise tailoring that the ADA's accommodation requirement allows, it also disfavors ad hoc exceptions to generally applicable policies and thus avoids enhancing employer discretion. Thus, amid trenchant criticism of the disparate-impact theory—from judges, as well as scholars at both ends of the ideological spectrum[203]—this Article provides an additional reason to retain it. As we confront new forms of discrimination and begin to develop new antidiscrimination norms in response, the disparate-impact model might offer a promising alternative to the ADA's model of individualized treatment as a way of accommodating difference in the workplace without subverting labor goals.

202. *See* 20 C.F.R. §§ 404.1503-.1511 & app. 2 (2012). For more on the contrast between disability determinations under the ADA and those under the Social Security Act, see Frank S. Ravitch, *Balancing Fundamental Disability Policies: The Relationship Between the Americans with Disabilities Act and Social Security Disability*, 1 GEO. J. ON FIGHTING POVERTY 240, 248 (1994).

203. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 594-96 (2009) (Scalia, J., concurring); Larry Alexander, *Disparate Impact: Fairness or Efficiency?*, 50 SAN DIEGO L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139753; Selmi, *supra* note 88.