Workplace Information Forcing

Charlotte S. Alexander[1*]

A variety of statutory, regulatory, and court-made rules force or strongly incentivize employers to provide information about workers' labor and employment rights in the form of break room posters, worksite notices, and employee policies and procedures. This "workplace information forcing" is designed to increase workers' legal knowledge and in turn to enable them to become enforcers of their own workplace rights. However, drafting the employer into the role of rights-informer and designating the workplace as the site of information transmission raises a number of economic, constitutional, and policy questions. Despite these questions, this Article concludes that workplace information forcing should be preserved, and even expanded, as one necessary component of a robust workplace rights enforcement regime.

Inequality, Organization, and the Separation of Powers

Kate Andrias

The United States has experienced a dramatic rise in economic inequality over the past generation. Yet constitutional theorists, particularly those who think about the structure of government, have all but ignored the issue. This is a mistake, for our political economy has a significant impact on inter- and intra-branch competition in ways not accounted for by existing law or theory.

Using workplace law and policy as a primary example, this Article demonstrates that rising inequality and the pervasive influence of organized wealthy interests limit political contestation within and between the political branches. On key issues, power is concentrated in few hands and the multiple heads of authority in government and in politics do not perform the continuous checking function anticipated by the Madisonian framework—or by scholars who focus on partisanship and internal bureaucratic checks. Understanding the relationship between political economy and the separation of powers enables us to better account for contemporary executive and legislative power. It also leads constitutional law and government reform in different directions than typically urged: Among other things, institutional design reforms ought focus more on facilitating countervailing organization, through labor law and other methods, and less on insulating government actors.

Modifying Employment Contracts

Rachel Arnow-Richman

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Long-term employment relationships are constantly in flux: worker responsibilities, terms of compensation, job titles, company policies, employer-provided benefits, and a variety of other conditions of work are routinely altered over the course of what is often a multi-year, highly dynamic professional and personal relationship. In cases involving at-will employment – the vast majority of such relationships -- the economic realities and power dynamics are such that changes in terms are likely to be introduced unilaterally by the employer for purposing of advancing its own business interests. The worker is presented with a set of non-negotiable terms, often less favorable than the ones previously governing the parties, and asked to accept on the implicit or explicit threat of termination.

For these reasons, the law and policy surrounding the modification of indefinite employment contracts has important ramifications for the economic success of corporate actors and the livelihood and wellbeing of individual workers. Despite this, the common law has developed neither a coherent legal framework for analyzing the enforceability of modifications to employment terms nor a theoretical basis for understanding existing doctrine. Indeed, employment law currently does not conceive of modification as a distinct problem. Rather, courts respond contextually to recurring factual scenarios – the imposition of additional employee obligations through a formal legal instrument (such as a non-compete or arbitration agreement) and the rescission of previously promulgated employee benefits (through the revision of a company policy or personnel handbook). Without explicitly recognizing the relationship between these two scenarios, courts' resolution of controversies surrounding enforcement of new employment terms reveals at least four judicial approaches to the common issue: what the article terms (1) the "formal modification" approach, (2) the "pure unilateral" approach, (3) the "unilateral modification plus performance" approach, and the (4) "unilateral modification plus notice" approach. Courts' explanations for their espousal of a particular approach tends to be grounded in formalistic reasoning – either an appeal to the traditional rule that

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modifications require "new" consideration to be binding, or a retrograde application of unilateral contract doctrine under which the promisor is free to withdraw its "offer" at any time prior to complete performance.

This is surprising given the state of contract modification law outside the employment context. Contemporary modification doctrine has systematically moved away from the historical inquiry into the formalities of contract formation in favor of an approach grounded in voluntariness and good faith, culminating in the Uniform Commercial Code's explicit rejection of the common law's pre-existing legal duty rule and requirement of "new" consideration to support a modification. At the same time, a robust body of scholarship has theorized the nature of binding obligation in the context of highly "relational" or "incomplete" contracts. In the tradition of the author's prior work, this article draws on developed bodies of doctrine and scholarship in the "mainstream" contract law arena, which has focused largely on sophisticated business and commercial relationships, to offer a more coherent approach to employment contracts. In so doing, it demonstrates that existing contract law, properly understood and creatively applied, can produce doctrinally correct results that may ironically be more generous to workers than the aberrant, context-specific rules developed in employment law to address the special nature of workplace relationships.

Against Immutability

Jessica Clarke[2*]

It is often said that antidiscrimination law provides the most protection for characteristics thought immutable, like sex and race. The gay rights movement has succeeded in convincing many courts to expand the concept of immutability to include not just those traits an individual cannot change, but also those considered too important for anyone to be asked to change. Religion is a paradigmatic example. This Article critically examines this new concept of immutability, asking whether it is fundamentally different from the old, and how it might apply to characteristics on the borders of employment discrimination protection, such as obesity, pregnancy, and ex-offender status. It argues that the new immutability does not avoid the old version's troublesome judgments about which traits are morally blameworthy, that it introduces new problems by requiring troublesome judgments about which traits are important, and that it ultimately distracts from the disruption of biases, stereotypes, stigma, and subordination.

Workers' Compensation and a State's Right to be worse than Pirates or Prussian Chancellors

Michael Duff

When a fertilizer facility explosion rocked West, Texas in April 2013—a blast registering 2.1 on the Richter scale—few noticed that the company was a nonsubscriber to the Texas workers' compensation system. Although, miraculously, none of the plant's workers were killed in the blast it would have faced no increase in its workers' compensation premiums if they had been. Texas law authorized the plant to "go bare" despite its routine storage of ammonium nitrate on premises. Fifteen people were killed in the explosion, more than 160 were injured, and more than 150 buildings were damaged or destroyed. The plant carried a single liability insurance policy covering up to one million dollars in losses.

Recently Oklahoma modified its workers' compensation system. Employers in Oklahoma have the option to opt out of the "Administrative Workers' Compensation Act" and provide benefits under a private plan pursuant to the "Employee Injury Benefit Act." Disputes under the private opt-out plans are heard by a private "committee" appointed by the employer. Limited state administrative agency review is available but judicial review, as a practical matter, is not. Employees covered by such a plan are not permitted to bring a tort suit against their employer for workplace injuries.

Last month a state district court judge in Florida declared that state's workers' compensation system unconstitutional. He found that Florida's workers' compensation benefits had been reduced so dramatically since 2003 that they no longer represented a fair exchange for the tort rights that had been given up as part of the original workers' compensation *quid pro quo*.

This Article discusses workers' compensation in constitutional terms. As states seek to roll back workers' compensation benefits in a depressed economy, the Article explores to what degree they are restrained from doing so by their own constitutions and by the U.S. Constitution. Many states' constitutions have "open courts" provisions that have been interpreted as guaranteeing a "right to a remedy." But what remedies and for which rights? Although it is not clear, the right to a remedy for invasions of "personal security" has ancient roots descending to Magna Carta, Coke, and Blackstone. Indeed, Blackstone thought the right to personal security to be co-equal in status to those of personal liberty and property.

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Workers' compensation remedies as a *quid pro quo* for tort were first upheld by the U.S. Supreme Court in 1917 (in the midst of the *Lochner* era) against various due process challenges brought by both employers and employees. The Court upheld the emerging compensation system noting that what it was not encountering at that time was the annihilation of common law negligence remedies (in this case by New York) without substitution of a reasonable remedy. The Court has not since faced the question of workers' compensation adequacy and it is not clear what it would do with the issue under current due process doctrine. Nor is it clear how the Court would confront the problem of *de facto* elimination of the workers' compensation remedy without a simultaneous resurrection of the previously traded-off tort. I ask in essence whether a state could deprive its injured workers of all access to legal remedies for personal injury and argue for the existence of a fundamental right to a remedy for invasions of personal security.

Harris v. Quinn and the Contradictions of Compelled Speech: The Arguable Unconstitutionality of the DFR in Right to Work Regimes

Catherine Fisk

In Harris v. Quinn, the Supreme Court held that unionized home care workers have a First Amendment right to refuse to pay their fair share of the cost of services that the union is statutorily required to provide them. In other words, the Court held, nonunion workers have a First Amendment right to free ride on expenditures made by their union member co-workers and the union, enjoying the benefits of union representation but not the costs. The Court entirely overlooked that the constitutional right to free ride compels the union and its dues-paying members to expend money on behalf of nonmembers. Its ruling compels speech by the union and its members. By forcing unions to spend membership dues for nonmembers, the Court has allowed the First Amendment rights of dissenters to trump the First Amendment rights of unions and union members.

This Article proposes a few interrelated arguments. First, unions and union members clearly possess First Amendment rights as unions and union members, which is to say, rights that exist independently of the NLRA and RLA (and state statutes). We and others have previously argued that the Court's failure to recognize these rights in its agency fee cases has created law that is out of step with the Court's campaign finance and freedom of association jurisprudence. Second, to the extent that the Court continues to interpret section 14(b) as enabling states to prohibit unions from collecting agency fees, the duty of fair representation in the right-to-work context operates as an unconstitutional condition imposed upon unions in violation of their and their members' First Amendment rights. Third, recognizing the First Amendment rights of unions and union members would radically displace the Court's usual analysis of the constitutionality of agency fee agreements. Recognizing that union representation requires balancing competing First Amendment interests, agency fee or fair share provisions would emerge as among the most constitutionally sound solutions insofar as these provision best respect simultaneous interests of dissenters, unions, and union members.

The structure of our argument is as follows. First, in Part II, we argue that the Court in Harris (and in the dues-objector cases that preceded it) was wrong to conclude that paying fees to a union that represents them is compelled speech. Payment of money to a person or organization is exchange for services is not speech. In Part III, we explain that if the payment of fees to a union is compelled speech, then it is equally compelled speech to require, as the Court's jurisprudence does, a union to expend money to negotiate and administer a contract on behalf of free-riding nonpayers. The Court has recognized that unions have First Amendment rights, and to the extent that expenditure of money is First Amendment activity, payment of money to secure working conditions burdens the First Amendment rights of the union exactly to the same extent it burdens the First Amendment rights of employees.

In Part IV we consider the government's interests in this regulatory regime and the implications of the Court's logic. First we examine the government's interest in regulating the workplace through law making a union chosen by a majority the exclusive bargaining representative of both members and nonmembers, and the duty of fair representation that requires unions to provide services both to its members and to free riders. Second, we address the question whether an implication of the Court's ruling in Harris is that any statute making a union the exclusive representative of workers -- including the National Labor Relations Act, the Railway Labor Act, and virtually every state and local labor law -- is unconstitutional. We show that exclusivity and majority rule are constitutional but that the DFR is not. Third, we show that the way out of the doctrinal and logical morass the Court has created in Harris is to overrule Abood (as the majority clearly wishes), but also all the fee-payer cases that preceded and followed it. When the majority chooses union representation, employees must pay to support it and nobody's First Amendment rights are violated when the union negotiates and administers a collective bargaining agreement, or engages in any other activity.

This presentation will serve as a final update to my work-in-progress presentation during the 2012 Colloquium. These presentations center on my article, **Comparative Unjust Dismissal Law: Reassessing American Exceptionalism (with Sam Estreicher).**

Jeff Hirsch

The article addresses the arguments by both proponents and opponents of at-will employment that the U.S. system is unique among developed countries. Although other countries' cause regimes differ significantly from the U.S. on paper, we examine whether those differences in normative law also reflect differences in employees' protection against wrongful termination in reality. We find that, even on paper, the cause protection of the surveyed countries is far less robust than typically described. Moreover, by using information from foreign employment law practitioners and available data—particularly claimants' success rates and average remedies—we conclude that in countries with cause protection, challenges to dismissal can be difficult to pursue and generally result in modest remedies by U.S. standards. This suggests that the U.S., with its at-will default and broader remedies, is actually part of continuum of employment laws found in advanced countries that is narrower than most commenters acknowledge.

Employment Discrimination in the Practice of Law: A Question of Ethics?

Alex B. Long

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In recent years, the ABA and local bar leaders have taken numerous steps to raise awareness about the need to increase diversity within the legal profession. In order to increase diversity, however, the legal profession must also seek to eliminate unlawful employment discrimination. In most workplaces, an employer's main concern with respect to discrimination is the possibility of civil suit. However, in a surprising number of states, rules of professional conduct either explicitly prohibit employment discrimination on the part of lawyers or could be easily read to do so. This paper will examine the extent to which it is desirable to use rules of professional conduct for lawyers to supplement existing statutory employment discrimination law.

What Makes a Law Student Succeed or Fail? A Longitudinal Study Correlating Law Student Applicant Data and Law School Outcomes

Alexia Brunet Marks and Scott A. Moss

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Despite the rise of "big data" empiricism, law admissions remain highly impressionistic, basing on anecdotes (*e.g.*, admitting those like recent star students, or fewer like recent underachievers), idiosyncratic preferences (*e.g.*, certain majors or jobs), or primarily LSAT score. The few studies of law student success typically are univariate, controlling for no other variables in finding predictive value in the LSAT or certain personal qualities. We aim to fill this gap with a two-school, 1400-student, 2005-2011 multivariate longitudinal study. After coding data in paper files, and merging admissions, registrar, and career databases, our multivariate regressions yield predictions of law grades ("LGPA") from numerous independent variables: LSAT; college grades ("UGPA"), quality, and major; having a rising UGPA; job type and duration; leadership activities; other graduate degrees; disciplinary and criminal records; and variable interactions (*e.g.*, having high LSAT but low UGPA or vice-versa; or testing rising UGPA for only new college graduates).

Our findings include the following. First, many variables help predict LGPA: (1) UGPA predicts as powerfully as LSAT, controlling for college quality and major – and among "splitters," high-UGPA/low-LSAT is equal to the more coveted high-LSAT/low-UGPA; (2) majoring in STEM (science, technology, engineering, math) or EAF (economics, finance, accounting) is akin to three extra LSAT points; (3) work experience, especially in teaching, strongly predicts success; (4) criminal/disciplinary record predicts negatively, akin to five fewer LSAT points. Second, many variables had nonlinear effects: college quality has *decreasing* returns but UGPA has *increasing* returns, and a *rising* UGPA is an additional positive; and work experience of 4-9 years is the "sweet spot," with 1-3 mildly positive, and over 10 not significant. Third, some variables predict *high LGPA variance*, meaning such candidates are a heterogeneous mix of high and low performers requiring close scrutiny – most notably, those with longer work experience and, among "splitters," those with high-UGPA/low-LSAT rather than the reverse. Third, many variables commonly seen as a positive had little or no effect, *e.g.*: public interest work; other graduate degrees; reading-intensive majors (*e.g.*, political science or liberal arts); leadership; and miltary background.

These findings can help schools discern which numerically similar applicants are better bets to outperform traditional predictors (*e.g.*, LSAT). Key caveats, however, are that some applicants projected to have middling grades retain appealing potential for leadership or lawyering success, and that no projections capture various qualities not reducible to data, so many will over- or under-perform even the best predictions.

People Analytics: Big Data Meets HR

Marcia McCormick (with Miriam Cherry, Matt Bodie, and Jintong Tang)

Recently, technology companies such as Google and IBM have started experimenting with "people analytics," a new data-driven approach to human resources management. People analytics is just one example of the new phenomenon of "big data," in which analyses of huge sets of quantitative information are used to guide a variety of different types of decisions. Applying big data to workplace situations could lead to more effective work outcomes, as in the *Moneyball* example, where the Oakland A's baseball franchise used statistics to assemble a winning team on a shoestring budget. People analytics is the name given to this new approach to personnel management on a wider scale.

Although people analytics is a nascent field, its implementation could help employers make more informed HR decisions. Data may help firms determine which candidates to hire, how to help workers improve job performance, and how to predict when an employee might quit or should be fired. In addition, people analytics could provide insights on more quotidian issues like employee seating and better use of break times. The data that drives these decisions is currently collected through the use of innovative computer games, monitoring employee electronic communications and activities, and new devices, such as ID badges that record worker locations and conversations.

While people analytics has great potential, no one has yet analyzed the employment law or business ethics implications of these new technologies or practices. To date, most of the discussion centers on the uses for the data, not on its effects or interactions with the law of the workplace. Implications worthy of consideration include the intersection of big data with workplace privacy norms and laws. In addition, the impact on equal-opportunity norms is an important one. While more information should lead to more merit-based decisions, disparate impact or unconscious bias could still operate to harm traditionally marginalized workers. Finally, the use of computer games and other technology to gather information raises intriguing questions, blurring the lines between work and leisure.

This long-term group project is to analyze people analytics and its potential while thoroughly discussing the legal and ethical issues from a balanced perspective. Our research plan is to begin to map out the legal and ethical implications of people analytics on HR practices and to begin to establish the best practices in its use. We plan to publish a series of interdisciplinary articles, authored jointly, in order to explore this new and exciting area that incorporates law, business, ethics, economics, psychology, and sociology. The initial series of articles will work to stake out our views in this new area and to pave the way for follow-on grants and empirical research.

We Are All Contingent: Institutionalizing Vulnerability in the U.S. Workforce

Ann C. McGinley[3*]

Although the rate of unemployment is declining in the United States, millions of people who need work have become discouraged and have stopped looking for jobs. In fact, there has been a sharp decrease in the number and quality of jobs available to U.S. workers. U.S. companies must compete in the global marketplace, and because of the competition, many companies have moved manufacturing processes overseas. Even the manufacturing jobs that continue to exist in the U.S., such as the meat-processing plants in the Midwest, pay much less than they did so previously. Instead, they have increasingly broken the unions and hired immigrant, low-paid, non-union workers.

What are the causes? One, of course, is the Supreme Court's refusal to interpret the law protecting collective bargaining and the concomitant decline of union membership. Another is that U.S. companies must compete in the global marketplace, competition that has lead to the shifting of manufacturing plants to countries where there are few protections for workers. Americans continue to buy the products produced in these "sweatshops" because they are cheap, and, given Americans' lower wages and difficulty in finding well-paid work, it would be unrealistic to expect them to purchase more expensive goods in the future.

When decades ago the decline of U.S. manufacturing was predicted, economists believed that the burgeoning service economy would provide the number and quality of jobs necessary to continue to employ Americans and to permit families to live middle-class lifestyles. And, while it is true that some high paying service jobs exist as a result of union density in particular markets like the entertainment and hospitality industry in Las Vegas, most service employees across the U.S. who should have more leverage with employers than their manufacturing counterparts because their services often cannot be outsourced to sweatshops overseas, are falling behind. Employers in places like fast food restaurants pay low wages while at the same time limiting employees' schedules, hiring them to work part time, but giving them little or no notice about their schedules so that it is nearly impossible to work two part-time jobs. The irony is that while many politicians eschew raising the minimum wage for low-level workers, the government

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actually ends up subsidizing these low-wage workers through food stamps and other programs. Such government programs are indirect subsidies of companies that pay inadequate wages. Thus, highly paid upper management and investors in these companies actually realize greater salaries and returns because of the indirect subsidies; they pocket taxpayer money at the expense of workers who can barely survive.

These workers who are often not protected by U.S. laws are contingent. In fact, due to the ineffective labor and wage laws and global competition, and our tenuous connection with our jobs, nearly all of us are contingent workers. I plan to explore this concept in this paper. I will discuss how we should define "contingent" workers, the problems caused by the global marketplace for contingent workers, and potential policies that, without harming our productivity as a nation, would support U.S. workers so that all workers – contingent or otherwise – have labor protections necessary for creating

Compelling Employers to Tell the Truth about Workplace Law

Helen Norton

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Antidiscrimination and other employment laws have long required employers to post notice of workers' legal rights in the workplace. Recently, however, such efforts have come under increasing constitutional and political attack, as employers argue -- with some success -- that the government should not compel them to make such workplace disclosures. This paper explores the constitutional and policy foundations for such notice requirements, and places them in the broader context of disclosure law, whereby under certain circumstances the Supreme Court has interpreted the First Amendment to permit government to compel parties -- including, but by no means limited to, commercial entities -- to make truthful factual disclosures to empower listener decisonmaking or achieve other important government objectives.

Improvisational Unionism

Michael Oswalt

Though the steps used to win collective bargaining rights in the private sector have been touched by some procedural innovations over the years, the essential script that unions have followed to round up and mobilize workers in the first place has, more or less, remained the same. But in 2012 it appeared that someone had edited that script. Campaigns at Walmart and in fast food burst onto the scene with national strikes, a tactic that had seemingly been left for dead. Some percentage of the strikers had had contact with the campaign virtually, with union organizers not at all, and learned strike techniques on-line, through an off-the-rack strike kit. Perhaps most surprising were the very goals—or lack of a specific goal—connected to the actions themselves. UFCW expressly disclaimed an interest in unionizing Walmart workers, and SEIU admitted there was no clear plan to turn fast food workers into union members. A basic question arises: what, exactly, is going on? This Article argues that the Walmart and fast food campaigns represent a significant turn in U.S. worker organizing, but what looks like throwing activism at the wall is actually improvisation, a concept reflected in a burgeoning field of organization studies research. The logic of this new "improvisational unionism" in modern workplace culture is considered, and particular focus is given to the aspects of labor law most likely to endanger it: intermittent strike doctrine and the rules against organizational and recognitional picketing.

The Stigmatic Harm of Special Treatment in the Workplace After the ADAAA

Nicole Buonocore Porter[4*]

This paper will explore a unique source of stigma suffered by individuals with disabilities in the workplace. Instead of focusing on those with the most stigmatizing disabilities (who are no doubt subject to frequent bullying, harassment, and exclusion because of their disabilities) I will focus on those individuals who have disabilities that might not be perceived as very severe, but yet the workplace accommodations those individuals receive for their disabilities cause them to be subject to resentment, anger, and sometimes harassment by their co-workers. In prior work, I have called this "special treatment stigma," the harm that arises from receiving special treatment in the workplace, especially when co-workers believe that the special treatment is unwarranted. In this paper, I will explore the scope and magnitude of the harm experienced by individuals with disabilities because of special treatment stigma. This stigma not only manifests itself in resentment and other negative treatment of individuals with disabilities by their co-workers. The special treatment stigma also can cause employers to avoid accommodations that place any burdens on other employees, which often limits the

[4*] Professor of Law, University of Toledo College of Law. I would like to thank participants at the Disability Law Section's meeting at the AALS Annual Meeting in January 2014, the Labor Law Group Meeting in June 2014, and the Ninth Annual Colloquium on Labor and Employment Law in September 2014, where versions of this paper was presented. I would also like to thank the University of Toledo College of Law for providing me a sabbatical, during which this paper was completed.

ability to accommodate the employee with the disability. After describing the problem of special treatment stigma, this paper turns to exploring whether the ADA Amendments Act will exacerbate the problem of special treatment stigma or make it better. Because the ADA Amendments Act has made it much easier to prove that an individual has a disability and therefore might be entitled to a reasonable accommodation, it is likely that there will be many more individuals requesting and receiving workplace accommodations. Thus, these increased numbers could exacerbate the special treatment stigma, especially if some of these individuals have what is perceived to be relatively minor impairments. On the other hand, as more individuals are perceived to have a disability, we could possibly see a growing acceptance of individuals with disabilities; thus, requesting and receiving accommodations might become the "new normal."

Valuing Diversity

Stephen M. Rich

Diversity has become a uniquely pervasive and powerful idea in American public life. It is used by universities to justify racial preferences in student admissions on the grounds that a diverse student body enhances classroom discussion and "promotes learning outcomes."[1] Corporations use it to explain choices regarding employee selection, recruitment strategy, boardroom composition, and community outreach, and to signal more generally that they are "headed in the right direction."[2] Customers, clients, and prospective employees demand information about an institution's commitment to diversity as an element of informed choice, assuming it to be a sign that an institution possesses other qualities, such as tolerance, fairness, effective management, legal compliance or a sense of social responsibility, or to indicate that the institution would likely be responsive to their needs.[3] Some may even view an institution's interest in diversity as the key to their own successful self-promotion, marketing their value to the institution in terms of their contributions to its diversity.[4] The value of diversity seems rarely to be in question, only the proper means of achieving it and the benchmark for evaluating its achievement.

Actual agreement, however, on the value of diversity is thin, for diversity is difficult to define and context matters. In legal discourse, our understanding of diversity is indebted to the equal protection decisions in which the Supreme Court has deemed diversity a "compelling interest" capable of "justify[ing] the use of race in university admissions."[5] In *Regents of the University of California v. Bakke*,[6] Justice Powell first theorized diversity as a non-remedial rationale, expressly distinguished from any effort to remedy "societal discrimination," and grounded instead on principles of academic freedom.[7] Yet, after *Bakke*, diversity became a "code word" in legal and academic discourse for remedying a history of racial exclusion.[8] In *Grutter v. Bollinger*,[9] the Supreme Court seemed to acknowledge this reality by endorsing a version of diversity that bridges the university's interest in improving the educational experience and the public's interests in "prepar[ing] students for an increasingly diverse workforce," promoting "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation," and "cultivat[ing] a set of leaders with legitimacy in the eyes of the citizenry."[10] The Court has yet to theorize from the connections that *Grutter* draws between educational diversity and diversity in other areas of public life how the diversity rationale might be used to uphold race conscious practices outside of the context of higher education. Doing so would invite important questions about the contextual nature of diversity's value, the limits of *Grutter*'s vision, and the stability of diversity as an organizing concept in antidiscrimination law.

Critiques of diversity are nothing new. Progressive legal scholars have cautioned that diversity's value as a legal tool to justify race-based public policy is, at the very least, complicated. Some have cautioned that diversity is "an incoherent concept to operationalize" and may undermine the efficacy of affirmative action efforts because it advises indirection in the pursuit of remedial purposes.[11] Others have warned that talk of diversity produces an apprehension among some members of the Court, which one might call "pluralism anxiety"[12] or fear of balkanization,[13] that repels its decisions "away from group-based equality jurisprudence and toward universal liberty jurisprudence."[14] To the extent that "diversity" serves as a "'code word'"[15] for substantive equality, it may fail to thread this political needle and become indistinguishable from the purpose to correct societal discrimination that the Court has frequently and firmly rejected.[16] Finally, the late Professor Derrick Bell criticized *Grutter*'s diversity rationale as a "definitive example" of "interest convergence," and many other scholars have sounded the same charge.[17] The requirement of "individualized consideration" is certainly responsive the interests of nonminority applicants and the value of universal liberty more generally to constrain affirmative action as a remedial device.[18] Diversity, however, has a life and logic of its own that the interest convergence thesis fails to fully capture. *Grutter*'s diversity rationale, for example, does not permit institutions to pursue racially inclusive policies because they satisfy the elite interests of universities. Rather, it permits universities to serve their own interests in obtaining student body diversity by deploying racially explicit means because student body diversity is presumed also to serve the public's interest in racial inclusion more generally. In other words, antidiscrimination law has inscribed racial inclusion as a public value that extends across many areas of American public life, and the university's reliance on race is permissible in part because it is presumed to uphold that value. Precisely because the relationship between education and forms of civil and social justice is so deeply ingrained in equal protection jurisprudence,[19] it is helpful to reach beyond the educational and constitutional context of the Court's decisions on diversity.

This Essay reappraises diversity as a legal rationale for race conscious measures by evaluating the case for its extension from education to employment. It begins with the premise that the core conceptual advantages of diversity are common to both settings. On the one hand, whether in education or employment, diversity can be invoked to justify an institution's use of racial preferences without revealing the institution's true purpose to promote the inclusion of historically disadvantaged groups. The Supreme Court understood racial inclusion to be the background motivation of the University of Michigan Law School in *Grutter*,[20] and some civil rights advocates and scholars have expressly embraced diversity as an affirmation of the values

epitomized by the civil rights movement and *Brown v. Board of Education*.[21] As constitutional scholar Reva Siegel has observed, "the familiar and comfortingly vague nomenclature of 'diversity'" aided the Court to "disguise" *Grutter*'s embodiment of antisubordination values.[22] Diversity can thus be viewed as a kind of intellectual Trojan horse concealing a commitment to substantive equality within a concept intended, by Justice Powell, to transcend remediation. In this Essay, however, I will demonstrate that diversity is a flawed vessel, incapable of conveying equality values without, at best, transforming them and, at worst, fouling their content and leaving us with us with the false impression that the value diversity was meant to convey is fully captured by its external façade. This danger is particularly acute in the employment context where statutory law continues to hold, though tenuously, to a vision of equal opportunity supportive of employers' voluntary efforts to promote workplace equality through affirmative action, and yet firms have already widely embraced a "business case" for diversity that, by design, spurns affirmative action and is divorced from civil rights enforcement.[23] In this sense, diversity does not merely conceal an ongoing competition between anticlassification and antisubordination values; it is a stakeholder in that competition and proposes to end it on its own terms.

On the other hand, diversity holds special appeal in the post civil rights era as a market-based rationale for racial inclusion. In education and employment, diversity proposes to align public values with institutional benefits. It legitimates uses of race that serve institutional self-interest, representing race as an opportunity to enhance institutional performance and market desirability. This is a forward-looking, non- remedial rationale,[24] and it suggests that diversity may provide a more palatable and more durable basis for racially inclusive measures than equality, because diversity locates the impetus to pursue inclusion within the institution and its continuing performance needs rather than arising out of a sense of moral debt or legal obligation.[25] This rationale leads to two conceptual problems. First, it puts the progress toward racial equality at the mercy of institutional self-interest. The problem here is not just that such progress may be slowed or limited in the way in which interest convergence theory would predict. Rather, our very understanding of progress may be altered, because institutions operating as "racial realists" will sometimes promote inclusion and other times resegregation based on what they construe to be their needs. Second, this account of diversity must specify what kinds of institutional interests are worthy of legal endorsement beyond the relatively easy case of public education faced by the Court in *Grutter*. The "educational benefits" of diversity recounted in *Grutter* are fairly fixed across educational institutions and their relationship to public values of civic participation and national leadership have long been established in the Court's constitutional cases. The diversity benefits available to private firms are more varied and their relationship to public goods more attenuated and speculative.

Finally, reconsidering diversity in the context of employment exposes diversity to a different set of practical problems. The manner in which the Supreme Court has described diversity is a function of the legal problem that diversity is offered to resolve—that is, whether an institution's explicit use of race in its admission's process violates equal protection. The diversity rationale is not offered in order to determine whether the institution's challenged practice is race conscious or to justify any practice other than student selection, such as faculty hiring,[26] academic support, or curricular design. What *Grutter* and its progeny call the "educational benefits of diversity" are the contributions made a university's "educational mission" once diversity has been achieved as an end state. By contrast, diversity often becomes an issue in the context of employment as an employer motivation (e.g., when courts attempt to determine whether a particular decision was indeed race conscious) or as a business strategy (e.g., when an employer attempts to distinguish from affirmative action a policy that takes an employee's social identity into account for some business purpose). Such disparate factual scenarios place conceptual pressure on diversity that *Grutter*'s rationale is inadequate to withstand.

The Essay argues that, as to each of these problems, the solution is the same: The law should confine its endorsement of diversity as a rationale for race conscious actions to situations in which the pursuit of diversity advances equal opportunity. Applying this constraint will enforce existing equality commitments in antidiscrimination law, while subordinating other, purely institutional motivations to pursue diversity to their proper market role. This solution may seem obvious if one assumes that this is already what the diversity rationale does. The analysis in this Essay will demonstrate that it is not and that correcting this deficiency requires more detailed focus on the many different ways in which diversity is discussed and deployed in public life.

Part I of the Essay juxtaposes diversity in education and employment in order to explore different conceptions of diversity and to elucidate the difference between diversity as an end-state condition of demographic inclusivity and diversity as an institutional strategy defined by a particular set of practices or motivations. Part II discusses the conceptual advantages of diversity as compared with other possible rationales for race conscious egalitarian measures. Part III examines several conceptual and practical problems with extending diversity to employment. Diversity's conceptual problems stem from its reliance on articulations of institutional need and from the indeterminacy of its referent, which again may be either an end-state, a strategy or a motivation. Its practical problems are a consequence of *Grutter*'s failure to anticipate situations in which the value of diversity is more speculative and market-dependent than it appears in education. This part demonstrates why the legal significance of institutional needs should be minimized in order for diversity to serve the law's commitment to equality, even if the appeal of diversity as a motivation for institutional reform is diminished as a consequence. If diversity truly fulfills a market rationale, institutional self-interest will continue to motivate its pursuit; but diversity should be endorsed as a legal basis for race conscious action only when it works to advance equal opportunity and to disrupt persistent patterns of racial subordination.

The Harm in Asking

Jessica L. Roberts[5*]

The lion's share of employment discrimination legislation requires that claimants experience an adverse employment action to trigger their protections. Hence, an individual must establish that her employer considered a protected status, like race, sex, age or disability, in making a job-related decision such as hiring, firing, or promotion. The underlying presumption is that absent an adverse employment action, the claimant has not suffered a cognizable harm. Drawing from hostile work environment jurisprudence and existing federal and state legislation, this Article takes a different perspective. It argues that certain inquiries into protected status—even if the employer never bases a decision on the relevant information—should also be considered legally actionable antidiscrimination harms.

More than a decade's worth of social psychology research indicates that when a person is reminded of her membership in a particular identity group and that group is the subject of a widely recognized stereotype, that reminder can directly affect her performance of stereotype-related tasks. For example, when asked to indicate race or sex prior to a standardized test, people of color and women tend to perform worse than their white or male counterparts. As a result, when an employer merely asks about a protected status, it holds the potential to impact an employee's mental state and, in turn, her job performance. In short, there is a harm in asking.

This Article argues that with the exception of certain discrete job- or antidiscrimination-related instances, the law should discourage employers from inquiring into their employees' protected statuses. It proposes that legislatures or courts expand existing laws and doctrine to recognize requesting information related to protected statuses like race, sex, age, and disability as unduly discriminatory and, thus, the basis for legal claims.

Litigating for the Future of Public Pensions in the United States

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It is nearly impossible in the United States today to go long without reading a headline about some aspect of the American public pension crisis or about some State undertaking public pension reform. Public pensions are horribly unfunded, millions of public employees are being forced to make greater contributions to their pensions, retirees are being forced to take benefit cuts, retirement ages and service requirements are being increased, and the list goes on and on.

These headlines involve all level of American government, from the recent move to require new federal employees to contribute more to their pensions, to the significant underfunding of state and local public pension funds across the country, to the sad spectacle of the Detroit municipal bankruptcy where the plight of public pensions plays a leading role in that drama. The underfunding of public pension plans has led not only to a number of bankruptcy proceedings, but has also led various states to reduce promised pension payouts to retired plan members or to increase pension contribution requirements for active employees.

As a result, government officials, employees, and retirees are in the midst of litigating for the future of American public pensions. This article focuses on all three levels of American government (federal, state, and local), and reviews the current status of pension litigation at each level. Although pension litigation does not exist as of the writing of this article at the federal level, there has been a large swath of litigation involving state and local pensions over the last few years, with diverse outcomes. After discussing the federal employee pension system in the United States, the article then considers one state's (Wisconsin) recent experience with pension reform legislation and litigation, and one city's experience (Detroit) with the municipal bankruptcy process to illustrate emerging trends in public pension litigation that are currently playing out throughout the United States

The start of a solution lies with harmonizing and standardizing the existing hodge-podge of American public pension law. Although ERISA is far from perfect in regulating private-sector pension plans in the United States, it nevertheless has provided uniform standards for management and administration of occupational retirement plans. In order to replicate that same consistency, this article proposes a hybrid approach which seeks to avoid some of the federalism pitfalls of previous public pension reform proposals. By applying ERISA only to federal pension plans, and by permitting the states to adopt uniform, state-wide pension legislation, public pension plans can take advantage of a reliable and stringent pension framework which will make future underfunding and fiduciary lapses less likely.

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Systemic Employment Litigation: Past, Present, and Future

Joseph Seiner

Since the Supreme Court's decision only a few years ago in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), much has been written on complex litigation generally and systemic employment discrimination more specifically. The Wal-Mart case triggered widespread criticism in the academic community. Several ways of navigating around the Supreme Court's case have been identified, and include: the governmental approach, the procedural approach, and revised relief. A more recent suggestion in the literature for limiting the effects of Wal-Mart examines the possible use of Federal Rule of Civil Procedure23(c)(4) -- issue class certification.

One developing area after the Wal-Mart decision is the possible constitutional implications of the case. Does the decision create a commonality standard for all class claims – irrespective of whether they are brought in state or federal court? This issue has been percolating in the lower courts and will likely be a major issue in the coming years. Even if Wal-Mart does not establish a constitutional commonality standard -- should one be developed by the courts and academics alike?

Did Justice Scalia Just Endorse Shelley v. Kraemer? Harris v. Quinn and More Puzzling Suggestions about State Action in the Private Sector

Joe Slater

Harris v. Quinn is best known for what held about union security clauses in the public sector. But it also suggested that such clauses in the private sector raised troubling questions under the First Amendment. This is puzzling, because such clauses in the private sector seem to lack a basic requirement of such a constitutional claim: state action.

This paper makes three points. First, while the suggestion in Harris about private-sector union contracts is dicta, it is important. It is important because other Supreme Court opinions have also suggested that a First Amendment issue exists in private sector union security clauses, and the majority in Harris wants to go further down this path. Also, this suggestion, if adopted into law—by making private-sector union security agreements illegal, or greatly limiting them, as a matter of constitutional law—would have staggeringly significant practical consequences. Second, this paper argues that there is no First Amendment problem because there is no state action. These clauses are a result of bargaining between two private parties. The National Labor Relations Act (NLRA) does not require such clauses; while it does require bargaining in good faith, it specifically does not require the parties to enter into any contracts. Nor does it even make legal a contract that would be illegal in the NLRA's absence. While the NLRA specifies what types of union security clauses are legal and what types are not, this fact does not create state action; labor and employment laws routinely put limits on private employment contracts without creating state action. The theory that a type of contract law that permits private parties to enter into certain terms constitutes sufficient state action to implicate the Constitution is most famously associated with Shelley v. Kramer. But it would be truly radical to expand that holding to private-sector labor contracts. Shelley is narrow and has mostly been confined to its facts. Deciding that private-sector labor contracts are a product of state action would mean that all clauses in such contracts are a product of state action. Thus, e.g., a drug-testing provision would be subject to Fourth Amendment restrictions. The paper concludes by suggesting that courts explicitly hold that union security clauses in the private sector do not raise First Amendment issues.

Retaliation and the Reasonable Person

Sandra Sperino

For decades, scholars have criticized procedural and substantive standards that require judges to evaluate facts through the lens of a reasonable person or a reasonable juror. These critiques have been especially boisterous in the employment discrimination context, where a reasonable person standard defines when employees suffer enough harm to present a cognizable claim of workplace harassment or retaliation.

Scholars often critique the standard as centered on a reasonable white man and not representing the interests of women and people of color. In the summary judgment context, one widely cited study showed that while Supreme Court justices' views of a videotaped encounter with police comported with the views of a substantial number of people, identifiable groups of people viewed the videotaped evidence differently.

These critiques are important, but they concede that the viewpoints expressed in the resulting case law at least represent the views of a substantial portion of people. This Article shows that the reasonable person standard created by judges in the retaliation context fails to reflect the views of most reasonable people. Using empirical evidence, I show that both men and women have strikingly similar views of retaliation harm.

Yet, courts routinely reach outcomes that are contrary to these views. For example, courts dismiss retaliation cases where workers claim they faced threats of termination, were placed on administrative leave, were threatened with disciplinary action, or received negative evaluations from supervisors. Courts routinely dismiss cases by claiming that a reasonable person would not be dissuaded from filing a discrimination complaint if faced with these consequences. This Article shows that a substantial portion of study participants perceived conduct, such as threatened terminations or negative evaluations, as likely to deter them from complaining about discrimination. These results held true for both men and women.

Traditional critiques of the reasonable person standard—that it tends to enshrine male values or that it fails to capture the views of identifiable subgroups—do not explain what is happening in the retaliation context. In raising this issue in the retaliation context, I also challenge similar critiques of sexual harassment doctrine. It is likely that current sexual harassment doctrine does not capture the views of men, but rather captures a narrow, legalistic view of harassment that does not reflect any consensus view of harassment, whether male or female.

Shifting the focus away from bias allows for a fuller exploration of how structural and substantive features of discrimination law generally and retaliation law specifically push the law in a conservative direction.

Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection

Jean R. Sternlight

Employers' imposition of mandatory arbitration constricts employees' access to justice. The twenty percent of the American workforce covered by mandatory arbitration clauses file just 2,000 arbitration claims annually, a miniscule number even compared to the small number of employees who litigate claims individually or as part of a class action. Exploring how mandatory arbitration prevents employees from enforcing their rights the Article shows employees covered by mandatory arbitration clauses (1) win far less frequently and far less money than employees who litigate; (2) have a harder time obtaining legal representation; (3) are often precluded from participating in class, collective or sometimes even group claims; and (4) do not fare well pro se in arbitration. Noting employers' use of mandatory arbitration is likely increasing, the Article urges Congress to pass the Arbitration Fairness Act both to protect individual employees and also to ensure employment laws are enforced.

An Empirical Study of Harassment Training Practices

Elizabeth Tippett

This study consists of a content analysis of harassment trainings by attorneys and professional training consultants. It examines how such trainings define harassment and to what extent they conform to or depart from legal definitions. It also examines the content of hypotheticals used in the training within the context of current sexual harassment jurisprudence.

It is Political: Using the Models of Judicial Decision-Making to Explain the Ideological History of Title VII

Kate Webber

Scholars and observers often explain or interpret Supreme Court decisions based on the ideology of the sitting Justices. Many offer a similarly political account of the Court's decisions in actions brought under Title VII of the Civil Rights Act of 1964 ("Title VII"). Certain events in the history of Title VII do suggest ideological decision-making by the Supreme Court. Dozens of the Court's Title VII opinions are split between the conservative and liberal Justices. On three separate occasions, including most recently the Lilly Ledbetter Fair Pay Act of 2009, a more liberal Congress amended Title VII in order to override the Supreme Court's conservative interpretation of the statute. Yet subsequent to each of these amendments, the conservative Justices continued to vote to restrict Title VII, apparently following their political preference over Congressional intent.

The full history of Title VII, however, does not conclusively establish that the Supreme Court is deciding cases according to ideological viewpoint. Although numerous split decisions fall along ideological lines, other cases, including a number of unanimous decisions, reflect votes contrary to political viewpoint and potentially indicate a different dynamic. The fifty years of Title VII jurisprudence therefore present the opportunity to assess whether Justices' votes on issues of employment discrimination are determined by their respective ideology.

To answer this question, this article turns to the work of political science scholars, specifically, the models of judicial decision-making developed by political theorists over the past two decades. These models use sophisticated empirical techniques to test whether the Justices of the Supreme Court vote according to their ideology and to explain

the circumstances when Justices vote contrary to their viewpoint. Their work can be divided into three predominant models, attitudinal, strategic and integrated, all of which agree that that ideology influences Supreme Court decisions, but offer different explanations for the exceptions when the Court's ideological pursuit is apparently constrained. The political science models therefore offer the potential to explain Title VII's varied jurisprudence.

This potential, however, is not fully realized. The strategic and integrated models fail to effectively explain a significant portion of the Supreme Court's Title VII decisions because these models have generally failed to study the effect of statutory overrides on the Court's decision-making. This article therefore draws on the few studies of overrides that are available, and some of the more context-specific analyses, to draw a more nuanced model for Title VII and to account for the apparent exceptions to ideological decision-making. Ultimately, this article asserts that the history of Title VII is not only political, but particularly so, with the Supreme Court exhibiting strong resistance to any restraint on their ideological voting in the area of employment discrimination.

The End of At-Will Employment? *Ricci* + the IAT = Intent to Discriminate

By Michael J. Zimmer[6*]

In *Ricci v. Stefano,* the Supreme Court, 5 to 4, decided that, by not using the scores of a promotion test for firefighters to avoid causing disparate impact against African-American and Latino testtakers, the City of New Haven had committed intentional disparate treatment discrimination against white testtakers. *Ricci* can be viewed as another case in a long line that has turned antidiscrimination and equal protection law on its head. In her 2013 Foreward to the Harvard Law Review, Professor Reva Siegel described that sad state of equal protection law where the majority but not the minority is protected:

> Equal protection law today is divided. When minorities challenge laws of general application and argue that government has segregated or profiled on the basis of race, plaintiffs must show that government acted for a discriminatory purpose, a standard that doctrine has made extraordinarily difficult to satisfy. . . . By contrast, when members of majority groups challenge state action that classifies by race – affirmative action has become the paradigmatic example – plaintiffs do not need to demonstrate …that government has acted for a legitimate purpose.

Because the Court in *Ricci* so easily found discrimination against whites, this paper argues that the Court has now potentially closed that divide and leveled the playing field so minority claims of discrimination would be analyzed like those brought by members of the majority. If it has done so, the Court has radically changed the basic structural foundation of American employment law by substantially undermining the prevailing rule of at-will employment.

Without using the words "color-blind," the Court found disparate treatment liability in *Ricci* solely because the City knew the racial consequences of the decision it was making. *Ricci* is not an affirmative action case where race was used expressly as a law or government policy to try to help the historic victims of discrimination. "The firefighters' exam at issue in *Ricci* did not involve racial classifications [since] the exam was the same for all applicants and no individual applicant was singled out for affirmative action for promotion." Instead of a challenge to affirmative action as established by law or policy, *Ricci* is a "reverse" discrimination case, a variant of disparate treatment cases generally: Instead of the explicit use of race to aid members of groups that have been the historic victims of discrimination, the employer denies using race therefore requiring the white plaintiffs to prove that the employer acted with an intent to discriminate against them because they are white. Generalizing *Ricci's* holding to all disparate treatment cases would mean that the intent to discriminate element of a disparate treatment case can hereafter be established simply by proving that the defendant knew the race or other protected characteristic of the plaintiffs adversely affected by the defendant's action. With disparate treatment discrimination made so much easier to establish, the federal "color-blind" standard applied generally to adverse employment action leaves little work left for the state law at-will presumption. With such a simplified proof, many more plaintiffs will succeed at least in establishing a prima facie discrimination case than ever would be able to overcome the at-will presumption under state law. This is a radical change in the structure of American employment law but it is implicit in the logic underlying the "color-blind" standard that the Court in *Ricci* established as applicable in disparate treatment cases, at least those brought by white plaintiffs. Having articulated the "color-blind" standard that is to be applied in "reverse" discrimination cases, the logic of *Ricci* supports its use in actions brought by members of groups who have historically been the victims of discrimination.

Like many shifts in a fundamental paradigm, it is difficult to see initially the new paradigm because its predecessor – here the difficult standard to prove intent to discriminate to support an exception to the at-will presumption -- is so deeply entrenched. But once the new paradigm is articulated, it seems that it should have been plainly obvious all along. The goal of this paper is to demonstrate that the paradigm for analyzing American employment law has shifted in favor of workers generally who challenge their treatment by employers as discrimination.

The finding that the City committed intentional disparate treatment discrimination is the linchpin for Justice Kennedy's opinion that then goes on at length developing new jurisprudence governing the relationship between disparate treatment and disparate impact bases of Title VII liability. New law was necessary because of the Court's unprecedented finding that simple knowledge of the racial consequences of an action establishes a prima facie case of disparate treatment discrimination. That

[6*] My thanks to Edward Hartnett, Charlie Sullivan and Margaret Moses. Also thanks to Reva Siegel. Her Foreward to the November 2013 Harvard Law Review plus our colloquy at the AALS Transnational Equality workshop in June, 2014, helped me decide to continue to attempt to mine *Ricci v. DeStefano* as a vehicle to advance the cause of antidiscrimination.

linchpin finding of intent to discriminate, however, is more assumed than analyzed. Nevertheless, the finding of intent to discriminate is essential to all that follows.

At core, the white plaintiffs in this "reverse" discrimination case established that the City committed intentional disparate treatment discrimination simply based on the fact that the City knew the racial consequences of deciding not to use the results of the promotion test. If the evidence to make out intent by the *Ricci* plaintiffs is sufficient by simply showing that the City knew the racial consequences of its action, then the same type and quality of evidence ought to prove intent to discriminate when plaintiffs bring discrimination claims generally. In other words, there is now equal treatment between "reverse" discrimination claims of disparate treatment brought by whites and claims of discrimination by claimants other than whites. Thus, *Ricci* can be seen as a radical, though not fully developed, reworking of prevailing antidiscrimination law. This radical approach, however, is justified because it is consistent with the recent work of psychologists, sociologists and economists that demonstrate the broad existence and impact of implicit bias.

Part I will develop the way Justice Kennedy rather peremptorily found the City liable for disparate treatment simply because the City knew the racial consequences of deciding not to use the test scores. He did not expressly use the words "color-blind" to establish the standard of liability, but he came close, concluding that the City' engaged in "*express, race-based decisionmaking*." But, even without an express statement of a "color-blind" standard, the only basis for finding, as a matter of law, that the City acted with intent to discriminate was the fact that the City knew the racial consequences of either using or not using the test results for promoting firefighters to lieutenant and captain positions. By not even referring to preexisting authority, the Court appears to have *sub silentio* overruled, or engaged in "stealth overruling" of, the considerable body of prior law that knowledge of the racial consequences by itself does not establish intent to discriminate, that proof of discriminatory purpose or intent is quite difficult to satisfy generally and that "reverse" discrimination cases raise special questions of proof of intent to discriminate. Part II will attempt to show how Justice Kennedy's approach in *Ricci* fits, if it does, with some of his other opinions for the Court including *Windsor, Lawrence* and *Romer* as well as his concurring opinion in *Parents Involved.* Looked at from the perspective of those other decisions, the interpretation of *Ricci* set forth in this paper may be somewhat less surprising than it at first appears. Indeed, these cases show that the Court's jurisprudence based on the concept of animus has in fact supplanted the more traditional doctrines that had applied in discrimination law. Part III develops a justification for this simplified basis for proving discriminatory intent or purpose based on what the social sciences have shown about implicit bias and how it frequently operates to influence decisions in the real world: Simply showing that an actor knew the racial consequences of her actions supports finding that implicit bias may well have occurred. That is sufficient to support drawing the inference of discrimination at least to a prima facie level. *Ricci* appears to provide a way to utilize implicit bias studies as a key part of antidiscrimination law. Because implicit bias studies demonstrate that discrimination is more or less universal, *Ricci* supports finding so that most adverse employment actions involving a worker of color triggers a prima facie case of disparate treatment discrimination. If *Ricci* is applied to the protected characteristics in addition to race, that means that most adverse employment actions would fall, at least prima facie, with the exception to the at-will presumption for statutory claims. Part IV will try to sketch out some of the consequences of this radical reconstruction of antidiscrimination law and its impact on employment law more generally.