Discrimination and the Supreme Court

Legal Basis for Prohibition of Discrimination

- U.S. Constitution

- Laws passed by Congress starting in 1964 (the Martin Luther King Revolution)

- State laws

U.S. Constitution

- Applies to government action only

  - 14th Amendment (1868) says no State may "deny any person within its jurisdiction the equal protection of the laws"

  - 5th Amendment (1791), which applies to Federal Government, guarantees "due process of law." The Supreme Court has interpreted that to include equal protection, but not until 1954.

What Is Equal Protection?

- Most laws deny "equal protection" in the sense of treating some people differently from others. Example: differing tax rates, different driving ages.

- But courts say there's no violation of equal protection if the law's distinctions have a "rational basis." In practice that means nearly anything. Whatever the legislature thinks is OK, the courts won't touch. Example: Warren Buffet's secretary.

- EXCEPT: if law discriminates against a specially protected class, courts will NOT defer to anything the legislature thinks is OK.

- Challenge from Institute for Justice, and Uber.

Specially Protected Classes

- Race

Original intent of 14th Amendment (which emerged from the Civil War).

In 1873, Supreme Court "[doubted] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the equal protection clause]." But that proved wrong.

- Other minorities (ethnicity, national origin)
- Sex (first decision in 1971)
- Sexual orientation

What Does "Special Protection" Mean?

- Courts will take a hard look ("strict scrutiny"), won't defer to legislature's judgment that a distinction should be drawn

  Race: Brown v. Board of Education, Loving v. Virginia

  Sex: Virginia Military Institute

  Gender: Same-Sex Marriage

What's a "Hard Look"?

- Government action discriminating on basis of race or sex sometimes survives a hard judicial look

Racial preferences to foster "diversity" in state universities, police forces

Sexual distinctions in definition of statutory rape.

Martin Luther King Leads a Revolution: Jim Crow

- Constitution allowed private discrimination. Lunch counters, buses, hotels.
- King's revolution culminated in 1964 with the first of a series of federal laws prohibiting private discrimination
- Targets included public accommodations, employment.

The King Revolution

- King revolution also targeted government discrimination in denial of the right to vote.
- Which had been illegal since the 15th Amendment (1870) but never meaningfully enforced.
- States had been avoiding enforcement. Voting Rights Act federalized enforcement

Government vs. Private Discrimination: Sexual Orientation

- Government discrimination

Example: definition of marriage. Courts decide what's discriminatory

- Private discrimination

Example: May a retail shop discriminate against some of its customers? Legislatures decide.

Protected Classes Under New Federal Laws

- Laws emerging from King's revolution prohibited discrimination because of race, ethnicity, national origin, sex, disability and old age
- Race discrimination was King's target
- Ethnicity and national origin naturally followed
- Sex discrimination was to employment law initially a "poison pill." (It wasn't King's target!)
- Then disability and old age

Is Prohibition Against Race Discrimination a Good Model?

- Prohibition against race discrimination has blazed the trail.
- Sex discrimination, but not race discrimination, allowed in sports, public toilets
- Discrimination vs.men sometimes allowed:

  Selective service registration. Rostker v. Goldberg (1981)

  Statutory rape. Michael M. v. Sonoma County (1981)

- Age discrimination, but not race discrimination, allowed in some employment decisions.

When Is Government Doing the Discriminating?

- If federal or state government actually does it. Public schools.
- Or if government lays down discriminatory requirement for private conduct. Definition of marriage.
- Expenditure of federal funds. Title IX — federal money leads to federal rules for college sports and sex.
- Federal contractors?

When Is Private Discrimination Illegal? 1964 Civil Rights Act

- In “public accommodations”: theaters, sports arenas, restaurants, food counters, gas stations, hotels. Covers discrimination based on “race, color, religion or national origin.” Not sex.

- Not retail stores. Was not thought an urgent problem. And doubt as to constitutionality.

- Employers with 15 employees or more. Cover “sex” as well as “race, color, religion or national origin.”

Wedding Cake Baker: Three Layers of Law

- Constitution
- Civil Rights Acts and other federal laws
- State laws
- A religious defense?

Additional Laws

- Age Discrimination in Employment Act (1967)
- Fair Housing Act (1990) — Disparate impact decision
- Americans with Disabilities Act (1990)
- Use of federal funds:

Title IX (1972): sex discrimination on campus. Federal rules for sex and alcohol?

Minority preferences for federal contracts

Executive order on federal contractors (1965)

Equal Pay Act

- Equal Pay Act (1963, 1972) requires equal pay among sexes for equal work where jobs involve equal skill effort and responsibility and similar working conditions.

- Defenses:

  Seniority

  Merit Pay

  Pay by quality or quantity of production

  Differential “based on any factor other than sex.”

Is Discrimination Necessarily Illegal?

- No, if you have a real good reason for it.
- Example: Strength requirements that most women can't meet, for firemen, police. Are they discrimination "because of" sex? If so, is there a real good reason for them?
- Example: Police departments seeking racial balance.
- Criminal background checks. Race discrimination?

How Good Is Your Reason?

- BFOQ defense: "Where religion sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operations of that particular business."

- But EEOC and courts will second-guess what is "reasonably necessary" for your business.

Practical Considerations

A. Employer wants to avoid "discrimination" label because:

1. Bad publicity

2. Litigation expense

3. Uncertain outcome of litigation over whether you have good reason to discriminate

What's a BFOQ?

- EEOC: Must "affect an employee's ability to do the job" and relate to the "essence" or the "central mission" of the employer's business.

For Example

- Jail guards in “contact” jobs in male maximum security prison housing sex offenders, where violence is “rampant.” Dothard v. Rawlinson (1977)

- Necessary for authenticity (actors); employees for Chinese restaurant.

Sex a BFOQ?

- Female child care specialist assigned to night shift because hospital "needed a female on that shift." Healey v Southward Psychiatric Hospital (3 Cir. 1996)

- "[G]ender-based policy was necessary to meet the therapeutic needs and privacy concerns of the mixed-sex patient population. The essence of the hospital's business was to treat emotionally disturbed and sexually abused children. Role modeling was an important element and a balanced staff was necessary to provide care for all the patients."

Emotional Needs of Male Customers?

- What's "necessary to the essence of the business"? Female flight attendants? Male sports announcers?Hooters?

EEOC Will Second-Guess Employers' Needs

- Kaplan University runs credit checks on applicants for positions that provide access to students' financial loan information.

- Kaplan started this after "it discovered that some of its financial-aid officers had stolen payments that belonged to students. Kaplan also learned that some of its executives had engaged in self-dealing by hiring relatives as vendors."

EEOC Doesn't Like Credit Checks

- EEOC thought credit checks discriminated against African-American applicants
- And thought they were not needed, because no statistical showing that credit problems were correlated with higher risk of embezzlement.

Court Decision

- Court ruled that EEOC had not shown that credit checks discriminated against African-Americans. EEOC v. Kaplan Higher Educ. (6th Cir. 2014)

- Because no discrimination, Court never reached the issue of whether credit checks were necessary for the business.

- EEOC has vowed to get better evidence of discrimination and continue the fight.

What Is Discrimination?

- Assuming no BFOQ, Civil Rights Act prohibits differing treatment in employment "because of" race, sex, ethnicity, national origin.

- Mixed motives? There's a violation if race or sex was a "motivating factor."

How Do You Prove Discrimination? Simple Cases

- Four women doing "bonding and coating" work pn tubes, three black and one (the junior worker) white.
- Fired after refusing to do heavy clean-up work (order given only to the three black women.
- Supervisor explained that "colored folks . . . clean better." (Cal. Fed. court 1973).

Another Simple Case

- Mayor of small Alabama town refused to hire black applicant, explaining that he "was's gonna let no federal government make me hire no [g-d n—]" Wilson v. City of Aliceville (11 Cir. 1986).

- Motels, lunch counters, can't cater to customer prejudice

Catering to Customer Prejudice?

- Female news anchor may be required to "soften" her image. (Ordered to do so as a result of customer surveys.) Craft v. Metromedia (8th Cir. 1985)

Male anchors also required to meet (different and less expensive) "appearance" standards. Lose weight, contact lenses, get a hair piece.

Court ruling: "A reasonable dress or grooming code is a proper management prerogative." TV station "took measures appropriate to individual situations, characteristics and shortcomings."

Equivalent Requirements?

- “The ‘dos’ and ‘don’ts’ for female anchors addressed the need to avoid tight sweaters and overly ‘sexy’ clothing and extreme ‘high fashion’ or ‘sporty’ outfits while male ‘dos’ and ‘don’ts’ similarly cautioned against ‘frivolous’ colors and ‘extreme’ textures and styles as damaging to the ‘authority’ of newscasters.”

Are Flight Attendants Like News Anchors?

- Airlines may not have weight requirements for women only and not men in similar positions. Germdom v. Continental Airlines (9th Cir. 1982):

"Passengers' preference for attendants who conform to a traditional image cannot justify discriminatory airline hiring policies."

Customer Preference Based on Language Fluency?

- Auto Zone fired a black sales manager who refused to transfer away from a store in a Hispanic neighborhood to a store in another neighborhood (and much farther from his home). Auto Zone believed "Hispanic customers would prefer to be served by Hispanic employees." EEOC says it is "illegal for employers to base employment decisions on customer discriminatory preferences."

Discrimination Based on Real Difference

- How about actuarial calculations based on fact that women live longer than men?
- Los Angeles County charged women employees more than men for their retirement annuities.

Los Angeles v. Manhart (1978)

- Civil Rights Act "precludes treatment of individuals as simply components of a racial, religious, sexual or national class. If height is required for a job a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."

But Insurance Requires Generalizations

- "Of course, the [employer] cannot know which individuals will predecease the average woman. Therefore, unless women as a class are assessed an extra charge, they will be subsidized, to some extent, by the class of male employees."

Still You Can’t Do It

- “Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, was well as sex. But a statute that was designed to make race irrelevant in the employment market . . . couldn't reasonably be construed to permit a take-home pay differential based on a racial classification.”

- So court won’t allow it for women.

Sex Stereotypes in Public Education?

Virginia Military Institute (1996)

A. Women excluded as unsuitable for "adversative" style of education

B. "VMI cadets live in a Spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. Entering students are incessantly exposed to the rat line, 'an extreme form of the adversative model,' comparable in intensity to Marine Corps boot camp."

Rationale for "Adversativeness"

- "Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their fellow tormentors."

For Men Only?

Court did not dispute testimony that many men respond favorably to an “adversative” atmosphere,” while women tend to “thrive in a cooperative atmosphere.”

But Court Rules Women Must Be Admitted

- "The burden of justification [for sex discrimination] is demanding and it rests entirely on the State."

- As long as some women might respond favorably to "adversative" education, all women must be given equal opportunity.

"It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. {But] it is also probable than many men would not want to be educated in such an environment. Education is not a 'one size fits all' business."

- Court influenced by decision of West Point and the Naval Academy to admit women.

- Court saw VMI's position as echoing attitude that had previously kept women out of the legal and medical professions as not "suitable" for women.

Are All-Women's Colleges Illegal?

- Friend-of-court briefs filed by women's colleges urged the court not to cast doubt on their legality: "diversity in educational opportunities is an altogether appropriate governmental pursuit and single-sex schools can contribute importantly to such diversity. . . . It is the mission of some single-sex schools to dissipate, rather than perpetuate, traditional gender classifications."

Are Women's Colleges Unaffected by the Ruling?

- "We address specifically and only an educational opportunity recognized as . . . 'unique,' an opportunity available only at Virginia's premier military institute."

- "Sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, to advance full development of the talent and capacities of our Nation's people."

- Meaning all-women's colleges OK, but not all-men's?

If You Don't Say the Wrong Things

- Court warns that an all-women's college should be careful in explaining itself: it "must not rely on over broad generalizations about the different talents, capacities or preferences of males and females." US v. Virginia (1996)

- Meaning its lawyers had better review the college's publicity materials.

Separating Boys and Girls in K-12?

- Proponents: “Create an academic culture in which girls’ self-esteem would be tied to academic achievement. . . Similar all-male schools would do the same for inner-city minority boys.”

- Is this illegal discrimination, based on “overbroad generalizations”?

The Fate of All-Boys K-8 in Detroit (1991)

- Goal: "address high unemployment rates, school dropout levels and homicide among urban males."

- School Board: "establishment of male academies is critical to determine what curriculum and training programs will work to keep urban males out of the City's morgues and prisons."

- "Current coed programs do not work."

All-Boys Curriculum in Detroit K-8

"Special programs including a class entitled 'Rites of Passage,' an Afrocentric (Pluralistic) curriculum, futuristic lessons in preparation for 21st century careers, an emphasis on male responsibility, mentors, Saturday classes, individualized counseling, extended classroom hours, and student uniforms."

Law Suit

- Suit brought by ACLU and NOW (National Organization for Women). Allege unconstitutional sex discrimination.
- School Board supported by local chapters of Urban League and NAACP.

Trial Court Rules for ACLU

Girls have problems too. "Urban girls drop out of school, suffer loss of self esteem and become involved in criminal activity. Ignoring the plight of urban females institutionalizes inequality and perpetuates the mouth that females are doing well in the current system."

Garrett v. Board of Education (D.Mich. 1991)

Giving Boys a Break is Illegal Unless You Do the Same for Girls

- "Although co-educational programs have failed, there is no showing that it is the co-educational factor that results in failure."

- "There is no evidence that the educational system is failing urban males because females attend schools with males. In fact, the educational system is also failing females."

Subsequent History

- Detroit School Board gave up
- In VMI decision, Scalia's dissent pointed to Detroit, said majority decision would perpetuate a terrible decision.
- Ginsburg's decision for the Court responded to women's colleges, but failed to respond to Scalia (suggesting that all-women's colleges are OK, but not all-boys K-12 schools?)

ACLU Campaign Continues

- Louisiana middle school: two all-boy classes, two all-girl classes, one co-ed class.
- ACLU alleged discrimination: single-sex classes got the gifted and talented children; coed classes the special needs children. (Parents chose which classes their kids would get.)

Court Decision

- Trial court ruled the program OK
- Court of Appeals required further hearings. Doe v. Vermillion Parish School Board (2011)
- Ruled that school must provide "exceedingly persuasive justification" for single-sex classes.
- Result was a consent decree in which school board agreed not to initiate separate programs in any of the district's 19 schools through the 2016-17 school years.

The Suits Continue

- In May, 2012, ACLU launched its "Teach Kids, Not Stereotypes" campaign
- Has sued in Florida, West Virginia, Idaho and Alabama, and threatened suit elsewhere
- Example of alleged sexual stereotyping: "teachers in all-boys classes are encouraged to be louder while teachers in all-girl classes are expected to be calmer and less critical." Tampa Bay Tribune 8/12/14

ACLU Fla. Suit

- "Teachers are trained that girls are not good at abstract thinking and learn best through building relationships, while boys excel in concrete thinking and learn best through competition."

- "Teachers of boys are instructed on how to 'engage students in higher level discourse.' Teachers of girls, on the other hand, are instructed that 'girls will learn better if they believe a teacher cares about them.'"

Federal Regulations: Single Sex Classes OK ONLY IF:

- Excluded sex must be offered "substantially equal" single-sex class or coed class. "Equality" includes "intangible factors" such as "reputation of faculty."

- Equality must be reevaluated every 2 years.

- Justification for program may not rely on "overly broad generalizations about different talents, capacities or preferences of either sex." Also must avoid "gender stereotypes."

All-Boys Public School in DC?

- DC "plans to open an all-boys college preparatory high school in the heavy minority area east of Anacostia."
- Model is a Chicago all-boys high school, which has achieved a 100 percent college acceptance rate for seniors for the past five years." WaPo 1/6/15.
- City Council member opposes on the ground of discrimination against girls. Demanded (and got) a DC Attorney General's opinion. Preparing for suit?

Computer Coding and Sex

- Protecting girls from overly-aggressive boys?
- Or teaching girls how to operate in a male-dominated occupation?
- Do separate classes rely on "gender stereotypes"?
- How about Justice Ginsburg's statement in VMI opinion that "Generalizations about 'the way women are' . . . no longer justify denying opportunity to women whose talent and capacity place them outside the average description."

Basis for Suit: ACLU's Position

- VMI case says unusual boy (or girl) must be accommodated. Many but not all girls may prefer working collaboratively in groups, while many but not all boys may thrive on competition.
- To succeed in the outside world, girls must learn to deal with male competition.
- Sex separation necessarily leads to gender stereotyping.

ACLU's "Chilling Impact"?

- "Fear of litigation combined with the financial and administrative burdens in legal maintaining a coed option have led a number of school districts to either forego new initiatives or discontinue existing ones despite interest from parents and students." BU L Rev. May 2013

- But DC is going forward

- As of 2014, 750 public schools with at least one single-sex class, and 850 entirely single-sex public schools (out of over 98,000 nationwide). Tex. L Rev Feb. 2016.

The Private Option

- Can you afford National Cathedral or Saint Albans?
- Who decides? Lawyers or educators?

Session 2

Statistics, Disparate Impact, Class Action

Discrimination and Statistics

- Civil Rights Act says employers can't be required to maintain certain ratios.
- BUT Courts have said bad statistics can prove discrimination under the Civil Rights Act.
- Contradiction?

Are the "Right Statistics" Required?

No: Civil Rights Act 703(j):

Employer is not required "to grant preferential treatment to any individual or to any group because of the race, color, sex, religion or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, sex, religion or national origin employed by any employer in comparison with the total number or percentage of such race [etc.] in the available work force."

BUT "Wrong" Statistics Can Prove Discrimination

- Trucking company had 6400 employees: 5% black, 4% Hispanic. 1800 long-distance drivers (preferrede position): 0.4% black, 0.3% Hispanic.

- Court rules that government proved discrimination: "[Statistical] imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force or less representative of the racial and ethnic composition of the population in the community from which employees are hired." International Brotherhood of Teamsters v. US (1977)

Court Acknowledges Contradiction

- Unbalanced statistics may be used as evidence of purposeful discrimination “even though Sec. 703(j) makes it clear that Title VII imposes no requirement that a work force mirror the general population.” International Brotherhood of Teamsters v. US (1977)

What if Statistics are "Wrong" for Some Other Reason?

- Duke Power Co. had explicitly restricted blacks to its lowest paying jobs. Griggs v. Duke Power (1971)
- When 1964 Civil Rights Act went into effect, it substituted a requirement of a high school education for higher paying jobs.
- Also, added a requirement to pass a professionally prepared aptitude test. Passing grade was the national median for high school graduates.

Discriminatory Impact

- Nationwide, 58% of whites passed the test, but only 6% of blacks. In North Carolina, 34% of white males graduated from high school but only 12% of black males

But No Discriminatory Intent

Supreme Court agreed with trial court that there was no discriminatory intent:

"The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training."

But the Company Didn't Really Need Those Requirements

- There was no “meaningful study” to show that the intelligence test or the high school graduation requirement “bear a demonstrable relationship to successful performance of the jobs for which it was used.”

- “Rather, a vice president testified that the requirements “generally would improve the overall quality of the work force.” Not good enough.

Court's Ruling: Disparate Impact Proves Discrimination

"The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Regardless of whether there is discriminatory intent. Griggs v. Duke Power (1971).

Congress Approves "Disparate Impact" Rule

Employer is in violation if:

— a practice neutral on its face causes a "disparate impact"

— employer fails to prove that the practice is "job related for the position in question and consistent with business necessity"

— or employee shows a less discriminatory alternative that the employer refuses to adopt. Sec. 7(k)

Disparate Impact in Practice

- EEOC has an "80 percent" rule
- For example, it sued Pennsylvania State police because it imposed physical tests that only 71 percent of women applicants passed but 94 percent of men. (300 meter run, sit-ups, push ups, vertical jump, 1.5 mile run). WaPo 7/30/14
- 71 is less than 80% of 94.

Employer's Defenses

- "Business necessity"
- "Bona fide occupational qualification"
- Burden is on employer to prove defenses
    - Risk of losing
    - Legal defense, bad publicity

How to Avoid Suit

- EEOC regulations: Won't sue based on disparate impact of any component of selection process, where total process results in no disparate impact. BCS 585

- Bottom line: the "right" statistics protect you against the EEOC

Disparate Impact: Criminal Background Checks

- At current rates, "About 1 in 17 white men are expected to serve time in prison during their lifetime; by contrast, this rate climbs to 1 in 6 for Hispanic men and 1 in 3 for African American men." EEOC Enforcement Guidance

- This data "supports a finding that criminal record exclusions [from employment] have a disparate impact based on race and national origin." EEOC Guidance

Are They Illegal?

- Employers have burden to prove that persons with a criminal record "pose an unacceptable level of risk." El v SEPTA (3d Cir. 2007)(bus drivers in Philadelphia)
- That depends on individualized consideration (a blanket rule can't be used), taking into account:
  - "nature and gravity of the offense
  - "time that has passed
  - "nature of the job sought

A Close Case

- 55-year old black transit driver trainee, terminated due to 40-year old conviction for second degree murder arising from gang fight when he was 15.

- Court ruled for SEPTA, but said that result might have been different if employee had "hired an expert who testified that there is a time at which a former criminal is no longer any more likely to recidivate than the average person."

General Rule?

- Across-the-board policies are out.
- EEOC says policy must be “narrowly tailored” to identify crimean conduct with a “demonstrably tight nexus to the position in question.”
- What dos that mean?

EEOC's Guidance

- Hypothetical example: Black employee of company that picks up discarded material for shredding. Job involved handling sensitive customer materials. Fired when employer found out that he had been convicted of insurance fraud 5 years ago, when he misstated the cost of home repairs.

- EEOC: Firing illegal, because company did not consider his clean employment record in the intervening five years.

Drug Convictions

- Dollar General has policy not to hire anyone with a drug conviction in past 10 years
- DG has 10,000 stores. 90 % of its employees are cashiers/stockers.
- Refused to hire a woman with 6-year old conviction for drug possession. Had worked as a cashier/stocker for another retailer within last 4 years.
- EEOC sued. Alleges across-the-board policy invalid; no business necessity.

Bad Credit?

EEOC: "Too many employers still uncritically assume that applicants with financial trouble equal potential embezzlers. Not so. . . . We are unaware of any empirical evidence establishing that people with poor credit history are more likely to cheat their companies." EEOC General Counsel letter to WSJ re Kaplan decision, 4/17/14.

How About Common Sense?

"Employers are not required . . . to introduce formal 'validation studies' showing that particular criteria predict actual on-the-job performance." Watson v. Fort Worth Bank (1988)

Whose Common Sense?

- Duke Power Company thought high school completion , or general intelligence test, “generally would improve the overall quality of the work force.”

- Not good enough. Not “shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.” Griggs v. Duke Power (1971).

But Common Sense Sometimes Prevails

"Legitimate employment goals of safety and efficiency" permitted exclusion of methadone users from employment with the New York Transit Authority. Even without a formal study and even with respect to non-safety-sensitive jobs, because there was still a "manifest relationship" to safety and efficiency.

New York City Transit Authority v. Beazer (1979)

Practical Realities

- Some objective employment screens OK. Professional degrees for lawyers, doctors, engineers.
- But can you insist on a top-ranked professional school?
- EEOC allows "professionally developed ability test," but can't be "designed, intended or used to discriminate because of race, sex ……"

Selection By Test?

EEOC: "The use of any selection procedure which has an adverse impact on the hiring, promotion, . . . of members of any race, sex, or ethnic group will be considered to be discriminatory . . ., unless the procedure has been validated in accordance with these guidelines."

Selection By Test?

- EEOC: "Whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures . . . which have as little adverse impact as possible, to determine the appropriateness of using them in accord with these guidelines."

- "Testing" questions during job interviews?

Problems If You Do Use a Test

- What if you do use a test, and its results are “disparate”?
- New Haven firefighters case. Ricci v. De Stefano

Subjective Judgments

- "[S]ome qualities — for example, common sense, good judgment, originality, loyalty and tact — cannot be measured accurately through standardized testing techniques." Watson v. Fort Worth Bank (1988)

- So you have to rely on judgment of interviewer (for hiring) or supervisor (for promotions).

How Do You Assess Bias In Subjective Judgments?

Decision accompanied by written memos or e-mails:

Female partner candidate was “macho,” “overcompensated for being a woman,” was advised to “take a course at a charm school,” to “walk more femininely, talk more femininely, wear makeup, have her hair styled, and wear jewelry.” Price Waterhouse v. Hopkins (1989)

Racist Comments

- Supervisor says teller position "involves a lot of money for blacks to have to count." Watson v. Fort Worth Bank (1988)

- Wal-Mart manager: "men are here to make a career and women aren't." Walmart v. Dukes (2011)

What If There Are No Offensive Remarks?

- "[S]moking gun evidence is rarely found in today's sophisticated employment world." Thomas v. Eastman Kodak (1st Cir. 1999)

- Acceptable euphemisms can hide bias. (What if Price Waterhouse — after some HR coaching —had denied Ms. Hopkins a partnership on the basis of "deficient interpersonal skills"?)

- Statistics may be the only way to show that bias is at work.

Statistics in Practice: Wal-Mart

- "Women fill 70 percent of the hourly jobs but make up only 33 percent of management. The higher one looks in the organization the lower the percentage of women.:

- "Women working in the company's stores are paid less than men in every region and the salary gap widens over time even for men and women hired into the same jobs at the same time. Walmart v. Dukes (2011)

What To Do About Wal-Mart

- EEOC has authority to charge a "pattern and practice" of discrimination. But statistics might not be extreme enough. Also, EEOC has limited resources, and Wal-Mart wouciesld put up a huge fight.

- Private suit? But not worth-while, unless you can file a class action.

- Not practical to litigate thousands of individual cases. Must show a single corporate policy.

- But Wal-Mart management is too sophisticated to issue any biased policy.

Biased Corporate Culture?

- Local store supervisors have large discretion to determine promotion, set pay (within a $2 range), and determine whether employees qualify for a program to train potential managers.

- Plaintiffs' theory: Local supervisors favor men, due to discriminatory culture. Management's failure to limit their discretion constitutes corporate discrimination.

Plaintiff's Theory

"A strong and uniform corporate culture permits bias against women to infect, perhaps subconsciously, the discretionary decision making of each one of Wal-Mart's thousands of managers — thereby making every woman at the company the victim of one common discriminatory practice."

Does Supreme Court Agree?

- Watson v. Fort Worth Bank (1988):

"It may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent."

- "If an employer's undisciplined system of subjective decision making 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." Watson.

- How is management supposed to tell whether supervisors need "disciplining," without using the statistics?

WalMart: HR Dept. Can't Reach Low-Level Managers

- One low-level manager refers to female employees as "little Janie Qs." Another said "men are here to make a career and women aren't." One employee says a male supervisor yelled at female employees, but not men. Another male supervisor told a female employee to "doll up", wear make up, and "dress a little better."

- 120 Wal-Mart female employees claim individual acts of discrimination.

WalMart Case

Class action on behalf of 1.5 million current and former female employees, going back 6 years.

Case reaches Supreme Court on issue of whether a class can be certified.

- Too costly to try each case separately
- If class action allowed, potential damages would create a huge incentive to settle.

Supreme Court Decision

- Court rules, 5-4, that there was not enough commonality to try cases together rather than separately
- Employees' expert admitted "he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."
- With this admission, there was no "significant proof that Wal-Mart operated under a general policy of discrimination
- "Lacking proof of a general policy, there is no basis for a class action." Wal-Mart Stores v. Dukes (2011)

Individual Cases Too Variable for a "Sampling"

- Plaintiffs "held a multitude of different jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3400 stores sprinkled across 59 states, with a kaleidoscope of supervisors (male and female)."

Sampling Not Adequate

- Individual plaintiffs claimed some 120 cases of discrimination, "1 for every 12,500 class members." Relating to 235 out of WalMart's 3400 stores.

- "Even if every single one of these accounts is true, that would not demonstrate that the entire company operated under a general policy of discrimination."

- On this basis, Court rejects lower court's proposal to try a set of sample cases, and apply percentage found to be discriminatory across the entire 12,500-member class of plaintiffs.

Dissent

- An employer's "undisciplined system of subjective decision making" is a practice that "may be analyzed under a disparate impact approach."
- That's enough uniformity to try the case as a class action.
- Admits that individual calculation of damages might be difficult. But court could issue an injunction, telling Wal-Mart to stop discriminating.
- But how does an injunction avoid reliance on statistics. And without damages, how do plaintiffs' lawyers hit the jackpot?

The Fight Continues

- Class action by 51 individual female store managers of Family Dollar, alleging lower pay due to "gender bias, subjectivity stereotyping."

- Federal appeals court rules Walmart decision doesn't apply. Scott v. Family Dollar Stores (4th Cir. 2013):

  - Wal-Mart involved discretionary decisions at individual store level. Family Dollar discretionary decisions were made at management level.

  - But Family Dollar involved 7000 stores, 95 vice-presidents and 400 district managers.

Racial Statistics Report

EEOC requires annual report on racial and gender composition of workforce

- Every employer with 100 or more employees covered. (Over 60 million employees nationwide.)
- Separate report for each “establishment” within the company.

Racial Categories Reported

Separately for males and females:

- White
- Black or African American
- Native Hawaiian or Other Pacific Islander
- Asian
- American Indian or Alaska Native
- Two or More Races
- Disability (to be added)

Separate Count for Each Job Category

Executive/Senior Level Officials and Managers

First/Mid-Level Officials and Managers

Professionals

Technicians

Sales Workers

Administrative Support Workers

Craft Workers

Operatives

Laborers

Service Workers

Purpose of Statistics

- EEOC states that it “uses these EEOC data to support civil rights enforcement.”

- Also used by OFCCP “to determine which employer facilities to select for compliance evaluation.”(OFCCP enforces rule vs. discrimination by Government contractors.)

A Fictional Blindfold

- EEOC regulations say these records should be kept "separate from the employee's basic personnel form or other records available to those responsible for personnel decisions."

- Pretense that these records are not intended to create a pressure to consider race and sex?

Session 3

Affirmative Action as a Judical Remedy

- Metal workers union excluded blacks and Hispanics completely. When ordered to stop discriminating, it engaged in a variety of evasive techniques. For example, when ordered to admit based on tests, it devised tests no one could pass without coaching, then gave that coaching only to whites. Sheet Metal Workers v. EEOC (1986)

Union Ordered to Discriminate in Favor of Minorities

- Running out of patience, the trial court finally ordered the union to make atupreme least 29% of its new admissions minorities, and appointed an administrator to make sure that goal was met.

- Supreme Court upheld the trial court, even though its order required the union to admit new members based on race — which the 1964 Civil Rights Act forbids.

Discrimination Needed To Cure Past Discrimination

"Requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII."

Sheet Metal Workers v. EEOC (1987)

Court Orders Racial Quota for Police Promotions

- US v. Paradise (1987) (Alabama State police).
- 12 years after being ordered not to discriminate in hiring or promotion:
  - "Of the 6 majors, *there is still not one black*. Of the 25 captains, *there is still not one black*. Of the 35 lieutenants, *there is still not one black*. Of the 65 sergeants, *there is still not one black*. Of the 66 corporals, *only four are black*."

Quotas Needed to Overcome Die-Hard Resistance

"The preceding scenario is intolerable and must not continue. The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers."

Voluntary Quotas?

- What if employer is responsible, recognizes the problem, and doesn't wait to be sued?

- Until 1974, Kaiser Steel had hired only craft workers with experience. Because craft unions had excluded blacks at one plant there were only 5 blacks among 273 craft workers

Voluntary Remedy

- Kaiser agreed with union to set craft-hiring goals for each plant equal to percentage of blacks in local labor force.
- On-the-job craft training programs were set for unskilled production workers, with 50% of the slots reserved for blacks.
- Rejected white workers sued

Court Allows Race Discrimination

- Court concedes that "Title VII forbids discrimination against whites as well as blacks."

- But, despite its literal language, Act can't be read to forbid "an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation." United Steel Workers v. Weber (1979).

Affirmative Action to Remedy Societal Discrimination?

- Board of Education agreed with union that in case of layoffs, teachers with less tenure would be laid off first.
- Except that tenure would be violated where necessary to maintain percentage of minority teachers equal to percentage of minority students.
- Layoffs occurred. White teachers were laid off, and minority teachers with less tenure retained.

Reverse Discrimination

- Laid off white teachers sued, and won.
- Wygant v. Jackson Board of Education (1986):
  - "No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."

The Court Waffles?

- Johnson v. Transportation Agency of Santa Clara County (1987):
  - Agency promoted a female to position of road dispatcher. Job was to assign road crews equipment and materials. The Agency had never employed a woman in this job. One requirement was that the person had served as a road maintenance worker. This applicant was the only female who had ever done so.
  - Agency promoted her because of her sex, to remedy past discrimination against women in this kind of job.
  - But no evidence that this Agency had discriminated.

Court Allows Sex Discrimination

- Sex discrimination valid because "designed to eliminate Agency work force imbalances in traditionally segregated job categories." Johnson v. Transportation Agency
- Imbalance must be "manifest." (Majority opinion)
- O'Connor: Imbalance must be so bad that employer could have been sued.
- Stevens: Affirmative action should be OK "for any reason that might seem sensible from a business or a social point of view."

Dissent (Scalia)

- Under "disparate impact" rule, any employer with "numerical disparities" can be sued, and can't be sure of winning even if there was no intent to discriminate.

- "If employers are free to discriminate through affirmative action, without fear of 'reverse discrimination' suits," they will have to engage in reverse discrimination to protect themselves.

- Hiring and promoting by the numbers will become routine.

Should Schools Be "Rebalanced"?

- How about racially based decisions on school admission, to counter effects of residential segregation?

- Rebalancing not required: "Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practicable ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts." Freeman v. Pitts (1992)

Is Voluntary "Rebalancing" Based on Race OK?

- Exclude black student fro a school she wants to attend because school is already "too black"?

- Is maintenance of a predetermined racial "balance" a legitimate basis for admission in K-12?

Affirmative Action in K-12

- Seattle allowed students to choose the school they want, but limits admission if it would upset a predetermined racial balance.

- Seattle had never discriminated against minorities, so affirmative action could not her justified as a remedy for past discrimination

No?

- Court sais Seattle violated Equal Protection Clause. Parents Involved in Community Schools v. Seattle School District (2007)

- "Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "at the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."

Or Yes?

- Kennedy voted against Seattle for other reasons, but would leave the door open for race-based diversity plans in other cases: "This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children." Seattle School District (concurring opinion)

The Fifth Vote for Racial Balance?

- "A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered." Kennedy in Seattle School District (2007).

Affirmative Action — Pros and Cons

Should be OK where a majority is favoring a minority:

There is a "significant difference between a decision by the majority to impose a special burden on members of a minority and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority."

Justice Stevens, dissenting in Adarand Constructors v. Pena (1995)

“Invidious” vs. “Benign” Discrimination

- “Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority.”

- “Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.”

Who Is the "Majority"

- City of Richmond v. Croson (1989) (invalidating racial preference in government contracts):

"Blacks compromise approximately 50% of the population of the City of Richmond. Five of the nine seats on the City Council are held by blacks."

Opposing View

- Doesn't the victim of "benign" discrimination suffer damage? Or at least race-based resentment?
- How about the "stigma" effect on the beneficiary of "benign" discrimination?

Needed to Compensate for Past Discrimination?

- You do not take a person who, for years, has b been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, you are free to compete with all the others.' . . . [I]t is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." LBJ, June 4, 1965

- How has the passage of 50 years affected this argument?

Affirmative Action Still Needed?

- "In order to get beyond racism, we must first take account of race. There is not other way. And in order to treat some persons equally, we must treat them differently." Blackmun, concurring in Regents of the University of California v. Bakke (1978)

The Other View: Discrimination Is Never "Benign"

- "The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, 'created equal', who were discriminated against."

- "And the relevant resolve is that it should never happen again. Racial preferences appear to 'even the score.' . . . Only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace."

Scalia, concurring in City of Richmond v. Croson (1989).

Affirmative Action and College Admission

- Principal rationale is to promote diversity rather than remedy past injustice.
- Under diversity rationale, affirmative action becomes a permanent feature of society.

Is Affirmative Action Permanent?

- Grutter v. Michigan (2003): "It has been 25 years since Justice Powell first approved the use of race to further an increase in student body diversity in the context of higher public education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary."

Court Approves Racial Preference to Promote Diversity

- Grutter v. Bollinger (2003) sustained the affirmative action program of the University of Michigan Law School.

- "Student body diversity is a compelling state interest that can justify the use of race in university admissions."

Court's Rationale

- Diversity "promotes cross racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races."

- "Class room discussion is livelier, more spirited, and simply more enlightening and interesting when students have the greatest possible variety of backgrounds."

- "Student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."

The Military Example

- Court relies on brief from high-ranking retired officers that a "racially diverse officer corps" is essential to the military.

- "The military cannot achieve an officer corps that is both high qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies."

Relevance of Military Example

- Court reasons: "It requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."

Political Leadership

- Law schools train political leaders. “In order to cultivate a set of leaders with legitimacy in the eyes the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”