PRICE WATERHOUSE *v.* HOPKINS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1167. Argued October 31, 1988—Decided May 1, 1989

Respondent was a senior manager in an office of petitioner professional accounting partnership when she was proposed for partnership in 1982. She was neither offered nor denied partnership but instead her candidacy was held for reconsideration the following year. When the partners in her office later refused to repropose her for partnership, she sued petitioner in Federal District Court under Title VII of the Civil Rights Act of 1964, charging that it had discriminated against her on the basis of sex in its partnership decisions. The District Court ruled in respondent's favor on the question of liability, holding that petitioner had unlawfully discriminated against her on the basis of sex by consciously giving credence and effect to partners' comments about her that resulted from sex stereotyping. The Court of Appeals affirmed. Both courts held that an employer who has allowed a discriminatory motive to play a part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination, and that petitioner had not carried this burden.

Held: The judgment is reversed, and the case is remanded.

263 U. S. App. D. C. 321, 825 F. 2d 458, reversed and remanded.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded that when a plaintiff in a Title VII case proves that her gender played a part in an employment decision, the defendant may avoid a finding of liability by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. The courts below erred by requiring petitioner to make its proof by clear and convincing evidence. Pp. 237-258.

(a) The balance between employee rights and employer prerogatives established by Title VII by eliminating certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice is decisive in this case. The words "because of" in § 703(a)(1) of the Act, which forbids an employer to make an adverse decision against an employee "because of such individual's . . . sex," requires looking at *all* of the reasons, both legitimate and illegitimate, contributing to the decision *at the time it is made*. The preservation of employers' freedom of choice means that an employer will not be liable if it can prove that, if

it had not taken gender into account, it would have come to the same decision. This Court's prior decisions demonstrate that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision thereby places the burden on the defendant to show that it would have made the same decision in the absence of the unlawful motive. Here, petitioner may not meet its burden by merely showing that respondent's interpersonal problems—abrasiveness with staff members—constituted a legitimate reason for denying her partnership; instead, petitioner must show that its legitimate reason, standing alone, would have induced petitioner to deny respondent partnership. Pp. 239-252.

(b) Conventional rules of civil litigation generally apply in Title VII cases, and one of these rules is that the parties need only prove their case by a preponderance of the evidence. Pp. 252-255.

(c) The District Court's finding that sex stereotyping was permitted to play a part in evaluating respondent as a candidate for partnership was not clearly erroneous. This finding is not undermined by the fact that many of the suspect comments made about respondent were made by partners who were supporters rather than detractors. Pp. 255-258.

JUSTICE WHITE, although concluding that the Court of Appeals erred in requiring petitioner to prove by clear and convincing evidence that it would have reached the same employment decision in the absence of the improper motive, rather than merely requiring proof by a preponderance of the evidence as in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, which sets forth the proper approach to causation in this case, also concluded that the plurality here errs in seeming to require, at least in most cases, that the employer carry its burden by submitting objective evidence that the same result would have occurred absent the unlawful motivation. In a mixed-motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof, and there is no special requirement of objective evidence. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action. Pp. 258-261.

JUSTICE O'CONNOR, although agreeing that on the facts of this case, the burden of persuasion should shift to petitioner to demonstrate by a preponderance of the evidence that it would have reached the same decision absent consideration of respondent's gender, and that this burden shift is properly part of the liability phase of the litigation, concluded that the plurality misreads Title VII's substantive causation requirement to *command* burden shifting if the employer's decisional process is

"tainted" by awareness of sex or race in any way, and thereby effectively eliminates the requirement. JUSTICE O'CONNOR also concluded that the burden shifting rule should be limited to cases such as the present in which the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion. Pp. 261–279.

(a) Contrary to the plurality's conclusion, Title VII's plain language making it unlawful for an employer to undertake an adverse employment action "because of" prohibited factors and the statute's legislative history demonstrate that a substantive violation only occurs when consideration of an illegitimate criterion is the "but-for" cause of the adverse action. However, nothing in the language, history, or purpose of the statute prohibits adoption of an evidentiary rule which places the burden of persuasion on the defendant to demonstrate that legitimate concerns would have justified an adverse employment action where the plaintiff has convinced the factfinder that a forbidden factor played a substantial role in the employment decision. Such a rule has been adopted in tort and other analogous types of cases, where leaving the burden of proof on the plaintiff to prove "but-for" causation would be unfair or contrary to the deterrent purposes embodied in the concept of duty of care. Pp. 262–269.

(b) Although the burden shifting rule adopted here departs from the careful framework established by *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248—which clearly contemplate that an individual disparate treatment plaintiff bears the burden of persuasion throughout the litigation—that departure is justified in cases such as the present where the plaintiff, having presented direct evidence that the employer placed substantial, though unquantifiable, reliance on a forbidden factor in making an employment decision, has taken her proof as far as it could go, such that it is appropriate to require the defendant, which has created the uncertainty as to causation by considering the illegitimate criterion, to show that its decision would have been justified by wholly legitimate concerns. Moreover, a rule shifting the burden in these circumstances will not conflict with other Title VII policies, particularly its prohibition on preferential treatment based on prohibited factors. *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, distinguished. Pp. 270–276.

(c) Thus, in order to justify shifting the burden on the causation issue to the defendant, a disparate treatment plaintiff must show by direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision. Such a showing entitles the factfinder to presume that the employer's discriminatory animus made a difference in the outcome, and, if the employer fails to carry its burden of persuasion, to conclude that the employer's decision was made "because of" consideration of the illegitimate factor, thereby satisfying

the substantive standard for liability under Title VII. This burden shifting rule supplements the *McDonnell Douglas-Burdine* framework, which continues to apply where the plaintiff has failed to satisfy the threshold standard set forth herein. Pp. 276–279.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., *post*, p. 258, and O'CONNOR, J., *post*, p. 261, filed opinions concurring in the judgment. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 279.

Kathryn A. Oberly argued the cause for petitioner. With her on the briefs were *Paul M. Bator*, *Douglas A. Poe*, *Eldon Olson*, and *Ulric R. Sullivan*.

James H. Heller argued the cause for respondent. With him on the brief was *Douglas B. Huron*.

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join.

Ann Hopkins was a senior manager in an office of Price Waterhouse when she was proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. When the partners in her office later re-

---

**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold*; for the American Psychological Association by *Donald N. Bersoff*; for the Committees on Civil Rights, Labor and Employment Law, and Sex and Law of the Association of the Bar of the City of New York by *Jonathan Lang*, *Eugene S. Friedman*, *Arthur Leonard*, and *Colleen McMahon*; and for the NOW Legal Defense and Education Fund et al. by *Sarah E. Burns*, *Lynn Hecht Schafran*, *Joan E. Bertin*, *John A. Powell*, and *Donna R. Lenhoff*.

Solicitor General Fried, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Merrill*, *Deputy Assistant Attorney General Clegg*, *Brian J. Martin*, and *David K. Flynn* filed a brief for the United States as *amicus curiae*.

fused to repropose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, charging that the firm had discriminated against her on the basis of sex in its decisions regarding partnership. Judge Gesell in the Federal District Court for the District of Columbia ruled in her favor on the question of liability, 618 F. Supp. 1109 (1985), and the Court of Appeals for the District of Columbia Circuit affirmed. 263 U. S. App. D. C. 321, 825 F. 2d 458 (1987). We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives. 485 U. S. 933 (1988).

I

At Price Waterhouse, a nationwide professional accounting partnership, a senior manager becomes a candidate for partnership when the partners in her local office submit her name as a candidate. All of the other partners in the firm are then invited to submit written comments on each candidate—either on a "long" or a "short" form, depending on the partner's degree of exposure to the candidate. Not every partner in the firm submits comments on every candidate. After reviewing the comments and interviewing the partners who submitted them, the firm's Admissions Committee makes a recommendation to the Policy Board. This recommendation will be either that the firm accept the candidate for partnership, put her application on "hold," or deny her the promotion outright. The Policy Board then decides whether to submit the candidate's name to the entire partnership for a vote, to "hold" her candidacy, or to reject her. The recommendation of the Admissions Committee, and the decision of the Policy Board, are not controlled by fixed guidelines: a certain number of positive comments from partners will not guarantee a candidate's admission to the partnership, nor will a specific

quantity of negative comments necessarily defeat her application. Price Waterhouse places no limit on the number of persons whom it will admit to the partnership in any given year.

Ann Hopkins had worked at Price Waterhouse's Office of Government Services in Washington, D. C., for five years when the partners in that office proposed her as a candidate for partnership. Of the 662 partners at the firm at that time, 7 were women. Of the 88 persons proposed for partnership that year, only 1—Hopkins—was a woman. Forty-seven of these candidates were admitted to the partnership, 21 were rejected, and 20—including Hopkins—were "held" for reconsideration the following year.[1] Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership.

In a jointly prepared statement supporting her candidacy, the partners in Hopkins' office showcased her successful 2-year effort to secure a $25 million contract with the Department of State, labeling it "an outstanding performance" and one that Hopkins carried out "virtually at the partner level." Plaintiff's Exh. 15. Despite Price Waterhouse's attempt at trial to minimize her contribution to this project, Judge Ge-

[1] Before the time for reconsideration came, two of the partners in Hopkins' office withdrew their support for her, and the office informed her that she would not be reconsidered for partnership. Hopkins then resigned. Price Waterhouse does not challenge the Court of Appeals' conclusion that the refusal to repropose her for partnership amounted to a constructive discharge. That court remanded the case to the District Court for further proceedings to determine appropriate relief, and those proceedings have been stayed pending our decision. Brief for Petitioner 15, n. 3. We are concerned today only with Price Waterhouse's decision to place Hopkins' candidacy on hold. Decisions pertaining to advancement to partnership are, of course, subject to challenge under Title VII. *Hishon* v. *King & Spalding*, 467 U. S. 69 (1984).

sell specifically found that Hopkins had "played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State." 618 F. Supp., at 1112. Indeed, he went on, "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership." *Ibid.*

The partners in Hopkins' office praised her character as well as her accomplishments, describing her in their joint statement as "an outstanding professional" who had a "deft touch," a "strong character, independence and integrity." Plaintiff's Exh. 15. Clients appear to have agreed with these assessments. At trial, one official from the State Department described her as "extremely competent, intelligent," "strong and forthright, very productive, energetic and creative." Tr. 150. Another high-ranking official praised Hopkins' decisiveness, broadmindedness, and "intellectual clarity"; she was, in his words, "a stimulating conversationalist." *Id.*, at 156–157. Evaluations such as these led Judge Gesell to conclude that Hopkins "had no difficulty dealing with clients and her clients appear to have been very pleased with her work" and that she "was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked." 618 F. Supp., at 1112–1113.

On too many occasions, however, Hopkins' aggressiveness apparently spilled over into abrasiveness. Staff members seem to have borne the brunt of Hopkins' brusqueness. Long before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members. Although later evaluations indicate an improvement, Hopkins' perceived shortcomings in this important area eventually doomed her bid for partnership. Virtually all of the partners' negative remarks about Hopkins—even those of partners supporting her—had to do with her "interpersonal skills." Both "[s]upporters and opponents of her candidacy," stressed Judge Gesell, "indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id.*, at 1113.

There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho" (Defendant's Exh. 30); another suggested that she "overcompensated for being a woman" (Defendant's Exh. 31); a third advised her to take "a course at charm school" (Defendant's Exh. 27). Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Tr. 321. Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." Defendant's Exh. 27. But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace:* in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 618 F. Supp., at 1117.

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified at trial that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping. Her testimony focused not only on the overtly sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her. One partner, for example, baldly stated that Hopkins was "universally disliked" by staff (Defendant's Exh. 27), and another described her as "consistently annoying and irritating" *(ibid.);* yet these were people who had had very little contact with Hopkins. According to

Fiske, Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping—although Fiske admitted that she could not say with certainty whether any particular comment was the result of stereotyping. Fiske based her opinion on a review of the submitted comments, explaining that it was commonly accepted practice for social psychologists to reach this kind of conclusion without having met any of the people involved in the decisionmaking process.

In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, "[c]andidates were viewed favorably if partners believed they maintained their femin[in]ity while becoming effective professional managers"; in this environment, "[t]o be identified as a 'women's lib[b]er' was regarded as [a] negative comment." 618 F. Supp., at 1117. In fact, the judge found that in previous years "[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers—yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations." *Ibid.*

Judge Gesell found that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman; although there were male candidates who lacked these skills but who were admitted to partnership, the judge found that these candidates possessed other, positive traits that Hopkins lacked.

The judge went on to decide, however, that some of the partners' remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments. He held that Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners' comments that resulted from sex stereotyping. Noting that Price Waterhouse could avoid equitable relief by proving by clear and convincing evidence that it would have placed Hopkins' candidacy on hold even absent this discrimination, the judge decided that the firm had not carried this heavy burden.

The Court of Appeals affirmed the District Court's ultimate conclusion, but departed from its analysis in one particular: it held that even if a plaintiff proves that discrimination played a role in an employment decision, the defendant will not be found liable if it proves, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination. 263 U. S. App. D. C., at 333–334, 825 F. 2d, at 470–471. Under this approach, an employer is not deemed to have violated Title VII if it proves that it would have made the same decision in the absence of an impermissible motive, whereas under the District Court's approach, the employer's proof in that respect only avoids equitable relief. We decide today that the Court of Appeals had the better approach, but that both courts erred in requiring the employer to make its proof by clear and convincing evidence.

II

The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute. According to Price Waterhouse, an employer violates Title VII only if it gives decisive consideration to an employee's gender, race, national origin, or religion in making a decision that affects that employee. On Price Waterhouse's theory, even if a plaintiff shows that her gender played a part in an employment decision, it is still her burden to show that the decision would have been different if the employer had

not discriminated. In Hopkins' view, on the other hand, an employer violates the statute whenever it allows one of these attributes to play any part in an employment decision. Once a plaintiff shows that this occurred, according to Hopkins, the employer's proof that it would have made the same decision in the absence of discrimination can serve to limit equitable relief but not to avoid a finding of liability.[2] We conclude that, as often happens, the truth lies somewhere in between.

---

[2] This question has, to say the least, left the Circuits in disarray. The Third, Fourth, Fifth, and Seventh Circuits require a plaintiff challenging an adverse employment decision to show that, but for her gender (or race or religion or national origin), the decision would have been in her favor. See, *e. g.*, *Bellissimo* v. *Westinghouse Electric Corp.*, 764 F. 2d 175, 179 (CA3 1985), cert. denied, 475 U. S. 1035 (1986); *Ross* v. *Communications Satellite Corp.*, 759 F. 2d 355, 365–366 (CA4 1985); *Peters* v. *Shreveport*, 818 F. 2d 1148, 1161 (CA5 1987); *McQuillen* v. *Wisconsin Education Assn. Council*, 830 F. 2d 659, 664–665 (CA7 1987). The First, Second, Sixth, and Eleventh Circuits, on the other hand, hold that once the plaintiff has shown that a discriminatory motive was a "substantial" or "motivating" factor in an employment decision, the employer may avoid a finding of liability only by proving that it would have made the same decision even in the absence of discrimination. These courts have either specified that the employer must prove its case by a preponderance of the evidence or have not mentioned the proper standard of proof. See, *e. g.*, *Fields* v. *Clark University*, 817 F. 2d 931, 936–937 (CA1 1987) ("motivating factor"); *Berl* v. *Westchester County*, 849 F. 2d 712, 714–715 (CA2 1988) ("substantial part"); *Terbovitz* v. *Fiscal Court of Adair County, Ky.*, 825 F. 2d 111, 115 (CA6 1987) ("motivating factor"); *Bell* v. *Birmingham Linen Service*, 715 F. 2d 1552, 1557 (CA11 1983). The Court of Appeals for the District of Columbia Circuit, as shown in this case, follows the same rule except that it requires that the employer's proof be clear and convincing rather than merely preponderant. 263 U. S. App. D. C. 321, 333–334, 825 F. 2d 458, 470–471 (1987); see also *Toney* v. *Block*, 227 U. S. App. D. C. 273, 275, 705 F. 2d 1364, 1366 (1983) (Scalia, J.) (it would be "destructive of the purposes of [Title VII] to require the plaintiff to establish . . . the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor"). The Court of Appeals for the Ninth Circuit also requires clear and convincing proof, but it goes further by holding that a Title VII violation is made out as soon as the plaintiff shows that an impermissible motivation played a part in an employment

A

In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.[3] Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of "for cause" legislation,[4] Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.

Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids

---

decision—at which point the employer may avoid reinstatement and an award of backpay by proving that it would have made the same decision in the absence of the unlawful motive. See, *e. g. Fadhl* v. *City and County of San Francisco*, 741 F. 2d 1163, 1165–1166 (1984) (Kennedy, J.) ("significant factor"). Last, the Court of Appeals for the Eighth Circuit draws the same distinction as the Ninth between the liability and remedial phases of Title VII litigation, but requires only a preponderance of the evidence from the employer. See, *e. g.*, *Bibbs* v. *Block*, 778 F. 2d 1318, 1320–1324 (1985) (en banc) ("discernible factor").

[3] We disregard, for purposes of this discussion, the special context of affirmative action.

[4] Congress specifically declined to require that an employment decision have been "for cause" in order to escape an affirmative penalty (such as reinstatement or backpay) from a court. As introduced in the House, the bill that became Title VII forbade such affirmative relief if an "individual was . . . refused employment or advancement, or was suspended or discharged *for cause*." H. R. Rep. No. 7152, 88th Cong., 1st Sess., 77 (1963) (emphasis added). The phrase "for cause" eventually was deleted in favor of the phrase "for any reason other than" one of the enumerated characteristics. See 110 Cong. Rec. 2567–2571 (1964). Representative Celler explained that this substitution "specif[ied] cause"; in his view, a court "cannot find any violation of the act which is based on facts other . . . than discrimination on the grounds of race, color, religion, or national origin." *Id.*, at 2567.

an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's . . . sex." 42 U. S. C. §§ 2000e–2(a)(1), (2) (emphasis added).[5] We take these words to mean that gender must be irrelevant to employment decisions. To construe the words "because of" as colloquial shorthand for "but-for causation," as does Price Waterhouse, is to misunderstand them.[6]

But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs of § 703(a)(1) ("to fail or refuse"), in contrast, turns our attention to the actual moment of the

[5] In this Court, Hopkins for the first time argues that Price Waterhouse violated § 703(a)(2) when it subjected her to a biased decisionmaking process that "tended to deprive" a woman of partnership on the basis of her sex. Since Hopkins did not make this argument below, we do not address it.

[6] We made passing reference to a similar question in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 282, n. 10 (1976), where we stated that when a Title VII plaintiff seeks to show that an employer's explanation for a challenged employment decision is pretextual, "no more is required to be shown than that race was a 'but for' cause." This passage, however, does not suggest that the plaintiff *must* show but-for cause; it indicates only that if she does so, she prevails. More important, *McDonald* dealt with the question whether the employer's stated reason for its decision was *the* reason for its action; unlike the case before us today, therefore, *McDonald* did not involve mixed motives. This difference is decisive in distinguishing this case from those involving "pretext." See *infra*, at 247, n. 12.

event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made*. Moreover, since we know that the words "because of" do not mean "*solely* because of,"[7] we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.

To attribute this meaning to the words "because of" does not, as the dissent asserts, *post*, at 282, divest them of causal significance. A simple example illustrates the point. Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, *neither* physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for cause of the object's movement. *Ibid.* Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.

We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words "because of," Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant

[7] Congress specifically rejected an amendment that would have placed the word "solely" in front of the words "because of." 110 Cong. Rec. 2728, 13837 (1964).

to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

Our interpretation of the words "because of" also is supported by the fact that Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a "bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise." 42 U. S. C. § 2000e–2(e). The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities. An employer may not, we have held, condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job. See *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977 (1988); *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971).

To say that an employer may not take gender into account is not, however, the end of the matter, for that describes only one aspect of Title VII. The other important aspect of the statute is its preservation of an employer's remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. The statute's maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court.

To begin with, the existence of the BFOQ exception shows Congress' unwillingness to require employers to change the very nature of their operations in response to the statute. And our emphasis on "business necessity" in disparate-

impact cases, see *Watson* and *Griggs*, and on "legitimate, nondiscriminatory reason[s]" in disparate-treatment cases, see *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), results from our awareness of Title VII's balance between employee rights and employer prerogatives. In *McDonnell Douglas*, we described as follows Title VII's goal to eradicate discrimination while preserving workplace efficiency: "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." 411 U. S., at 801.

When an employer ignored the attributes enumerated in the statute, Congress hoped, it naturally would focus on the qualifications of the applicant or employee. The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute's legislative history. An interpretive memorandum entered into the Congressional Record by Senators Case and Clark, comanagers of the bill in the Senate, is representative of this general theme.[8] According to their memorandum, Title VII "'expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.'"[9] 110 Cong. Rec. 7247 (1964), quoted in *Griggs* v.

---

[8] We have in the past acknowledged the authoritativeness of this interpretive memorandum, written by the two bipartisan "captains" of Title VII. See, *e. g.*, *Firefighters* v. *Stotts*, 467 U. S. 561, 581, n. 14 (1984).

[9] Many of the legislators' statements, such as the memorandum quoted in text, focused specifically on race rather than on gender or religion or national origin. We do not, however, limit their statements to the context of

Duke Power Co., supra, at 434. The memorandum went on: "To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title." 110 Cong. Rec. 7213 (1964).

Many other legislators made statements to a similar effect; we see no need to set out each remark in full here. The central point is this: while an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ), it is free to decide against a woman for other reasons. We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability[10] only by proving that it would have made the same

race, but instead we take them as general statements on the meaning of Title VII. The somewhat bizarre path by which "sex" came to be included as a forbidden criterion for employment—it was included in an attempt to *defeat* the bill, see C. & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115–117 (1985)—does not persuade us that the legislators' statements pertaining to race are irrelevant to cases alleging gender discrimination. The amendment that added "sex" as one of the forbidden criteria for employment was passed, of course, and the statute on its face treats each of the enumerated categories exactly the same.

By the same token, our specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin.

[10] Hopkins argues that once she made this showing, she was entitled to a finding that Price Waterhouse had discriminated against her on the basis of sex; as a consequence, she says, the partnership's proof could only limit the relief she received. She relies on Title VII's § 706(g), which permits a court to award affirmative relief when it finds that an employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice," and yet forbids a court to order reinstatement of, or backpay to, "an individual . . . if such individual was refused . . . employment or advancement or was suspended or discharged *for any reason other than* discrimination on account of race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–5(g) (emphasis added). We do not take this provision to mean that a court inevitably can find a violation of the statute without having considered whether the employment decision would have been the same absent the impermissible motive. That would be to interpret § 706(g)—a provision defining *remedies*—to influence the substantive commands of the statute. We think that this provision merely limits courts' authority to award affirmative relief in those circumstances in which a violation of the statute is not dependent upon the effect of the employer's discriminatory practices on a particular employee, as in pattern-or-practice suits and class actions. "The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.'" *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 876 (1984), quoting *Teamsters* v. *United States*, 431 U. S. 324, 360, n. 46 (1977).

Without explicitly mentioning this portion of § 706(g), we have in the past held that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect. See *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 772 (1976); *Teamsters* v. *United States*, *supra*, at 367–371; *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 404, n. 9 (1977). These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination, not on charges of individual discrimination. Cf. *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393 (1983) (upholding the National Labor Relations Board's identical interpretation of § 10(c) of the National Labor Relations Act, 29 U. S. C. § 160(c), which contains language almost identical to § 706(g)).

decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights.

Our holding casts no shadow on *Burdine*, in which we decided that, even after a plaintiff has made out a prima facie case of discrimination under Title VII, the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was the true reason. 450 U. S., at 256–258. We stress, first, that nei-

ther court below shifted the burden of persuasion to Price Waterhouse on this question, and in fact, the District Court found that Hopkins had not shown that the firm's stated reason for its decision was pretextual. 618 F. Supp., at 1114–1115. Moreover, since we hold that the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not the one of "shifting burdens" that we addressed in *Burdine*. Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another. See *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393, 400 (1983).[11]

Price Waterhouse's claim that the employer does not bear any burden of proof (if it bears one at all) until the plaintiff has shown "substantial evidence that Price Waterhouse's explanation for failing to promote Hopkins was not the 'true reason' for its action" (Brief for Petitioner 20) merely restates its argument that the plaintiff in a mixed-motives case

[11] Given that both the plaintiff and defendant bear a burden of proof in cases such as this one, it is surprising that the dissent insists that our approach requires the employer to bear "the ultimate burden of proof." *Post*, at 288. It is, moreover, perfectly consistent to say *both* that gender was a factor in a particular decision when it was made *and* that, when the situation is viewed hypothetically and after the fact, the same decision would have been made even in the absence of discrimination. Thus, we do not see the "internal inconsistency" in our opinion that the dissent perceives. See *post*, at 285–286. Finally, where liability is imposed because an employer is unable to prove that it would have made the same decision even if it had not discriminated, this is not an imposition of liability "where sex made no difference to the outcome." *Post*, at 285. In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate. Thus, where an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, we are entitled to conclude that gender *did* make a difference to the outcome.

must squeeze her proof into *Burdine*'s framework. Where a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was "*the* 'true reason'" (Brief for Petitioner 20 (emphasis added)) for the decision—which is the question asked by *Burdine*. See *Transportation Management*, *supra*, at 400, n. 5.[12] Oblivious to this last point, the dissent would insist that *Burdine*'s framework perform work that it was never intended to perform. It would require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source—for the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision. To say that *Burdine*'s evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations is not to cast aspersions on the utility of that scheme in the circumstances for which it was designed.

[12] Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a "pretext" case or a "mixed-motives" case from the beginning in the District Court; indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both. Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her. At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual. The dissent need not worry that this evidentiary scheme, if used during a jury trial, will be so impossibly confused and complex as it imagines. See, *e. g.*, *post*, at 292. Juries long have decided cases in which defendants raised affirmative defenses. The dissent fails, moreover, to explain why the evidentiary scheme that we endorsed over 10 years ago in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), has not proved unworkable in that context but would be hopelessly complicated in a case brought under federal antidiscrimination statutes.

B

In deciding as we do today, we do not traverse new ground. We have in the past confronted Title VII cases in which an employer has used an illegitimate criterion to distinguish among employees, and have held that it is the employer's burden to justify decisions resulting from that practice. When an employer has asserted that gender is a BFOQ within the meaning of § 703(e), for example, we have assumed that it is the employer who must show why it must use gender as a criterion in employment. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 332–337 (1977). In a related context, although the Equal Pay Act expressly permits employers to pay different wages to women where disparate pay is the result of a "factor other than sex," see 29 U. S. C. § 206(d)(1), we have decided that it is the employer, not the employee, who must prove that the actual disparity is not sex linked. See *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 196 (1974). Finally, some courts have held that, under Title VII as amended by the Pregnancy Discrimination Act, it is the employer who has the burden of showing that its limitations on the work that it allows a pregnant woman to perform are necessary in light of her pregnancy. See, *e. g.*, *Hayes* v. *Shelby Memorial Hospital*, 726 F. 2d 1543, 1548 (CA11 1984); *Wright* v. *Olin Corp.*, 697 F. 2d 1172, 1187 (CA4 1982). As these examples demonstrate, our assumption always has been that if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision. We have not in the past required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men, and we do not do so today.

We have reached a similar conclusion in other contexts where the law announces that a certain characteristic is irrelevant to the allocation of burdens and benefits. In *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), the

plaintiff claimed that he had been discharged as a public school teacher for exercising his free-speech rights under the First Amendment. Because we did not wish to "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," *id.*, at 285, we concluded that such an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." *Id.*, at 286. We therefore held that once the plaintiff had shown that his constitutionally protected speech was a "substantial" or "motivating factor" in the adverse treatment of him by his employer, the employer was obligated to prove "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff] even in the absence of the protected conduct." *Id.*, at 287. A court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a "but-for" cause of the employment decision. See *Givhan* v. *Western Line Consolidated School Dist.*, 439 U. S. 410, 417 (1979). See also *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 270–271, n. 21 (1977) (applying *Mt. Healthy* standard where plaintiff alleged that unconstitutional motive had contributed to enactment of legislation); *Hunter* v. *Underwood*, 471 U. S. 222, 228 (1985) (same).

In *Transportation Management*, we upheld the NLRB's interpretation of § 10(c) of the National Labor Relations Act, which forbids a court to order affirmative relief for discriminatory conduct against a union member "if such individual was suspended or discharged for cause." 29 U. S. C. § 160(c). The Board had decided that this provision meant that once an employee had shown that his suspension or discharge was based in part on hostility to unions, it was up to the employer to prove by a preponderance of the evidence that it would have made the same decision in the absence of this impermissible motive. In such a situation, we empha-

of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, "standing alone," would or would not establish a plaintiff's case, since such a decision is unnecessary in this case. But see *post*, at 277 (O'CONNOR, J., concurring in judgment).

As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive.[14] Moreover, proving "'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.'" *Givhan*, 439 U. S., at 416, quoting *Ayers* v. *Western Line Consolidated School District*, 555 F. 2d 1309, 1315 (CA5 1977). An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Finally, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The very premise of a mixed-motives case is that a legitimate reason was present, and indeed, in this case, Price Waterhouse already has made this showing by convincing Judge Gesell that Hopkins' interpersonal problems were a legitimate concern. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

III

The courts below held that an employer who has allowed a discriminatory impulse to play a motivating part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination. We are persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence.

[14] JUSTICE WHITE's suggestion, *post*, at 261, that the employer's own testimony as to the probable decision in the absence of discrimination is due special credence where the court has, contrary to the employer's testimony, found that an illegitimate factor played a part in the decision, is baffling.

Conventional rules of civil litigation generally apply in Title VII cases, see, *e. g.*, *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 716 (1983) (discrimination not to be "treat[ed] . . . differently from other ultimate questions of fact"), and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence. See, *e. g.*, *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 390 (1983). Exceptions to this standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual. See *Santosky* v. *Kramer*, 455 U. S. 745, 756 (1982) (termination of parental rights); *Addington* v. *Texas*, 441 U. S. 418, 427 (1979) (involuntary commitment); *Woodby* v. *INS*, 385 U. S. 276 (1966) (deportation); *Schneiderman* v. *United States*, 320 U. S. 118, 122, 125 (1943) (denaturalization). Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief, see, *e. g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 342 (1974) (defamation), and we find it significant that in such cases it was the defendant rather than the plaintiff who sought the elevated standard of proof—suggesting that this standard ordinarily serves as a shield rather than, as Hopkins seeks to use it, as a sword.

It is true, as Hopkins emphasizes, that we have noted the "clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562 (1931). Likewise, an Equal Employment Opportunity Commission (EEOC) regulation does require federal agencies proved to have violated

Title VII to show by clear and convincing evidence that an individual employee is not entitled to relief. See 29 CFR § 1613.271(c)(2) (1988). And finally, it is true that we have emphasized the importance of make-whole relief for victims of discrimination. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975). Yet each of these sources deals with the proper determination of relief rather than with the initial finding of liability. This is seen most easily in the EEOC's regulation, which operates only after an agency or the EEOC has found that "an employee of the agency was discriminated against." See 29 CFR § 1613.271(c) (1988). Because we have held that, by proving that it would have made the same decision in the absence of discrimination, the employer may avoid a finding of liability altogether and not simply avoid certain equitable relief, these authorities do not help Hopkins to show why we should elevate the standard of proof for an employer in this position.

Significantly, the cases from this Court that most resemble this one, *Mt. Healthy* and *Transportation Management*, did not require clear and convincing proof. *Mt. Healthy*, 429 U. S., at 287; *Transportation Management*, 462 U. S., at 400, 403. We are not inclined to say that the public policy against firing employees because they spoke out on issues of public concern or because they affiliated with a union is less important than the policy against discharging employees on the basis of their gender. Each of these policies is vitally important, and each is adequately served by requiring proof by a preponderance of the evidence.

Although Price Waterhouse does not concretely tell us how its proof was preponderant even if it was not clear and convincing, this general claim is implicit in its request for the less stringent standard. Since the lower courts required Price Waterhouse to make its proof by clear and convincing evidence, they did not determine whether Price Waterhouse had proved by *a preponderance of the evidence* that it would have placed Hopkins' candidacy on hold even if it had not permitted sex-linked evaluations to play a part in the decision-making process. Thus, we shall remand this case so that that determination can be made.

IV

The District Court found that sex stereotyping "was permitted to play a part" in the evaluation of Hopkins as a candidate for partnership. 618 F. Supp., at 1120. Price Waterhouse disputes both that stereotyping occurred and that it played any part in the decision to place Hopkins' candidacy on hold. In the firm's view, in other words, the District Court's factual conclusions are clearly erroneous. We do not agree.

In finding that some of the partners' comments reflected sex stereotyping, the District Court relied in part on Dr. Fiske's expert testimony. Without directly impugning Dr. Fiske's credentials or qualifications, Price Waterhouse insinuates that a social psychologist is unable to identify sex stereotyping in evaluations without investigating whether those evaluations have a basis in reality. This argument comes too late. At trial, counsel for Price Waterhouse twice assured the court that he did not question Dr. Fiske's expertise (App. 25) and failed to challenge the legitimacy of her discipline. Without contradiction from Price Waterhouse, Fiske testified that she discerned sex stereotyping in the partners' evaluations of Hopkins, and she further explained that it was part of her business to identify stereotyping in written documents. *Id.*, at 64. We are not inclined to accept petitioner's belated and unsubstantiated characterization of Dr. Fiske's testimony as "gossamer evidence" (Brief for Petitioner 20) based only on "intuitive hunches" (*id.*, at 44) and of her detection of sex stereotyping as "intuitively divined" (*id.*, at 43). Nor are we disposed to adopt the dissent's dismissive attitude toward Dr. Fiske's field of study and toward her own professional integrity, see *post*, at 293–294, n. 5.

Indeed, we are tempted to say that Dr. Fiske's expert testimony was merely icing on Hopkins' cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.[15]

Price Waterhouse also charges that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold. As we have stressed, however, Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners' comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments, either in Hopkins' case or in the past. Certainly a plausible—and, one might say, inevitable—conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper deportment.[16]

[15] We reject the claim, advanced by Price Waterhouse here and by the dissenting judge below, that the District Court clearly erred in finding that Beyer was "responsible for telling [Hopkins] what problems the Policy Board had identified with her candidacy." 618 F. Supp., at 1117. This conclusion was reasonable in light of the testimony at trial of a member of both the Policy Board and the Admissions Committee, who stated that he had "no doubt" that Beyer would discuss with Hopkins the reasons for placing her candidacy on hold and that Beyer "knew exactly where the problems were" regarding Hopkins. Tr. 316.

[16] We do not understand the dissenters' dissatisfaction with the District Judge's statements regarding the failure of Price Waterhouse to "sensitize" partners to the dangers of sexism. *Post*, at 294. Made in the context of determining that Price Waterhouse had not disclaimed reliance on sex-based evaluations, and following the judge's description of the firm's history of condoning such evaluations, the judge's remarks seem to us justified.

Price Waterhouse concedes that the proof in *Transportation Management* adequately showed that the employer there had relied on an impermissible motivation in firing the plaintiff. Brief for Petitioner 45. But the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was that the employer harbored a grudge toward the plaintiff on account of his union activity; there was, contrary to Price Waterhouse's suggestion, no direct evidence that that grudge had played a role in the decision, and, in fact, the employer had given other reasons in explaining the plaintiff's discharge. See 462 U. S., at 396. If the partnership considers that proof sufficient, we do not know why it takes such vehement issue with Hopkins' proof.

Nor is the finding that sex stereotyping played a part in the Policy Board's decision undermined by the fact that many of the suspect comments were made by supporters rather than detractors of Hopkins. A negative comment, even when made in the context of a generally favorable review, nevertheless may influence the decisionmaker to think less highly of the candidate; the Policy Board, in fact, did not simply tally the "yesses" and "noes" regarding a candidate, but carefully reviewed the content of the submitted comments. The additional suggestion that the comments were made by "persons outside the decisionmaking chain" (Brief for Petitioner 48)—and therefore could not have harmed Hopkins—simply ignores the critical role that partners' comments played in the Policy Board's partnership decisions.

Price Waterhouse appears to think that we cannot affirm the factual findings of the trial court without deciding that, instead of being overbearing and aggressive and curt, Hopkins is, in fact, kind and considerate and patient. If this is indeed its impression, petitioner misunderstands the theory

on which Hopkins prevailed. The District Judge acknowledged that Hopkins' conduct justified complaints about her behavior as a senior manager. But he also concluded that the reactions of at least some of the partners were reactions to her as a *woman* manager. Where an evaluation is based on a subjective assessment of a person's strengths and weaknesses, it is simply not true that each evaluator will focus on, or even mention, the same weaknesses. Thus, even if we knew that Hopkins had "personality problems," this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.

V

We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Because the courts below erred by deciding that the defendant must make this proof by clear and convincing evidence, we reverse the Court of Appeals' judgment against Price Waterhouse on liability and remand the case to that court for further proceedings.

It is so ordered.

JUSTICE WHITE, concurring in the judgment.

In my view, to determine the proper approach to causation in this case, we need look only to the Court's opinion in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977). In *Mt. Healthy*, a public employee was not rehired, in part

because of his exercise of First Amendment rights and in part because of permissible considerations. The Court rejected a rule of causation that focused "solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire," on the grounds that such a rule could make the employee better off by exercising his constitutional rights than by doing nothing at all. *Id.*, at 285. Instead, the Court outlined the following approach:

> "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." *Id.*, at 287 (footnote omitted).

It is not necessary to get into semantic discussions on whether the *Mt. Healthy* approach is "but-for" causation in another guise or creates an affirmative defense on the part of the employer to see its clear application to the issues before us in this case. As in *Mt. Healthy*, the District Court found that the employer was motivated by both legitimate and illegitimate factors. And here, as in *Mt. Healthy*, and as the Court now holds, Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action. Rather, as JUSTICE O'CONNOR states, her burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action. The District Court, as its opinion was construed by the Court of Appeals, so found, 263 U. S. App. D. C. 321, 333, 334, 825 F. 2d 458, 470, 471 (1987), and I agree that the finding was supported by the record. The burden of persuasion then

should have shifted to Price Waterhouse to prove "by a preponderance of the evidence that it would have reached the same decision . . . in the absence of" the unlawful motive. *Mt. Healthy*, *supra*, at 287.

I agree with JUSTICE BRENNAN that applying this approach to causation in Title VII cases is not a departure from, and does not require modification of, the Court's holdings in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), and *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). The Court has made clear that "mixed-motives" cases, such as the present one, are different from pretext cases such as *McDonnell Douglas* and *Burdine*. In pretext cases, "the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision." *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393, 400, n. 5 (1983). In mixed-motives cases, however, there is no one "true" motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate. It can hardly be said that our decision in this case is a departure from cases that are "inapposite." *Ibid.* I also disagree with the dissent's assertion that this approach to causation is inconsistent with our statement in *Burdine* that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U. S., at 253. As we indicated in *Transportation Management Corp.*, the showing required by *Mt. Healthy* does not improperly shift from the plaintiff the ultimate burden of persuasion on whether the defendant intentionally discriminated against him or her. See 462 U. S., at 400, n. 5.

Because the Court of Appeals required Price Waterhouse to prove by clear and convincing evidence that it would have reached the same employment decision in the absence of the improper motive, rather than merely requiring proof by a preponderance of the evidence as in *Mt. Healthy*, I concur in the judgment reversing this case in part and remanding.

With respect to the employer's burden, however, the plurality seems to require, at least in most cases, that the employer submit objective evidence that the same result would have occurred absent the unlawful motivation. *Ante*, at 252. In my view, however, there is no special requirement that the employer carry its burden by objective evidence. In a mixed-motives case, where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof. This would even more plainly be the case where the employer denies any illegitimate motive in the first place but the court finds that illegitimate, as well as legitimate, factors motivated the adverse action.*

JUSTICE O'CONNOR, concurring in the judgment.

I agree with the plurality that, on the facts presented in this case, the burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins' candidacy absent consideration of her gender. I further agree that this burden shift is properly part of the liability phase of the litigation. I thus concur in the judgment of the Court. My disagreement stems from the plurality's conclusions concerning the substantive requirement of causation under the statute and its broad statements regarding the applicability of the allocation of the burden of proof applied in this case. The evidentiary rule the Court adopts today should be viewed as a supplement to the careful framework established by our unanimous decisions in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), for use in cases such as this one where the employer has created uncertainty as to causation by knowingly giving

*I agree with the plurality that if the employer carries this burden, there has been no violation of Title VII.

substantial weight to an impermissible criterion. I write separately to explain why I believe such a departure from the *McDonnell Douglas* standard is justified in the circumstances presented by this and like cases, and to express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered.

I

Title VII provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin." 42 U. S. C. §2000e-2(a) (emphasis added). The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the "but-for" cause of an adverse employment action. The legislative history makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts. Critics of the bill that became Title VII labeled it a "thought control bill," and argued that it created a "punishable crime that does not require an illegal external act as a basis for judgment." 100 Cong. Rec. 7254 (1964) (remarks of Sen. Ervin). Senator Case, whose views the plurality finds so persuasive elsewhere, responded:

> "The man must do or fail to do something in regard to employment. There must be some specific external act, more than a mental act. Only if he does the act because of the grounds stated in the bill would there be any legal consequences." *Ibid.*

Thus, I disagree with the plurality's dictum that the words "because of" do not mean "but-for" causation; manifestly they

do. See *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 499 (1986) (WHITE, J., dissenting) ("[T]he general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of the discrimination"). We should not, and need not, deviate from that policy today. The question for decision in this case is what allocation of the burden of persuasion on the issue of causation best conforms with the intent of Congress and the purposes behind Title VII.

The evidence of congressional intent as to which party should bear the burden of proof on the issue of causation is considerably less clear. No doubt, as a general matter, Congress assumed that the plaintiff in a Title VII action would bear the burden of proof on the elements critical to his or her case. As the dissent points out, *post*, at 287, n. 3, the interpretative memorandum submitted by sponsors of Title VII indicates that "the plaintiff, *as in any civil case*, would have the burden of proving that discrimination had occurred." 110 Cong. Rec. 7214 (1964) (emphasis added). But in the area of tort liability, from whence the dissent's "but-for" standard of causation is derived, see *post*, at 282, the law has long recognized that in certain "civil cases" leaving the burden of persuasion on the plaintiff to prove "but-for" causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care. Thus, in multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the "but-for" cause of the plaintiff's injury. See *e. g.*, *Summers* v. *Tice*, 33 Cal. 2d 80, 84–87, 199 P. 2d 1, 3–4 (1948). The same rule has been applied where the effect of a defendant's tortious conduct combines with a force of unknown or innocent origin to produce the harm to the plaintiff. See *Kingston* v. *Chicago & N. W. R. Co.*, 191 Wis. 610, 616, 211 N. W. 913, 915 (1927) ("Granting that the union of that fire [caused by defendant's

negligence] with another of natural origin, or with another of much greater proportions, is available as a defense, the burden is on the defendant to show that . . . the fire set by him was not the proximate cause of the damage"). See also 2 J. Wigmore, Select Cases on the Law of Torts § 153, p. 865 (1912) ("When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that one of the two persons, or one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm").

While requiring that the plaintiff in a tort suit or a Title VII action prove that the defendant's "breach of duty" was the "but-for" cause of an injury does not generally hamper effective enforcement of the policies behind those causes of action,

> "at other times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture. But when conjecture is demanded it can be given a direction that is consistent with the policy considerations that underlie the controversy." Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 67 (1956).

Like the common law of torts, the statutory employment "tort" created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. As we have noted in the past, the award of backpay to a Title VII plaintiff provides "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as

possible, the last vestiges" of discrimination in employment. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418 (1975) (citation omitted). The second goal of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418.

Both these goals are reflected in the elements of a disparate treatment action. There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, "[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote." 110 Cong. Rec. 7218 (1964). See also *id.*, at 13088 (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment"). Reliance on such factors is exactly what the threat of Title VII liability was meant to deter. While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex. This Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual. See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989). At the same time, Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind.

Where an individual disparate treatment plaintiff has shown by a preponderance of the evidence that an illegitimate criterion was a *substantial* factor in an adverse employment decision, the deterrent purpose of the statute has clearly been triggered. More importantly, as an evidentiary matter, a reasonable factfinder could conclude that absent further explanation, the employer's discriminatory motivation "caused" the employment decision. The employer has

not yet been shown to be a violator, but neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination. Both the policies behind the statute, and the evidentiary principles developed in the analogous area of causation in the law of torts, suggest that at this point the employer may be required to convince the factfinder that, despite the smoke, there is no fire.

We have given recognition to these principles in our cases which have discussed the "remedial phase" of class action disparate treatment cases. Once the class has established that discrimination against a protected group was essentially the employer's "standard practice," there has been harm to the group and injunctive relief is appropriate. But as to the individual members of the class, the liability phase of the litigation is not complete. See *Dillon* v. *Coles*, 746 F. 2d 998, 1004 (CA3 1984) ("It is misleading to speak of the additional proof required by an individual class member for relief as being a part of the damage phase, that evidence is actually an element of the liability portion of the case") (footnote omitted). Because the class has already demonstrated that, as a rule, illegitimate factors were considered in the employer's decisions, the burden shifts to the employer "to demonstrate that the individual applicant was denied an employment opportunity for legitimate reasons." *Teamsters* v. *United States*, 431 U. S. 324, 362 (1977). See also *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 772 (1976).

The individual members of a class action disparate treatment case stand in much the same position as Ann Hopkins here. There has been a strong showing that the employer has done exactly what Title VII forbids, but the connection between the employer's illegitimate motivation and any injury to the individual plaintiff is unclear. At this point calling upon the employer to show that despite consideration of illegitimate factors the individual plaintiff would not have been hired or promoted in any event hardly seems "unfair" or

contrary to the substantive command of the statute. In fact, an individual plaintiff who has shown that an illegitimate factor played a substantial role in the decision in his or her case has proved *more* than the class member in a *Teamsters* type action. The latter receives the benefit of a burden shift to the defendant based on the *likelihood* that an illegitimate criterion was a factor in the individual employment decision.

There is a tension between the *Franks* and *Teamsters* line of decisions and the individual disparate treatment cases cited by the dissent. See *post*, at 286–289. Logically, under the dissent's view, each member of a disparate treatment class action would have to show "but-for" causation as to his or her individual employment decision, since it is not an element of the pattern or practice proof of the entire class and it is statutorily mandated that the plaintiff bear the burden of proof on this issue throughout the litigation. While the Court has properly drawn a distinction between the elements of a class action claim and an individual disparate treatment claim, see *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 873–878 (1984), and I do not suggest the wholesale transposition of rules from one setting to the other, our decisions in *Teamsters* and *Franks* do indicate a recognition that presumptions shifting the burden of persuasion based on evidentiary probabilities and the policies behind the statute are not alien to our Title VII jurisprudence.

Moreover, placing the burden on the defendant in this case to prove that the same decision would have been justified by legitimate reasons is consistent with our interpretation of the constitutional guarantee of equal protection. Like a disparate treatment plaintiff, one who asserts that governmental action violates the Equal Protection Clause must show that he or she is "the victim of intentional discrimination." *Burdine*, 450 U. S., at 256. Compare *post*, at 286, 289 (KENNEDY, J., dissenting), with *Washington* v. *Davis*, 426 U. S. 229, 240 (1976). In *Alexander* v. *Louisiana*, 405 U. S. 625 (1972), we dealt with a criminal defendant's allegation that

members of his race had been invidiously excluded from the grand jury which indicted him in violation of the Equal Protection Clause. In addition to the statistical evidence presented by petitioner in that case, we noted that the State's "selection procedures themselves were not racially neutral." *Id.*, at 630. Once the consideration of race in the decisional process had been established, we held that "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Id.*, at 632.

We adhered to similar principles in *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), a case which, like this one, presented the problems of motivation and causation in the context of a multimember decisionmaking body authorized to consider a wide range of factors in arriving at its decisions. In *Arlington Heights* a group of minority plaintiffs claimed that a municipal governing body's refusal to rezone a plot of land to allow for the construction of low-income integrated housing was racially motivated. On the issue of causation, we indicated that the plaintiff was not required

> "to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Id.*, at 265–266 (citation omitted).

If the strong presumption of regularity and rationality of legislative decisionmaking must give way in the face of evidence that race has played a significant part in a legislative decision, I simply cannot believe that Congress intended Title VII to accord *more* deference to a private employer in the face of evidence that its decisional process has been substantially infected by discrimination. Indeed, where a public employee brings a "disparate treatment" claim under 42 U. S. C. § 1983 and the Equal Protection Clause the employee is entitled to the favorable evidentiary framework of *Arlington Heights*. See, *e. g.*, *Hervey* v. *Little Rock*, 787 F. 2d 1223, 1233–1234 (CA8 1986) (applying *Arlington Heights* to public employee's claim of sex discrimination in promotion decision); *Lee* v. *Russell County Bd. of Education*, 684 F. 2d 769, 773–774 (CA11 1982) (applying *Arlington Heights* to public employees' claims of race discrimination in discharge case). Under the dissent's reading of Title VII, Congress' extension of the coverage of the statute to public employers in 1972 has placed these employees under a less favorable evidentiary regime. In my view, nothing in the language, history, or purpose of Title VII prohibits adoption of an evidentiary rule which places the burden of persuasion on the defendant to demonstrate that legitimate concerns would have justified an adverse employment action where the plaintiff has convinced the factfinder that a forbidden factor played a substantial role in the employment decision. Even the dissenting judge below "[had] no quarrel with [the] principle" that "a party with one permissible motive and one unlawful one may prevail only by affirmatively proving that it would have acted as it did even if the forbidden motive were absent." 263 U. S. App. D. C. 321, 341, 825 F. 2d 458, 478 (1987) (Williams, J. dissenting).

II

The dissent's summary of our individual disparate treatment cases to date is fair and accurate, and amply demonstrates that the rule we adopt today is at least a change in direction from some of our prior precedents. See *post*, at 286–289. We have indeed emphasized in the past that in an individual disparate treatment action the plaintiff bears the burden of persuasion throughout the litigation. Nor have we confined the word "pretext" to the narrow definition which the plurality attempts to pin on it today. See *ante*, at 244–247. *McDonnell Douglas* and *Burdine* clearly contemplated that a disparate treatment plaintiff could show that the employer's proffered explanation for an event was not "the true reason" either because it *never* motivated the employer in its employment decisions or because it did not do so in a particular case. *McDonnell Douglas* and *Burdine* assumed that the plaintiff would bear the burden of persuasion as to both these attacks, and we clearly depart from that framework today. Such a departure requires justification, and its outlines should be carefully drawn.

First, *McDonnell Douglas* itself dealt with a situation where the plaintiff presented no direct evidence that the employer had relied on a forbidden factor under Title VII in making an employment decision. The prima facie case established there was not difficult to prove, and was based only on the statistical probability that when a number of potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision. See *Teamsters*, 431 U. S., at 358, n. 44 ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination"). In the face of this inferential proof, the employer's burden was deemed to be only one of production; the employer must articulate a legitimate reason for the adverse employment action. See *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 577 (1978). The plaintiff must then be given an "opportunity to demonstrate

by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U. S., at 805. Our decision in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), also involved the "narrow question" whether, after a plaintiff had carried the "not onerous" burden of establishing the prima facie case under *McDonnell Douglas*, the burden of persuasion should be shifted to the employer to prove that a legitimate reason for the adverse employment action existed. 450 U. S., at 250. As the discussion of *Teamsters* and *Arlington Heights* indicates, I do not think that the employer is entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII.

The only individual disparate treatment case cited by the dissent which involved the kind of direct evidence of discriminatory animus with which we are confronted here is *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 713–714, n. 2 (1983). The question presented to the Court in that case involved only a challenge to the elements of the prima facie case under *McDonnell Douglas* and *Burdine*, see Pet. for Cert. in *United States Postal Service Bd. of Governors* v. *Aikens*, O. T. 1981, No. 81–1044, and the question we confront today was neither briefed nor argued to the Court. As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there *is* direct evidence of intentional discrimination. Indeed, in one Age Discrimination in Employment Act case, the Court seemed to indicate that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World*

Airlines, Inc. v. *Thurston*, 469 U. S. 111, 121 (1985). See also *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 403–404, n. 9 (1977).

Second, the facts of this case, and a growing number like it decided by the Courts of Appeals, convince me that the evidentiary standard I propose is necessary to make real the promise of *McDonnell Douglas* that "[i]n the implementation of [employment] decisions, it is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise." 411 U. S., at 801. In this case, the District Court found that a number of the evaluations of Ann Hopkins submitted by partners in the firm overtly referred to her failure to conform to certain gender stereotypes as a factor militating against her election to the partnership. 618 F. Supp. 1109, 1116–1117 (DC 1985). The District Court further found that these evaluations were given "great weight" by the decisionmakers at Price Waterhouse. *Id.*, at 1118. In addition, the District Court found that the partner responsible for informing Hopkins of the factors which caused her candidacy to be placed on hold, indicated that her "professional" problems would be solved if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*, at 1117 (footnote omitted). As the Court of Appeals characterized it, Ann Hopkins proved that Price Waterhouse "permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner." 263 U. S. App. D. C., at 324, 825 F. 2d, at 461.

At this point Ann Hopkins had taken her proof as far as it could go. She had proved discriminatory input into the decisional process, and had proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision. It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider

her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid. If, as we noted in *Teamsters*, "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof," 431 U. S., at 359, n. 45, one would be hard pressed to think of a situation where it would be more appropriate to require the defendant to show that its decision would have been justified by wholly legitimate concerns.

Moreover, there is mounting evidence in the decisions of the lower courts that respondent here is not alone in her inability to pinpoint discrimination as the precise cause of her injury, despite having shown that it played a significant role in the decisional process. Many of these courts, which deal with the evidentiary issues in Title VII cases on a regular basis, have concluded that placing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate criterion makes sense as a rule of evidence and furthers the substantive command of Title VII. See, *e. g.*, *Bell* v. *Birmingham Linen Service*, 715 F. 2d 1552, 1556 (CA11 1983) (Tjoflat, J.) ("It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its action"). Particularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions. See, *e. g.*, *Fields* v. *Clark University*, 817 F. 2d 931, 935–937

(CA1 1987) (where plaintiff produced "strong evidence" that sexist attitudes infected faculty tenure decision, burden properly shifted to defendant to show that it would have reached the same decision absent discrimination); *Thompkins* v. *Morris Brown College*, 752 F. 2d 558, 563 (CA11 1985) (direct evidence of discriminatory animus in decision to discharge college professor shifted burden of persuasion to defendant).

Finally, I am convinced that a rule shifting the burden to the defendant where the plaintiff has shown that an illegitimate criterion was a "substantial factor" in the employment decision will not conflict with other congressional policies embodied in Title VII. Title VII expressly provides that an employer need not give preferential treatment to employees or applicants of any race, color, religion, sex, or national origin in order to maintain a work force in balance with the general population. See 42 U. S. C. § 2000e–2(j). The interpretive memorandum, whose authoritative force is noted by the plurality, see *ante*, at 243, n. 8, specifically provides: "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race." 110 Cong. Rec. 7213 (1964).

Last Term, in *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977 (1988), the Court unanimously concluded that the disparate impact analysis first enunciated in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), should be extended to subjective or discretionary selection processes. At the same time a plurality of the Court indicated concern that the focus on bare statistics in the disparate impact setting could force employers to adopt "inappropriate prophylactic measures" in violation of § 2000e–2(j). The plurality went on to emphasize that in a disparate impact case, the plaintiff may not simply

point to a statistical disparity in the employer's work force. Instead, the plaintiff must identify a particular employment practice and "must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." 487 U. S., at 994. The plurality indicated that "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Id.*, at 997.

I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical proof as in the disparate impact setting and shifting the burden of persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision. First, the explicit consideration of race, color, religion, sex, or national origin in making employment decisions "was the most obvious evil Congress had in mind when it enacted Title VII." *Teamsters*, 431 U. S., at 335, n. 15. While the prima facie case under *McDonnell Douglas* and the statistical showing of imbalance involved in a disparate impact case may both be indicators of discrimination or its "functional equivalent," they are not, in and of themselves, the evils Congress sought to eradicate from the employment setting. Second, shifting the burden of persuasion to the employer in a situation like this one creates no incentive to preferential treatment in violation of § 2000e–(2)(j). To avoid bearing the burden of justifying its decision, the employer need not seek racial or sexual balance in its work force; rather, all it need do is avoid substantial reliance on forbidden criteria in making its employment decisions.

While the danger of forcing employers to engage in unwarranted preferential treatment is thus less dramatic in this setting than in the situation the Court faced in *Watson*, it is far from wholly illusory. Based on its misreading of

the words "because of" in the statute, see *ante*, at 240–242, the plurality appears to conclude that if a decisional process is "tainted" by awareness of sex or race in any way, the employer has violated the statute, and Title VII thus *commands* that the burden shift to the employer to justify its decision. *Ante*, at 250–252. The plurality thus effectively reads the causation requirement out of the statute, and then replaces it with an "affirmative defense." *Ante*, at 244–247.

In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision. As the Court of Appeals noted below: "While most circuits have not confronted the question squarely, the consensus among those that have is that once a Title VII plaintiff has demonstrated by direct evidence that discriminatory animus played a significant or substantial role in the employment decision, the burden shifts to the employer to show that the decision would have been the same absent discrimination." 263 U. S. App. D. C., at 333–344, 825 F. 2d, at 470–471. Requiring that the plaintiff demonstrate that an illegitimate factor played a substantial role in the employment decision identifies those employment situations where the deterrent purpose of Title VII is most clearly implicated. As an evidentiary matter, where a plaintiff has made this type of strong showing of illicit motivation, the factfinder is entitled to presume that the employer's discriminatory animus made a difference to the outcome, absent proof to the contrary from the employer. Where a disparate treatment plaintiff has made such a showing, the burden then rests with the employer to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor. The employer need not isolate the sole cause for the decision; rather it must demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same employment

action. This evidentiary scheme essentially requires the employer to place the employee in the same position he or she would have occupied absent discrimination. Cf. *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 286 (1977). If the employer fails to carry this burden, the factfinder is justified in concluding that the decision was made "because of" consideration of the illegitimate factor and the substantive standard for liability under the statute is satisfied.

Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see *Meritor Savings Bank* v. *Vinson*, 477 U. S. 57, 63–69 (1986), cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. In addition, in my view testimony such as Dr. Fiske's in this case, standing alone, would not justify shifting the burden of persuasion to the employer. Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex. What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality, the plurality's suggestion to the contrary notwithstanding. See *ante*, at 250, n. 13. The plurality proceeds from the premise that the words "because of" in the statute do not embody any

causal requirement at all. Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status. Only then would the burden of proof shift to the defendant to prove that the decision would have been justified by other, wholly legitimate considerations. See also *ante*, at 259–260 (WHITE, J., concurring in judgment).

In sum, because of the concerns outlined above, and because I believe that the deterrent purpose of Title VII is disserved by a rule which places the burden of proof on plaintiffs on the issue of causation in all circumstances, I would retain but supplement the framework we established in *McDonnell Douglas* and subsequent cases. The structure of the presentation of evidence in an individual disparate treatment case should conform to the general outlines we established in *McDonnell Douglas* and *Burdine*. First, the plaintiff must establish the *McDonnell Douglas* prima facie case by showing membership in a protected group, qualification for the job, rejection for the position, and that after rejection the employer continued to seek applicants of complainant's general qualifications. *McDonnell Douglas*, 411 U. S., at 802. The plaintiff should also present any direct evidence of discriminatory animus in the decisional process. The defendant should then present its case, including its evidence as to legitimate, nondiscriminatory reasons for the employment decision. As the dissent notes, under this framework, the employer "has every incentive to convince the trier of fact that the decision was lawful." *Post*, at 292, citing *Burdine*, 450 U. S., at 258. Once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*,

with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination. In my view, such a system is both fair and workable, and it calibrates the evidentiary requirements demanded of the parties to the goals behind the statute itself.

I agree with the dissent, see *post*, at 293, n. 4, that the evidentiary framework I propose should be available to all disparate treatment plaintiffs where an illegitimate consideration played a substantial role in an adverse employment decision. The Court's allocation of the burden of proof in *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 626–627 (1987), rested squarely on "the analytical framework set forth in *McDonnell Douglas*," *id.*, at 626, which we alter today. It would be odd to say the least if the evidentiary rules applicable to Title VII actions were themselves dependent on the gender or the skin color of the litigants. But see *ante*, at 239, n. 3.

In this case, I agree with the plurality that petitioner should be called upon to show that the outcome would have been the same if respondent's professional merit had been its only concern. On remand, the District Court should determine whether Price Waterhouse has shown by a preponderance of the evidence that if gender had not been part of the process, its employment decision concerning Ann Hopkins would nonetheless have been the same.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Today the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), is a wiser course than creation of more disarray in an area of the law already difficult for the bench and bar, and so I must dissent.

Before turning to my reasons for disagreement with the Court's disposition of the case, it is important to review the actual holding of today's decision. I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision. *Ante*, at 276–277 (opinion of O'CONNOR, J.); *ante*, at 259–260 (opinion of WHITE, J.). As the opinions make plain, the evidentiary scheme created today is not for every case in which a plaintiff produces evidence of stray remarks in the workplace. *Ante*, at 251 (opinion of BRENNAN, J.); *ante*, at 277 (opinion of O'CONNOR, J.).

Where the plaintiff makes the requisite showing, the burden that shifts to the employer is to show that legitimate employment considerations would have justified the decision without reference to any impermissible motive. *Ante*, at 260–261 (opinion of WHITE, J.); *ante*, at 278 (opinion of O'CONNOR, J.). The employer's proof on the point is to be presented and reviewed just as with any other evidentiary question: the Court does not accept the plurality's suggestion that an employer's evidence need be "objective" or otherwise out of the ordinary. *Ante*, at 261 (opinion of WHITE, J.).

In sum, the Court alters the evidentiary framework of *McDonnell Douglas* and *Burdine* for a closely defined set of cases. Although JUSTICE O'CONNOR advances some thoughtful arguments for this change, I remain convinced that it is unnecessary and unwise. More troubling is the plurality's rationale for today's decision, which includes a number of unfortunate pronouncements on both causation and methods of proof in employment discrimination cases. To demonstrate the defects in the plurality's reasoning, it is nec-

essary to discuss, first, the standard of causation in Title VII cases, and, second, the burden of proof.

I

The plurality describes this as a case about the standard of *causation* under Title VII, *ante*, at 237, but I respectfully suggest that the description is misleading. Much of the plurality's rhetoric is spent denouncing a "but-for" standard of causation. The theory of Title VII liability the plurality adopts, however, essentially incorporates the but-for standard. The importance of today's decision is not the standard of causation it employs, but its shift to the defendant of the burden of proof. The plurality's causation analysis is misdirected, for it is clear that, whoever bears the burden of proof on the issue, Title VII liability requires a finding of but-for causation. See also *ante*, at 261, and n. (opinion of WHITE, J.); *ante*, at 262–263 (opinion of O'CONNOR, J.).

The words of Title VII are not obscure. The part of the statute relevant to this case provides:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1) (emphasis added).

By any normal understanding, the phrase "because of" conveys the idea that the motive in question made a difference to the outcome. We use the words this way in everyday speech. And assuming, as the plurality does, that we ought to consider the interpretive memorandum prepared by the statute's drafters, we find that this is what the words meant to them as well. "To discriminate is to make a distinction, to make a difference in treatment or favor." 110 Cong. Rec. 7213 (1964). Congress could not have chosen a clearer way

to indicate that proof of liability under Title VII requires a showing that race, color, religion, sex, or national origin caused the decision at issue.

Our decisions confirm that Title VII is not concerned with the mere presence of impermissible motives; it is directed to employment decisions that result from those motives. The verbal formulae we have used in our precedents are synonymous with but-for causation. Thus we have said that providing different insurance coverage to male and female employees violates the statute by treating the employee "'in a manner which but-for that person's sex would be different.'" *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 683 (1983), quoting *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 711 (1978). We have described the relevant question as whether the employment decision was "based on" a discriminatory criterion, *Teamsters* v. *United States*, 431 U. S. 324, 358 (1977), or whether the particular employment decision at issue was "made on the basis of" an impermissible factor, *Cooper* v. *Federal Reserve Bank of Richmond*, 467 U. S. 867, 875 (1984).

What we term "but-for" cause is the least rigorous standard that is consistent with the approach to causation our precedents describe. If a motive is not a but-for cause of an event, then by definition it did not make a difference to the outcome. The event would have occurred just the same without it. Common-law approaches to causation often require proof of but-for cause as a starting point toward proof of legal cause. The law may require more than but-for cause, for instance proximate cause, before imposing liability. Any standard less than but-for, however, simply represents a decision to impose liability without causation. As Dean Prosser puts it, "[a]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 265 (5th ed. 1984).

One of the principal reasons the plurality decision may sow confusion is that it claims Title VII liability is unrelated to but-for causation, yet it adopts a but-for standard once it has placed the burden of proof as to causation upon the employer. This approach conflates the question whether causation must be shown with the question of how it is to be shown. Because the plurality's theory of Title VII causation is ultimately consistent with a but-for standard, it might be said that my disagreement with the plurality's comments on but-for cause is simply academic. See *ante*, at 259 (opinion of WHITE, J.). But since those comments seem to influence the decision, I turn now to that part of the plurality's analysis.

The plurality begins by noting the quite unremarkable fact that Title VII is written in the present tense. *Ante*, at 240–241. It is unlawful "to fail" or "to refuse" to provide employment benefits on the basis of sex, not "to have failed" or "to have refused" to have done so. The plurality claims that the present tense excludes a but-for inquiry as the relevant standard because but-for causation is necessarily concerned with a hypothetical inquiry into how a past event would have occurred absent the contested motivation. This observation, however, tells us nothing of particular relevance to Title VII or the cause of action it creates. I am unaware of any federal prohibitory statute that is written in the past tense. Every liability determination, including the novel one constructed by the plurality, necessarily is concerned with the examination of a past event.[1] The plurality's analysis of verb tense serves only to divert attention from the causation requirement that is made part of the statute by the "because

[1] The plurality's description of its own standard is both hypothetical and retrospective. The inquiry seeks to determine whether "if we asked the employer at the moment of decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Ante*, at 250.

of" phrase. That phrase, I respectfully submit, embodies a rather simple concept that the plurality labors to ignore.[2]

We are told next that but-for cause is not required, since the words "because of" do not mean "*solely* because of." *Ante*, at 241. No one contends, however, that sex must be the sole cause of a decision before there is a Title VII violation. This is a separate question from whether consideration of sex must be *a* cause of the decision. Under the accepted approach to causation that I have discussed, sex is a cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i. e.*, a but-for cause. See *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U. S. 273, 282, n. 10 (1976). The plurality seems to say that since we know the words "because of" do not mean "solely because of," they must not mean "because of" at all. This does not follow, as a matter of either semantics or logic.

The plurality's reliance on the "bona fide occupational qualification" (BFOQ) provisions of Title VII, 42 U. S. C. § 2000e–2(e), is particularly inapt. The BFOQ provisions allow an employer, in certain cases, to make an employment decision of which it is conceded that sex is the cause. That sex may be the legitimate cause of an employment decision where gender is a BFOQ is consistent with the opposite com-

[2] The plurality's discussion of overdetermined causes only highlights the error of its insistence that but-for is not the substantive standard of causation under Title VII. The opinion discusses the situation where two physical forces move an object, and either force acting alone would have moved the object. *Ante*, at 241. Translated to the context of Title VII, this situation would arise where an employer took an adverse action in reliance both on sex and on legitimate reasons, and *either* the illegitimate or the legitimate reason standing alone would have produced the action. If this state of affairs is proved to the factfinder, there will be no liability under the plurality's own test, for the same decision would have been made had the illegitimate reason never been considered.

mand that a decision caused by sex in any other case justifies the imposition of Title VII liability. This principle does not support, however, the novel assertion that a violation has occurred where sex made no difference to the outcome.

The most confusing aspect of the plurality's analysis of causation and liability is its internal inconsistency. The plurality begins by saying: "When . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account." *Ante*, at 241. Yet it goes on to state that "an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision." *Ante*, at 242.

Given the language of the statute, these statements cannot both be true. Title VII unambiguously states that an employer who makes decisions "because of" sex has violated the statute. The plurality's first statement therefore appears to indicate that an employer who considers illegitimate reasons when making a decision is a violator. But the opinion then tells us that the employer who shows that the same decision would have been made absent consideration of sex is *not* a violator. If the second statement is to be reconciled with the language of Title VII, it must be that a decision that would have been the same absent consideration of sex was not made "because of" sex. In other words, there is no violation of the statute absent but-for causation. The plurality's description of the "same decision" test it adopts supports this view. The opinion states that "[a] court that finds for a plaintiff under this standard has effectively concluded that an illegitimate motive was a 'but-for' cause of the employment decision," *ante*, at 249, and that this "is not an imposition of liability 'where sex made no difference to the outcome,'" *ante*, at 246, n. 11.

The plurality attempts to reconcile its internal inconsistency on the causation issue by describing the employer's showing as an "affirmative defense." This is nothing more than a label, and one not found in the language or legislative history of Title VII. Section 703(a)(1) is the statutory basis of the cause of action, and the Court is obligated to explain how its disparate-treatment decisions are consistent with the terms of § 703(a)(1), not with general themes of legislative history or with other parts of the statute that are plainly inapposite. While the test ultimately adopted by the plurality may not be inconsistent with the terms of § 703(a)(1), see *infra*, at 292, the same cannot be said of the plurality's reasoning with respect to causation. As JUSTICE O'CONNOR describes it, the plurality "reads the causation requirement out of the statute, and then replaces it with an 'affirmative defense.'" *Ante*, at 276. Labels aside, the import of today's decision is not that Title VII liability can arise without but-for causation, but that in certain cases it is not the plaintiff who must prove the presence of causation, but the defendant who must prove its absence.

II

We established the order of proof for individual Title VII disparate-treatment cases in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and reaffirmed this allocation in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981). Under *Burdine*, once the plaintiff presents a prima facie case, an inference of discrimination arises. The employer must rebut the inference by articulating a legitimate nondiscriminatory reason for its action. The final burden of persuasion, however, belongs to the plaintiff. *Burdine* makes clear that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*, at 253. See also *Board of Trustees of Keene State College* v.

Sweeney, 439 U. S. 24, 29 (1978) (STEVENS, J., dissenting).[3] I would adhere to this established evidentiary framework, which provides the appropriate standard for this and other individual disparate-treatment cases. Today's creation of a new set of rules for "mixed-motives" cases is not mandated by the statute itself. The Court's attempt at refinement provides limited practical benefits at the cost of confusion and complexity, with the attendant risk that the trier of fact will misapprehend the controlling legal principles and reach an incorrect decision.

In view of the plurality's treatment of *Burdine* and our other disparate-treatment cases, it is important first to state why those cases are dispositive here. The plurality tries to reconcile its approach with *Burdine* by announcing that it applies only to a "pretext" case, which it defines as a case in which the plaintiff attempts to prove that the employer's proffered explanation is itself false. *Ante*, at 245–247, and n. 11. This ignores the language of *Burdine*, which states that a plaintiff may succeed in meeting her ultimate burden of persuasion "*either* directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U. S., at 256 (emphasis added). Under the first of these two alternative methods, a plaintiff meets her burden if she can "persuade the court that the employment decision more likely than not was motivated by a discriminatory reason." *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 717–718 (1983)

[3] The interpretive memorandum on which the plurality relies makes plain that "the plaintiff, as in any civil case, would have the burden of proving that discrimination had occurred." 110 Cong. Rec. 7214 (1964). Coupled with its earlier definition of discrimination, the memorandum tells us that the plaintiff bears the burden of showing that an impermissible motive "made a difference" in the treatment of the plaintiff. This is none other than the traditional requirement that the plaintiff show but-for cause.

(BLACKMUN, J., concurring). The plurality makes no attempt to address this aspect of our cases.

Our opinions make plain that *Burdine* applies to all individual disparate-treatment cases, whether the plaintiff offers direct proof that discrimination motivated the employer's actions or chooses the indirect method of showing that the employer's proffered justification is false, that is to say, a pretext. See *Aikens, supra,* at 714, n. 3 ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence"). The plurality is mistaken in suggesting that the plaintiff in a so-called "mixed-motives" case will be disadvantaged by having to "squeeze her proof into *Burdine*'s framework." *Ante,* at 247. As we acknowledged in *McDonnell Douglas*, "[t]he facts necessarily will vary in Title VII cases," and the specification of the prima facie case set forth there "is not necessarily applicable in every respect to differing factual situations." 411 U. S., at 802, n. 13. The framework was "never intended to be rigid, mechanized, or ritualistic." *Aikens, supra,* at 715. *Burdine* compels the employer to come forward with its explanation of the decision and permits the plaintiff to offer evidence under either of the logical methods for proof of discrimination. This is hardly a framework that confines the plaintiff; still less is it a justification for saying that the ultimate burden of proof must be on the employer in a mixed-motives case. *Burdine* provides an orderly and adequate way to place both inferential and direct proof before the factfinder for a determination whether intentional discrimination has caused the employment decision. Regardless of the character of the evidence presented, we have consistently held that the ultimate burden "remains at all times with the plaintiff." *Burdine, supra,* at 253.

Aikens illustrates the point. There, the evidence showed that the plaintiff, a black man, was far more qualified than any of the white applicants promoted ahead of him. More important, the testimony showed that "the person responsible for the promotion decisions at issue had made numerous

derogatory comments about blacks in general and Aikens in particular." 460 U. S., at 713–714, n. 2. Yet the Court in *Aikens* reiterated that the case was to be tried under the proof scheme of *Burdine*. JUSTICE BRENNAN and JUSTICE BLACKMUN concurred to stress that the plaintiff could prevail under the *Burdine* scheme in either of two ways, one of which was directly to persuade the court that the employment decision was motivated by discrimination. 460 U. S., at 718. *Aikens* leaves no doubt that the so-called "pretext" framework of *Burdine* has been considered to provide a flexible means of addressing all individual disparate-treatment claims.

Downplaying the novelty of its opinion, the plurality claims to have followed a "well-worn path" from our prior cases. The path may be well worn, but it is in the wrong forest. The plurality again relies on Title VII's BFOQ provisions, under which an employer bears the burden of justifying the use of a sex-based employment qualification. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 332–337 (1977). In the BFOQ context this is a sensible, indeed necessary, allocation of the burden, for there by definition sex is the but-for cause of the employment decision and the only question remaining is how the employer can justify it. The same is true of the plurality's citations to Pregnancy Discrimination Act cases, *ante,* at 248. In such cases there is no question that pregnancy was the cause of the disputed action. The Pregnancy Discrimination Act and BFOQ cases tell us nothing about the case where the employer claims not that a sex-based decision was justified, but that the decision was not sex-based at all.

Closer analogies to the plurality's new approach are found in *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), and *NRLB* v. *Transportation Management Corp.*, 462 U. S. 393 (1983), but these cases were decided in different contexts. *Mt. Healthy* was a First Amendment case involving the firing of a teacher, and *Transportation Management* involved review of the NLRB's interpretation of the National Labor Re-

lations Act. The *Transportation Management* decision was based on the deference that the Court traditionally accords NLRB interpretations of the statutes it administers. See 462 U. S., at 402–403. Neither case therefore tells us why the established *Burdine* framework should not continue to govern the order of proof under Title VII.

In contrast to the plurality, JUSTICE O'CONNOR acknowledges that the approach adopted today is a "departure from the *McDonnell Douglas* standard." *Ante*, at 262. Although her reasons for supporting this departure are not without force, they are not dispositive. As JUSTICE O'CONNOR states, the most that can be said with respect to the Title VII itself is that "nothing in the language, history, or purpose of Title VII *prohibits* adoption" of the new approach. *Ante*, at 269 (emphasis added). JUSTICE O'CONNOR also relies on analogies from the common law of torts, other types of Title VII litigation, and our equal protection cases. These analogies demonstrate that shifts in the burden of proof are not unprecedented in the law of torts or employment discrimination. Nonetheless, I believe continued adherence to the *Burdine* framework is more consistent with the statutory mandate. Congress' manifest concern with preventing imposition of liability in cases where discriminatory animus did not actually cause an adverse action, see *ante*, at 262 (opinion of O'CONNOR, J.), suggests to me that an affirmative showing of causation should be required. And the most relevant portion of the legislative history supports just this view. See n. 3, *supra*. The limited benefits that are likely to be produced by today's innovation come at the sacrifice of clarity and practical application.

The potential benefits of the new approach, in my view, are overstated. First, the Court makes clear that the *Price Waterhouse* scheme is applicable only in those cases where the plaintiff has produced direct and substantial proof that an impermissible motive was relied upon in making the decision at issue. The burden shift properly will be found to apply in

only a limited number of employment discrimination cases. The application of the new scheme, furthermore, will make a difference only in a smaller subset of cases. The practical importance of the burden of proof is the "risk of nonpersuasion," and the new system will make a difference only where the evidence is so evenly balanced that the factfinder cannot say that either side's explanation of the case is "more likely" true. This category will not include cases in which the allocation of the burden of proof will be dispositive because of a complete lack of evidence on the causation issue. Cf. *Summers* v. *Tice*, 33 Cal. 2d 80, 199 P. 2d 1 (1948) (allocation of burden dispositive because no evidence of which of two negligently fired shots hit plaintiff). Rather, *Price Waterhouse* will apply only to cases in which there is substantial evidence of reliance on an impermissible motive, as well as evidence from the employer that legitimate reasons supported its action.

Although the *Price Waterhouse* system is not for every case, almost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of "stray remarks" or other evidence of discriminatory animus. Trial and appellate courts will therefore be saddled with the task of developing standards for determining when to apply the burden shift. One of their new tasks will be the generation of a jurisprudence of the meaning of "substantial factor." Courts will also be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence. Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism, the application of which itself depends on assessment of credibility and a determination whether evidence is sufficiently direct and substantial, is not likely to lend clarity to the process. The presence of an existing burden-shifting mechanism distinguishes the individual disparate-treatment case from the tort, class-action discrimination, and equal protection cases on which

JUSTICE O'CONNOR relies. The distinction makes JUSTICE WHITE's assertions that one "need look only to" *Mt. Healthy* and *Transportation Management* to resolve this case, and that our Title VII cases in this area are "inapposite," *ante*, at 258–260, at best hard to understand.

Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under 42 U. S. C. § 1981 or the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials. See, *e. g.*, Note, The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change, 73 Va. L. Rev. 601 (1987) (noting high reversal rate caused by use of Title VII burden shifting in a jury setting). Perhaps such cases in the future will require a bifurcated trial, with the jury retiring first to make the credibility findings necessary to determine whether the plaintiff has proved that an impermissible factor played a substantial part in the decision, and later hearing evidence on the "same decision" or "pretext" issues. Alternatively, perhaps the trial judge will have the unenviable task of formulating a single instruction for the jury on all of the various burdens potentially involved in the case.

I do not believe the minor refinement in Title VII procedures accomplished by today's holding can justify the difficulties that will accompany it. Rather, I "remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination." *Burdine*, 450 U. S., at 258. Although the employer does not bear the burden of persuasion under *Burdine*, it must offer clear and reasonably specific reasons for the contested decision, and has every incentive to persuade the trier of fact that the decision was lawful. *Ibid.* Further, the suggestion that the employer should bear the burden of persuasion due to superior access to evidence has little force in the Title VII context, where the liberal discovery rules available to all litigants are supplemented by EEOC investigatory files. *Ibid.*

In sum, the *Burdine* framework provides a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," *Aikens*, 460 U. S., at 715, and it should continue to govern the order of proof in Title VII disparate-treatment cases.[4]

III

The ultimate question in every individual disparate-treatment case is whether discrimination caused the particular decision at issue. Some of the plurality's comments with respect to the District Court's findings in this case, however, are potentially misleading. As the plurality notes, the District Court based its liability determination on expert evidence that some evaluations of respondent Hopkins were based on unconscious sex stereotypes,[5] and on the fact that

[4] The plurality states that it disregards the special context of affirmative action. *Ante*, at 239, n. 3. It is not clear that this is possible. Some courts have held that in a suit challenging an affirmative-action plan, the question of the plan's validity need not be reached unless the plaintiff shows that the plan was a but-for cause of the adverse decision. See *McQuillen* v. *Wisconsin Education Association Council*, 830 F. 2d 659, 665 (CA7 1987), cert. denied, 485 U. S. 914 (1988). Presumably it will be easier for a plaintiff to show that consideration of race or sex pursuant to an affirmative-action plan was a substantial factor in a decision, and the court will need to move on to the question of a plan's validity. Moreover, if the structure of the burdens of proof in Title VII suits is to be consistent, as might be expected given the identical statutory language involved, today's decision suggests that plaintiffs should no longer bear the burden of showing that affirmative-action plans are illegal. See *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 626–627 (1987).

[5] The plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision. Price Waterhouse chose not to object to Fiske's testimony, and at this late stage we are constrained to accept it, but I think the plurality's enthusiasm for Fiske's conclusions unwarranted. Fiske purported to discern stereotyping in comments that were gender neutral—*e. g.*, "overbearing and abrasive"—without any knowledge of the comments' basis in reality and without having met the speaker or subject. "To an expert of Dr. Fiske's qualifications, it seems plain that no woman could *be* overbearing, arrogant, or abrasive: any observations to that effect would necessarily

Price Waterhouse failed to disclaim reliance on these comments when it conducted the partnership review. The District Court also based liability on Price Waterhouse's failure to "make partners sensitive to the dangers [of stereotyping], to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes." 618 F. Supp. 1109, 1119 (DC 1985).

Although the District Court's version of Title VII liability is improper under any of today's opinions, I think it important to stress that Title VII creates no independent cause of action for sex stereotyping. Evidence of use by decision-makers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent. The ultimate question, however, is whether discrimination caused the plaintiff's harm. Our cases do not support the suggestion that failure to "disclaim reliance" on stereotypical comments itself violates Title VII. Neither do they support creation of a "duty to sensitize." As the dissenting judge in the Court of Appeals observed, acceptance of such theories would turn Title VII "from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts." 263 U. S. App. D. C. 321, 340, 825 F. 2d 458, 477 (1987) (Williams, J., dissenting).

Employment discrimination claims require factfinders to make difficult and sensitive decisions. Sometimes this may mean that no finding of discrimination is justified even though a qualified employee is passed over by a less than admirable employer. In other cases, Title VII's protections properly extend to plaintiffs who are by no means model employees. As JUSTICE BRENNAN notes, *ante*, at 258, courts do not sit to determine whether litigants are nice. In this

be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes." 263 U. S. App. D. C. 321, 340, 825 F. 2d 458, 477 (1987) (Williams, J., dissenting). Today's opinions cannot be read as requiring factfinders to credit testimony based on this type of analysis. See also *ante*, at 277 (opinion of O'CONNOR, J.).

case, Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of discrimination in Price Waterhouse's partnership process. Had the District Court found on this record that sex discrimination caused the adverse decision, I doubt it would have been reversible error. Cf. *Aikens*, *supra*, at 714, n. 2. That decision was for the finder of fact, however, and the District Court made plain that sex discrimination was not a but-for cause of the decision to place Hopkins' partnership candidacy on hold. Attempts to evade tough decisions by erecting novel theories of liability or multitiered systems of shifting burdens are misguided.

IV

The language of Title VII and our well-considered precedents require this plaintiff to establish that the decision to place her candidacy on hold was made "because of" sex. Here the District Court found that the "comments of the individual partners and the expert evidence of Dr. Fiske do not prove an intentional discriminatory motive or purpose," 618 F. Supp., at 1118, and that "[b]ecause plaintiff has considerable problems dealing with staff and peers, the Court cannot say that she would have been elected to partnership if the Policy Board's decision had not been tainted by sexually based evaluations," *id.*, at 1120. Hopkins thus failed to meet the requisite standard of proof after a full trial. I would remand the case for entry of judgment in favor of Price Waterhouse.

WARDS COVE PACKING CO., INC., ET AL. *v.* ATONIO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-1387. Argued January 18, 1989—Decided June 5, 1989

Jobs at petitioners' Alaskan salmon canneries are of two general types: unskilled "cannery jobs" on the cannery lines, which are filled predominantly by nonwhites; and "noncannery jobs," most of which are classified as skilled positions and filled predominantly with white workers, and virtually all of which pay more than cannery positions. Respondents, a class of nonwhite cannery workers at petitioners' facilities, filed suit in the District Court under Title VII of the Civil Rights Act of 1964, alleging, *inter alia*, that various of petitioners' hiring/promotion practices were responsible for the work force's racial stratification and had denied them employment as noncannery workers on the basis of race. The District Court rejected respondents' claims, finding, among other things, that nonwhite workers were overrepresented in cannery jobs because many of those jobs were filled under a hiring hall agreement with a predominantly nonwhite union. The Court of Appeals ultimately reversed in pertinent part, holding, *inter alia*, that respondents had made out a prima facie case of disparate impact in hiring for both skilled and unskilled noncannery jobs, relying solely on respondents' statistics showing a high percentage of nonwhite workers in cannery jobs and a low percentage of such workers in noncannery positions. The court also concluded that once a plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer to prove the challenged practice's business necessity.

Held:

1. The Court of Appeals erred in ruling that a comparison of the percentage of cannery workers who are nonwhite and the percentage of noncannery workers who are nonwhite makes out a prima facie disparate-impact case. Rather, the proper comparison is generally between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market. *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 308. With respect to the skilled noncannery jobs at issue, the cannery work force in no way reflected the pool of *qualified* job applicants or the *qualified* labor force population. Petitioners' selection methods or employment practices cannot be said to have had a disparate impact on nonwhites if the absence of minorities holding such skilled jobs reflects a dearth of qualified nonwhite applicants for reasons that are not petitioners' fault. With respect to the unskilled noncannery jobs, as long as there are no barriers or practices deterring qualified nonwhites from applying, the employer's selection mechanism probably does not have a disparate impact on minorities if the percentage of selected nonwhite applicants is not significantly less than the percentage of qualified nonwhite applicants. Where this is the case, the percentage of nonwhite workers found in other positions in the employer's labor force is irrelevant to a prima facie statistical disparate-impact case. Moreover, isolating the cannery workers as the potential labor force for unskilled noncannery jobs is both too broad—because the majority of cannery workers did not seek noncannery jobs—and too narrow—because there are many qualified persons in the relevant labor market who are not cannery workers. Under the Court of Appeals' method of comparison, any employer having a racially imbalanced segment of its work force could be haled into court and made to undertake the expensive and time-consuming task of defending the business necessity of its selection methods. For many employers, the only practicable option would be the adoption of racial quotas, which has been rejected by this Court and by Congress in drafting Title VII. The Court of Appeals' theory is also flawed because, if minorities are overrepresented in cannery jobs by virtue of petitioners' having contracted with a predominantly nonwhite union to fill those positions, as the District Court found, petitioners could eliminate respondents' prima facie case simply by ceasing to use the union, *without making any change whatsoever* in their hiring practices for the noncannery positions at issue. Pp. 650–655.

2. On remand for a determination whether the record will support a prima facie disparate-impact case on some basis other than the racial disparity between cannery and noncannery workers, a mere showing that nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth herein will not alone suffice. Rather, the courts below must also require, as part of respondents' prima facie case, a demonstration that the statistical disparity complained of is the result of one or more of the employment practices respondents are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. This specific causation requirement is not unduly burdensome, since liberal discovery rules give plaintiffs broad access to employers' records, and since employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures must maintain records disclosing the impact of tests and selection proce-

dures on employment opportunities of persons by identifiable race, sex, or ethnic group. Pp. 656–658.

3. If, on remand, respondents establish a prima facie disparate-impact case with respect to any of petitioners' practices, the burden of producing evidence of a legitimate business justification for those practices will shift to petitioners, but the burden of persuasion will remain with respondents at all times. This rule conforms with the usual method for allocating persuasion and production burdens in the federal courts and with the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment practice was based solely on a legitimate, neutral consideration. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 256–258. To the extent that some of this Court's decisions speak of an employer's "burden of proof" with respect to the business justification defense, they should be understood to mean an employer's burden of production, not persuasion. Even if respondents cannot persuade the trier of fact on the business necessity question, they may still prevail by coming forward with alternatives that reduce the disparate impact of petitioners' current practices, provided such alternatives are equally effective in achieving petitioners' legitimate employment goals in light of the alternatives' costs and other burdens. Pp. 658–661.

827 F. 2d 439, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 661. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 662.

Douglas M. Fryer argued the cause for petitioners. With him on the briefs were *Douglas M. Duncan* and *Richard L. Phillips*.

Abraham A. Arditi argued the cause and filed a brief for respondents.*

---

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Clegg, Richard G. Taranto, David K. Flynn,* and *Lisa J. Stark;* for the American Society for Personnel Administration by *Lawrence Z. Lorber* and *J. Robert Kirk;* for the Chamber of Commerce of the United States by *Glen D. Nager, Andrew M. Kramer, David A. Copus, Patricia A. Dunn,* and *Stephen A. Bokat;* and for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Edward E. Potter.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Joan E. Bertin, Isabelle Katz Pinzler,* and *John A. Powell;* for the Lawyers' Committee for Civil Rights Under Law by *Nicholas DeB. Katzenbach, Alan E. Kraus, Conrad Harper, Stuart J. Land, Norman Redlich, Richard T. Seymour,* and *James C. Gray, Jr.;* for the National Association for the Advancement of Colored People by *Grover G. Hankins* and *Alfred W. Blumrosen;* and for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius LeVonne Chambers, Charles Stephen Ralston, Ronald L. Ellis, Bill Lann Lee, Patrick O. Patterson, Jr., Theodore M. Shaw, Antonia Hernandez,* and *E. Richard Larson.*

Clint Bolick, Jerald L. Hill, and *Mark J. Bredemeier* filed a brief for the Center for Civil Rights as *Amicus Curiae.*

JUSTICE WHITE delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, makes it an unfair employment practice for an employer to discriminate against any individual with respect to hiring or the terms and condition of employment because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees in ways that would adversely affect any employee because of the employee's race, color, religion, sex, or national origin.[1] § 2000e–2(a). *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971), construed Title VII to proscribe "not only overt discrimination but also practices that are fair in form but discriminatory in practice." Under this basis for liability, which is known as the "disparate-impact" theory and which is involved in this case, a facially neutral

---

[1] Title 42 U. S. C. § 2000e–2(a), provides:

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a "disparate-treatment" case.

I

The claims before us are disparate-impact claims, involving the employment practices of petitioners, two companies that operate salmon canneries in remote and widely separated areas of Alaska. The canneries operate only during the salmon runs in the summer months. They are inoperative and vacant for the rest of the year. In May or June of each year, a few weeks before the salmon runs begin, workers arrive and prepare the equipment and facilities for the canning operation. Most of these workers possess a variety of skills. When salmon runs are about to begin, the workers who will operate the cannery lines arrive, remain as long as there are fish to can, and then depart. The canneries are then closed down, winterized, and left vacant until the next spring. During the off-season, the companies employ only a small number of individuals at their headquarters in Seattle and Astoria, Oregon, plus some employees at the winter shipyard in Seattle.

The length and size of salmon runs vary from year to year, and hence the number of employees needed at each cannery also varies. Estimates are made as early in the winter as possible; the necessary employees are hired, and when the time comes, they are transported to the canneries. Salmon must be processed soon after they are caught, and the work during the canning season is therefore intense.[2] For this

[2] "Independent fishermen catch the salmon and turn them over to company-owned boats called 'tenders,' which transport the fish from the fishing grounds to the canneries. Once at the cannery, the fish are eviscerated, the eggs pulled, and they are cleaned. Then, operating at a rate of approximately four cans per second, the salmon are filled into cans. Next, the canned salmon are cooked under precise time-temperature requirements established by the FDA, and the cans are inspected to ensure

reason, and because the canneries are located in remote regions, all workers are housed at the canneries and have their meals in company-owned mess halls.

Jobs at the canneries are of two general types: "cannery jobs" on the cannery line, which are unskilled positions; and "noncannery jobs," which fall into a variety of classifications. Most noncannery jobs are classified as skilled positions.[3] Cannery jobs are filled predominantly by nonwhites: Filipinos and Alaska Natives. The Filipinos are hired through, and dispatched by, Local 37 of the International Longshoremen's and Warehousemen's Union pursuant to a hiring hall agreement with the local. The Alaska Natives primarily reside in villages near the remote cannery locations. Noncannery jobs are filled with predominantly white workers, who are hired during the winter months from the companies' offices in Washington and Oregon. Virtually all of the noncannery jobs pay more than cannery positions. The predominantly white noncannery workers and the predominantly nonwhite cannery employees live in separate dormitories and eat in separate mess halls.

In 1974, respondents, a class of nonwhite cannery workers who were (or had been) employed at the canneries, brought this Title VII action against petitioners. Respondents alleged that a variety of petitioners' hiring/promotion practices—*e. g.*, nepotism, a rehire preference, a lack of objective hiring criteria, separate hiring channels, a practice of not promoting from within—were responsible for the racial strati-

that proper seals are maintained on the top, bottom and sides." 768 F. 2d 1120, 1123 (CA9), vacated, 787 F. 2d 462 (1985).

[3] The noncannery jobs were described as follows by the Court of Appeals: "Machinists and engineers are hired to maintain the smooth and continuous operation of the canning equipment. Quality control personnel conduct the FDA-required inspections and recordkeeping. Tenders are staffed with a crew necessary to operate the vessel. A variety of support personnel are employed to operate the entire cannery community, including, for example, cooks, carpenters, store-keepers, bookkeepers, beach gangs for dock yard labor and construction, etc." 768 F. 2d, at 1123.

fication of the work force and had denied them and other nonwhites employment as noncannery workers on the basis of race. Respondents also complained of petitioners' racially segregated housing and dining facilities. All of respondents' claims were advanced under both the disparate-treatment and disparate-impact theories of Title VII liability.

The District Court held a bench trial, after which it entered 172 findings of fact. 34 EPD ¶34,437, pp. 33,822–33,836 (WD Wash. 1983). It then rejected all of respondents' disparate-treatment claims. It also rejected the disparate-impact challenges involving the subjective employment criteria used by petitioners to fill these noncannery positions, on the ground that those criteria were not subject to attack under a disparate-impact theory. *Id.*, p. 33,840. Petitioners' "objective" employment practices (*e. g.*, an English language requirement, alleged nepotism in hiring, failure to post noncannery openings, the rehire preference, etc.) were found to be subject to challenge under the disparate-impact theory, but these claims were rejected for failure of proof. Judgment was entered for petitioners.

On appeal, a panel of the Ninth Circuit affirmed, 768 F. 2d 1120 (1985), but that decision was vacated when the Court of Appeals agreed to hear the case en banc, 787 F. 2d 462 (1985). The en banc hearing was ordered to settle an intracircuit conflict over the question whether subjective hiring practices could be analyzed under a disparate-impact model; the Court of Appeals held—as this Court subsequently ruled in *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977 (1988)—that disparate-impact analysis could be applied to subjective hiring practices. 810 F. 2d 1477, 1482 (1987). The Ninth Circuit also concluded that in such a case, "[o]nce the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer," *id.*, at 1485, to "prov[e the] business necessity" of the challenged practice, *id.*, at 1486. Because the en banc holding on subjective employment practices reversed

the District Court's contrary ruling, the en banc Court of Appeals remanded the case to a panel for further proceedings.

On remand, the panel applied the en banc ruling to the facts of this case. 827 F. 2d 439 (1987). It held that respondents had made out a prima facie case of disparate impact in hiring for both skilled and unskilled noncannery positions. The panel remanded the case for further proceedings, instructing the District Court that it was the employer's burden to prove that any disparate impact caused by its hiring and employment practices was justified by business necessity. Neither the en banc court nor the panel disturbed the District Court's rejection of the disparate-treatment claims.[4]

Petitioners sought review of the Court of Appeals' decision in this Court, challenging it on several grounds. Because some of the issues raised by the decision below were matters

[4] The fact that neither the District Court, nor the Ninth Circuit en banc, nor the subsequent Court of Appeals panel ruled for respondents on their disparate-treatment claims—*i. e.*, their allegations of intentional racial discrimination—warrants particular attention in light of the dissents' comment that the canneries "bear an unsettling resemblance to aspects of a plantation economy." *Post*, at 664, n. 4 (STEVENS, J., dissenting); *post*, at 662 (BLACKMUN, J., dissenting).

Whatever the "resemblance," the unanimous view of the lower courts in this litigation has been that respondents did not prove that the canneries practice intentional racial discrimination. Consequently, JUSTICE BLACKMUN's hyperbolic allegation that our decision in this case indicates that this Court no longer "believes that race discrimination . . . against nonwhites . . . is a problem in our society," *ibid.*, is inapt. Of course, it is unfortunately true that race discrimination exists in our country. That does not mean, however, that it exists at the canneries—or more precisely, that it has been proved to exist at the canneries.

Indeed, JUSTICE STEVENS concedes that respondents did not press before us the legal theories under which the aspects of cannery life that he finds to most resemble a "plantation economy" might be unlawful. *Post*, at 664, n. 4. Thus, the question here is not whether we "approve" of petitioners' employment practices or the society that exists at the canneries, but, rather, whether respondents have properly established that these practices violate Title VII.

on which this Court was evenly divided in *Watson* v. *Fort Worth Bank & Trust*, *supra*, we granted certiorari, 487 U. S. 1264 (1988), for the purpose of addressing these disputed questions of the proper application of Title VII's disparate-impact theory of liability.

II

In holding that respondents had made out a prima facie case of disparate impact, the Court of Appeals relied solely on respondents' statistics showing a high percentage of nonwhite workers in the cannery jobs and a low percentage of such workers in the noncannery positions.[5] Although statistical proof can alone make out a prima facie case, see *Teamsters* v. *United States*, 431 U. S. 324, 339 (1977); *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 307–308 (1977), the Court of Appeals' ruling here misapprehends our precedents and the purposes of Title VII, and we therefore reverse.

"There can be no doubt," as there was when a similar mistaken analysis had been undertaken by the courts below in *Hazelwood*, *supra*, at 308, "that the . . . comparison . . . fundamentally misconceived the role of statistics in employment discrimination cases." The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market." *Ibid.* It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that generally forms

[5] The parties dispute the extent to which there is a discrepancy between the percentage of nonwhites employed as cannery workers and those employed in noncannery positions. Compare, *e. g.*, Brief for Petitioners 4–9 with Brief for Respondents 4–6. The District Court made no precise numerical findings in this regard, but simply noted that there were "significant disparities between the at-issue jobs [*i. e.*, noncannery jobs] and the total workforce at the canneries" which were explained by the fact that "nearly all employed in the 'cannery worker' department are non-white." See 34 EPD ¶34,437, pp. 33,841, 33,829 (WD Wash. 1983).

For reasons explained below, the degree of disparity between these groups is not relevant to our decision here.

the proper basis for the initial inquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics—such as measures indicating the racial composition of "otherwise-qualified applicants" for at-issue jobs—are equally probative for this purpose. See, *e. g.*, *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 585 (1979).[6]

It is clear to us that the Court of Appeals' acceptance of the comparison between the racial composition of the cannery work force and that of the noncannery work force, as probative of a prima facie case of disparate impact in the selection of the latter group of workers, was flawed for several reasons. Most obviously, with respect to the skilled noncannery jobs at issue here, the cannery work force in no way reflected "the pool of *qualified* job applicants" or the "*qualified* population in the labor force." Measuring alleged discrimination in the selection of accountants, managers, boat captains, electricians, doctors, and engineers—and the long list of other "skilled" noncannery positions found to exist by the District Court, see 34 EPD ¶34,437, p. 33,832—by comparing the number of nonwhites occupying these jobs to the number of nonwhites filling cannery worker positions is nonsensical. If the absence of minorities holding such skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault),[7] petition-

[6] In fact, where "figures for the general population might . . . accurately reflect the pool of qualified job applicants," cf. *Teamsters* v. *United States*, 431 U. S. 324, 340, n. 20 (1977), we have even permitted plaintiffs to rest their prima facie cases on such statistics as well. See, *e. g.*, *Dothard* v. *Rawlinson*, 433 U. S. 321, 329–330 (1977).

[7] Obviously, the analysis would be different if it were found that the dearth of qualified nonwhite applicants was due to practices on petitioners' part which—expressly or implicitly—deterred minority group members from applying for noncannery positions. See, *e. g.*, *Teamsters* v. *United States*, *supra*, at 365.

ers' selection methods or employment practices cannot be said to have had a "disparate impact" on nonwhites.

One example illustrates why this must be so. Respondents' own statistics concerning the noncannery work force at one of the canneries at issue here indicate that approximately 17% of the new hires for medical jobs, and 15% of the new hires for officer worker positions, were nonwhite. See App. to Brief for Respondents B–1. If it were the case that less than 15 to 17% of the applicants for these jobs were nonwhite and that nonwhites made up a lower percentage of the relevant qualified labor market, it is hard to see how respondents, without more, cf. *Connecticut* v. *Teal*, 457 U. S. 440 (1982), would have made out a prima facie case of disparate impact. Yet, under the Court of Appeals' theory, simply because nonwhites comprise 52% of the cannery workers at the cannery in question, see App. to Brief for Respondents B–1, respondents would be successful in establishing a prima facie case of racial discrimination under Title VII.

Such a result cannot be squared with our cases or with the goals behind the statute. The Court of Appeals' theory, at the very least, would mean that any employer who had a segment of his work force that was—for some reason—racially imbalanced, could be haled into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his work force. The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof; this is a result that Congress expressly rejected in drafting Title VII. See 42 U. S. C. § 2000e–2(j); see also *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. at 922–994, and n. 2 (opinion of O'CONNOR, J.). The Court of Appeals' theory would "leave the employer little choice . . . but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII." *Albemarle Paper Co.* v. *Moody*,

422 U. S. 405, 449 (1975) (BLACKMUN, J., concurring in judgment).

The Court of Appeals also erred with respect to the unskilled noncannery positions. Racial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions, even where workers for the different positions may have somewhat fungible skills (as is arguably the case for cannery and unskilled noncannery workers). As long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions, see n. 6, *supra*, if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities.* Where this is the case, the percentage of nonwhite workers found in other positions in the employer's labor force is irrelevant to the question of a prima facie statistical case of disparate impact. As noted above, a contrary ruling on this point would almost inexorably lead to the use of numerical quotas in the workplace, a result that Congress and this Court have rejected repeatedly in the past.

Moreover, isolating the cannery workers as the potential "labor force" for unskilled noncannery positions is at once both too broad and too narrow in its focus. It is too broad because the vast majority of these cannery workers did not

*We qualify this conclusion—observing that it is only "probable" that there has been no disparate impact on minorities in such circumstances—because bottom-line racial balance is not a defense under Title VII. See *Connecticut* v. *Teal*, 457 U. S. 440 (1982). Thus, even if petitioners could show that the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, respondents would still have a case under Title VII, if they could prove that some particular hiring practice has a disparate impact on minorities, notwithstanding the bottom-line racial balance in petitioners' work force. See *Teal*, *supra*, at 450.

seek jobs in unskilled noncannery positions; there is no showing that many of them would have done so even if none of the arguably "deterring" practices existed. Thus, the pool of cannery workers cannot be used as a surrogate for the class of qualified job applicants because it contains many persons who have not (and would not) be noncannery job applicants. Conversely, if respondents propose to use the cannery workers for comparison purposes because they represent the "qualified labor population" generally, the group is too narrow because there are obviously many qualified persons in the labor market for noncannery jobs who are not cannery workers.

The peculiar facts of this case further illustrate why a comparison between the percentage of nonwhite cannery workers and nonwhite noncannery workers is an improper basis for making out a claim of disparate impact. Here, the District Court found that nonwhites were "overrepresent[ed]" among cannery workers because petitioners had contracted with a predominantly nonwhite union (local 37) to fill these positions. See 34 EPD ¶33,437, p. 33,829. As a result, if petitioners (for some permissible reason) ceased using local 37 as its hiring channel for cannery positions, it appears (according to the District Court's findings) that the racial stratification between the cannery and noncannery workers might diminish to statistical insignificance. Under the Court of Appeals' approach, therefore, it is possible that *with no change whatsoever* in their hiring practices for noncannery workers—the jobs at issue in this lawsuit—petitioners could make respondents' prima facie case of disparate impact "disappear." But *if* there would be no prima facie case of disparate impact in the selection of noncannery workers absent petitioners' use of local 37 to hire cannery workers, surely petitioners' reliance on the union to fill the cannery jobs not at issue here (and its resulting "overrepresentation" of nonwhites in those positions) does not—standing alone—make out a prima facie case of disparate impact. Yet it is precisely

such an ironic result that the Court of Appeals reached below.

Consequently, we reverse the Court of Appeals' ruling that a comparison between the percentage of cannery workers who are nonwhite and the percentage of noncannery workers who are nonwhite makes out a prima facie case of disparate impact. Of course, this leaves unresolved whether the record made in the District Court will support a conclusion that a prima facie case of disparate impact has been established on some basis other than the racial disparity between cannery and noncannery workers. This is an issue that the Court of Appeals or the District Court should address in the first instance.

III

Since the statistical disparity relied on by the Court of Appeals did not suffice to make out a prima facie case, any inquiry by us into whether the specific challenged employment practices of petitioners caused that disparity is pretermitted, as is any inquiry into whether the disparate impact that any employment practice may have had was justified by business considerations.[7] Because we remand for further proceedings, however, on whether a prima facie case of disparate impact has been made in defensible fashion in this case, we address two other challenges petitioners have made to the decision of the Court of Appeals.

---

[7] As we understand the opinions below, the specific employment practices were challenged only insofar as they were claimed to have been responsible for the overall disparity between the number of minority cannery and noncannery workers. The Court of Appeals did not purport to hold that any specified employment practice produced its own disparate impact that was actionable under Title VII. This is not to say that a specific practice, such as nepotism, if it were proved to exist, could not itself be subject to challenge if it had a disparate impact on minorities. Nor is it to say that segregated dormitories and eating facilities in the workplace may not be challenged under 42 U. S. C. § 2000e-2(a)(2) without showing a disparate impact on hiring or promotion.

A

First is the question of causation in a disparate-impact case. The law in this respect was correctly stated by JUSTICE O'CONNOR's opinion last Term in *Watson* v. *Fort Worth Bank & Trust*, 487 U. S., at 994:

> "[W]e note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

Cf. also *id.*, at 1000 (BLACKMUN, J., concurring in part and concurring in judgment).

Indeed, even the Court of Appeals—whose decision petitioners assault on this score—noted that "it is . . . essential that the practices identified by the cannery workers be linked causally with the demonstrated adverse impact." 827 F. 2d, at 445. Notwithstanding the Court of Appeals' apparent adherence to the proper inquiry, petitioners contend that that court erred by permitting respondents to make out their case by offering "only [one] set of cumulative comparative statistics as evidence of the disparate impact of each and all of [petitioners' hiring] practices." Brief for Petitioners 31.

Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities. Just as an employer cannot escape liability under Title VII by demonstrating that, "at the bottom line," his work force is racially balanced (where particular hiring practices may operate to deprive minorities of employment opportunities), see *Connecticut* v. *Teal*, 457 U. S., at

450, a Title VII plaintiff does not make out a case of disparate impact simply by showing that, "at the bottom line," there is racial *imbalance* in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII.

Here, respondents have alleged that several "objective" employment practices (*e. g.*, nepotism, separate hiring channels, rehire preferences), as well as the use of "subjective decision making" to select noncannery workers, have had a disparate impact on nonwhites. Respondents base this claim on statistics that allegedly show a disproportionately low percentage of nonwhites in the at-issue positions. However, even if on remand respondents can show that nonwhites are underrepresented in the at-issue jobs in a manner that is acceptable under the standards set forth in Part II, *supra*, this alone will *not* suffice to make out a prima facie case of disparate impact. Respondents will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites. To hold otherwise would result in employers being potentially liable for "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson* v. *Fort Worth Bank & Trust*, *supra*, at 992.

Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims. Also, employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 *et seq.* (1988),

are required to "maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group[s]." See § 1607.4(A). This includes records concerning "the individual components of the selection process" where there is a significant disparity in the selection rates of whites and nonwhites. See § 1607.4(C). Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the work force; respondents presumably took full advantage of these opportunities to build their case before the trial in the District Court was held.[10]

Consequently, on remand, the courts below are instructed to require, as part of respondents' prima facie case, a demonstration that specific elements of the petitioners' hiring process have a significantly disparate impact on nonwhites.

B

If, on remand, respondents meet the proof burdens outlined above, and establish a prima facie case of disparate impact with respect to any of petitioners' employment practices, the case will shift to any business justification petitioners offer for their use of these practices. This phase of the disparate-impact case contains two components: first, a consideration of the justifications an employer offers for his use of these practices; and second, the availability of alternative practices to achieve the same business ends, with less racial impact. See, *e. g.*, *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 425. We consider these two components in turn.

[10] Of course, petitioners' obligation to collect or retain any of these data may be limited by the Guidelines themselves. See 29 CFR § 1602.14(b) (1988) (exempting "seasonal" jobs from certain recordkeeping requirements).

(1)

Though we have phrased the query differently in different cases, it is generally well established that at the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. See, *e. g.*, *Watson* v. *Fort Worth Bank & Trust*, 487 U. S., at 997–999; *New York City Transit Authority* v. *Beazer*, 440 U. S., at 587, n. 31; *Griggs* v. *Duke Power Co.*, 401 U. S., at 432. The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be "essential" or "indispensable" to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils we have identified above. See *supra*, at 652–653.

In this phase, the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff. To the extent that the Ninth Circuit held otherwise in its en banc decision in this case, see 810 F. 2d, at 1485–1486, or in the panel's decision on remand, see 827 F. 2d, at 445, 447—suggesting that the persuasion burden should shift to petitioners once respondents established a prima facie case of disparate impact—its decisions were erroneous. "[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*." *Watson*, *supra*, at 997 (O'CONNOR, J.) (emphasis added). This rule conforms with the usual method for allocating persuasion and production bur-

dens in the federal courts, see Fed. Rule Evid. 301, and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 256–258 (1981). We acknowledge that some of our earlier decisions can be read as suggesting otherwise. See *Watson*, *supra*, at 1006–1008 (BLACKMUN, J., concurring in part and concurring in judgment). But to the extent that those cases speak of an employer's "burden of proof" with respect to a legitimate business justification defense, see, *e. g.*, *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977), they should have been understood to mean an employer's production—but not persuasion—burden. Cf., *e. g.*, *NLRB* v. *Transportation Management Corp.*, 462 U. S. 393, 404, n. 7 (1983). The persuasion burden here must remain with the plaintiff, for it is he who must prove that it was "because of such individual's race, color," etc., that he was denied a desired employment opportunity. See 42 U. S. C. § 2000e–2(a).

(2)

Finally, if on remand the case reaches this point, and respondents cannot persuade the trier of fact on the question of petitioners' business necessity defense, respondents may still be able to prevail. To do so, respondents will have to persuade the factfinder that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate [hiring] interest[s]"; by so demonstrating, respondents would prove that "[petitioners were] using [their] tests merely as a 'pretext' for discrimination." *Albemarle Paper Co.*, *supra*, at 425; see also *Watson*, 487 U. S., at 998 (O'CONNOR, J.); *id.*, at 1005–1006 (BLACKMUN, J., concurring in part and concurring in judgment). If respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that

reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

Of course, any alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals." *Watson*, *supra*, at 998 (O'CONNOR, J.). "Courts are generally less competent than employers to restructure business practices," *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit.

IV

For the reasons given above, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

I fully concur in JUSTICE STEVENS' analysis of this case. Today a bare majority of the Court takes three major strides backwards in the battle against race discrimination. It reaches out to make last Term's plurality opinion in *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977 (1988), the law, thereby upsetting the longstanding distribution of burdens of proof in Title VII disparate-impact cases. It bars the use of internal work force comparisons in the making of a prima

facie case of discrimination, even where the structure of the industry in question renders any other statistical comparison meaningless. And it requires practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible.

The harshness of these results is well demonstrated by the facts of this case. The salmon industry as described by this record takes us back to a kind of overt and institutionalized discrimination we have not dealt with in years: a total residential and work environment organized on principles of racial stratification and segregation, which, as JUSTICE STEVENS points out, resembles a plantation economy. *Post*, at 664, n. 4. This industry long has been characterized by a taste for discrimination of the old-fashioned sort: a preference for hiring nonwhites to fill its lowest level positions, on the condition that they stay there. The majority's legal rulings essentially immunize these practices from attack under a Title VII disparate-impact analysis.

Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was. Cf. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989).

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Fully 18 years ago, this Court unanimously held that Title VII of the Civil Rights Act of 1964[1] prohibits employment practices that have discriminatory effects as well as those that are intended to discriminate. *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Federal courts and agencies consistently have enforced that interpretation, thus promoting our national goal of eliminating barriers that define economic opportunity not by aptitude and ability but by race, color, na-

[1] 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

tional origin, and other traits that are easily identified but utterly irrelevant to one's qualification for a particular job.[2] Regrettably, the Court retreats from these efforts in its review of an interlocutory judgment respecting the "peculiar facts" of this lawsuit.[3] Turning a blind eye to the meaning and purpose of Title VII, the majority's opinion perfunctorily rejects a longstanding rule of law and underestimates the probative value of evidence of a racially stratified work force.[4] I cannot join this latest sojourn into judicial activism.

[2] Title VII also bars discrimination because of religion or sex. 42 U. S. C. § 2000e-2(a). Discrimination based on other characteristics has been challenged under other statutes. See, *e. g.*, *School Board of Nassau County* v. *Arline*, 480 U. S. 273 (1987) (determining scope of protection for handicapped schoolteacher under § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U. S. C. § 794); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669 (1983) (Pregnancy Discrimination Act of 1978, Pub. L. 95-555, § 1, 92 Stat. 2076, 42 U. S. C. § 2000e-(k)); *Lorillard* v. *Pons*, 434 U. S. 575 (1978) (Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*); *Corning Glass Works* v. *Brennan*, 417 U. S. 188 (1974) (Equal Pay Act of 1963, 77 Stat. 56, § 3, enacted as § 6(d) of the Fair Labor Standards Act of 1938, 29 U. S. C. § 206(d)).

[3] See *ante*, at 654. The majority purports to reverse the Court of Appeals but in fact directs the District Court to make additional findings, some of which had already been ordered by the Court of Appeals. Compare 827 F. 2d 439, 445 (CA9 1987), with *ante*, at 657–658. Furthermore, nearly half the majority's opinion is devoted to two questions not fairly raised at this point: "the question of causation in a disparate-impact case," *ante*, at 656, and the nature of the employer's defense, *ante*, at 658. Because I perceive no urgency to decide "these disputed questions," *ante*, at 650, at an interlocutory stage of such a factually complicated case, I believe the Court should have denied certiorari and allowed the District Court to make the additional findings directed by the Court of Appeals.

[4] Respondents constitute a class of present and former employees of petitioners, two Alaskan salmon canning companies. The class members, described by the parties as "nonwhite," include persons of Samoan, Chinese, Filipino, Japanese, and Alaska Native descent, all but one of whom are United States citizens. 34 EPD ¶ 34,437, pp. 33,822, 33,836–33,838 (WD Wash. 1983). Fifteen years ago they commenced this suit, alleging that petitioners engage in hiring, job assignment, housing, and messing

I

I would have thought it superfluous to recount at this late date the development of our Title VII jurisprudence, but the majority's facile treatment of settled law necessitates such a primer. This Court initially considered the meaning of Title VII in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), in which a class of utility company employees challenged the conditioning of entry into higher paying jobs upon a high school education or passage of two written tests. Despite evidence that "these two requirements operated to render ineligible a markedly disproportionate number of Negroes,"[5] the Court of Appeals had held that be-

practices that segregate nonwhites from whites in violation of Title VII. Evidence included this response in 1971 by a foreman to a college student's inquiry about cannery employment:

"'We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups.'" *Id.*, at 33,836.

Some characteristics of the Alaska salmon industry described in this litigation—in particular, the segregation of housing and dining facilities and the stratification of jobs along racial and ethnic lines—bear an unsettling resemblance to aspects of a plantation economy. See generally Plantation, Town, and County, Essays on the Local History of American Slave Society 163–334 (E. Miller & E. Genovese eds. 1974). Indeed the maintenance of inferior, segregated facilities for housing and feeding nonwhite employees, see 34 EPD ¶ 34,437, pp. 33,836, 33,843–33,844, strikes me as a form of discrimination that, although it does not necessarily fit neatly into a disparate-impact or disparate-treatment mold, nonetheless violates Title VII. See generally Brief for National Association for the Advancement of Colored People as *Amicus Curiae*. Respondents, however, do not press this theory before us.

[5] This Court noted that census statistics showed that in the employer's State, North Carolina, "while 34% of white males had completed high school, only 12% of Negro males had done so. . . . Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks." *Griggs*, 401 U. S., at 430, n. 6.

cause there was no showing of an intent to discriminate on account of race, there was no Title VII violation. *Id.*, at 429. Chief Justice Burger's landmark opinion established that an employer may violate the statute even when acting in complete good faith without any invidious intent.[6] Focusing on § 703(a)(2),[7] he explained:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U. S., at 429–430.

The opinion in *Griggs* made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose. "The touchstone is business necessity," the Court stressed. *Id.*, at 431. Because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation[,] . . . Congress has placed on the employer the burden of showing

[6] "The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees.' We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but *good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.*" *Id.*, at 432 (emphasis added) (citation omitted).

[7] See *id.*, at 426, n. 1. This subsection provides that "[i]t shall be an unlawful employment practice for an employer—

"(a) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(2).

that any given requirement must have a manifest relationship to the employment in question."[8] *Id.*, at 432 (emphasis in original). Congress has declined to act—as the Court now sees fit—to limit the reach of this "disparate-impact" theory, see *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977); indeed it has extended its application.[9] This approval lends added force to the *Griggs* holding.

The *Griggs* framework, with its focus on ostensibly neutral qualification standards, proved inapposite for analyzing an individual employee's claim, brought under § 703(a)(1),[10] that an employer intentionally discriminated on account of race.[11]

[8] The opinion concluded:

"Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. *What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.*" 401 U. S., at 436 (emphasis added).

[9] Voting Rights Act Amendments of 1982, Pub. L. 97-205, 96 Stat. 131, 134, as amended, codified at 42 U. S. C. §§ 1973, 1973b (1982 ed. and Supp. V). Legislative Reports leading to 1972 amendments to Title VII also evince support for disparate-impact analysis. H. R. Rep. No. 92-238, pp. 8, 20-22 (1971); S. Rep. No. 92-415, p. 5, and n. 1 (1971); accord, *Connecticut* v. *Teal*, 457 U. S. 440, 447, n. 8 (1982). Moreover, the theory is employed to enforce fair housing and age discrimination statutes. See Note, Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act, 54 Ford. L. Rev. 563 (1986); Note, Disparate Impact Analysis and the Age Discrimination in Employment Act, 68 Minn. L. Rev. 1038 (1984).

[10] This subsection makes it unlawful for an employer

"to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U. S. C. § 2000e-2(a)(1).

[11] In *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), Justice Powell explained:

The means for determining intent absent direct evidence was outlined in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981), two opinions written by Justice Powell for unanimous Courts. In such a "disparate-treatment" case, see *Teamsters*, 431 U. S., at 335, n. 15, the plaintiff's initial burden, which is "not onerous," 450 U. S., at 253, is to establish "a prima facie case of racial discrimination," 411 U. S., at 802; that is, to create a presumption of unlawful discrimination by "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection."[12] 450 U. S., at 254. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U. S., at 802; see 450 U. S., at 254. Fi-

"*Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of 'artificial, arbitrary, and unnecessary barriers to employment' which the Court found to be the intention of Congress to remove." *Id.*, at 806 (citations omitted).

[12] "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.*, at 802.

nally, because "Title VII does not . . . permit [the employer] to use [the employee's] conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1)," the employee "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." 411 U. S., at 804–805; see 450 U. S., at 256. While the burdens of producing evidence thus shift, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[13] 450 U. S., at 253.

Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate-treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate-impact case is proof of an affirmative defense of business necessity.[14] Although the majority's opinion blurs

[13] Although disparate impact and disparate treatment are the most prevalent modes of proving discrimination violative of Title VII, they are by no means exclusive. See generally B. Schlei & P. Grossman, Employment Discrimination Law 13–289 (2d ed. 1983) (four chapters discussing "disparate treatment," "present effects of past discrimination," "adverse impact," and "reasonable accommodation" as "categories" of discrimination). Cf. n. 4, *supra*. Moreover, either or both of the primary theories may be applied to a particular set of facts. See *Teamsters* v. *United States*, 431 U. S. 324, 336, n. 15 (1977).

[14] See *McDonnell Douglas*, 411 U. S., at 802, n. 14. See also, *e. g.*, *Teal*, 457 U. S., at 446 ("employer must . . . demonstrate that 'any given requirement [has] a manifest relationship to the employment in question'"); *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 587 (1979) (employer "rebutted" prima facie case by "demonstration that its narcotics rule . . . 'is job related'"); *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977) (employer has to "prov[e] that the challenged requirements are job related"); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975) (employer has "burden of proving that its tests are 'job related'"); *Griggs*, 401 U. S., at 432 (employer has "burden of showing that any given requirement must have a manifest relationship to the employment"). Court of Appeals opinions properly treating the employer's burden include *Bunch* v. *Bullard*, 795 F. 2d 384, 393–394 (CA5 1986); *Lewis* v. *Bloomsburg Mills*,

that distinction, thoughtful reflection on common-law pleading principles clarifies the fundamental differences between the two types of "burdens of proof."[15] In the ordinary civil trial, the plaintiff bears the burden of persuading the trier of fact that the defendant has harmed her. See, *e. g.*, 2 Restatement (Second) of Torts §§ 328 A, 433 B (1965) (hereinafter Restatement). The defendant may undercut plaintiff's efforts both by confronting plaintiff's evidence during her case in chief and by submitting countervailing evidence during its own case.[16] But if the plaintiff proves the existence of the harmful act, the defendant can escape liability only by persuading the factfinder that the act was justified or excusable. See, *e. g.*, Restatement §§ 454–461, 463–467. The plaintiff in turn may try to refute this affirmative defense. Although the burdens of producing evidence regarding the existence of harm or excuse thus shift between the plaintiff

Inc., 773 F. 2d 561, 572 (CA4 1985); *Nash* v. *Jacksonville*, 763 F. 2d 1393, 1397 (CA11 1985); *Segar* v. *Smith*, 238 U. S. App. D. C. 103, 121, 738 F. 2d 1249, 1267 (1984), cert. denied *sub nom. Meese* v. *Segar*, 471 U. S. 1115 (1985); *Moore* v. *Hughes Helicopters, Inc., Div. of Summa Corp.*, 708 F. 2d 475, 481 (CA9 1983); *Hawkins* v. *Anheuser-Busch, Inc.*, 697 F. 2d 810, 815 (CA8 1983); *Johnson* v. *Uncle Ben's, Inc.*, 657 F. 2d 750 (CA5 1981), cert. denied, 459 U. S. 967 (1982); contra, *Croker* v. *Boeing Co.*, 662 F. 2d 975, 991 (CA3 1981) (en banc). Cf. Equal Employment Opportunity Comm'n, Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 *et seq.* (1988).

[15] See, *e. g.*, 9 J. Wigmore, Evidence §§ 2485–2498 (J. Chadbourn rev. 1981); D. Louisell & C. Mueller, Federal Evidence §§ 65–70 (1977) (hereinafter Louisell); 21 C. Wright & K. Graham, Federal Practice and Procedure § 5122 (1977) (hereinafter Wright); J. Thayer, A Preliminary Treatise on Evidence 353–389 (1898) (hereinafter Thayer); C. Langdell, Equity Pleading 108–115 (2d ed. 1883).

[16] Cf. Thayer 357 (quoting *Caldwell* v. *New Jersey S. B. Co.*, 47 N. Y. 282, 290 (1872)) ("'The burden of maintaining the affirmative of the issue, and, properly speaking, the burden of proof, remained upon the plaintiff throughout the trial; but the burden or necessity was cast upon the defendant, to relieve itself from the presumption of negligence raised by the plaintiff's evidence'").

and the defendant, the burden of proving either proposition remains throughout on the party asserting it.

In a disparate-treatment case there is no "discrimination" within the meaning of Title VII unless the employer intentionally treated the employee unfairly because of race. Therefore, the employee retains the burden of proving the existence of intent at all times. If there is direct evidence of intent, the employee may have little difficulty persuading the factfinder that discrimination has occurred. But in the likelier event that intent has to be established by inference, the employee may resort to the *McDonnell/Burdine* inquiry. In either instance, the employer may undermine the employee's evidence but has no independent burden of persuasion.

In contrast, intent plays no role in the disparate-impact inquiry. The question, rather, is whether an employment practice has a significant, adverse effect on an identifiable class of workers—regardless of the cause or motive for the practice. The employer may attempt to contradict the factual basis for this effect; that is, to prevent the employee from establishing a prima facie case. But when an employer is faced with sufficient proof of disparate impact, its only recourse is to justify the practice by explaining why it is necessary to the operation of business. Such a justification is a classic example of an affirmative defense.[17]

---

[17] Accord, Fed. Rule Civ. Proc. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense"). Cf. Thayer 368–369:

"An admission may, of course, end the controversy; but such an admission may be, and yet not end it; and if that be so, it is because the party making the admission sets up something that avoids the apparent effect of it . . . When this happens, the party defending becomes, in so far, the *actor* or plaintiff. In general, he who seeks to move a court in his favor, whether as an original plaintiff whose facts are merely denied, or as a defendant, who, in admitting his adversary's contention and setting up an affirmative defence, takes the rôle of *actor (reus excipiendo fit actor)*,—must satisfy the court of the truth and adequacy of the grounds of his claim, both in point of fact and law."

Similarly, in suits alleging price discrimination in violation of § 2 of the Clayton Act, as amended by the Robinson Patman Act, 15 U. S. C. § 13, it is well settled that the defendant has the burden of affirmatively establishing as a defense either a cost justification, under the proviso to subsection (a), *United States* v. *Borden Co.*, 370 U. S. 460, 467 (1962), or a good-faith effort to meet a competitor's equally low price, pursuant to subsection (b), *Standard Oil Co.* v. *FTC*, 340 U. S. 231, 250 (1951).

Failing to explore the interplay between these distinct orders of proof, the Court announces that our frequent statements that the employer shoulders the burden of proof respecting business necessity "should have been understood to mean an employer's production—but not persuasion—burden."[18] *Ante*, at 660. Our opinions always have emphasized that in a disparate-impact case the employer's burden is weighty. "The touchstone," the Court said in *Griggs*, "is business necessity." 401 U. S., at 431. Later, we held that prison administrators had failed to "rebu[t] the prima facie case of discrimination by showing that the height and weight requirements are . . . essential to effective job performance," *Dothard* v. *Rawlinson*, 433 U. S. 321, 331 (1977). Cf. n. 14, *supra*. I am thus astonished to read that the "touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. . . . [T]here is no requirement that the challenged practice be . . . 'essential,'" *ante*, at 659. This casual—almost summary—rejec-

---

[18] The majority's only basis for this proposition is the plurality opinion in *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 997 (1988), which in turn cites no authority. As JUSTICE BLACKMUN explained in *Watson*, *id.*, at 1001–1002 (concurring in part and concurring in judgment), and as I have shown here, the assertion profoundly misapprehends the difference between disparate-impact and disparate-treatment claims.

The Court also makes passing reference to Federal Rule of Evidence 301. *Ante*, at 660. That Rule pertains only to shifting of evidentiary burdens upon establishment of a presumption and has no bearing on the substantive burdens of proof. See Louisell §§ 65–70; Wright § 5122.

tion of the statutory construction that developed in the wake of *Griggs* is most disturbing. I have always believed that the *Griggs* opinion correctly reflected the intent of the Congress that enacted Title VII. Even if I were not so persuaded, I could not join a rejection of a consistent interpretation of a federal statute. Congress frequently revisits this statutory scheme and can readily correct our mistakes if we misread its meaning. *Johnson* v. *Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 644 (1987) (STEVENS, J., concurring); *Runyon* v. *McCrary*, 427 U. S. 160, 190–192 (1976) (STEVENS, J., concurring). See *McNally* v. *United States*, 483 U. S. 350, 376 (1987) (STEVENS, J., dissenting); *Commissioner* v. *Fink*, 483 U. S. 89, 102–105 (1987) (STEVENS, J., dissenting); see also *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 486 (1989) (STEVENS, J., dissenting).

Also troubling is the Court's apparent redefinition of the employees' burden of proof in a disparate-impact case. No prima facie case will be made, it declares, unless the employees "'isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities.'" *Ante*, at 656 (quoting *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 994 (1988) (plurality opinion)). This additional proof requirement is unwarranted.[19] It is elementary that a plaintiff cannot recover upon proof of injury alone; rather, the plaintiff must connect the injury to an act of the defendant in order to establish prima facie that the defendant is liable. *E. g.*, Restatement § 430. Although the causal link must have substance, the act

[19] The Solicitor General's brief *amicus curiae* on behalf of the employers agrees:

"[A] decision rule for selection may be complex: it may, for example, involve consideration of multiple factors. And certainly if the factors combine to produce a single ultimate selection decision and it is not possible to challenge each one, that decision may be challenged (and defended) as a whole." Brief for United States as *Amicus Curiae* 22 (footnote omitted).

need not constitute the sole or primary cause of the harm. §§ 431–433; cf. *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989). Thus in a disparate-impact case, proof of numerous questionable employment practices ought to fortify an employee's assertion that the practices caused racial disparities.[20] Ordinary principles of fairness require that Title VII actions be tried like "any lawsuit." Cf. *U. S. Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 714, n. 3 (1983). The changes the majority makes today, tipping the scales in favor of employers, are not faithful to those principles.

II

Petitioners seek reversal of the Court of Appeals and dismissal of this suit on the ground that respondents' statistical evidence failed to prove a prima facie case of discrimination. Brief for Petitioners 48. The District Court concluded "there were 'significant disparities'" between the racial composition of the cannery workers and the noncannery workers, but it "made no precise numerical findings" on this and other critical points. See *ante*, at 650, n. 5. Given this dearth of findings and the Court's newly articulated preference for individualized proof of causation, it would be manifestly unfair to consider respondents' evidence in the aggregate and deem it insufficient. Thus the Court properly rejects petitioners' request for a final judgment and remands for further determination of the strength of respondents' prima facie case. See *ante*, at 655. Even at this juncture, however, I believe that respondents' evidence deserves greater credit than the majority allows.

[20] The Court discounts the difficulty its causality requirement presents for employees, reasoning that they may employ "liberal civil discovery rules" to obtain the employer's statistical personnel records. *Ante*, at 657. Even assuming that this generally is true, it has no bearing in this litigation, since it is undisputed that petitioners did not preserve such records. Brief for Respondents 42–43; Reply Brief for Petitioners 18–19.

Statistical evidence of discrimination should compare the racial composition of employees in disputed jobs to that "'of the qualified . . . population in the relevant labor market.'" *Ante*, at 650 (quoting *Hazelwood School Dist.* v. *United States*, 433 U. S. 299, 308 (1977)). That statement leaves open the definition of the qualified population and the relevant labor market. Our previous opinions, *e. g.*, *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 584–586 (1979); *Dothard* v. *Rawlinson*, 433 U. S., at 329–330; *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975); *Griggs*, 401 U. S., at 426, 430, n. 6, demonstrate that in reviewing statistical evidence, a court should not strive for numerical exactitude at the expense of the needs of the particular case.

The District Court's findings of fact depict a unique industry. Canneries often are located in remote, sparsely populated areas of Alaska. 34 EPD ¶34,437, p. 33,825 (WD Wash. 1983). Most jobs are seasonal, with the season's length and the canneries' personnel needs varying not just year to year but day to day. *Ibid.* To fill their employment requirements, petitioners must recruit and transport many cannery workers and noncannery workers from States in the Pacific Northwest. *Id.*, at 33,828. Most cannery workers come from a union local based outside Alaska or from Native villages near the canneries. *Ibid.* Employees in the noncannery positions—the positions that are "at issue"—learn of openings by word of mouth; the jobs seldom are posted or advertised, and there is no promotion to noncannery jobs from within the cannery workers' ranks. *Id.*, at 33,827–33,828.

In general, the District Court found the at-issue jobs to require "skills," ranging from English literacy, typing, and "ability to use seam micrometers, gauges, and mechanic's hand tools" to "good health" and a driver's license.[21] *Id.*, at

[21] The District Court found that of more than 100 at-issue job titles, all were skilled except these 15: kitchen help, waiter/waitress, janitor, oil dock crew, night watchman, tallyman, laundry, gasman, roustabout, store help,

33,833–33,834. All cannery workers' jobs, like a handful of at-issue positions, are unskilled, and the court found that the intensity of the work during canning season precludes on-the-job training for skilled noncannery positions. *Id.*, at 33,825. It made no findings regarding the extent to which the cannery workers already are qualified for at-issue jobs: individual plaintiffs testified persuasively that they were fully qualified for such jobs,[22] but the court neither credited nor discredited this testimony. Although there are no findings concerning wage differentials, the parties seem to agree that wages for cannery workers are lower than those for noncannery workers, skilled or unskilled. The District Court found that "nearly all" cannery workers are nonwhite, while the percentage of nonwhites employed in the entire Alaska salmon canning industry "has stabilized at about 47% to 50%." *Id.*, at 33,829. The precise stratification of the work force is not described in the findings, but the parties seem to agree that the noncannery jobs are predominantly held by whites.

Petitioners contend that the relevant labor market in this case is the general population of the "'external' labor market for the jobs at issue." Brief for Petitioners 17. While they would rely on the District Court's findings in this regard, those findings are ambiguous. At one point the District Court specifies "Alaska, the Pacific Northwest, and California" as "the geographical region from which [petitioners] draw their employees," but its next finding refers to "this relevant geographical area for cannery worker, laborer, and other nonskilled jobs," 34 EPD ¶34,437, p. 33,828. There

stockroom help, assistant caretaker (winter watchman and watchman's assistant), machinist helper/trainee, deckhand, and apprentice carpenter/carpenter's helper. 34 EPD ¶34,437, p. 33,835.

[22] Some cannery workers later became architects, an Air Force officer, and a graduate student in public administration. Some had college training at the time they were employed in the canneries. See *id.*, at 33,837–33,838; App. 38, 52–53; Tr. 76, 951–952, 1036, 1050, 2214.

is no express finding of the relevant labor market for noncannery jobs.

Even assuming that the District Court properly defined the relevant geographical area, its apparent assumption that the population in that area constituted the "available labor supply," *ibid.*, is not adequately founded. An undisputed requirement for employment either as a cannery or noncannery worker is availability for seasonal employment in the far reaches of Alaska. Many noncannery workers, furthermore, must be available for preseason work. *Id.*, at 33,829, 33,833–33,834. Yet the record does not identify the portion of the general population in Alaska, California, and the Pacific Northwest that would accept this type of employment.[23] This deficiency respecting a crucial job qualification diminishes the usefulness of petitioners' statistical evidence. In contrast, respondents' evidence, comparing racial compositions within the work force, identifies a pool of workers willing to work during the relevant times and familiar with the workings of the industry. Surely this is more probative than the untailored general population statistics on which petitioners focus. Cf. *Hazelwood*, 433 U. S., at 308, n. 13; *Teamsters*, 431 U. S., at 339–340, n. 20.

[23] The District Court's justification for use of general population statistics occurs in these findings of fact:

"119. Most of the jobs at the canneries entail migrant, seasonal labor. While as a general proposition, most people prefer full-year, fixed location employment near their homes, seasonal employment in the unique salmon industry is not comparable to most other types of migrant work, such as fruit and vegetable harvesting which, for example, may or may not involve a guaranteed wage.

"120. Thus, while census data is *[sic]* dominated by people who prefer full-year, fixed-location employment, such data is *[sic]* nevertheless appropriate in defining labor supplies for migrant, seasonal work." 34 EPD ¶34,437, p. 33,829.

The court's rather confusing distinction between work in the cannery industry and other "migrant, seasonal work" does not support its conclusion that the general population composes the relevant labor market.

Evidence that virtually all the employees in the major categories of at-issue jobs were white,[24] whereas about two-thirds of the cannery workers were nonwhite,[25] may not by itself suffice to establish a prima facie case of discrimination.[26] But such evidence of racial stratification puts the specific employment practices challenged by respondents into perspective. Petitioners recruit employees for at-issue jobs from outside the work force rather than from lower paying, overwhelmingly nonwhite, cannery worker positions. 34 EPD ¶34,437, p. 33,828–33,829. Information about availability of at-issue positions is conducted by word of mouth;[27] therefore,

[24] For example, from 1971 to 1980, there were 443 persons hired in the job departments labeled "machinists," "company fishing boat," and "tender" at petitioner Castle & Cooke, Inc.'s Bumble Bee cannery; only 3 of them were nonwhites. Joint Excerpt of Record 35 (Exh. 588). In the same categories at the Red Salmon cannery of petitioner Wards Cove Packing Co., Inc., 488 whites and 42 nonwhites were hired. *Id.*, at 36 (Exh. 589).

[25] The Court points out that nonwhites are "overrepresented" among the cannery workers. *Ante*, at 654. Such an imbalance will be true in any racially stratified work force; its significance becomes apparent only upon examinaton of the pattern of segregation within the work force. In the cannery industry nonwhites are concentrated in positions offering low wages and little opportunity for promotion. Absent any showing that the "underrepresentation" of whites in this stratum is the result of a barrier to access, the "overrepresentation" of nonwhites does not offend Title VII.

[26] The majority suggests that at-issue work demands the skills possessed by "accountants, managers, boat captains, electricians, doctors, and engineers." See *ante*, at 651. It is at least theoretically possible that a disproportionate number of white applicants possessed the specialized skills required by some at-issue jobs. In fact, of course, many at-issue jobs involved skills not at all comparable to these selective examples. See 34 EPD ¶34,437, p. 33,833–33,834. Even the District Court recognized that in a year-round employment setting, "some of the positions which this court finds to be skilled, *e. g.*, truckdriving on the beach, [would] fit into the category of jobs which require skills that are readily acquirable by persons in the general public." *Id.*, at 33,841.

[27] As the Court of Appeals explained in its remand opinion:

"Specifically, the companies sought cannery workers in Native villages and through dispatches from ILWU Local 37, thus securing a work force for the lowest paying jobs which was predominantly Alaska Native and Fili-

the maintenance of housing and mess halls that separate the largely white noncannery work force from the cannery workers, *id.*, at 33,836, 33,843–33,844, coupled with the tendency toward nepotistic hiring,[28] are obvious barriers to employment opportunities for nonwhites. Putting to one side the issue of business justifications, it would be quite wrong to conclude that these practices have no discriminatory consequence.[29] Thus I agree with the Court of Appeals, 827 F. 2d 439, 444–445 (CA9 1987), that when the District Court makes the additional findings prescribed today, it should treat the evidence of racial stratification in the work force as a significant element of respondents' prima facie case.

III

The majority's opinion begins with recognition of the settled rule that that "a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case." *Ante*, at 645–646. It then departs from the body of law engendered by this disparate-

pino. For other departments the companies relied on informal word-of-mouth recruitment by predominantly white superintendents and foremen, who recruited primarily white employees. That such practices can cause a discriminatory impact is obvious." 827 F. 2d, at 446.

[28] The District Court found but downplayed the fact that relatives of employees are given preferential consideration. See 34 EPD ¶34,437, p. 33,840. But "of 349 nepotistic hires in four upper-level departments during 1970–75, 332 were of whites, 17 of nonwhites," the Court of Appeals noted. "If nepotism exists, it is by definition a practice of giving preference to relatives, and where those doing the hiring are predominantly white, the practice necessarily has an adverse impact on nonwhites." 827 F. 2d, at 445.

[29] The Court suggests that the discrepancy in economic opportunities for white and nonwhite workers does not amount to disparate impact within the meaning of Title VII unless respondents show that it is "petitioners' fault." *Ante*, at 651; see also *ante*, at 653–654. This statement distorts the disparate-impact theory, in which the critical inquiry is whether an employer's practices *operate* to discriminate. *E. g.*, *Griggs*, 401 U. S., at 431. Whether the employer intended such discrimination is irrelevant.

impact theory, reformulating the order of proof and the weight of the parties' burdens. Why the Court undertakes these unwise changes in elementary and eminently fair rules is a mystery to me.

I respectfully dissent.

existing common-law claims against an allegedly negligent doctor working abroad, even though the doctor is indemnified by the Federal Government. I cannot believe that Congress intended that result. I am therefore persuaded that § 5(b)(2)(B) should be read in a way that prevents it from being nothing more than a meaningless appendage and allows it to fulfill its intended purpose of preserving pre-existing claims.[13]

In *Westfall* v. *Erwin*, 484 U. S. 292 (1988), we said that "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context" and we suggested that "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Id.*, at 300. Today, the Court, by deciding that a section of Congress' handiwork is a nullity, once again invites Congress to step in and "provide guidance."

I respectfully dissent.

---

[13] In response to this dissent, the Court has restated its argument that respondent did not "violate" the Gonzalez Act. See *ante*, at 174. As a matter of pure grammar, the Court is, of course, correct. It nevertheless remains true that this literal reading of the Liability Reform Act fails to answer two critical questions: (1) What legislative purpose is served by depriving malpractice victims, such as petitioner, of their Gonzalez Act remedy? (2) If § 5(b)(2)(B) does not preserve that remedy, then what was its purpose? If forced to choose between an assumption that Congress used imperfect grammar to achieve a benign purpose identified in the legislative history and an assumption that it inadvertently achieved a heartless purpose disclaimed in the legislative history, I have no difficulty in choosing the former.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. *v.* JOHNSON CONTROLS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 89-1215. Argued October 10, 1990—Decided March 20, 1991

A primary ingredient in respondent's battery manufacturing process is lead, occupational exposure to which entails health risks, including the risk of harm to any fetus carried by a female employee. After eight of its employees became pregnant while maintaining blood lead levels exceeding that noted by the Occupational Safety and Health Administration (OSHA) as critical for a worker planning to have a family, respondent announced a policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding the OSHA standard. Petitioners, a group including employees affected by respondent's fetal-protection policy, filed a class action in the District Court, claiming that the policy constituted sex discrimination violative of Title VII of the Civil Rights Act of 1964, as amended. The court granted summary judgment for respondent, and the Court of Appeals affirmed. The latter court held that the proper standard for evaluating the policy was the business necessity inquiry applied by other Circuits; that respondent was entitled to summary judgment because petitioners had failed to satisfy their burden of persuasion as to each of the elements of the business necessity defense under *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642; and that even if the proper evaluative standard was bona fide occupational qualification (BFOQ) analysis, respondent still was entitled to summary judgment because its fetal-protection policy is reasonably necessary to further the industrial safety concern that is part of the essence of respondent's business.

Held: Title VII, as amended by the Pregnancy Discrimination Act (PDA), forbids sex-specific fetal-protection policies. Pp. 197–211.

(a) By excluding women with childbearing capacity from lead-exposed jobs, respondent's policy creates a facial classification based on gender and explicitly discriminates against women on the basis of their sex under § 703(a) of Title VII. Moreover, in using the words "capable of bearing children" as the criterion for exclusion, the policy explicitly classifies on the basis of potential for pregnancy, which classification must be

regarded, under the PDA, in the same light as explicit sex discrimination. The Court of Appeals erred in assuming that the policy was facially neutral because it had only a discriminatory effect on women's employment opportunities, and because its asserted purpose, protecting women's unconceived offspring, was ostensibly benign. The policy is not neutral because it does not apply to male employees in the same way as it applies to females, despite evidence about the debilitating effect of lead exposure on the male reproductive system. Also, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Cf. *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542. Because respondent's policy involves disparate treatment through explicit facial discrimination, the business necessity defense and its burden-shifting under *Wards Cove* are inapplicable here. Rather, as indicated by the Equal Employment Opportunity Commission's enforcement policy, respondent's policy may be defended only as a BFOQ, a more stringent standard than business necessity. Pp. 197–200.

(b) The language of both the BFOQ provision set forth in § 703(e)(1) of Title VII—which allows an employer to discriminate on the basis of sex "in those certain instances where . . . sex . . . is a [BFOQ] reasonably necessary to the normal operation of [the] particular business"—and the PDA provision that amended Title VII—which specifies that, unless pregnant employees differ from others "in their ability or inability to work," they must be "treated the same" as other employees "for all employment-related purposes"—as well as these provisions' legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. The so-called safety exception to the BFOQ is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform, and the employer must direct its concerns in this regard to those aspects of the woman's job-related activities that fall within the "essence" of the particular business. *Dothard* v. *Rawlinson*, 433 U. S. 321, 333, 335; *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 413. The unconceived fetuses of respondent's female employees are neither customers nor third parties whose safety is essential to the business of battery manufacturing. Pp. 200–206.

(c) Respondent cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Moreover, respondent's professed concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Title VII, as amended by the PDA, mandates that decisions about the welfare of future children be left to the parents

who conceive, bear, support, and raise them rather than to the employers who hire those parents or the courts. Pp. 206–207.

(d) An employer's tort liability for potential fetal injuries and its increased costs due to fertile women in the workplace do not require a different result. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best. Moreover, the incremental cost of employing members of one sex cannot justify a discriminatory refusal to hire members of that gender. See, *e. g.*, *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 716–718, and n. 32. Pp. 208–211.

886 F. 2d 871, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which MARSHALL, STEVENS, O'CONNOR, and SOUTER, JJ., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 211. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 223.

Marsha S. Berzon argued the cause for petitioners. With her on the briefs were *Jordan Rossen*, *Ralph O. Jones*, and *Laurence Gold*.

Stanley S. Jaspan argued the cause for respondent. With him on the briefs were *Susan R. Maisa*, *Anita M. Sorensen*, *Charles G. Curtis, Jr.*, and *John P. Kennedy*.*

*Briefs of *amici curiae* urging reversal were filed for the United States et al. by *Solicitor General Starr*, *Assistant Attorney General Dunne*, *Deputy Solicitor General Roberts*, *Deputy Assistant Attorney General Clegg*, *Clifford M. Sloan*, *David K. Flynn*, *Charles A. Shanor*, *Gwendolyn Young Reams*, *Lorraine C. Davis*, and *Carolyn L. Wheeler*; for the State of California et al. by *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *Marian M. Johnston*, Supervising Deputy Attorney General, and *Manuel M. Medeiros*, Deputy Attorney General; for the Commonwealth of Massachusetts et al. by *James M. Shannon*, Attorney General of Massachusetts, *Jennifer Wriggins*, *Marjorie Heins*, and *Judith E. Beals*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *Clarine Nardi Riddle* of Connecticut, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Robert M. Spire* of Ne-

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we are concerned with an employer's gender-based fetal-protection policy. May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?

I

Respondent Johnson Controls, Inc., manufactures batteries. In the manufacturing process, the element lead is a primary ingredient. Occupational exposure to lead entails health risks, including the risk of harm to any fetus carried by a female employee.

braska, *Robert J. Del Tufo* of New Jersey, *Robert Abrams* of New York, *Anthony J. Celebrezze, Jr.*, of Ohio, *Robert H. Henry* of Oklahoma, *Hector Rivera-Cruz* of Puerto Rico, *Jim Mattox* of Texas, *Jeffrey L. Amestoy* of Vermont, *Godfrey R. de Castro* of the Virgin Islands, and *Kenneth O. Eikenberry* of Washington; for the American Civil Liberties Union et al. by *Joan E. Bertin, Elisabeth A. Werby*, and *Isabelle Katz Pinzler*; for the American Public Health Association et al. by *Nadine Taub* and *Suzanne L. Mager*; for Equal Rights Advocates et al. by *Susan Deller Ross* and *Naomi R. Cahn*; for the NAACP Legal Defense and Educational Fund, Inc., et al., by *Julius LeVonne Chambers, Charles Stephen Ralston*, and *Ronald L. Ellis*; and for Trial Lawyers for Public Justice by *Arthur H. Bryant*.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America by *Timothy B. Dyk, Willis J. Goldsmith, Stephen A. Bokat*, and *Robin S. Conrad*; for Concerned Women for America by *Jordan W. Lorence, Cimron Campbell*, and *Wendell R. Bird*; for the Equal Employment Advisory Council et al. by *Robert E. Williams, Douglas S. McDowell, Garen E. Dodge, Jan S. Amundson*, and *Quentin Riegel*; for the Industrial Hygiene Law Project by *Jack Levy* and *Ilise Levy Feitshans*; for the National Safe Workplace Institute by *James D. Holzhauer*; for the United States Catholic Conference by *Mark E. Chopko* and *John A. Liekweg*; and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar*, and *John C. Scully*.

Briefs of *amici curiae* were filed for the Association of the Bar of the City of New York et al. by *Sidney S. Rosdeitcher, Evelyn Cohn, Janet Gallagher, Janice Goodman, Arthur Leonard*, and *Jim Williams*; for Natural Resources Defense Council, Inc., by *Thomas O. McGarity* and *Albert H. Meyerhoff*; and for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *Anthony T. Caso*.

Before the Civil Rights Act of 1964, 78 Stat. 241, became law, Johnson Controls did not employ any woman in a battery-manufacturing job. In June 1977, however, it announced its first official policy concerning its employment of women in lead-exposure work:

> "[P]rotection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.
>
> ". . . Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant." App. 140.

Consistent with that view, Johnson Controls "stopped short of excluding women capable of bearing children from lead exposure," *id.*, at 138, but emphasized that a woman who expected to have a child should not choose a job in which she would have such exposure. The company also required a woman who wished to be considered for employment to sign a statement that she had been advised of the risk of having a child while she was exposed to lead. The statement informed the woman that although there was evidence "that women exposed to lead have a higher rate of abortion," this evidence was "not as clear . . . as the relationship between cigarette smoking and cancer," but that it was, "medically speaking, just good sense not to run that risk if you want children and do not want to expose the unborn child to risk, however small . . . ." *Id.*, at 142–143.

Five years later, in 1982, Johnson Controls shifted from a policy of warning to a policy of exclusion. Between 1979 and 1983, eight employees became pregnant while maintaining blood lead levels in excess of 30 micrograms per deciliter. Tr. of Oral Arg. 25, 34. This appeared to be the critical level

noted by the Occupational Safety and Health Administration (OSHA) for a worker who was planning to have a family. See 29 CFR § 1910.1025 (1990). The company responded by announcing a broad exclusion of women from jobs that exposed them to lead:

> "[I]t is [Johnson Controls'] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." App. 85–86.

The policy defined "women . . . capable of bearing children" as "[a]ll women except those whose inability to bear children is medically documented." *Id.*, at 81. It further stated that an unacceptable work station was one where, "over the past year," an employee had recorded a blood lead level of more than 30 micrograms per deciliter or the work site had yielded an air sample containing a lead level in excess of 30 micrograms per cubic meter. *Ibid.*

II

In April 1984, petitioners filed in the United States District Court for the Eastern District of Wisconsin a class action challenging Johnson Controls' fetal-protection policy as sex discrimination that violated Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.* Among the individual plaintiffs were petitioners Mary Craig, who had chosen to be sterilized in order to avoid losing her job, Elsie Nason, a 50-year-old divorcee, who had suffered a loss in compensation when she was transferred out of a job where she was exposed to lead, and Donald Penney, who had been denied a request for a leave of absence for the purpose of lowering his lead level because he intended to become a father. Upon stipulation of the parties, the District Court certified a class consisting of "all past, present and future production and maintenance employees" in United Auto Workers bar-

gaining units at nine of Johnson Controls' plants "who have been and continue to be affected by [the employer's] Fetal Protection Policy implemented in 1982." No. 84–C–0472 (Feb. 25, 1985), pp. 1, 2.

The District Court granted summary judgment for defendant-respondent Johnson Controls. 680 F. Supp. 309 (1988). Applying a three-part business necessity defense derived from fetal-protection cases in the Courts of Appeals for the Fourth and Eleventh Circuits, the District Court concluded that while "there is a disagreement among the experts regarding the effect of lead on the fetus," the hazard to the fetus through exposure to lead was established by "a considerable body of opinion"; that although "[e]xpert opinion has been provided which holds that lead also affects the reproductive abilities of men and women . . . [and] that these effects are as great as the effects of exposure of the fetus . . . a great body of experts are of the opinion that the fetus is more vulnerable to levels of lead that would not affect adults"; and that petitioners had "failed to establish that there is an acceptable alternative policy which would protect the fetus." *Id.*, at 315–316. The court stated that, in view of this disposition of the business necessity defense, it did not "have to undertake a bona fide occupational qualification's *[sic]* (BFOQ) analysis." *Id.*, at 316, n. 5.

The Court of Appeals for the Seventh Circuit, sitting en banc, affirmed the summary judgment by a 7-to-4 vote. 886 F. 2d 871 (1989). The majority held that the proper standard for evaluating the fetal-protection policy was the defense of business necessity; that Johnson Controls was entitled to summary judgment under that defense; and that even if the proper standard was a BFOQ, Johnson Controls still was entitled to summary judgment.

The Court of Appeals, see *id.*, at 883–885, first reviewed fetal-protection opinions from the Eleventh and Fourth Circuits. See *Hayes* v. *Shelby Memorial Hospital*, 726 F. 2d 1543 (CA11 1984), and *Wright* v. *Olin Corp.*, 697 F. 2d 1172

(CA4 1982). Those opinions established the three-step business necessity inquiry: whether there is a substantial health risk to the fetus; whether transmission of the hazard to the fetus occurs only through women; and whether there is a less discriminatory alternative equally capable of preventing the health hazard to the fetus. 886 F. 2d, at 885. The Court of Appeals agreed with the Eleventh and Fourth Circuits that "the components of the business necessity defense the courts of appeals and the EEOC have utilized in fetal protection cases balance the interests of the employer, the employee and the unborn child in a manner consistent with Title VII." *Id.*, at 886. The court further noted that, under *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), the burden of persuasion remained on the plaintiff in challenging a business necessity defense, and—unlike the Fourth and Eleventh Circuits—it thus imposed the burden on the plaintiffs for all three steps. 886 F. 2d, at 887–893. Cf. *Hayes*, 726 F. 2d, at 1549, and *Wright*, 697 F. 2d, at 1187.

Applying this business necessity defense, the Court of Appeals ruled that Johnson Controls should prevail. Specifically, the court concluded that there was no genuine issue of material fact about the substantial health-risk factor because the parties agreed that there was a substantial risk to a fetus from lead exposure. 886 F. 2d, at 888–889. The Court of Appeals also concluded that, unlike the evidence of risk to the fetus from the mother's exposure, the evidence of risk from the father's exposure, which petitioners presented, "is, at best, speculative and unconvincing." *Id.*, at 889. Finally, the court found that petitioners had waived the issue of less discriminatory alternatives by not adequately presenting it. It said that, in any event, petitioners had not produced evidence of less discriminatory alternatives in the District Court. *Id.*, at 890–893.

Having concluded that the business necessity defense was the appropriate framework and that Johnson Controls satis-

fied that standard, the court proceeded to discuss the BFOQ defense and concluded that Johnson Controls met that test, too. *Id.*, at 893–894. The en banc majority ruled that industrial safety is part of the essence of respondent's business, and that the fetal-protection policy is reasonably necessary to further that concern. Quoting *Dothard* v. *Rawlinson*, 433 U. S. 321, 335 (1977), the majority emphasized that, in view of the goal of protecting the unborn, "more is at stake" than simply an individual woman's decision to weigh and accept the risks of employment. 886 F. 2d, at 898.

Judges Cudahy and Posner dissented and would have reversed the judgment and remanded the case for trial. Judge Cudahy explained: "It may (and should) be difficult to establish a BFOQ here but I would afford the defendant an opportunity to try." *Id.*, at 901. "[T]he BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety." *Id.*, at 902, n. 1. He concluded that this case's "painful complexities are manifestly unsuited for summary judgment." *Id.*, at 902.

Judge Posner stated: "I think it a mistake to suppose that we can decide this case once and for all on so meager a record." *Ibid.* He, too, emphasized that, under Title VII, a fetal-protection policy which explicitly applied just to women could be defended only as a BFOQ. He observed that Title VII defines a BFOQ defense as a "'bona fide occupational qualification reasonably necessary to the normal operation'" of a business, and that "the 'normal operation' of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties." *Id.*, at 902 and 904. He emphasized, however, that whether a particular policy is lawful is a question of fact that should ordinarily be resolved at trial. *Id.*, at 906. Like Judge Cudahy, he stressed that "it will be the rare case where the lawfulness of such a policy can be decided on the defendant's motion for summary judgment." *Ibid.*

Judge Easterbrook, also in dissent and joined by Judge Flaum, agreed with Judges Cudahy and Posner that the only defense available to Johnson Controls was the BFOQ. He concluded, however, that the BFOQ defense would not prevail because respondent's stated concern for the health of the unborn was irrelevant to the operation of its business under the BFOQ. He also viewed the employer's concern as irrelevant to a woman's ability or inability to work under the Pregnancy Discrimination Act's amendment to Title VII, 92 Stat. 2076, 42 U. S. C. § 2000e(k). Judge Easterbrook also stressed what he considered the excessive breadth of Johnson Controls' policy. It applied to all women (except those with medical proof of incapacity to bear children) although most women in an industrial labor force do not become pregnant, most of those who do become pregnant will have blood lead levels under 30 micrograms per deciliter, and most of those who become pregnant with levels exceeding that figure will bear normal children anyway. 886 F. 2d, at 912–913. "Concerns about a tiny minority of women cannot set the standard by which all are judged." *Id.*, at 913.

With its ruling, the Seventh Circuit became the first Court of Appeals to hold that a fetal-protection policy directed exclusively at women could qualify as a BFOQ. We granted certiorari, 494 U. S. 1055 (1990), to resolve the obvious conflict between the Fourth, Seventh, and Eleventh Circuits on this issue, and to address the important and difficult question whether an employer, seeking to protect potential fetuses, may discriminate against women just because of their ability to become pregnant.[1]

[1] Since our grant of certiorari, the Sixth Circuit has reversed a District Court's summary judgment for an employer that had excluded fertile female employees from foundry jobs involving exposure to specified concentrations of air-borne lead. See *Grant* v. *General Motors Corp.*, 908 F. 2d 1303 (1990). The court said: "We agree with the view of the dissenters in *Johnson Controls* that fetal protection policies perforce amount to overt sex discrimination, which cannot logically be recast as disparate impact and cannot be countenanced without proof that infertility is a BFOQ. . . . [P]laintiff . . . has alleged a claim of overt discrimination that her employer may justify only through the BFOQ defense." *Id.*, at 1310.

In *Johnson Controls, Inc.* v. *Fair Employment & Housing Comm'n*, 218 Cal. App. 3d 517, 267 Cal. Rptr. 158 (1990), the court held respondent's fetal-protection policy invalid under California's fair-employment law.

III

The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. Section 703(a) of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U. S. C. § 2000e–2(a), prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status.[2] Respondent's fetal-protection policy explicitly discriminates against women on the basis of their sex. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender. Respondent assumes as much in its brief before this Court. Brief for Respondent 17, n. 24.

Nevertheless, the Court of Appeals assumed, as did the two appellate courts that already had confronted the issue, that sex-specific fetal-protection policies do not involve facial discrimination. 886 F. 2d, at 886–887; *Hayes*, 726 F. 2d, at 1547; *Wright*, 697 F. 2d, at 1190. These courts analyzed the policies as though they were facially neutral and had only a

[2] The statute reads:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

discriminatory effect upon the employment opportunities of women. Consequently, the courts looked to see if each employer in question had established that its policy was justified as a business necessity. The business necessity standard is more lenient for the employer than the statutory BFOQ defense. The Court of Appeals here went one step further and invoked the burden-shifting framework set forth in *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), thus requiring petitioners to bear the burden of persuasion on all questions. 886 F. 2d, at 887–888. The court assumed that because the asserted reason for the sex-based exclusion (protecting women's unconceived offspring) was ostensibly benign, the policy was not sex-based discrimination. That assumption, however, was incorrect.

First, Johnson Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone. Respondent does not seek to protect the unconceived children of all its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees. Accordingly, it appears that Johnson Controls would have lost in the Eleventh Circuit under *Hayes* because its policy does not "effectively and equally protec[t] the offspring of all employees." 726 F. 2d, at 1548. This Court faced a conceptually similar situation in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971), and found sex discrimination because the policy established "one hiring policy for women and another for men—each having pre-school-age children." *Id.*, at 544. Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing.

Our conclusion is bolstered by the Pregnancy Discrimination Act (PDA), 42 U. S. C. § 2000e(k), in which Congress explicitly provided that, for purposes of Title VII, discrimination "'on the basis of sex'" includes discrimination "because

of or on the basis of pregnancy, childbirth, or related medical conditions."[3] "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 684 (1983). In its use of the words "capable of bearing children" in the 1982 policy statement as the criterion for exclusion, Johnson Controls explicitly classifies on the basis of potential for pregnancy. Under the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.

We concluded above that Johnson Controls' policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females. Moreover, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. In *Martin Marietta*, *supra*, the motives underlying the employers' express exclusion of women did not alter the intentionally discriminatory character of the policy. Nor did the arguably benign motives lead to consideration of a business necessity defense. The ques-

---

[3] The Act added subsection (k) to § 701 of the Civil Rights Act of 1964 and reads in pertinent part:

"The terms "because of sex" or "on the basis of sex" [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ."

tion in that case was whether the discrimination in question could be justified under § 703(e) as a BFOQ. The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ.

The enforcement policy of the Equal Employment Opportunity Commission accords with this conclusion. On January 24, 1990, the EEOC issued a Policy Guidance in the light of the Seventh Circuit's decision in the present case. App. to Pet. for Cert. 127a. The document noted: "For the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law." *Id.*, at 133a. The Commission concluded: "[W]e now think BFOQ is the better approach." *Id.*, at 134a.

In sum, Johnson Controls' policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 711 (1978), quoting Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1170 (1971). We hold that Johnson Controls' fetal-protection policy is sex discrimination forbidden under Title VII unless respondent can establish that sex is a "bona fide occupational qualification."

IV

Under § 703(e)(1) of Title VII, an employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U. S. C. § 2000e-2(e)(1). We therefore turn to the question whether Johnson Controls' fetal-protection policy is one of those "certain instances" that come within the BFOQ exception.

The BFOQ defense is written narrowly, and this Court has read it narrowly. See, *e. g.*, *Dothard* v. *Rawlinson*, 433 U. S. 321, 332–337 (1977); *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 122–125 (1985). We have read the BFOQ language of § 4(f) of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 603, as amended, 29 U. S. C. § 623(f)(1), which tracks the BFOQ provision in Title VII, just as narrowly. See *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400 (1985). Our emphasis on the restrictive scope of the BFOQ defense is grounded on both the language and the legislative history of § 703.

The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. The statute thus limits the situations in which discrimination is permissible to "certain instances" where sex discrimination is "reasonably necessary" to the "normal operation" of the "particular" business. Each one of these terms—certain, normal, particular—prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is "occupational"; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.

JUSTICE WHITE defines "occupational" as meaning related to a job. *Post*, at 212, n. 1. According to him, any discriminatory requirement imposed by an employer is "job-related" simply because the employer has chosen to make the requirement a condition of employment. In effect, he argues that sterility may be an occupational qualification for women because Johnson Controls has chosen to require it. This reading of "occupational" renders the word mere surplusage. "Qualification" by itself would encompass an employer's idiosyncratic requirements. By modifying "qualification" with "occupational," Congress narrowed the term to qualifications that affect an employee's ability to do the job.

Johnson Controls argues that its fetal-protection policy falls within the so-called safety exception to the BFOQ. Our cases have stressed that discrimination on the basis of sex because of safety concerns is allowed only in narrow circumstances. In *Dothard* v. *Rawlinson*, this Court indicated that danger to a woman herself does not justify discrimination. 433 U. S., at 335. We there allowed the employer to hire only male guards in contact areas of maximum-security male penitentiaries only because more was at stake than the "individual woman's decision to weigh and accept the risks of employment." *Ibid.* We found sex to be a BFOQ inasmuch as the employment of a female guard would create real risks of safety to others if violence broke out because the guard was a woman. Sex discrimination was tolerated because sex was related to the guard's ability to do the job—maintaining prison security. We also required in *Dothard* a high correlation between sex and ability to perform job functions and refused to allow employers to use sex as a proxy for strength although it might be a fairly accurate one.

Similarly, some courts have approved airlines' layoffs of pregnant flight attendants at different points during the first five months of pregnancy on the ground that the employer's policy was necessary to ensure the safety of passengers. See *Harriss* v. *Pan American World Airways, Inc.*, 649 F. 2d 670 (CA9 1980); *Burwell* v. *Eastern Air Lines, Inc.*, 633 F. 2d 361 (CA4 1980), cert. denied, 450 U. S. 965 (1981); *Condit* v. *United Air Lines, Inc.*, 558 F. 2d 1176 (CA4 1977), cert. denied, 435 U. S. 934 (1978); *In re National Airlines, Inc.*, 434 F. Supp. 249 (SD Fla. 1977). In two of these cases, the courts pointedly indicated that fetal, as opposed to passenger, safety was best left to the mother. *Burwell*, 633 F. 2d, at 371; *National Airlines*, 434 F. Supp., at 259.

We considered safety to third parties in *Western Airlines, Inc.* v. *Criswell*, *supra*, in the context of the ADEA. We focused upon "the nature of the flight engineer's tasks," and the "actual capabilities of persons over age 60" in relation to

those tasks. 472 U. S., at 406. Our safety concerns were not independent of the individual's ability to perform the assigned tasks, but rather involved the possibility that, because of age-connected debility, a flight engineer might not properly assist the pilot, and might thereby cause a safety emergency. Furthermore, although we considered the safety of third parties in *Dothard* and *Criswell*, those third parties were indispensable to the particular business at issue. In *Dothard*, the third parties were the inmates; in *Criswell*, the third parties were the passengers on the plane. We stressed that in order to qualify as a BFOQ, a job qualification must relate to the "'essence,'" *Dothard*, 433 U. S., at 333 (emphasis deleted), or to the "central mission of the employer's business," *Criswell*, 472 U. S., at 413.

JUSTICE WHITE ignores the "essence of the business" test and so concludes that "protecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety to third parties in guarding prisons *(Dothard)* or flying airplanes *(Criswell)*." *Post*, at 217. By limiting its discussion to cost and safety concerns and rejecting the "essence of the business" test that our case law has established, he seeks to expand what is now the narrow BFOQ defense. Third-party safety considerations properly entered into the BFOQ analysis in *Dothard* and *Criswell* because they went to the core of the employee's job performance. Moreover, that performance involved the central purpose of the enterprise. *Dothard*, 433 U. S., at 335 ("The essence of a correctional counselor's job is to maintain prison security"); *Criswell*, 472 U. S., at 413 (the central mission of the airline's business was the safe transportation of its passengers). JUSTICE WHITE attempts to transform this case into one of customer safety. The unconceived fetuses of Johnson Controls' female employees, however, are neither customers nor third parties whose safety is essential to the business of battery manufacturing. No one can disregard the possibility of injury to future children; the BFOQ, how-

ever, is not so broad that it transforms this deep social concern into an essential aspect of battery making.

Our case law, therefore, makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job. This approach is consistent with the language of the BFOQ provision itself, for it suggests that permissible distinctions based on sex must relate to ability to perform the duties of the job. Johnson Controls suggests, however, that we expand the exception to allow fetal-protection policies that mandate particular standards for pregnant or fertile women. We decline to do so. Such an expansion contradicts not only the language of the BFOQ and the narrowness of its exception, but also the plain language and history of the PDA.

The PDA's amendment to Title VII contains a BFOQ standard of its own: Unless pregnant employees differ from others "in their ability or inability to work," they must be "treated the same" as other employees "for all employment-related purposes." 42 U. S. C. § 2000e(k). This language clearly sets forth Congress' remedy for discrimination on the basis of pregnancy and potential pregnancy. Women who are either pregnant or potentially pregnant must be treated like others "similar in their ability . . . to work." *Ibid.* In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.

JUSTICE WHITE asserts that the PDA did not alter the BFOQ defense. *Post*, at 218. He arrives at this conclusion by ignoring the second clause of the Act, which states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U. S. C. § 2000e(k). Until this day, every Member of this Court had acknowledged that "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be

treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work." *California Federal Savings and Loan Assn.* v. *Guerra*, 479 U. S. 272, 297 (1987) (WHITE, J., dissenting). JUSTICE WHITE now seeks to read the second clause out of the Act.

The legislative history confirms what the language of the PDA compels. Both the House and Senate Reports accompanying the legislation indicate that this statutory standard was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children. See Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95–331, pp. 4–6 (1977):

> "Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees. . . .
>
> . . . . .
>
> "[U]nder this bill, employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue."

See also Prohibition of Sex Discrimination Based on Pregnancy, H. R. Rep. No. 95–948, pp. 3–6 (1978).

This history counsels against expanding the BFOQ to allow fetal-protection policies. The Senate Report quoted above states that employers may not require a pregnant woman to stop working at any time during her pregnancy unless she is unable to do her work. Employment late in pregnancy often imposes risks on the unborn child, see Chavkin, Walking a Tightrope: Pregnancy, Parenting, and Work, in Double Exposure 196, 196–202 (W. Chavkin ed. 1984), but Congress indicated that the employer may take into account only the woman's ability to get her job done. See Becker, From *Muller v. Oregon* to Fetal Vulnerability Policies, 53 U. Chi.

L. Rev. 1219, 1255–1256 (1986). With the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself.

We conclude that the language of both the BFOQ provision and the PDA which amended it, as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. We reiterate our holdings in *Criswell* and *Dothard* that an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the "essence" of the particular business.[4]

V

We have no difficulty concluding that Johnson Controls cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the

[4] JUSTICE WHITE predicts that our reaffirmation of the narrowness of the BFOQ defense will preclude considerations of privacy as a basis for sex-based discrimination. *Post*, at 219–220, n. 8. We have never addressed privacy-based sex discrimination and shall not do so here because the sex-based discrimination at issue today does not involve the privacy interests of Johnson Controls' customers. Nothing in our discussion of the "essence of the business test," however, suggests that sex could not constitute a BFOQ when privacy interests are implicated. See, *e. g.*, *Backus* v. *Baptist Medical Center*, 510 F. Supp. 1191 (ED Ark. 1981), vacated as moot, 671 F. 2d 1100 (CA8 1982) (essence of obstetrics nurse's business is to provide sensitive care for patient's intimate and private concerns).

PDA. Johnson Controls has attempted to exclude women because of their reproductive capacity. Title VII and the PDA simply do not allow a woman's dismissal because of her failure to submit to sterilization.

Nor can concerns about the welfare of the next generation be considered a part of the "essence" of Johnson Controls' business. Judge Easterbrook in this case pertinently observed: "It is word play to say that 'the job' at Johnson [Controls] is to make batteries without risk to fetuses in the same way 'the job' at Western Air Lines is to fly planes without crashing." 886 F. 2d, at 913.

Johnson Controls argues that it must exclude all fertile women because it is impossible to tell which women will become pregnant while working with lead. This argument is somewhat academic in light of our conclusion that the company may not exclude fertile women at all; it perhaps is worth noting, however, that Johnson Controls has shown no "factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 235 (CA5 1969), quoted with approval in *Dothard*, 433 U. S., at 333. Even on this sparse record, it is apparent that Johnson Controls is concerned about only a small minority of women. Of the eight pregnancies reported among the female employees, it has not been shown that any of the babies have birth defects or other abnormalities. The record does not reveal the birth rate for Johnson Controls' female workers, but national statistics show that approximately nine percent of all fertile women become pregnant each year. The birthrate drops to two percent for blue collar workers over age 30. See Becker, 53 U. Chi. L. Rev., at 1233. Johnson Controls' fear of prenatal injury, no matter how sincere, does not begin to show that substantially all of its fertile women employees are incapable of doing their jobs.

VI

A word about tort liability and the increased cost of fertile women in the workplace is perhaps necessary. One of the dissenting judges in this case expressed concern about an employer's tort liability and concluded that liability for a potential injury to a fetus is a social cost that Title VII does not require a company to ignore. 886 F. 2d, at 904–905. It is correct to say that Title VII does not prevent the employer from having a conscience. The statute, however, does prevent sex-specific fetal-protection policies. These two aspects of Title VII do not conflict.

More than 40 States currently recognize a right to recover for a prenatal injury based either on negligence or on wrongful death. See, *e. g.*, *Wolfe* v. *Isbell*, 291 Ala. 327, 333–334, 280 So. 2d 758, 763 (1973); *Simon* v. *Mullin*, 34 Conn. Supp. 139, 147, 380 A. 2d 1353, 1357 (1977). See also Note, 22 Suffolk U. L. Rev. 747, 754–756, and nn. 54, 57, and 58 (1988) (listing cases). According to Johnson Controls, however, the company complies with the lead standard developed by OSHA and warns its female employees about the damaging effects of lead. It is worth noting that OSHA gave the problem of lead lengthy consideration and concluded that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." 43 Fed. Reg. 52952, 52966 (1978). See also *id.*, at 54354, 54398. Instead, OSHA established a series of mandatory protections which, taken together, "should effectively minimize any risk to the fetus and newborn child." *Id.*, at 52966. See 29 CFR § 1910.1025(k)(ii) (1990). Without negligence, it would be difficult for a court to find liability on the part of the employer. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.

Although the issue is not before us, JUSTICE WHITE observes that "it is far from clear that compliance with Title VII will pre-empt state tort liability." *Post*, at 213. The cases relied upon by him to support his prediction, however, are inapposite. For example, in *California Federal Savings and Loan Assn.* v. *Guerra*, 479 U. S. 272 (1987), we considered a California statute that expanded upon the requirements of the PDA and concluded that the statute was not pre-empted by Title VII because it was not inconsistent with the purposes of the federal statute and did not require an act that was unlawful under Title VII. *Id.*, at 291–292. Here, in contrast, the tort liability that JUSTICE WHITE fears will punish employers for *complying* with Title VII's clear command. When it is impossible for an employer to comply with both state and federal requirements, this Court has ruled that federal law pre-empts that of the States. See, *e. g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963).

This Court faced a similar situation in *Farmers Union* v. *WDAY, Inc.*, 360 U. S. 525 (1959). In *WDAY*, it held that § 315(a) of the Federal Communications Act of 1934 barred a broadcasting station from removing defamatory statements contained in speeches broadcast by candidates for public office. It then considered a libel action which arose as a result of a speech made over the radio and television facilities of WDAY by a candidate for the 1956 senatorial race in North Dakota. It held that the statutory prohibition of censorship carried with it an immunity from liability for defamatory statements made by the speaker. To allow libel actions "would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee." *Id.*, at 531. It concluded:

> "We are aware that causes of action for libel are widely recognized throughout the States. But we have not hesitated to abrogate state law where satisfied that

its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*, at 535, quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U. S. 767, 773 (1947).

If state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII. Because Johnson Controls has not argued that it faces any costs from tort liability, not to mention crippling ones, the pre-emption question is not before us. We therefore say no more than that the concurrence's speculation appears unfounded as well as premature.

The tort-liability argument reduces to two equally unpersuasive propositions. First, Johnson Controls attempts to solve the problem of reproductive health hazards by resorting to an exclusionary policy. Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace. Second, the spectre of an award of damages reflects a fear that hiring fertile women will cost more. The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender. See *Manhart*, 435 U. S., at 716–718, and n. 32. Indeed, in passing the PDA, Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the "decision to forbid special treatment of pregnancy despite the social costs associated therewith." *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, 1085, n. 14 (1983) (opinion of MARSHALL, J.). See *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989).

We, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the

survival of the employer's business. We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them.

VII

Our holding today that Title VII, as so amended, forbids sex-specific fetal-protection policies is neither remarkable nor unprecedented. Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. See, *e. g.*, *Muller* v. *Oregon*, 208 U. S. 412 (1908). Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the PDA means what it says.

It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, concurring in part and concurring in the judgment.

The Court properly holds that Johnson Controls' fetal-protection policy overtly discriminates against women, and thus is prohibited by Title VII of the Civil Rights Act of 1964 unless it falls within the bona fide occupational qualification (BFOQ) exception, set forth at 42 U. S. C. § 2000e–2(e). The Court erroneously holds, however, that the BFOQ defense is so narrow that it could never justify a sex-specific fetal-protection policy. I nevertheless concur in the judgment of reversal because on the record before us summary judgment in favor of Johnson Controls was improperly en-

tered by the District Court and affirmed by the Court of Appeals.

I

In evaluating the scope of the BFOQ defense, the proper starting point is the language of the statute. Cf. *Demarest* v. *Manspeaker*, 498 U. S. 177, 190 (1991); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 237 (1990). Title VII forbids discrimination on the basis of sex, except "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U. S. C. § 2000e–2(e)(1). For the fetal-protection policy involved in this case to be a BFOQ, therefore, the policy must be "reasonably necessary" to the "normal operation" of making batteries, which is Johnson Controls' "particular business." Although that is a difficult standard to satisfy, nothing in the statute's language indicates that it could *never* support a sex-specific fetal-protection policy.[1]

On the contrary, a fetal-protection policy would be justified under the terms of the statute if, for example, an employer could show that exclusion of women from certain jobs was reasonably necessary to avoid substantial tort liability. Common sense tells us that it is part of the normal operation of business concerns to avoid causing injury to third parties, as well as to employees, if for no other reason than to avoid

[1] The Court's heavy reliance on the word "'occupational'" in the BFOQ statute, *ante*, at 201, is unpersuasive. *Any* requirement for employment can be said to be an occupational qualification, since "occupational" merely means related to a job. See Webster's Third New International Dictionary 1560 (1976). Thus, Johnson Controls' requirement that employees engaged in battery manufacturing be either male or nonfertile clearly is an "occupational qualification." The issue, of course, is whether that qualification is "reasonably necessary to the normal operation" of Johnson Controls' business. It is telling that the Court offers no case support, either from this Court or the lower federal courts, for its interpretation of the word "occupational."

tort liability and its substantial costs. This possibility of tort liability is not hypothetical; every State currently allows children born alive to recover in tort for prenatal injuries caused by third parties, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 55, p. 368 (5th ed. 1984), and an increasing number of courts have recognized a right to recover even for prenatal injuries caused by torts committed prior to conception, see 3 F. Harper, F. James, & O. Gray, Law of Torts § 18.3, pp. 677–678, n. 15 (2d ed. 1986).

The Court dismisses the possibility of tort liability by no more than speculating that if "Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best." *Ante*, at 208. Such speculation will be small comfort to employers. First, it is far from clear that compliance with Title VII will pre-empt state tort liability, and the Court offers no support for that proposition.[2] Second, although warnings may preclude claims by injured *employees*, they will not preclude claims by injured children because the general rule is that parents cannot waive causes of action on behalf of their children, and the parents' negligence will not be imputed to the children.[3] Finally, although state tort liabil-

[2] Cf. *English* v. *General Electric Co.*, 496 U. S. 72 (1990) (state law action for intentional infliction of emotional distress not pre-empted by Energy Reorganization Act of 1974); *California Federal Savings and Loan Assn.* v. *Guerra*, 479 U. S. 272, 290–292 (1987) (state statute requiring the provision of leave and reinstatement to employees disabled by pregnancy not pre-empted by the Pregnancy Discrimination Act (PDA), 92 Stat. 2076, 42 U. S. C. § 2000e(k)); *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 256 (1984) (state punitive damage claim not pre-empted by federal laws regulating nuclear power plants); *Bernstein* v. *Aetna Life & Casualty*, 843 F. 2d 359, 364–365 (CA9 1988) ("It is well-established that Title VII does not preempt state common law remedies"); see also 42 U. S. C. § 2000e–7.

[3] See, *e. g.*, *In re Estate of Infant Fontaine*, 128 N. H. 695, 700, 519 A. 2d 227, 230 (1986); *Collins* v. *Eli Lilly Co.*, 116 Wis. 2d 166, 200, n. 14, 342

ity for prenatal injuries generally requires negligence, it will be difficult for employers to determine in advance what will constitute negligence. Compliance with OSHA standards, for example, has been held not to be a defense to state tort or criminal liability. See *National Solid Wastes Management Assn.* v. *Killian*, 918 F. 2d 671, 680, n. 9 (CA7 1990) (collecting cases); see also 29 U. S. C. § 653(b)(4). Moreover, it is possible that employers will be held strictly liable, if, for example, their manufacturing process is considered "abnormally dangerous." See Restatement (Second) of Torts § 869, Comment *b* (1979).

Relying on *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), the Court contends that tort liability cannot justify a fetal-protection policy because the extra costs of hiring women is not a defense under Title VII. *Ante*, at 210. This contention misrepresents our decision in *Manhart*. There, we held that a requirement that female employees contribute more than male employees to a pension fund, in order to reflect the greater longevity of women, constituted discrimination against women under Title VII because it treated them as a class rather than as individuals. 435 U. S., at 708, 716–717. We did not in that case address in any detail the nature of the BFOQ defense, and we certainly did not hold that cost was irrelevant to the BFOQ analysis. Rather, we merely stated in a footnote that "there has been no showing that sex distinctions are reasonably necessary to the normal operation of the Department's retirement plan." *Id.*, at 716, n. 30. We further noted that although Title VII does not contain a "cost-justification defense comparable to the affirmative defense available in a price dis-

N. W. 2d 37, 53, n. 14 (1984), cert. denied, 469 U. S. 826 (1984); *Doyle* v. *Bowdoin College*, 403 A. 2d 1206, 1208, n. 3 (Me. 1979); *Littleton* v. *Jordan*, 428 S. W. 2d 472 (Tex. Civ. App. 1968); *Fallaw* v. *Hobbs*, 113 Ga. App. 181, 182–183, 147 S. E. 2d 517, 519 (1966); see also Restatement (Second) of Torts § 488(1) (1965).

crimination suit," "no defense based on the *total* cost of employing men and women was attempted in this case." *Id.*, at 716–717, and n. 32.

Prior decisions construing the BFOQ defense confirm that the defense is broad enough to include considerations of cost and safety of the sort that could form the basis for an employer's adoption of a fetal-protection policy. In *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977), the Court held that being male was a BFOQ for "contact" guard positions in Alabama's maximum-security male penitentiaries. The Court first took note of the actual conditions of the prison environment: "In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians." *Id.*, at 335–336. The Court also stressed that "[m]ore [was] at stake" than a risk to individual female employees: "The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel." *Ibid.* Under those circumstances, the Court observed that "it would be an oversimplification to characterize [the exclusion of women] as an exercise in 'romantic paternalism.' Cf. *Frontiero* v. *Richardson*, 411 U. S. 677, 684." *Id.*, at 335.

We revisited the BFOQ defense in *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400 (1985), this time in the context of the Age Discrimination in Employment Act of 1967 (ADEA). There, we endorsed the two-part inquiry for evaluating a BFOQ defense used by the Fifth Circuit Court of Appeals in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (1976). First, the job qualification must not be "so peripheral to the central mission of the employer's business" that no dis-

crimination could be "'reasonably *necessary* to the normal operation of the particular business.'" 472 U. S., at 413. Although safety is *not* such a peripheral concern, *id.*, at 413, 419,[4] the inquiry "'adjusts to the safety factor'"—"'[t]he greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications,'" *id.*, at 413 (quoting *Tamiami*, *supra*, at 236). Second, the employer must show either that all or substantially all persons excluded "'"would be unable to perform safely and efficiently the duties of the job involved,"'" or that it is "'"impossible or highly impractical"'" to deal with them on an individual basis. 472 U. S., at 414 (quoting *Tamiami*, *supra*, at 235 (quoting *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228, 235 (CA5 1969))). We further observed that this inquiry properly takes into account an employer's interest in safety—"[w]hen an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business." 472 U. S., at 419.

Dothard and *Criswell* make clear that avoidance of substantial safety risks to third parties is *inherently* part of both an employee's ability to perform a job and an employer's

[4] An example of a "peripheral" job qualification was in *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (CA5), cert. denied, 404 U. S. 950 (1971). There, the Fifth Circuit held that being female was not a BFOQ for the job of flight attendant, despite a determination by the trial court that women were better able than men to perform the "nonmechanical" functions of the job, such as attending to the passengers' psychological needs. The court concluded that such nonmechanical functions were merely "tangential" to the normal operation of the airline's business, noting that "[n]o one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another." 442 F. 2d, at 388.

"normal operation" of its business. Indeed, in both cases, the Court approved the statement in *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, *supra*, that an employer could establish a BFOQ defense by showing that "all or substantially all women would be unable to perform *safely and efficiently* the duties of the job involved." *Id.*, at 235 (emphasis added). See *Criswell*, 472 U. S., at 414; *Dothard*, *supra*, at 333. The Court's statement in this case that "the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job," *ante*, at 204, therefore adds no support to its conclusion that a fetal-protection policy could never be justified as a BFOQ. On the facts of this case, for example, protecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety to third parties in guarding prisons *(Dothard)* or flying airplanes *(Criswell)*.[5]

Dothard and *Criswell* also confirm that costs are relevant in determining whether a discriminatory policy is reasonably necessary for the normal operation of a business. In *Dothard*, the safety problem that justified exclusion of women from the prison guard positions was largely a result of inadequate staff and facilities. See 433 U. S., at 335. If the cost of employing women could not be considered, the employer there should have been required to hire more staff and restructure the prison environment rather than exclude women. Similarly, in *Criswell* the airline could have been

[5] I do not, as the Court asserts, *ante*, at 203, reject the "'essence of the business'" test. Rather, I merely reaffirm the obvious—that safety to third parties is part of the "essence" of most if not all businesses. Of course, the BFOQ inquiry "'adjusts to the safety factor.'" *Criswell*, 472 U. S., at 413 (quoting *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224, 236 (CA5 1976)). As a result, more stringent occupational qualifications may be justified for jobs involving higher safety risks, such as flying airplanes. But a recognition that the importance of safety varies among businesses does not mean that safety is completely irrelevant to the essence of a job such as battery manufacturing.

required to hire more pilots and install expensive monitoring devices rather than discriminate against older employees. The BFOQ statute, however, reflects "Congress' unwillingness to require employers to change the very nature of their operations." *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 242 (1989) (plurality opinion).

The PDA, contrary to the Court's assertion, *ante*, at 204, did not restrict the scope of the BFOQ defense. The PDA was only an amendment to the "Definitions" section of Title VII, 42 U. S. C. § 2000e, and did not purport to eliminate or alter the BFOQ defense. Rather, it merely clarified Title VII to make it clear that pregnancy and related conditions are included within Title VII's antidiscrimination provisions. As we have already recognized, "the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles." *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, 1085, n. 14 (1983).[6]

This interpretation is confirmed by the PDA's legislative history. As discussed in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678–679, and n. 17 (1983), the PDA was designed to overrule the decision in *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), where the Court

[6] Contrary to the Court's assertion, *ante*, at 204–205, neither the majority decision nor the dissent in *California Federal Savings and Loan Assn.* v. *Guerra*, 479 U. S. 272 (1987), is relevant to the issue whether the PDA altered the BFOQ standard for pregnancy-related discrimination. In that case, the Court held that the PDA did not pre-empt a state law requiring employers to provide leave and reinstatement to pregnant employees. The Court reasoned that the PDA was not intended to prohibit all employment practices that favor pregnant women. *Id.*, at 284–290. The dissent disagreed with that conclusion, arguing that the state statute was pre-empted because the PDA's language that pregnant employees "shall be treated the same for all employment-related purposes" appeared to forbid preferential treatment of pregnant workers. *Id.*, at 297–298. Obviously, the dispute in that case between the majority and the dissent was purely over what constituted *discrimination* under Title VII, as amended by the PDA, not over the scope of the BFOQ defense.

had held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.*, at 136. The PDA thus "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News*, *supra*, at 684. It does not, however, alter the standards for employer *defenses*. The Senate Report, for example, stated that the PDA "defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences [pregnancy, childbirth, and related medical conditions] peculiar to women; *it does not change the application of Title VII to sex discrimination in any other way*." S. Rep. No. 95–331, pp. 3–4 (1977) (emphasis added). Similarly, the House Report stated that "[p]regnancy-based distinctions will be subject to the same scrutiny *on the same terms* as other acts of sex discrimination proscribed in the existing statute." H. R. Rep. No. 95–948, p. 4 (1978) (emphasis added).[7]

In enacting the BFOQ standard, "Congress did not ignore the public interest in safety." *Criswell*, 472 U. S., at 419. The Court's narrow interpretation of the BFOQ defense in this case, however, means that an employer cannot exclude even *pregnant* women from an environment highly toxic to their fetuses. It is foolish to think that Congress intended such a result, and neither the language of the BFOQ exception nor our cases requires it.[8]

[7] Even if the PDA *did* establish a separate BFOQ standard for pregnancy-related discrimination, if a female employee could only perform the duties of her job by imposing substantial safety and liability risks, she would not be "similar in [her] ability or inability to work" as a male employee, under the terms of the PDA. See 42 U. S. C. § 2000e(k).

[8] The Court's cramped reading of the BFOQ defense is also belied by the legislative history of Title VII, in which three examples of permissible sex discrimination were mentioned—a female nurse hired to care for an elderly woman, an all-male professional baseball team, and a masseur. See 110 Cong. Rec. 2718 (1964) (Rep. Goodell); *id.*, at 7212–7213 (interpretive memorandum introduced by Sens. Clark and Case); *id.*, at 2720 (Rep.

II

Despite my disagreement with the Court concerning the scope of the BFOQ defense, I concur in reversing the Court of Appeals because that court erred in affirming the District Court's grant of summary judgment in favor of Johnson Controls. First, the Court of Appeals erred in failing to consider the level of risk avoidance that was part of Johnson Controls' "normal operation." Although the court did conclude that there was a "substantial risk" to fetuses from lead exposure in fertile women, 886 F. 2d 871, 879–883, 898 (CA7 1989), it merely meant that there was a high risk that *some* fetal injury would occur absent a fetal-protection policy. That analysis, of course, fails to address the *extent* of fetal injury that is likely to occur.[9] If the fetal-protection policy insists on a risk-avoidance level substantially higher than other risk lev-

Multer). In none of those situations would gender "actually interfer[e] with the employee's ability to perform the job," as required today by the Court, *ante*, at 204.

The Court's interpretation of the BFOQ standard also would seem to preclude considerations of privacy as a basis for sex-based discrimination, since those considerations do not relate directly to an employee's physical ability to perform the duties of the job. The lower federal courts, however, have consistently recognized that privacy interests may justify sex-based requirements for certain jobs. See, *e. g.*, *Fesel* v. *Masonic Home of Delaware, Inc.*, 447 F. Supp. 1346 (Del. 1978), aff'd, 591 F. 2d 1334 (CA3 1979) (nurse's aide in retirement home); *Jones* v. *Hinds General Hospital*, 666 F. Supp. 933 (SD Miss. 1987) (nursing assistant); *Local 567 American Federation of State, County, and Municipal Employees, AFL–CIO* v. *Michigan Council 25, American Federation of State, County, and Municipal Employees, AFL–CIO*, 635 F. Supp. 1010 (ED Mich. 1986) (mental health workers); *Norwood* v. *Dale Maintenance System, Inc.*, 590 F. Supp. 1410 (ND Ill. 1984) (washroom attendant); *Backus* v. *Baptist Medical Center*, 510 F. Supp. 1191 (ED Ark. 1981), vacated as moot, 671 F. 2d 1100 (CA8 1982) (nursing position in obstetrics and gynecology department of hospital).

[9] Apparently, between 1979 and 1983, only eight employees at Johnson Controls became pregnant while maintaining high blood lead levels, and only one of the babies born to this group later recorded an elevated blood lead level. See *ante*, at 191; 886 F. 2d, at 876–877.

els tolerated by Johnson Controls such as risks to employees and consumers, the policy should not constitute a BFOQ.[10]

Second, even without more information about the normal level of risk at Johnson Controls, the fetal-protection policy at issue here reaches too far. This is evident both in its presumption that, absent medical documentation to the contrary, all women are fertile regardless of their age, see *id.*, at 876, n. 8, and in its exclusion of presumptively fertile women from positions that might result in a promotion to a position involving high lead exposure, *id.*, at 877. There has been no showing that either of those aspects of the policy is reasonably necessary to ensure safe and efficient operation of Johnson Controls' battery-manufacturing business. Of course, these infirmities in the company's policy do not warrant invalidating the entire fetal-protection program.

Third, it should be recalled that until 1982 Johnson Controls operated without an exclusionary policy, and it has not identified any grounds for believing that its current policy is reasonably necessary to its normal operations. Although it is now more aware of some of the dangers of lead exposure, *id.*, at 899, it has not shown that the risks of fetal harm or the costs associated with it have substantially increased. Cf. *Manhart*, 435 U. S., at 716, n. 30, in which we rejected a BFOQ defense because the employer had operated prior to the discrimination with no significant adverse effects.

Finally, the Court of Appeals failed to consider properly petitioners' evidence of harm to offspring caused by lead exposure in males. The court considered that evidence only in its discussion of the business necessity standard, in which it focused on whether *petitioners* had met their burden of proof. 886 F. 2d, at 889–890. The burden of proving that a discriminatory qualification is a BFOQ, however, rests with

[10] It is possible, for example, that alternatives to exclusion of women, such as warnings combined with frequent bloodtestings, would sufficiently minimize the risk such that it would be comparable to other risks tolerated by Johnson Controls.

the employer. See, *e. g.*, *Price Waterhouse*, 490 U. S., at 248; *Dothard*, 433 U. S., at 333. Thus, the court should have analyzed whether the evidence was sufficient for petitioners to survive summary judgment in light of *respondent's* burden of proof to establish a BFOQ. Moreover, the court should not have discounted the evidence as "speculative," 886 F. 2d, at 889, merely because it was based on animal studies. We have approved the use of animal studies to assess risks, see *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S. 607, 657, n. 64 (1980), and OSHA uses animal studies in establishing its lead control regulations, see *United Steelworkers of America, AFL–CIO–CLC* v. *Marshall*, 208 U. S. App. D. C. 60, 128, n. 97, 647 F. 2d 1189, 1257, n. 97 (1980), cert. denied, 453 U. S. 913 (1981). It seems clear that if the Court of Appeals had properly analyzed that evidence, it would have concluded that summary judgment against petitioners was not appropriate because there was a dispute over a material issue of fact.

As Judge Posner observed below:

> "The issue of the legality of fetal protection is as novel and difficult as it is contentious and the most sensible way to approach it at this early stage is on a case-by-case basis, involving careful examination of the facts as developed by the full adversary process of a trial. The record in this case is too sparse. The district judge jumped the gun. By affirming on this scanty basis we may be encouraging incautious employers to adopt fetal protection policies that could endanger the jobs of millions of women for minor gains in fetal safety and health.
>
> "But although the defendant did not present enough evidence to warrant the grant of summary judgment in its favor, there is no ground for barring it from presenting additional evidence at trial. Therefore it would be equally precipitate for us to direct the entry of judgment in the plaintiffs' favor . . . ." 886 F. 2d, at 908.

JUSTICE SCALIA, concurring in the judgment.

I generally agree with the Court's analysis, but have some reservations, several of which bear mention.

First, I think it irrelevant that there was "evidence in the record about the debilitating effect of lead exposure on the male reproductive system," *ante*, at 198. Even without such evidence, treating women differently "on the basis of pregnancy" constitutes discrimination "on the basis of sex," because Congress has unequivocally said so. Pregnancy Discrimination Act, 92 Stat. 2076, 42 U. S. C. § 2000e(k).

Second, the Court points out that "Johnson Controls has shown no factual basis for believing that all or substantially all women would be unable to perform safely . . . the duties of the job involved," *ante*, at 207 (internal quotation marks omitted). In my view, this is not only "somewhat academic in light of our conclusion that the company may not exclude fertile women at all," *ibid.*; it is entirely irrelevant. By reason of the Pregnancy Discrimination Act, it would not matter if all pregnant women placed their children at risk in taking these jobs, just as it does not matter if no men do so. As Judge Easterbrook put it in his dissent below: "Title VII gives parents the power to make occupational decisions affecting their families. A legislative forum is available to those who believe that such decisions should be made elsewhere." 886 F. 2d 871, 915 (CA7 1989).

Third, I am willing to assume, as the Court intimates, *ante*, at 208–211, that any action required by Title VII cannot give rise to liability under state tort law. That assumption, however, does not answer the question whether an action *is* required by Title VII (including the BFOQ provision) even if it is subject to liability under state tort law. It is perfectly reasonable to believe that Title VII has *accommodated* state tort law through the BFOQ exception. However, all that need be said in the present case is that Johnson has not demonstrated a substantial risk of tort liability—which is

alone enough to defeat a tort-based assertion of the BFOQ exception.

Last, the Court goes far afield, it seems to me, in suggesting that increased cost alone—short of "costs . . . so prohibitive as to threaten the survival of the employer's business," *ante*, at 210—cannot support a BFOQ defense. See *ante*, at 206. I agree with JUSTICE WHITE's concurrence, *ante*, at 214, that nothing in our prior cases suggests this, and in my view it is wrong. I think, for example, that a shipping company may refuse to hire pregnant women as crew members on long voyages because the on-board facilities for foreseeable emergencies, though quite feasible, would be inordinately expensive. In the present case, however, Johnson has not asserted a cost-based BFOQ.

I concur in the judgment of the Court.

SALVE REGINA COLLEGE *v.* RUSSELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 89-1629. Argued November 27, 1990—Decided March 20, 1991

Respondent Russell filed a diversity action in the District Court, alleging, *inter alia*, that petitioner college, located in Rhode Island, had breached an implied agreement to educate her when it asked her to withdraw from its nursing program for failing to meet certain weight loss commitments. The court denied petitioner's motion for a directed verdict, concluding that the Rhode Island Supreme Court would apply the commercial doctrine of substantial performance in an academic setting, such that Russell could prevail even though she had not fully complied with the contract's terms. The jury returned a verdict for Russell, which the Court of Appeals affirmed. Applying the appellate deference that it customarily accords to interpretations of state law made by federal judges of that State, the Court of Appeals found that the District Court's state-law determination did not constitute reversible error.

Held: Courts of appeals must review *de novo* district courts' state-law determinations. Pp. 231–240.

(a) The general rule of independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. Courts of appeals are structurally suited to the collaborative juridical process that promotes decisional accuracy. They are able to devote their primary attention to legal issues. They have the advantage of refined briefs which bring to bear on the legal issues more information and more comprehensive analysis than was provided to the district judge. And they employ multijudge panels that permit reflective dialogue and collective judgment. Pp. 231–233.

(b) Departure from the rule of independent appellate review is not warranted by the exercise of diversity jurisdiction. Appellate deference to the district court's state-law determination is inconsistent with the aims of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, to discourage forum shopping and to avoid inequitable administration of the laws, since it invites divergent development of state law among the federal trial courts within a single State and creates a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum. Such deference is also contrary to this Court's cases decided after *Erie*. See, *e. g.*, *New York Life Ins. Co.* v. *Jackson*, 304 U. S. 261. Pp. 233–235.

courts must do more than recite the constitutional rule. They also must apply it, faithful to its letter and cognizant of the principles underlying it. Unfortunately, such review is not always forthcoming. Amici recite case after case in which review has been inadequate or absent altogether. See, *e.g.*, Brief for Phillips Petroleum Co. et al. as *Amici Curiae* 20–27. The Supreme Court of Appeals of West Virginia, at the same time it recognized *Haslip* as law, itself warned:

> "[W]e understand as well as the next court how to . . . articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. [All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *Garnes, supra*, 186 W.Va. at 666, 413 S.E.2d, at 907.

I fear that the Supreme Court of Appeals followed such a course in this case. By affirming the judgment nonetheless, today's decision renders the meaningful appellate review contemplated in *Haslip* illusory; courts now may disregard the post-trial review required by due process at whim or will, so long as they do not deny its necessity openly or altogether.

IV

As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." Ellis, 56 S.Cal. L.Rev., at 2. Recently, however, the frequency and size of such awards have been skyrocketing. One commentator has observed that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40 Ala.L.Rev. 919 (1989). And it appears that the upward trajectory continues unabated. See Volz & Fayz, Punitive Damages and the Due Process Clause: The Search for Constitutional Standards, 69 Univ.Det.Mercy L.Rev. 459, 462, n.17 (1992). The increased frequency and size of punitive awards, however, has not been matched by a corresponding expansion of procedural protections or predictability. On the contrary, although some courts have made genuine efforts at reform, many courts continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness—the jury itself—to be converted into a source of caprice and bias. This Court's decision in *Haslip* promised that, even if juries occasionally failed to fulfill their function faithfully, trial and appellate courts would provide meaningful review sufficient to discern impermissible influences and guarantee constitutional results. In my view, today's decision fails to make good on that promise. I therefore respectfully dissent.

ST. MARY'S HONOR CENTER, et al., Petitioners

v.

Melvin HICKS.

No. 92–602.

Argued April 20, 1993.

Decided June 25, 1993.

Correctional officer formerly employed at halfway house brought Title VII action, alleging that his demotion and discharge were because of his race. The United States District Court for the Eastern District of Missouri, Stephen Nathaniel Limbaugh, J., 756 F.Supp. 1244, entered judgment against correctional officer, and he appealed. The Court of Appeals for the Eighth Circuit, 970 F.2d 487, reversed and remanded, and certiorari was granted. The Supreme Court, Justice Scalia, held that trier of fact's rejection of employer's asserted legitimate, nondiscriminatory reasons for its challenged actions does not entitle employee to judgment as matter of law under *McDonnell Douglas* scheme applicable to discriminatory treatment cases.

Court of Appeals reversed, and case remanded.

Justice Souter filed dissenting opinion, in which Justice White, Justice Blackmun, and Justice Stevens joined.

1. Civil Rights ⇐383

Under *McDonnell Douglas* scheme applicable to Title VII discriminatory treatment cases, plaintiff must first establish by preponderance of evidence a "prima facie" case of racial discrimination, thus creating presumption that employer unlawfully discriminated against employee. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

2. Civil Rights ⇐378

To establish "presumption" of discrimination in Title VII discriminatory treatment case is to say that finding of predicate fact (here, the prima facie case) produces a required conclusion in absence of explanation (here, the finding of unlawful discrimination); thus, *McDonnell Douglas* presumption places upon defendant burden of producing explanation to rebut prima facie case, i.e., burden of "producing evidence" that adverse employment actions were taken for legitimate, nondiscriminatory reason. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

3. Civil Rights ⇐378

Under *McDonnell Douglas* scheme applicable to Title VII discriminatory treatment cases, after plaintiff establishes prima facie case of discrimination, defendant must clearly set forth, through introduction of admissible evidence, reasons for its actions which, if believed by trier of fact, would support finding that unlawful discrimination was not cause of challenged employment action; however, although burden of production is shifted to defendant, ultimate burden of persuading trier of fact that defendant intentionally discriminated against plaintiff remains at all times with plaintiff. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1); Fed.Rules Evid.Rule 301, 28 U.S.C.A.

4. Civil Rights ⇐378

Under *McDonnell Douglas* scheme applicable to Title VII discriminatory treatment cases, the shifted burden of production, arising from plaintiff's establishing prima facie case of discrimination, becomes irrelevant once defendant introduces evidence of legitimate, nondiscriminatory reason for its actions; presumption created by prima facie case is rebutted, and drops from the case, if defendant carries this burden of production. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

5. Civil Rights ⇐378

Under *McDonnell Douglas* scheme applicable to Title VII discriminatory treatment cases, determination that defendant has met its burden of production regarding legitimate, nondiscriminatory reason for challenged action (and has thus rebutted any legal presumption of intentional discrimination arising from plaintiff's prima facie case) can involve no credibility assessment, for burden-of-production determination necessarily precedes credibility-assessment stage. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

6. Civil Rights ⇐378

Under *McDonnell Douglas* scheme applicable to Title VII discriminatory treatment cases, court must award judgment to plaintiff as matter of law at close of defendant's case if, on evidence presented, any rational person would have to find existence of facts constituting prima facie case of discrimination, and defendant has failed to introduce evidence which, taken as true, would permit conclusion that there was

nondiscriminatory reason for adverse action; however, if defendant has failed to sustain its burden and reasonable minds could differ as to whether preponderance of evidence establishes facts of prima facie case, then question of fact does remain, which trier of fact will be called upon to answer. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

7. Civil Rights ⇐378

If defendant in Title VII discriminatory treatment case has succeeded in carrying its burden of production regarding legitimate, nondiscriminatory reason for challenged action, *McDonnell Douglas* framework, with its presumptions and burdens, is no longer relevant; the defendant's "production" (whatever its persuasive effect) having been made, trier of fact proceeds to decide ultimate question of whether plaintiff has proven that defendant intentionally discriminated against him because of his race. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

8. Civil Rights ⇐378

Rejection of legitimate, nondiscriminatory reasons for challenged employment action, proffered by employer under *McDonnell Douglas* scheme, will permit trier of fact to infer ultimate fact of intentional discrimination, and no additional proof of discrimination is required upon such rejection; however, rejection of defendant's proffered reasons does not compel judgment for plaintiff, and to hold otherwise disregards fundamental principle that presumption does not shift burden of proof, and ignores repeated admonition that Title VII plaintiff at all time bears ultimate burden of persuasion. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1); Fed.Rules Evid.Rule 301, 28 U.S.C.A.

9. Civil Rights ⇐141

Liability may not be imposed upon employer for alleged discriminatory employment practices unless appropriate fact finder determines, according to proper procedures, that employer has unlawfully discriminated; nothing in law permits substituting for required finding that employer's action was product of unlawful discrimination, the much different (and much lesser) finding that employer's explanation of its action was not believable. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

10. Civil Rights ⇐141

That employer's legitimate, nondiscriminatory reason proffered for challenged employment action is disbelieved by fact finder does not make employer perjurer and liar against whom judgment should be entered as matter of law in Title VII action. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

11. Civil Rights ⇐142, 377.1

Title VII does not award damages against employers who cannot prove nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of race or some other prohibited criterion; that employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that plaintiff's proffered reason of race is correct. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e–2(a)(1).

Syllabus *

Petitioner halfway house employed respondent Hicks as a correctional officer and later a shift commander. After being demoted and ultimately discharged, Hicks filed suit, alleging that these actions had been taken because of his race in violation of, *inter alia*, § 703(a)(1) of Title VII of the Civil Rights Act of 1964. Adhering to the allocation of the burden of production and the order for the presentation of proof in Title VII discriminatory-treatment cases

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

that was established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 the District Court found that Hicks had established, by a preponderance of the evidence, a prima facie case of racial discrimination; that petitioners had rebutted that presumption by introducing evidence of two legitimate, nondiscriminatory reasons for their actions; and that petitioners' reasons were pretextual. It nonetheless held that Hicks had failed to carry his ultimate burden of proving that the adverse actions were racially motivated. In setting aside this determination, the Court of Appeals held that Hicks was entitled to judgment as a matter of law once he proved that all of petitioners' proffered reasons were pretextual.

Held: The trier of fact's rejection of an employer's asserted reasons for its actions does not entitle a plaintiff to judgment as a matter of law. Pp. 2746–2756.

(a) Under *McDonnell Douglas*, once Hicks established, by a preponderance of the evidence, a prima facie case of discrimination, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252–253, 101 S.Ct. 1089, 1093–94, 67 L.Ed.2d 207 a presumption arose that petitioners unlawfully discriminated against him, *id.*, at 254, 101 S.Ct., at 1094, requiring judgment in his favor unless petitioners came forward with an explanation. This presumption placed upon petitioners the burden of producing evidence that the adverse actions were taken for legitimate, nondiscriminatory reasons, which, *if believed by the trier of fact*, would support a finding that unlawful discrimination did not cause their actions. *Id.*, at 254–255, and n. 8, 101 S.Ct., at 1094–1095, and n. 8. However, as in the case of all presumptions, see Fed.Rule Evid. 301, the ultimate burden of persuasion remained at all times with Hicks, *id.*, at 253, 101 S.Ct., at 1093–1094. The Court of Appeals erred when it concluded that the trier of fact's disbelief of petitioners' proffered reasons placed petitioners in the same position as if they had remained silent in the face of Hicks' prima facie case of racial discrimination. Petitioners' production of evidence of nondiscriminatory reasons, whether ultimately persuasive or not, satisfied their burden of production and rebutted the presumption of intentional discrimination. The *McDonnell Douglas* framework then became irrelevant, and the trier of fact was required to decide the ultimate question of fact: whether Hicks had proven that petitioners intentionally discriminated against him because of his race. Compelling judgment for Hicks would disregard the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and would ignore the admonition that the Title VII plaintiff at all times bears the ultimate burden of persuasion. Pp. 2746–2750.

(b) This Court has no authority to impose liability upon an employer for alleged discriminatory employment practices unless the factfinder determines that the employer has unlawfully discriminated. Nor may the Court substitute for that required finding the much different and much lesser finding that the employer's explanation of its action was not believable. Any doubt created by a dictum in *Burdine* that falsity of the employer's explanation is alone enough to sustain a plaintiff's case was eliminated by *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403. Pp. 2750–2754.

(c) The concerns of the dissent and respondent that this decision will produce dire practical consequences are unfounded. Pp. 2754–2756.

970 F.2d 487 (CA8 1992), reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which WHITE, BLACKMUN, and STEVENS, JJ., joined.

Gary L. Gardner, Jefferson City, MO, for petitioners.

Charles R. Oldham, St. Louis, MO, for respondent.

Edward C. DuMont, Washington, DC, for U.S. and E.E.O.C., as amici curiae, by special leave of the Court.

Justice SCALIA delivered the opinion of the Court.

We granted certiorari to determine whether, in a suit against an employer alleging intentional racial discrimination in violation of § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e–2(a)(1), the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff.

I

Petitioner St. Mary's Honor Center (St. Mary's) is a halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR). Respondent Melvin Hicks, a black man, was hired as a correctional officer at St. Mary's in August 1978 and was promoted to shift commander, one of six supervisory positions, in February 1980.

In 1983 MDCHR conducted an investigation of the administration of St. Mary's, which resulted in extensive supervisory changes in January 1984. Respondent retained his position, but John Powell became the new chief of custody (respondent's immediate supervisor) and petitioner Steve Long the new superintendent. Prior to these personnel changes respondent had enjoyed a satisfactory employment record, but soon thereafter became the subject of repeated, and increasingly severe, disciplinary actions. He was suspended for five days for violations of institutional rules by his subordinates on March 3, 1984. He received a letter of reprimand for alleged failure to conduct an adequate investigation of a brawl between inmates that occurred during his shift on March 21. He was later demoted from shift commander to correctional officer for his failure to ensure that his subordinates entered their use of a St. Mary's vehicle into the official log book on March 19, 1984. Finally, on June 7, 1984, he was discharged for threatening Powell during an exchange of heated words on April 19.

Respondent brought this suit in the United States District Court for the Eastern District of Missouri, alleging that petitioner St. Mary's violated § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), and that petitioner Long violated Rev.Stat. § 1979, 42 U.S.C. § 1983, by demoting and then discharging him because of his race. After a full bench trial, the District Court found for petitioners. 756 F.Supp. 1244 (E.D.Mo.1991). The United States Court of Appeals for the Eighth Circuit reversed and remanded, 970 F.2d 487 (1992), and we granted certiorari, 506 U.S. ——, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993).

II

[1] Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part:

"It shall be an unlawful employment practice for an employer—

"(1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . ." 42 U.S.C. § 2000e–2(a).

With the goal of "progressively . . . sharpen[ing] the inquiry into the elusive factual question of intentional discrimination," *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8, 101 S.Ct. 1089, 1094, n. 8, 67 L.Ed.2d 207 (1981), our opinion in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases.[1] The plaintiff in such a case, we said, must first establish, by a preponderance of the evidence, a "prima facie" case of racial discrimination. *Burdine, supra*, at 252–253, 101 S.Ct., at 1093–1094. Petitioners do not challenge the District Court's finding that respondent satisfied the minimal requirements of such a prima facie case (set out in *McDonnell Douglas, supra*, at 802, 93 S.Ct. at 1824–1825) by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man. 756 F.Supp., at 1249–1250.

[2, 3] Under the *McDonnell Douglas* scheme, "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine, supra*, at 254, 101 S.Ct., at 1094. To establish a "presumption" is to say that a finding of the predicate fact (here, the prima facie case) produces "a required conclusion in the absence of explanation" (here, the finding of unlawful discrimination). 1 D. Louisell & C. Mueller, Federal Evidence § 67, p. 536 (1977). Thus, the *McDonnell Douglas* presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case—*i.e.*, the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S., at 254, 101 S.Ct., at 1094. "[T]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action. *Id.*, at 254–255, and n. 8, 101 S.Ct., at 1094–1095, and n. 8. It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," *id.*, at 253, 101 S.Ct., at 1093. In this regard it operates like all presumptions, as described in Rule 301 of the Federal Rules of Evidence:

"In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

[4] Respondent does not challenge the District Court's finding that petitioners sustained their burden of production by introducing evidence of two legitimate, nondiscriminatory reasons for their actions: the severity and the accumulation of rules violations committed by respondent. 756 F.Supp., at 1250. Our cases make clear that at that point the shifted burden of production became irrelevant: "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," *Burdine*, 450 U.S., at 255, 101 S.Ct., at 1094–1095, and "drops from the case," *id.*, at 255, n. 10, 101 S.Ct., at 1095, n. 10. The plaintiff then has "the full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of the defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," *id.*, at 256, 101 S.Ct., at 1095, and that race was. He retains that "ultimate burden of persuading the [trier

1. The Court of Appeals held that the purposeful-discrimination element of respondent's § 1983 claim against petitioner Long is the same as the purposeful-discrimination element of his Title VII claim against petitioner St. Mary's. 970 F.2d 487, 490–491 (1992). Neither side challenges that proposition, and we shall assume that the *McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983. Cf. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186, 109 S.Ct. 2363, 2377–2378, 105 L.Ed.2d 132 (1989) (applying framework to claims under 42 U.S.C. § 1981).

of fact] that [he] has been the victim of intentional discrimination." *Ibid.*

The District Court, acting as trier of fact in this bench trial, found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge. It found that respondent was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by respondent's coworkers were either disregarded or treated more leniently; and that Powell manufactured the final verbal confrontation in order to provoke respondent into threatening him. 756 F.Supp., at 1250–1251. It nonetheless held that respondent had failed to carry his ultimate burden of proving that *his race* was the determining factor in petitioners' decision first to demote and then to dismiss him.[2] In short, the District Court concluded that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." *Id.*, at 1252.

The Court of Appeals set this determination aside on the ground that "[o]nce [respondent] proved all of [petitioners'] proffered reasons for the adverse employment actions to be pretextual, [respondent] was entitled to judgment as a matter of law." 970 F.2d, at 492. The Court of Appeals reasoned:

> "Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race." *Ibid.*

That is not so. By producing *evidence* (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a "better position" than if they had remained silent."

[5, 6] In the nature of things, the determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment. For the burden-of-production determination necessarily *precedes* the credibility-assessment stage. At the close of the defendant's case, the court is asked to decide whether an issue of fact remains for the trier of fact to determine. None does if, on the evidence presented, (1) any rational person would have to find the existence of facts constituting a prima facie case, and (2) the defendant has failed to meet its burden of production—*i.e.*, has failed to introduce evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action. In that event, the court must award judgment to the plaintiff as a matter of law under Federal Rule of Civil Procedure 50(a)(1) (in the case of jury trials) or Federal Rule of Civil Procedure 52(c) (in the case of bench trials). See F. James & G. Hazard, Civil Procedure § 7.9, p. 327 (3d ed. 1985); 1 Louisell & Mueller, Federal Evidence § 70, at 568. If the defendant has failed to sustain its burden but reasonable minds could *differ* as to whether a preponderance of the evidence establishes the facts of a prima facie case, then a question of fact *does* remain, which the trier of fact will be called upon to answer.

2. Various considerations led it to this conclusion, including the fact that two blacks sat on the disciplinary review board that recommended disciplining respondent; that respondent's black subordinates who actually committed the violations were not disciplined, and that "the number of black employees at St. Mary's remained constant." 756 F.Supp. 1244, 1252 (E.D.Mo.1991).

3. If the finder of fact answers affirmatively—if it finds that the prima facie case *is* supported by a preponderance of the evidence—it *must* find the existence of the presumed fact of unlawful discrimination and *must*, therefore, render a verdict for the plaintiff. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, and n. 7, 101 S.Ct. 1089, 1094, and n. 7, 67 L.Ed.2d 207 (1981); F. James & G. Hazard, Civil Procedure § 7.9, p. 327 (3d ed. 1985); 1 D. Louisell & C. Mueller, Federal Evidence § 70, pp. 568–569 (1977). Thus, the *effect* of failing to produce evidence to rebut the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), presumption is not felt until the prima facie case has been *established*, either as a matter of law (because the plaintiff's facts are uncontested) or by the factfinder's determination that the plaintiff's facts are supported by a preponderance of the evidence. It is thus technically accurate to describe the sequence as we did in *Burdine*: "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 450 U.S., at 252–253, 101 S.Ct., at 1093 (internal quotation omitted). As a practical matter, however, and in the real-life sequence of a trial, the defendant *feels* the "burden" not when the plaintiff's prima facie case is *proved*, but as soon as evidence of it is *introduced*. The defendant then knows that its failure to introduce evidence of a nondiscriminatory reason will cause judgment to go against it *unless* the plaintiff's prima facie case is held to be inadequate in law or fails to convince the factfinder. It is this practical coercion which causes the *McDonnell Douglas* presumption to function as a means of "arranging the presentation of evidence," *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986, 108 S.Ct. 2777, 2784, 101 L.Ed.2d 827 (1988).

[7, 8] If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." 450 U.S., at 254, 101 S.Ct. at 1094. The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. *Id.*, at 255, 101 S.Ct., at 1094–1095. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race, *id.*, at 253, 101 S.Ct., at 1093. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination,[4] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*," 970 F.2d, at 493 (emphasis added). But the Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion." See, *e.g.*, *United States States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (citing *Burdine, supra*, at 256, 101 S.Ct., at 1095); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187, 109 S.Ct. 2363, 2378, 105 L.Ed.2d 132 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245–246, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989) (plurality opinion of Brennan, J., joined by Marshall, BLACKMUN, and STEVENS, JJ.); *id.*, at 260, 109 S.Ct., at 1795–1796 (WHITE, J., concurring in judgment); *id.*, at 270, 109 S.Ct., at 1801 (O'CONNOR, J., concurring in judgment); *id.*, at 286–288,

4. Contrary to the dissent's confusion-producing analysis, *post*, at 2761–2762, there is nothing whatever inconsistent between this statement and our later statements that (1) the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason," *infra*, at 2752, and (2) "it is not enough . . . to *disbelieve* the employer," *infra*, at 2754. Even though (as we say here) rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*

109 S.Ct., at 1809–1810 (KENNEDY, J., joined by THE CHIEF JUSTICE and SCALIA, J., dissenting); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); cf. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659–660, 109 S.Ct. 2115, 2125–2126, 104 L.Ed.2d 733 (1989); *id.*, at 668, 109 S.Ct., at 2130 (STEVENS, J., dissenting); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986, 108 S.Ct. 2777, 2784, 101 L.Ed.2d 827 (1988).

III

Only one unfamiliar with our case-law will be upset by the dissent's alarum that we are today setting aside "settled precedent," *post*, at 2757, "two decades of stable law in this Court," *post*, at 2757, "a framework carefully crafted in precedents as old as 20 years," *post*, at 2764, which "Congress is [aware]" of and has implicitly approved, *post*, at 2766. Panic will certainly not break out among the courts of appeals, whose divergent views concerning the nature of the supposedly "stable law in this Court" are precisely what prompted us to take this case—a divergence in which the dissent's version of "settled precedent" cannot remotely be considered the "prevailing view." Compare, *e.g.*, *EEOC v. Flasher Co.*, 986 F.2d 1312, 1321 (CA10 1992) (finding of pretext does not mandate finding of illegal discrimination); *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 282–283 (CA6 1991) (same) (opinion of Boggs, J.), cert. denied, 503 U.S. ——, 112 S.Ct. 1497, 117 L.Ed.2d 637 (1992); 944 F.2d, at 283 (same) (opinion of Guy, J., concurring in result); *Samuels v. Raytheon Corp.*, 934 F.2d 388, 392 (CA1 1991) (same); *Holder v. City of Raleigh*, 867 F.2d 823, 827–828 (CA4 1989) (same); *Benzies v. Illinois Dept. of Mental Health and Developmental Disabilities*, 810 F.2d 146, 148 (CA7) (same) (*dictum*), cert. denied, 483 U.S. 1006, 107 S.Ct. 3231, 97 L.Ed.2d 737 (1987); *Clark v. Huntsville City Bd. of Ed.*, 717 F.2d 525, 529 (CA11 1983) (same) (*dictum*), with *Hicks v. St. Mary's Honor Center*, 970 F.2d 487, 492–493 (CA8 1992) (case below) (finding of pretext mandates finding of illegal discrimination), cert. granted, 506 U.S. ——, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993); *Tye v. Board of Ed. of Polaris Joint Vocational School Dist.*, 811 F.2d 315, 320 (CA6) (same), cert. denied, 484 U.S. 924, 108 S.Ct. 285, 98 L.Ed.2d 246 (1987); *King v. Palmer*, 250 U.S.App.D.C. 257, 260, 778 F.2d 878, 881 (1985) (same); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395–1396 (CA3) (same), cert. denied, 469 U.S. 1087, 105 S.Ct. 592, 83 L.Ed.2d 702 (1984); *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 161 (CA2) (same) (*dictum*), cert. denied, 502 U.S. ——, 112 S.Ct. 228, 116 L.Ed.2d 185 (1991); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1554 (CA11 1990) (same) (*dictum*); *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 639–640, 646–647 (CA5 1985) (same) (*dictum*). We mean to answer the dissent's accusations in detail by examining our cases; but at the outset it is worth noting the utter implausibility that we would ever have held what the dissent says we held.

As we have described, Title VII renders it unlawful "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Here (in the context of the now-permissible jury trials for Title VII causes of action) is what the dissent asserts we have held to be a proper assessment of liability for violation of this law: Assume that 40% of a business' work force are members of a particular minority group, a group which comprises only 10% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that *same minority group*, and the search to fill the opening continues. The rejected applicant files suit for racial

discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired. Under *McDonnell Douglas*, the plaintiff has a prima facie case, see 411 U.S., at 802, 93 S.Ct., at 1824, and under the dissent's interpretation of our law not only must the company come forward with some explanation for the refusal to hire (which it will have to try to confirm out of the mouth of its now antagonistic former employee), but the jury must be instructed that, if they find that explanation to be *incorrect*, they must assess damages against the company, *whether or not they believe the company was guilty of racial discrimination*. The disproportionate minority makeup of the company's work force and the fact that its hiring officer was of the same minority group as the plaintiff will be irrelevant, because the plaintiff's case can be proved "indirectly by showing that the employer's proffered explanation is unworthy of credence." [5] Surely nothing short of inescapable prior *holdings* (the dissent does not pretend there are any) should make one assume that this is the law we have created.

[9] We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated*. We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe *McDonnell Douglas* represents. But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable. The dissent's position amounts to precisely this, *unless* what is required to establish the *McDonnell Douglas* prima facie case is a degree of proof so high that it would, in absence of rebuttal, require a directed verdict for the plaintiff (for in that case proving the employer's rebuttal noncredible would leave the plaintiff's directed-verdict case in place, and compel a judgment in his favor). Quite obviously, however, what is required to establish the *McDonnell Douglas* prima facie case is infinitely less than what a directed verdict demands. The dissent is thus left with a position that has no support in the statute, no support in the reason of the matter, no support in any holding of this Court (that is not even contended), and support, if at all, only in the dicta of this Court's opinions. It is to those that we now turn—begrudgingly, since we think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.

The principal case on which the dissent relies is *Burdine*. While there are some statements in that opinion that could be read to support the dissent's position, all but one of them bear a meaning consistent with our interpretation, and the one exception is simply incompatible with other language in the case. *Burdine* describes the situation that obtains after the employer has met its burden of adducing a nondiscriminatory reason as follows: "Third, should the defendant carry this burden, the plaintiff must then have an opportunity to

5. The dissent has no response to this (not at all unrealistic) hypothetical, except to assert that *surely* the employer must have "personnel records" to which it can resort to demonstrate the reason for the failure to hire. The notion that every reasonable employer keeps "personnel records" on people who never became personnel, showing *why* they did not become personnel (*i.e.*, in what respects all other people who were hired were better) seems to us highly fanciful—or for the sake of American business we hope it is. But more fundamentally, the dissent's response misses the point. Even if such "personnel records" *do* exist, it is a mockery of justice to say that if the jury believes the reason they set forth is probably not the "true" one, all the other utterly compelling evidence that discrimination was *not* the reason will then be excluded from the jury's consideration.

prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." 450 U.S., at 253, 101 S.Ct., at 1093. The dissent takes this to mean that if the plaintiff proves the asserted reason to be *false*, the plaintiff wins. But a reason cannot be proved to be "a pretext *for discrimination*" unless it is shown *both* that the reason was false, *and* that discrimination was the real reason. *Burdine*'s later allusions to proving or demonstrating simply "pretext," *e.g.*, *id.*, at 258, 101 S.Ct., at 1096, are reasonably understood to refer to the previously described pretext, *i.e.*, "pretext for discrimination."[6]

Burdine also says that when the employer has met its burden of production "the factual inquiry proceeds to a new level of specificity." *Id.*, at 255, 101 S.Ct., at 1095. The dissent takes this to mean that the factual inquiry reduces to whether the employer's asserted reason is true or false—if false, the defendant loses. But the "new level of specificity" may also (as we believe) refer to the fact that the inquiry now turns from the few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced.

In the next sentence, *Burdine* says that "[p]lacing this burden of production on the defendant thus serves . . . to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.*, at 255–256, 101 S.Ct., at 1095. The dissent thinks this means that the only factual issue remaining in the case is whether the employer's reason is false. But since in our view "pretext" means "pretext for discrimination," we think the sentence must be understood as addressing the form rather than the substance of the defendant's production burden: The requirement that the employer "clearly set forth" its reasons, *id.*, at 255, 101 S.Ct., at 1094, gives the plaintiff a "full and fair" rebuttal opportunity.

A few sentences later, *Burdine* says: "[The plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.*, at 256, 101 S.Ct., at 1095. The dissent takes this "merger" to mean that "the ultimate burden of persuading the court that she has been the victim of intentional discrimination" is *replaced* by the mere burden of "demonstrat[ing] that the proffered reason was not the true reason for the employment decision." But that would be a merger in which the little fish swallows the big one. Surely a more reasonable reading is that proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination.

Finally, in the next sentence *Burdine* says: "[The plaintiff] may succeed in this [*i.e.*, in persuading the court that she has been the victim of intentional discrimination] either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, 411 U.S., at 804–805 [93 S.Ct., at 1825–1827]." *Ibid.* We must agree with the dissent on this one. The words bear no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgment for the plaintiff. The problem is, that that dictum contradicts or renders inexplicable numerous other statements, both in *Burdine* itself and in our later case-law—commencing with the very citation of authority *Burdine* uses to support the proposition. *McDonnell Douglas* does *not* say, at the cited pages or elsewhere, that all the plaintiff need do is disprove the employer's asserted reason. In fact, it says just the opposite: "[O]n the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection *were in fact a coverup for a racially discriminatory decision.*" 411 U.S., at 805, 93 S.Ct., at 1826 (emphasis added). "We . . . insist that respondent under § 703(a)(1) must be given a full and fair opportunity to demonstrate by competent evidence *that whatever the stated reasons for his rejection, the decision was in reality racially premised.*" *Id.*, at 805, n. 18, 93 S.Ct., at 1825, n. 18 (emphasis added). The statement in question also contradicts *Burdine*'s repeated assurance (indeed, its holding) regarding the burden of persuasion: "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S., at 253, 101 S.Ct., at 1093. "The plaintiff retains the burden of persuasion." *Id.*, at 256, 101 S.Ct., at 1095.[7] And lastly, the statement renders inexplicable *Burdine*'s explicit reliance, in describing the shifting burdens of *McDonnell Douglas*, upon authorities setting forth the classic law of presumptions we have described earlier, including Wigmore's Evidence, 450 U.S., at 253, 254, n. 7, 255, n. 8, 101 S.Ct., at 1093–1094, 1094, nn. 7, 8, James' and Hazard's Civil Procedure, *id.*, at 255, n. 8, 101 S.Ct., at 1094, n. 8, Federal Rule of Evidence 301, *ibid.*, Maguire's Evidence, Common Sense and Common Law, *ibid.*, and Thayer's Preliminary Treatise on Evidence, *id.*, at 255, n. 10, 101 S.Ct., at 1095, n. 10. In light of these inconsistencies, we think that the dictum at issue here must be regarded as an inadvertence, to the extent that it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent.

In sum, our interpretation of *Burdine* creates difficulty with one sentence; the dissent's interpretation causes many portions of the opinion to be incomprehensible or deceptive. But whatever doubt *Burdine* might have created was eliminated by *Aikens*. There we said, in language that cannot reasonably be mistaken, that "the ultimate question [is] discrimination *vel non*." 460 U.S., at 714, 103 S.Ct., at 1481. Once the defendant "responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide" *not* (as the dissent would have it) whether that evidence is credible, but "whether the rejection was discriminatory within the meaning of Title VII." *Id.*, at 714–715, 103 S.Ct., at 1481. At that stage, we said, "[t]he District Court was . . . in a position to decide the ultimate factual issue in the case," which is "whether the defendant intentionally discriminated against the plaintiff." *Id.*, at 715, 103 S.Ct. at 1482 (brackets and internal quotation marks omitted). The *McDonnell Douglas* methodology was "'never intended to be rigid, mechanized, or ritualistic.'" 460 U.S., at 715, 103 S.Ct., at 1482 (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957). Rather, once the defendant has responded to the plaintiff's prima facie case, "the district court has before it all the evidence it needs to decide" *not* (as the dissent would have it) whether defendant's response is credible, but "whether the de-

6. The same is true of *McDonnell Douglas*'s concluding summary of the framework it created (relied upon by the dissent, *post*, at 2759) to the effect that if the plaintiff fails to show "pretext," the challenged employment action "must stand."

411 U.S., at 807, 93 S.Ct., at 1827. There, as in *Burdine*, "pretext" means the pretext required earlier in the opinion, *viz.*, "pretext for the sort of discrimination prohibited by [Title VII]." 411 U.S., at 804, 93 S.Ct., at 1825.

7. The dissent's reading leaves *some* burden of persuasion on the plaintiff, to be sure: the burden of persuading the factfinder that the employer's explanation is not true. But it would be beneath contempt for this Court, in a unanimous opinion no less, to play such word-games with the concept of "leaving the burden of persuasion upon the plaintiff." By parity of analysis, it could be said that holding a criminal defendant guilty unless he comes forward with a credible alibi does not shift the ultimate burden of persuasion, so long as the Government has the burden of persuading the factfinder that the alibi is *not* credible.

fendant intentionally discriminated against the plaintiff." 460 U.S., at 715, 103 S.Ct., at 1482 (internal quotation marks omitted). "On the state of the record at the close of the evidence, the District Court in this case should have proceeded to this specific question directly, just as district courts decide disputed questions of fact in other civil litigation." *Id.*, at 715–716, 103 S.Ct., at 1482. *In confirmation of this* (rather than in contradiction of it), the Court then quotes the problematic passage from *Burdine*, which says that the plaintiff may carry her burden either directly "'or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" 460 U.S., at 716, 103 S.Ct., at 1482. It then characterizes that passage as follows: "In short, the district court must decide which party's explanation of the employer's motivation it believes." *Ibid.* It is not enough, in other words, to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination. It is noteworthy that Justice BLACKMUN, although joining the Court's opinion in *Aikens*, wrote a separate concurrence for the sole purpose of saying that he understood the Court's opinion to be saying what the dissent today asserts. That concurrence was joined only by Justice Brennan. Justice Marshall would have none of that, but simply refused to join the Court's opinion, concurring without opinion in the judgment. We think there is little doubt what *Aikens* meant.

IV

[10] We turn, finally, to the dire practical consequences that the respondents and the dissent claim our decision today will produce. What appears to trouble the dissent more than anything is that, in its view, our rule is adopted "for the benefit of employers who have been found to have given false evidence in a court of law," whom we "favo[r]" by "exempting them from responsibility for lies." *Post*, at 2762. As we shall explain, our rule in no way gives special favor to those employers whose evidence is disbelieved. But initially, we must point out that there is no justification for assuming (as the dissent repeatedly does) that those employers whose evidence is disbelieved are perjurers and liars. See *ibid.* ("the employer who lies"; "the employer's lie"; "found to have given false evidence"; "lies"), *post*, at 2764 ("benefit from lying"; "must lie"; "offering false evidence"), 2764 n. 13 ("employer who lies"; "employer caught in a lie"; "rewarded for its falsehoods"), 2764 ("requires a party to lie"). Even if these were typically cases in which an individual defendant's sworn assertion regarding a physical occurrence was pitted against an individual plaintiff's sworn assertion regarding the same physical occurrence, surely it would be imprudent to call the party whose assertion is (by a mere preponderance of the evidence) disbelieved, a perjurer and a liar. And in these Title VII cases, the defendant is ordinarily *not* an individual but a company, which must rely upon the statement of an employee—often a relatively low-level employee—as to the central fact; and that central fact is *not* a physical occurrence, but rather that employee's state of mind. To say that the company which in good faith introduces such testimony, or even the testifying employee himself, becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd.

Undoubtedly some employers (or at least their employees) will be lying. But even if we could readily identify these perjurers, what an extraordinary notion, that we "exempt them from responsibility for their lies" unless we enter Title VII judgments for the plaintiffs! Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that. The dissent's notion of judgment-for-lying is seen to be not even a fair and even-handed punishment for vice, when one realizes how strangely selective it is: the employer is free to lie to its heart's content about whether the plaintiff ever applied for a job, about how long he worked, how much he

made—indeed, about anything and everything *except* the reason for the adverse employment action. And the plaintiff is permitted to lie about absolutely *everything* without losing a verdict he otherwise deserves. This is not a major, or even a sensible, blow against fibbery.

The respondent's argument based upon the employer's supposed lying is a more modest one: "A defendant which unsuccessfully offers a 'phony reason' logically cannot be in a better legal position [*i.e.*, the position of having overcome the presumption from the plaintiff's prima facie case] than a defendant who remains silent, and offers no reasons at all for its conduct." Brief for Respondent 21; see also Brief for United States as *Amicus Curiae* 11, 17–18. But there is no anomaly in that, once one recognizes that the *McDonnell Douglas* presumption is a *procedural* device, designed only to establish an order of proof and production. The books are full of procedural rules that place the perjurer (initially, at least) in a better position than the truthful litigant who makes no response at all. A defendant who fails to answer a complaint will, on motion, suffer a default judgment that a deceitful response could have avoided. Fed.Rule Civ.Proc. 55(a). A defendant whose answer fails to contest critical averments in the complaint will, on motion, suffer a judgment on the pleadings that untruthful denials could have avoided. Rule 12(c). And a defendant who fails to submit affidavits creating a genuine issue of fact in response to a motion for summary judgment will suffer a dismissal that false affidavits could have avoided. Rule 56(e). In all of those cases, as under the *McDonnell Douglas* framework, perjury may purchase the defendant a chance at the factfinder—though there, as here, it also carries substantial risks, see Rules 11 and 56(g); 18 U.S.C. § 1621.

The dissent repeatedly raises a procedural objection that is impressive only to one who mistakes the basic nature of the *McDonnell Douglas* procedure. It asserts that "the Court now holds that the further enquiry [*i.e.*, the inquiry that follows the employer's response to the prima facie case] is wide open, not limited at all by the scope of the employer's proffered explanation." *Post*, at 2761. The plaintiff cannot be expected to refute "reasons not articulated by the employer, but discerned in the record by the factfinder." *Ibid.* He should not "be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record." *Post*, at 2762. "Under the scheme announced today, any conceivable explanation for the employer's actions that might be suggested by the evidence, however unrelated to the employer's articulated reasons, must be addressed by [the plaintiff]." *Post*, at 2763. These statements imply that the employer's "proffered explanation," his "stated reasons," his "articulated reasons," somehow exist *apart from the record*—in some pleading, or perhaps in some formal, nontestimonial statement made on behalf of the defendant to the factfinder. ("Your honor, pursuant to *McDonnell Douglas* the defendant hereby formally asserts, as *its* reason for the dismissal at issue here, incompetence of the employee.") Of course it does not work like that. The reasons the defendant sets forth are set forth "through the introduction of admissible evidence." *Burdine*, 450 U.S., at 255, 101 S.Ct., at 1094. In other words, the defendant's "articulated reasons" *themselves* are to be found "lurking in the record." It thus makes no sense to contemplate "the employer who is caught in a lie, but succeeds in *injecting* into the trial an *unarticulated* reason for its actions." *Post*, at 2764, n. 13 (emphasis added). There is a "lurking-in-the-record" problem, but it exists not for us but for the dissent. *If*, after the employer has met its preliminary burden, the plaintiff need not prove discrimination (and therefore need not disprove *all* other reasons suggested, no matter how vaguely, in

the record) there must be some device for determining which particular portions of the record represent "articulated reasons" set forth with sufficient clarity to satisfy *McDonnell Douglas*—since it is only *that* evidence which the plaintiff must refute. But of course our *McDonnell Douglas* framework makes no provision for such a determination, which would have to be made not at the close of the trial but *in medias res*, since otherwise the plaintiff would not know what evidence to offer. It makes no sense.

[11] Respondent contends that "[t]he litigation decision of the employer to place in controversy only . . . particular explanations eliminates from further consideration the alternative explanations that the employer chose not to advance." Brief for Respondent 15. The employer should bear, he contends, "the responsibility for its choices and the risk that plaintiff will disprove any pretextual reasons *and therefore prevail.*" *Id.*, at 30 (emphasis added). It is the "therefore" that is problematic. Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race. That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review—which should be conducted on remand in this case under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a), see, *e.g., Anderson v. Bessemer City*, 470 U.S. 564, 573–576, 105 S.Ct. 1504, 1511–1513, 84 L.Ed.2d 518 (1985).

Finally, respondent argues that it "would be particularly ill-advised" for us to come forth with the holding we pronounce today "just as Congress has provided a right to jury trials in Title VII" cases. *Id.*, at 31. See § 102 of the Civil Rights Act of 1991, 105 Stat. 1073, 42 U.S.C. § 1981a(c) (1988 ed., Supp. III) (providing jury trial right in certain Title VII suits). We think quite the opposite is true. Clarity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them, and when detailed factual findings by the trial court will not be available upon review.

* * *

We reaffirm today what we said in *Aikens:*

"[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof,' *Burdine*, 450 U.S., at 252 [101 S.Ct., at 1093], in deciding this ultimate question." *Aikens*, 460 U.S., at 716, 103 S.Ct., at 1482.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOUTER, with whom Justice WHITE, Justice BLACKMUN, and Justice STEVENS join, dissenting.

Twenty years ago, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), this Court unanimously prescribed a "sensible, orderly way to evaluate the evidence" in a Title VII disparate-treatment case, giving both plaintiff and defendant fair opportunities to litigate "in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). We have repeatedly reaffirmed and refined the *McDonnell Douglas* framework, most notably in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), another unanimous opinion. See also *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Furnco, supra.* But today, after two decades of stable law in this Court and only relatively recent disruption in some of the Circuits, see *ante*, at 2750–2751, the Court abandons this practical framework together with its central purpose, which is "to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine, supra*, at 255, n. 8, 101 S.Ct., at 1094, n. 8. Ignoring language to the contrary in both *McDonnell Douglas* and *Burdine*, the Court holds that, once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions in response to a prima facie showing of discrimination, the factfinder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove. Because the majority departs from settled precedent in substituting a scheme of proof for disparate-treatment actions that promises to be unfair and unworkable, I respectfully dissent.

The *McDonnell Douglas* framework that the Court inexplicably casts aside today was summarized neatly in *Burdine:*

"First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." 450 U.S., at 252–253, 101 S.Ct., at 1093 (citations and internal quotation marks omitted).

We adopted this three-step process to implement, in an orderly fashion, "[t]he language of Title VII," which "makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Id.*, at 800, 93 S.Ct., at 1823. Because "Title VII tolerates no racial discrimination, subtle or otherwise," *id.*, at 801, 93 S.Ct., at 1824, we devised a framework that would allow both plaintiffs and the courts to deal effectively with employment discrimination revealed only through circumstantial evidence. See *Aikens, supra*, at 716, 103 S.Ct., at 1482 ("There will seldom be 'eyewitness' testimony as to the employer's mental processes"). This framework has gained wide acceptance, not only in cases alleging discrimination on the basis of "race, color, religion, sex, or national origin" under Title VII, 42 U.S.C. § 2000e–2, but also in similar cases, such as those alleging age discrimination under the Age Discrimination in Employment Act of 1967. See, *e.g., Halsell v. Kimberly–Clark Corp.*, 683 F.2d 285, 289 (CA8 1982), cert. denied, 459 U.S. 1205, 103 S.Ct. 1194, 75 L.Ed.2d 438 (1983); see also Brief for Lawyers' Committee for Civil Rights et al. as *Amici Curiae* 3–4.

At the outset, under the *McDonnell Douglas* framework, a plaintiff alleging disparate treatment in the workplace in violation of Title VII must provide the basis for an inference of discrimination. In this case, as all agree, Melvin Hicks met this initial burden by proving by a preponderance of the evidence that he was black and therefore a member of a protected class; he was qualified to be a shift commander; he was demoted and then termi-

nated; and his position remained available and was later filled by a qualified applicant.[1] See 970 F.2d 487, 491, and n. 7 (CA8 1992). Hicks thus proved what we have called a "prima facie case" of discrimination, and it is important to note that in this context a prima facie case is indeed a proven case. Although, in other contexts, a prima facie case only requires production of enough evidence to raise an issue for the trier of fact, here it means that the plaintiff has actually established the elements of the prima facie case to the satisfaction of the factfinder by a preponderance of the evidence. See 450 U.S., at 253, 254, n. 7, 101 S.Ct., at 1093, 1094, n. 7. By doing so, Hicks "eliminat[ed] the most common nondiscriminatory reasons" for demotion and firing: that he was unqualified for the position or that the position was no longer available. *Burdine*, 450 U.S., at 254, 101 S.Ct., at 1094. Given our assumption that "people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting," we have explained that a prima facie case implies discrimination "because we presume [the employer's] acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S., at 577, 98 S.Ct., at 2949–2950; see also *Burdine*, 450 U.S., at 254, 101 S.Ct., at 1094.

Under *McDonnell Douglas* and *Burdine*, however, proof of a prima facie case not only raises an inference of discrimination; in the absence of further evidence, it also creates a mandatory presumption in favor of the plaintiff. 450 U.S., at 254, n. 7, 101 S.Ct., at 1094, n. 7. Although the employer bears no trial burden at all until the plaintiff proves his prima facie case, once the plaintiff does so the employer must either respond or lose. As we made clear in *Burdine*, "[I]f the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff." *Id.*, at 254, 101 S.Ct., at 1094; see *ante*, at 2748–2749, n. 3 (in these circumstances, the factfinder "*must* find the existence of the presumed fact of unlawful discrimination and *must*, therefore, render a verdict for the plaintiff") (emphasis in original). Thus, if the employer remains silent because it acted for a reason it is too embarrassed to reveal, or for a reason it fails to discover, see *ante*, at 2750–2751, the plaintiff is entitled to judgment under *Burdine*.

Obviously, it would be unfair to bar an employer from coming forward at this stage with a nondiscriminatory explanation for its actions, since the lack of an open position and the plaintiff's lack of qualifications do not exhaust the set of nondiscriminatory reasons that might explain an adverse personnel decision. If the trier of fact could not consider other explanations, employers' autonomy would be curtailed far beyond what is needed to rectify the discrimination identified by Congress. Cf. *Furnco*, *supra*, at 577–578, 98 S.Ct., at 2950 (Title VII "does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees"). On the other hand, it would be equally unfair and utterly impractical to saddle the victims of discrimination with the burden of either producing direct evidence of discriminatory intent or eliminating the entire universe of possible nondiscriminatory reasons for a personnel decision. The Court in *McDonnell Douglas* reconciled these competing interests in a very sensible way by requiring the employer to "articulate," through the introduction of admissible evidence, one or more "legitimate, nondiscriminatory reason[s]" for its actions. 411 U.S., at 802, 93 S.Ct., at 1824; *Burdine*, *supra*, at 254–255, 101 S.Ct., at 1094–1095. Proof of a prima facie case thus serves as a catalyst obligat-

1. The majority, following the courts below, mentions that Hicks's position was filled by a white male. *Ante*, at 2747 (citing the District Court's opinion); see 970 F.2d 487, 491, n. 7 (CA8 1992). This Court has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material, and that issue is not before us today. Cf. *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 154–155 (CA1 1990) (identity of replacement is not relevant).

ing the employer to step forward with an explanation for its actions. St. Mary's, in this case, used this opportunity to provide two reasons for its treatment of Hicks: the severity and accumulation of rule infractions he had allegedly committed. 970 F.2d, at 491.

The Court emphasizes that the employer's obligation at this stage is only a burden of production, *ante*, at 2747, 2748; see 450 U.S., at 254–255, 101 S.Ct., at 1094–1095, and that, if the employer meets the burden, the presumption entitling the plaintiff to judgment "drops from the case." *Id.*, at 255, n. 10, 101 S.Ct., at 1095, n. 10; see *ante*, at 2747. This much is certainly true,[2] but the obligation also serves an important function neglected by the majority, in requiring the employer "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." 450 U.S., at 255–256, 101 S.Ct., at 1095. The employer, in other words, has a "burden of production" that gives it the right to choose the scope of the factual issues to be resolved by the factfinder. But investing the employer with this choice has no point unless the scope it chooses binds the employer as well as the plaintiff. Nor does it make sense to tell the employer, as this Court has done, that its explanation of legitimate reasons "must be clear and reasonably specific," if the factfinder can rely on a reason not clearly articulated, or on one not articulated at all, to rule in favor of the employer.[3] *Id.*, at 258, 101 S.Ct., at 1096; see *id.*, at 255, n. 9, 101 S.Ct. at 1094, n. 9 ("An articulation not admitted into evidence will not suffice").[4]

Once the employer chooses the battleground in this manner, "the factual inquiry proceeds to a new level of specificity." *Id.*, at 255, 101 S.Ct., at 1095. During this final, more specific enquiry, the employer has no burden to prove that its proffered reasons are true; rather, the plaintiff must prove by a preponderance of the evidence that the proffered reasons are pretextual.[4] *Id.*, at 256, 101 S.Ct., at 1095. *McDonnell Douglas* makes it clear that if the plaintiff fails to show "pretext," the challenged employment action "must stand." 411 U.S., at 807, 93 S.Ct., at 1827. If, on the other hand, the plaintiff carries his burden of showing "pretext," the court "must order a prompt and appropriate remedy."[5] *Ibid.* Or, as we said in *Burdine*: "[The plaintiff]

2. The majority contends that it would "fl[y] in the face of our holding in *Burdine*" to "resurrect" this mandatory presumption at a later stage, in cases where the plaintiff proves that the employer's proffered reasons are pretextual. *Ante*, at 2749. Hicks does not argue to the contrary. See Brief for Respondent 20, n. 4 (citing Fed.Rule Evid. 301). The question presented in this case is not whether the mandatory presumption is resurrected (everyone agrees that it is not), but whether the factual enquiry is narrowed by the *McDonnell Douglas* framework to the question of pretext.

3. The majority is simply wrong when it suggests that my reading of *McDonnell Douglas* and *Burdine* proceeds on the assumption that the employer's reasons must be stated "apart from the record." *Ante*, at 2755–2756 (emphasis omitted). As I mentioned above, and I repeat here, such reasons must be set forth "through the introduction of admissible evidence." *Supra*, at 2758; see *Burdine*, 450 U.S., at 255, 101 S.Ct., at 1094. Such reasons cannot simply be found "lurking in the record," as the Court suggests, *ante*, at 2755 for *Burdine* requires the employer to articulate its reasons through testimony or other admissible evidence that is "clear and reasonably specific," 450 U.S., at 258, 101 S.Ct., at 1096. Accordingly, the plaintiff need not worry about waiting for the court to identify the employer's reasons at the end of trial, or in this case six months after trial, because *McDonnell Douglas* and *Burdine* require the employer to articulate its reasons clearly during trial. No one, for example, had any trouble in this case identifying the two reasons for Hicks's dismissal that St. Mary's articulated during trial.

4. We clarified this aspect of the *McDonnell Douglas* framework in *Burdine*, where the question presented was "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." 450 U.S., at 250, 101 S.Ct., at 1091.

5. The Court makes a halfhearted attempt to rewrite these passages from *McDonnell Douglas*, arguing that "pretext for discrimination" should appear where "pretext" actually does. *Ante*, at 2752, n. 6. I seriously doubt that such a change in diction would have altered the meaning of

now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination."[6] 450 U.S., at 256, 101 S.Ct., at 1095. *Burdine* drives home the point that the case has proceeded to "a new level of specificity" by explaining that the plaintiff can meet his burden of persuasion in either of two ways: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[7] *Ibid.*; see *Aikens*, 460 U.S., at 716, 103 S.Ct., at 1482 (quoting this language from *Burdine*); *id.*, at 717–718, 103 S.Ct., at 1482–1483 (BLACKMUN, J., joined by Brennan, J., concurring); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 287–289, 109 S.Ct. 1775, 1810–1811, 104 L.Ed.2d 268 (1989) (KENNEDY, J., dissenting) (discussing these "two alternative methods" and relying on Justice BLACKMUN's concurrence in *Aikens*). That the plaintiff can succeed simply by showing that "the employer's proffered explanation is unworthy of credence" indicates that the case has been narrowed to the question whether the employer's proffered reasons are pretextual.[8] Thus, because Hicks carried his burden of

these crucial passages in the manner the majority suggests, see n. 7, *infra*, but even on the majority's assumption that there is a crucial difference, it must believe that the *McDonnell Douglas* Court was rather sloppy in summarizing its own opinion. Earlier in the *McDonnell Douglas* opinion, the Court does state that an employer may not use a plaintiff's conduct "as a pretext for ... discrimination." 411 U.S., at 804, 93 S.Ct., at 1825; see *ante*, at 2752, n. 6 (quoting this sentence to justify rewriting the *McDonnell Douglas* summary). But in the next sentence, when the *McDonnell Douglas* Court's focus shifts from what the employer may not do to what the plaintiff must show, the Court states that the plaintiff must "be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext," plain and simple. 411 U.S., at 804, 93 S.Ct., at 1825. To the extent choosing between "pretext" and "pretext for discrimination" is important, the *McDonnell Douglas* Court's diction appears to be consistent, not sloppy. *Burdine*, of course, nails down the point that the plaintiff satisfies his burden simply by proving that the employer's explanation does not deserve credence. See *infra*, at 2760.

6. The majority puts forward what it calls "a more reasonable reading" of this passage, *ante*, at 2752, but its chosen interpretation of the "merger" that occurs is flatly contradicted by the very next sentence in *Burdine*, which indicates, as the majority subsequently admits, *ante*, at 2752, that the burden of persuasion is limited to the question of pretext. It seems to me "more reasonable" to interpret the "merger" language in harmony with, rather than in contradiction to, its immediate context in *Burdine*.

7. The majority's effort to rewrite *Burdine* centers on repudiating this passage, see *ante*, at 2752–2753, which has provided specific, concrete guidance to courts and Title VII litigants for more than a decade, and on replacing "pretext" wherever it appears with "pretext for discrimination," as defined by the majority, see *ante*, at 2752. These two efforts are intertwined, for *Burdine* tells us specifically how a plaintiff can prove either "pretext" or "pretext for discrimination": "*either* directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S., at 256, 101 S.Ct., at 1095 (emphasis supplied). The majority's chosen method of proving "pretext for discrimination" changes *Burdine*'s "either ... or" into a "both ... and": "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *Ante*, at 2752 (emphasis omitted). The majority thus takes a shorthand phrase from *Burdine* ("pretext for discrimination"), discovers requirements in the phrase that are directly at odds with the specific requirements actually set out in *Burdine*, and then rewrites *Burdine* in light of this "discovery." No one "[f]amiliar with our case-law," *ante*, at 2750, will be persuaded by this strategy.

8. That the sole, and therefore determinative, issue left at this stage is pretext is further indicated by our discussion in *McDonnell Douglas* of the various types of evidence "that may be relevant to any showing of pretext," 411 U.S., at 804, 93 S.Ct., at 1825, by our decision to reverse in *Furnco* because the Court of Appeals "did not conclude that the [challenged] practices were a pretext for discrimination," 438 U.S., at 578, 98 S.Ct., at 2950, and by our reminder in *Burdine* that even after the employer meets the plaintiff's

persuasion by showing that St. Mary's proffered reasons were "unworthy of credence," the Court of Appeals properly concluded that he was entitled to judgment.[9] 970 F.2d, at 492.

The Court today decides to abandon the settled law that sets out this structure for trying disparate-treatment Title VII cases, only to adopt a scheme that will be unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court. Under the majority's scheme, once the employer succeeds in meeting its burden of production, "the *McDonnell Douglas* framework ... is no longer relevant." *Ante*, at 2749. Whereas we said in *Burdine* that if the employer carries its burden of production, "the factual inquiry proceeds to a new level of specificity," 450 U.S., at 255, 101 S.Ct., at 1095, the Court now holds that the further enquiry is wide open, not limited at all by the scope of the employer's proffered explanation.[10] Despite the Court's assiduous effort to reinterpret our precedents, it remains clear that today's decision stems from a flat misreading of *Burdine* and ignores the central purpose of the *McDonnell Douglas* framework, which is "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*, at 255, n. 8, 101 S.Ct., at 1094, n. 8. We have repeatedly identified the compelling reason for limiting the factual issues in the final stage of a *McDonnell Douglas* case as "the requirement that the plaintiff be afforded a full and fair opportunity to demonstrate pretext." *Id.*, at 258, 101 S.Ct., at 1096 (internal quotation marks omitted); see *id.*, at 256, 101 S.Ct., at 1095 (the plaintiff "must have the opportunity to demonstrate" pretext); *Aikens, supra*, at 716, n. 5, 103 S.Ct., at 1482; *Furnco*, 438 U.S., at 578, 98 S.Ct., at 2950; *McDonnell Douglas*, 411 U.S., at 805, 93 S.Ct., at 1825–1826. The majority fails to explain how the plaintiff, under its scheme, will ever have a "full and fair opportunity" to demonstrate that reasons not articulated by the employer, but discerned in the record by the factfinder, are also unworthy of credence. The Court thus transforms the employer's burden of production from a device used to provide notice and promote fairness into a misleading and potentially useless ritual.

The majority's scheme greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent. The Court repeats the truism that the plaintiff has the "ultimate burden" of proving discrimination, see *ante*, at 2747, 2748, 2749, 2753, without ever facing the practical question of how the plaintiff without such direct evidence can meet this burden. *Burdine* provides the answer, telling us that such a plaintiff may succeed in

prima facie case, the "evidence previously introduced by the plaintiff to establish a prima facie case" and the "inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the [employer's] explanation is pretextual," 450 U.S., at 255, n. 10, 101 S.Ct., at 1095, n. 10.

9. The foregoing analysis of burdens describes who wins on various combinations of evidence and proof. It may or may not also describe the actual sequence of events at trial. In a bench trial, for example, the parties may be limited in their presentation of evidence until the court has decided whether the plaintiff has made his prima facie showing. But the court also may allow in all the evidence at once. In such a situation, under our decision in *Aikens*, the defendant will have to choose whether it wishes simply to attack the prima facie case or whether it wants to present nondiscriminatory reasons for its actions. If the defendant chooses the former approach, the factfinder will decide at the end of the trial whether the plaintiff has proven his prima facie case. If the defendant takes the latter approach, the only question for the factfinder will be the issue of pretext. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1481–1482, 75 L.Ed.2d 403 (1983); see *ante*, at 2748–2749, n. 3.

10. Under the Court's unlikely interpretation of the "new level of specificity" called for by *Burdine* (and repeated in *Aikens*, see 460 U.S., at 715, 103 S.Ct., at 1482), the issues facing the plaintiff and the court can be discovered anywhere in the evidence the parties have introduced concerning discriminatory motivation. *Ante*, at 2752.

meeting his ultimate burden of proving discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S., at 256, 101 S.Ct., at 1095; see *Aikens, supra*, at 716, 103 S.Ct., at 1482; *id.*, at 717–718, 103 S.Ct., at 1482–1483 (BLACKMUN, J., joined by Brennan, J., concurring). The possibility of some practical procedure for addressing what *Burdine* calls indirect proof is crucial to the success of most Title VII claims, for the simple reason that employers who discriminate are not likely to announce their discriminatory motive. And yet, under the majority's scheme, a victim of discrimination lacking direct evidence will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record. In the Court's own words, the plaintiff must "disprove *all* other reasons suggested, no matter how vaguely, in the record." *Ante*, at 2756 (emphasis in original).

While the Court appears to acknowledge that a plaintiff will have the task of disproving even vaguely suggested reasons, and while it recognizes the need for "[c]larity regarding the requisite elements of proof," *ante*, at 2756, it nonetheless gives conflicting signals about the scope of its holding in this case. In one passage, the Court states that although proof of the falsity of the employer's proffered reasons does not "compe[l] judgment for the plaintiff," such evidence, without more, "will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Ante*, at 2749 (emphasis omitted). The same view is implicit in the Court's decision to remand this case, *ante*, at 2756, keeping Hicks's chance of winning a judgment alive although he has done no more (in addition to proving his prima facie case) than show that the reasons proffered by St. Mary's are unworthy of credence. But other language in the Court's opinion supports a more extreme conclusion, that proof of the falsity of the employer's articulated reasons will not even be sufficient to sustain judgment for the plaintiff. For example, the Court twice states that the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason." *Ante*, at 2752; see *ante*, at 2748. In addition, in summing up its reading of our earlier cases, the Court states that "[i]t is not enough . . . to disbelieve the employer." *Ante*, at 2754 (emphasis omitted). This "pretext-plus" approach would turn *Burdine* on its head, see n. 7, *supra*, and it would result in summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence. Cf. *Carter v. Duncan-Huggins, Ltd.*, 234 U.S.App. D.C. 126, 146, 727 F.2d 1225, 1245 (1984) (Scalia, J., dissenting) ("[I]n order to get to the jury the plaintiff would . . . have to introduce some evidence . . . that the *basis* for [the] discriminatory treatment was *race*") (emphasis in original). See generally Lanctot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 Hastings L.J. 57 (1991) (criticizing the "pretext-plus" approach).

The Court fails to explain, moreover, under either interpretation of its holding, why proof that the employer's articulated reasons are "unpersuasive, or even obviously contrived," *ante*, at 2756, falls short. Under *McDonnell Douglas* and *Burdine*, there would be no reason in this situation to question discriminatory intent. The plaintiff has raised an inference of discrimination (though no longer a presumption) through proof of his prima facie case, and as we noted in *Burdine*, this circumstantial proof of discrimination can also be used by the plaintiff to show pretext. 450 U.S., at 255, n. 10, 101 S.Ct., at 1095, n. 10. Such proof is merely strengthened by showing, through use of further evidence, that the employer's articulated reasons are false, since "common experience" tells us that it is "more likely than not" that the employer who lies is simply trying to cover up the illegality alleged by the plaintiff. *Furnco*, 438 U.S., at 577, 98 S.Ct., at 2949–2950. Unless *McDonnell Douglas*'s command to structure and limit the case as the employer chooses is to be rendered meaningless, we should not look beyond the employer's lie by assuming the possible existence of other reasons the employer might have proffered without lying. By telling the factfinder to keep digging in cases where the plaintiff's proof of pretext turns on showing the employer's reasons to be unworthy of credence, the majority rejects the very point of the *McDonnell Douglas* rule requiring the scope of the factual enquiry to be limited, albeit in a manner chosen by the employer. What is more, the Court is throwing out the rule for the benefit of employers who have been found to have given false evidence in a court of law. There is simply no justification for favoring these employers by exempting them from responsibility for lies.[11] It may indeed be true that such employers have nondiscriminatory reasons for their actions, but ones so shameful that they wish to conceal them. One can understand human frailty and the natural desire to conceal it, however, without finding in it a justification to dispense with an orderly procedure for getting at "the elusive factual question of intentional discrimination." *Burdine*, 450 U.S., at 255, n. 8, 101 S.Ct., at 1094, n. 8.

With no justification in the employer's favor, the consequences to actual and potential Title VII litigants stand out sharply. To the extent that workers like Melvin Hicks decide not to sue, given the uncertainties they would face under the majority's scheme, the legislative purpose in adopting Title VII will be frustrated. To the extent such workers nevertheless decide to press forward, the result will likely be wasted time, effort, and money for all concerned. Under the scheme announced today, any conceivable explanation for the employer's actions that might be suggested by the evidence, however unrelated to the employer's articulated reasons, must be addressed by a plaintiff who does not wish to risk losing. Since the Court does not say whether a trial court may limit the introduction of evidence at trial to what is relevant to the employer's articulated reasons, and since the employer can win on the possibility of an unstated reason, the scope of admissible evidence at trial presumably includes any evidence potentially relevant to "the ultimate question" of discrimination, unlimited by the employer's stated reasons. *Ante*, at 2749. If so, Title VII trials promise to be tedious affairs. But even if, on the contrary, relevant evidence is still somehow to be limited by reference to the employer's reasons, however "vaguely" articulated, the careful plaintiff will have to anticipate all the side issues that might arise even in a more limited evidentiary presentation. Thus, in either case, pretrial discovery will become more extensive and wide-ranging (if the plaintiff can afford it), for a much wider set of facts could prove to be both relevant and important at trial. The majority's scheme, therefore, will promote longer trials and more pre-trial discovery, threatening increased expense and delay in Title VII litigation for both plaintiffs and defendants, and increased burdens on the judiciary.

In addition to its unfairness and impracticality, the Court's new scheme, on its own terms, produces some remarkable results.

11. Although the majority chides me for referring to employers who offer false evidence in court as "liars," see *ante*, at 2754–2755, it was the first to place such employers in the company of perjurers. See *ante*, at 2750. In any event, it is hardly "absurd" to say that an individual is lying when the factfinder does not believe his testimony, whether he is testifying on his own behalf or as the agent of a corporation. *Ante*, at 2754. Factfinders constantly must decide whether explanations offered in court are true, and when they conclude, by a preponderance of the evidence, that a proffered explanation is false, it is not unfair to call that explanation a lie. To label it "perjury," a criminal concept, would be jumping the gun, but only the majority has employed that term. See *ante*, at 2754–2755.

Contrary to the assumption underlying the *McDonnell Douglas* framework, that employers will have "*some* reason" for their hiring and firing decisions, see *Furnco*, 438 U.S., at 577, 98 S.Ct., at 2949–2950 (emphasis in original), the majority assumes that some employers will be unable to discover the reasons for their own personnel actions. See *ante*, at 2750–2751. Under the majority's scheme, however, such employers, when faced with proof of a prima facie case of discrimination, still must carry the burden of producing evidence that a challenged employment action was taken for a nondiscriminatory reason. *Ante*, at 2746–2747, 2748. Thus, if an employer claims it cannot produce any evidence of a nondiscriminatory reason for a personnel decision,[12] and the trier of fact concludes that the plaintiff has proven his prima facie case, the court must enter judgment for the plaintiff. *Ante*, at 2748–2749, n. 3.

The majority's scheme therefore leads to the perverse result that employers who fail to discover nondiscriminatory reasons for their own decisions to hire and fire employees not only will benefit from lying,[13] but must lie, to defend successfully against a disparate-treatment action. By offering false evidence of a nondiscriminatory reason, such an employer can rebut the presumption raised by the plaintiff's prima facie case, and then hope that the factfinder will conclude that the employer may have acted for a reason unknown rather than for a discriminatory reason. I know of no other scheme for structuring a legal action that, on its own terms, requires a party to lie in order to prevail.

Finally, the Court's opinion destroys a framework carefully crafted in precedents as old as 20 years, which the Court attempts to deflect, but not to confront. The majority first contends that the opinions

12. The Court is unrealistically concerned about the rare case in which an employer cannot easily turn to one of its employees for an explanation of a personnel decision. See *ante*, at 2750–2751. Most companies, of course, keep personnel records, and such records generally are admissible under Rule 803(6) of the Federal Rules of Evidence. See, *e.g.*, *Martin v. Funtime, Inc.*, 963 F.2d 110, 115–116 (CA6 1992); *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 925–926 (CA11 1990). Even those employers who do not keep records of their decisions will have other means of discovering the likely reasons for a personnel action by, for example, interviewing co-workers, examining employment records, and identifying standard personnel policies. The majority's scheme rewards employers who decide, in this atypical situation, to invent rather than to investigate.

This concern drives the majority to point to the hypothetical case, *ante*, at 2750–2751, of the employer with a disproportionately high percentage of minority workers who would nonetheless lose a Title VII racial discrimination case by giving an untrue reason for a challenged personnel action. What the majority does not tell us, however, is why such an employer must rely solely on an "antagonistic former employee," *ante*, at 2751, rather than on its own personnel records, among other things, to establish the credible, nondiscriminatory reason it almost certainly must have had, given the facts assumed. The majority claims it would be a "mockery of justice" to allow recovery against an employer who presents "compelling evidence" of nondiscrimination simply because the jury believes a reason given in a personnel record "is probably not the 'true' one." *Ante*, at 2751, n. 5. But prior to drawing such a conclusion, the jury would consider all of the "compelling evidence" as at least circumstantial evidence for the truth of the nondiscriminatory explanation, because the employer would be able to argue that it would not lie to avoid a discrimination charge when its general behavior had been so demonstrably meritorious. If the jury still found that the plaintiff had carried his burden to show untruth, the untruth must have been a real whopper, or else the "compelling evidence" must not have been very compelling. In either event, justice need not worry too much about mockery.

13. As the majority readily admits, its scheme places any employer who lies in a better position than the employer who says nothing. *Ante*, at 2754–2755. Under *McDonnell Douglas* and *Burdine*, an employer caught in a lie will lose on the merits, subjecting himself to liability not only for damages, but also for the prevailing plaintiff's attorney's fees, including, presumably, fees for the extra time spent to show pretext. See 42 U.S.C. § 2000e–5(k) (1988 ed., Supp. III) (providing for an award of a "reasonable attorney's fee" to the "prevailing party" in a Title VII action). Under the majority's scheme, the employer who is caught in a lie, but succeeds in injecting into the trial an unarticulated reason for its actions, will win its case and walk away rewarded for its falsehoods.

creating and refining the *McDonnell Douglas* framework consist primarily of dicta, whose bearing on the issue we consider today presumably can be ignored. See *ante*, at 2751. But this readiness to disclaim the Court's considered pronouncements devalues them. Cases, such as *McDonnell Douglas*, that set forth an order of proof necessarily go beyond the minimum necessary to settle the narrow dispute presented, but evidentiary frameworks set up in this manner are not for that reason subject to summary dismissal in later cases as products of mere dicta. Courts and litigants rely on this Court to structure lawsuits based on federal statutes in an orderly and sensible manner, and we should not casually abandon the structures adopted.

Because the Court thus naturally declines to rely entirely on dismissing our prior directives as dicta, it turns to the task of interpreting our prior cases in this area, in particular *Burdine*. While acknowledging that statements from these earlier cases may be read, and in one instance must be read, to limit the final enquiry in a disparate-treatment case to the question of pretext, the Court declares my reading of those cases to be "utter[ly] implausib[le]," *ante*, at 2750, imputing views to earlier Courts that would be "beneath contempt," *ante*, at 2753, n. 7. The unlikely reading is, however, shared by the Solicitor General and the Equal Employment Opportunity Commission, which is charged with implementing and enforcing Title VII and related statutes, see Brief for United States et al. as *Amici Curiae* 1–2, not to mention the Court of Appeals in this case and, even by the Court's count, more than half of the Courts of Appeals to have discussed the question (some, albeit, in dicta). See *ante*, at 2750. The company should not be cause for surprise. For reasons explained above, *McDonnell Douglas* and *Burdine* provide a clear answer to the question before us, and it would behoove the majority to explain its decision to depart from those cases.

The Court's final attempt to neutralize the force of our precedents comes in its claim that *Aikens* settled the question presented today. This attempt to rest on *Aikens* runs into the immediate difficulty, however, that *Aikens* repeats what we said earlier in *Burdine*: the plaintiff may succeed in meeting his ultimate burden of persuasion "'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Aikens*, 460 U.S., at 716, 103 S.Ct., at 1482 (quoting *Burdine*, 450 U.S., at 256, 101 S.Ct., at 1095). Although the *Aikens* Court quoted this statement approvingly, the majority here projects its view that the latter part of the statement is "problematic," *ante*, at 2754, arguing that the next sentence in *Aikens* takes care of the "problem." The next sentence, however, only creates more problems for the majority, as it directs the District Court to "decide *which party's* explanation of the employer's motivation it believes." 460 U.S., at 716, 103 S.Ct., at 1482 (emphasis supplied). By requiring the factfinder to choose between the employer's explanation and the plaintiff's claim of discrimination (shown either directly or indirectly), *Aikens* flatly bars the Court's conclusion here that the factfinder can choose a third explanation, never offered by the employer, in ruling against the plaintiff. Because *Aikens* will not bear the reading the majority seeks to place upon it, there is no hope of projecting into the past the abandonment of precedent that occurs today.

I cannot join the majority in turning our back on these earlier decisions. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989). It is not as though Congress is

unaware of our decisions concerning Title VII, and recent experience indicates that Congress is ready to act if we adopt interpretations of this statutory scheme it finds to be mistaken. See Civil Rights Act of 1991, 105 Stat. 1071. Congress has taken no action to indicate that we were mistaken in *McDonnell Douglas* and *Burdine*.

* * *

The enhancement of a Title VII plaintiff's burden wrought by the Court's opinion is exemplified in this case. Melvin Hicks was denied any opportunity, much less a full and fair one, to demonstrate that the supposedly nondiscriminatory explanation for his demotion and termination, the personal animosity of his immediate supervisor, was unworthy of credence. In fact, the District Court did not find that personal animosity (which it failed to recognize might be racially motivated) was the true reason for the actions St. Mary's took; it adduced this reason simply as a possibility in explaining that Hicks had failed to prove "that the crusade [to terminate him] was racially rather than personally motivated." 756 F.Supp. 1244, 1252 (EDMo.1991). It is hardly surprising that Hicks failed to prove anything about this supposed personal crusade, since St. Mary's never articulated such an explanation for Hicks's discharge, and since the person who allegedly conducted this crusade denied at trial any personal difficulties between himself and Hicks. App. 46. While the majority may well be troubled about the unfair treatment of Hicks in this instance and thus remands for review of whether the District Court's factual conclusions were clearly erroneous, see *ante*, at 2756, the majority provides Hicks with no opportunity to produce evidence showing that the District Court's hypothesized explanation, first articulated six months after trial, is unworthy of credence. Whether Melvin Hicks wins or loses on remand, many plaintiffs in a like position will surely lose under the scheme adopted by the Court today, unless they possess both prescience and resources beyond what this Court has previously required Title VII litigants to employ.

Because I see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent, I respectfully dissent.

Ferris J. ALEXANDER, Sr., Petitioner

v.

UNITED STATES.

No. 91-1526.

Argued Jan. 12, 1993.

Decided June 28, 1993.

Defendant was convicted in the United States District Court for the District of Minnesota, James M. Rosenbaum, J., of tax offenses, obscenity offenses, and Racketeer Influenced and Corrupt Organizations Act (RICO) violations, and he appealed. The Eighth Circuit Court of Appeals, 943 F.2d 825, affirmed. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) forfeiture of defendant's assets, used in adult entertainment business, following conviction for participating in racketeering activities in violation of RICO, did not violate defendant's First Amendment rights, and (2) Court of Appeals should have considered whether forfeiture was an "excessive fine" imposed in violation of the Eighth Amendment.

Vacated and remanded.

Justice Souter concurred in judgment in part and dissented in part, and filed statement.

Justice Kennedy dissented and filed opinion, in which Justice Blackmun and Justice Stevens joined, and in which Justice Souter joined as to Part II.

1. Constitutional Law ⇐90.1(1)

Term "prior restraint" is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." U.S.C.A. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐90.4(1)

Court-ordered forfeiture of assets used in furtherance of racketeering activities prohibited by RICO, involving predicate acts of distributing obscene material, did not constitute prior restraint on defendant's freedom of speech, even though he claimed that loss of assets would preclude his re-entry into adult entertainment business; decree was punishment for past acts, rather than prospective restraint on speech, as nothing in forfeiture order would prevent him from taking untainted assets and resuming adult entertainment business. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. § 1963(a)(2)(A, D), (a)(3).

3. Constitutional Law ⇐42.2(1)

"Overbreadth" doctrine, which is departure from traditional rules of standing, permits defendant to make facial challenge to an overly broad statute restricting speech, even if defendant has engaged in speech that could be regulated under more narrowly drawn statute. U.S.C.A. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⇐90.4(1)
Forfeitures ⇐2

Statute permitting forfeiture of business assets involved in racketeering activity prohibited by RICO was not constitutionally overbroad, as applied to forfeiture of materials used in adult entertainment business, even though forfeiture would involve materials not found to have been obscene, and it was claimed that extensive forfeiture would have chilling effect on sellers of adult materials; activities for which forfeiture was ordered already carried prison term and fine threats, which would have far more powerful deterrent effect on protected speech than prospect of forfeiture, and which were clearly constitutional. U.S.C.A. Const.Amend. 1.

5. Criminal Law ⇐1214

Forfeiture of assets, as penalty for violating RICO, is equivalent of fine, for purposes of Eighth Amendment prohibition against imposing "excessive fines." U.S.C.A. Const.Amend. 8.

6. Criminal Law ⇐1214

Court determining whether criminal punishment violates Eighth Amendment is required to consider whether an "excessive fine" is disproportionate to gravity of defendant's offenses in cases in addition to those involving sentence of at least life imprisonment without possibility of parole. U.S.C.A. Const.Amend. 8.

7. Criminal Law ⇐1214

Court of Appeals should have considered whether order of forfeiture of defendant's wholesale and retail adult entertainment businesses, and $9 million in monies acquired through racketeering activity relating to distribution of obscene material, following RICO conviction, was an "excessive fine" within contemplation of Eighth Amendment, when accompanied by six-year prison term and $100,000 fine. 18 U.S.C.A. § 1963(a)(2); U.S.C.A. Const.Amend. 8.

Syllabus *

After a full criminal trial, petitioner, the owner of numerous businesses dealing

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*,

Accordingly, we disagree with the Second Circuit's theory that "a parent may not obtain reimbursement for a unilateral placement if that placement was in a school that was not on [the State's] approved list of private" schools. *Tucker*, 873 F.2d, at 568 (internal quotation marks omitted). Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.

Furthermore, although the absence of an approved list of private schools is not essential to our holding, we note that parents in the position of Shannon's have no way of knowing at the time they select a private school whether the school meets state standards. South Carolina keeps no publicly available list of approved private schools, but instead approves private school placements on a case-by-case basis. In fact, although public school officials had previously placed three children with disabilities at Trident, see App. to Pet. for Cert. 28a, Trident had not received blanket approval from the State. South Carolina's case-by-case approval system meant that Shannon's parents needed the cooperation of state officials before they could know whether Trident was state-approved. As we recognized in *Burlington*, such cooperation is unlikely in cases where the school officials disagree with the need for the private placement. 471 U.S., at 372, 105 S.Ct., at 2004.

III

The school district also claims that allowing reimbursement for parents such as Shannon's puts an unreasonable burden on financially strapped local educational authorities. The school district argues that requiring parents to choose a state-approved private school if they want reimbursement is the only meaningful way to allow States to control costs; otherwise States will have to reimburse dissatisfied parents for any private school that provides an education that is proper under the Act, no matter how expensive it may be.

There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

[6] Moreover, parents who, like Shannon's, "unilaterally change their child's placement during the pendency of review proceedings, without the consent of the state or local school officials, do so at their own financial risk." *Burlington, supra*, at 373–374, 105 S.Ct., at 2004–2005. They are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA, and that the private school placement was proper under the Act.

[7] Finally, we note that once a court holds that the public placement violated IDEA, it is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Under this provision, "equitable considerations are relevant in fashioning relief," *Burlington*, 471 U.S., at 374, 105 S.Ct., at 2005, and the court enjoys "broad discretion" in so doing, *id.*, at 369, 105 S.Ct., at 2002. Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable.

Accordingly, we affirm the judgment of the Court of Appeals.

So ordered.

Teresa HARRIS, Petitioner,

v.

FORKLIFT SYSTEMS, INC.

No. 92-1168.

Argued Oct. 13, 1993.

Decided Nov. 9, 1993.

Former employee filed Title VII action, claiming that the conduct of the employer's president amounted to "abusive work environment" harassment on the basis of gender. The United States District Court for the Middle District of Tennessee dismissed the action pursuant to a report and recommendation of a United States Magistrate Judge. Former employee appealed. The Court of Appeals for the Sixth Circuit, 976 F.2d 733, affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) to be actionable under Title VII as "abusive work environment" harassment, the conduct need not seriously affect an employee's psychological well-being or lead the employee to suffer injury; (2) the *Meritor* standard requires an objectively hostile or abusive environment as well as the victim's objective perception that the environment is abusive; and (3) whether an environment is sufficiently hostile or abusive to be actionable requires consideration of all the circumstances, not any one factor.

Judgment of Court of Appeals reversed and case remanded.

Justices Scalia and Ginsburg filed concurring opinions.

1. Civil Rights ⇐141, 145, 167

Title VII's prohibition against discrimination with respect to "terms, conditions, or privileges of employment" based on race, color, religion, sex, or national origin is not limited to economic or tangible discrimination, but extends to entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in discriminatorily hostile or a environment. Civil Rights Act of §§ 701 et seq., 703(a)(1), as amende U.S.C.A. §§ 2000e et seq., 2000e–2(a)

See publication Word and Phra for other judicial construc ions and d initions.

2. Civil Rights ⇐145

Title VII is violated when workpl permeated with discriminatory intimid ridicule, and insult that is sufficiently s or pervasive to alter conditions of vi employment and create abusive workin vironment. Civil Rights Act of 1964, § et seq., 703(a)(1), as amended, 42 U.S §§ 2000e et seq., 2000e–2(a)(1).

3. Civil Rights ⇐145

Meritor standard for determ whether conduct is actionable under VII as "abusive work environment" ha ment requires objectively hostile or ab environment—one that reasonable p would find hostile or abusive—as we victim's subjective perception that en ment is abusive; conduct that is not s or pervasive enough to create objec hostile or abusive work environment i yond Title VII's purview, as is conduct victim does not subjectively perceive as sive. Civil Rights Act of 1964, §§ 7 seq., 703(a)(1), as amended, 42 U.S §§ 2000e et seq., 2000e–2(a)(1).

4. Civil Rights ⇐145

Discriminatorily abusive work en ment, even one that does not seriously employees' psychological well-being, ca often will detract from employees' job p mance to such a degree as to be actio under Title VII, even before harassing duct leads to nervous breakdown. Rights Act of 1964, §§ 701 et seq., 703 as amended, 42 U.S.C.A. §§ 2000e et 2000e–2(a)(1).

5. Civil Rights ⇐145, 167

Even without regard to tangible e of objectively hostile or abusive work ronment, very fact that discriminatory duct is so severe or pervasive that it cr

work environment abusive to employees on basis of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality. Civil Rights Act of 1964, §§ 701 et seq., 703(a)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(a)(1).

6. Civil Rights ⇐145, 167

To be actionable under Title VII as "abusive work environment" harassment, conduct need not seriously affect employee's psychological well-being or lead employee to suffer injury, so long as environment would reasonably be perceived, and is perceived, as hostile or abusive; focusing on employee's psychological well-being or whether employee suffered injury could unnecessarily focus fact finder's attention on concrete psychological harm, which Title VII does not require. Civil Rights Act of 1964, §§ 701 et seq., 703(a)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

7. Civil Rights ⇐145, 167

Whether work environment is "hostile" or "abusive" in violation of Title VII can be determined looking only at all circumstances, which may include frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating, or merely offensive, and whether it unreasonably interferes with employee's work performance; effect on employee's psychological well-being is relevant in determining whether victim actually found environment abusive, but that factor, like any other relevant factor, may be taken into account and no single factor is required. Civil Rights Act of 1964, §§ 701 et seq., 703(a)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(a)(1).

8. Federal Courts ⇐462

Reversal and remand was necessary for further proceedings on whether work environment was sufficiently intimidating or abusive to female employee that it would have been actionable under Title VII; district court had erroneously required, in close case, that conduct must have seriously affected employee's psychological well-being or led her to suffer injury. Civil Rights Act of 1964, §§ 701 et seq., 703(a)(1), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-2(a)(1).

*Syllabus**

Petitioner Harris sued her former employer, respondent Forklift Systems, Inc., claiming that the conduct of Forklift's president toward her constituted "abusive work environment" harassment because of her gender in violation of Title VII of the Civil Rights Act of 1964. Declaring this to be "a close case," the District Court found, among other things, that Forklift's president often insulted Harris because of her gender and often made her the target of unwanted sexual innuendos. However, the court concluded that the comments in question did not create an abusive environment because they were not "so severe as to . . . seriously affect [Harris'] psychological well-being" or lead her to "suffe[r] injury." The Court of Appeals affirmed.

Held: To be actionable as "abusive work environment" harassment, conduct need not "seriously affect [an employee's] psychological well-being" or lead the plaintiff to "suffe[r] injury." Pp. 370-371.

(a) The applicable standard, here reaffirmed, is stated in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49: Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment, *id.*, at 64, 67, 106 S.Ct., at 2404, 2405. This standard requires an objectively hostile or abusive environment—one that a reasonable person would find hostile or abusive—as well as the victim's subjective perception that the environment is abusive. Pp. 370-371.

See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

(b) Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances, which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is relevant in determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required. P. 371.

(c) Reversal and remand are required because the District Court's erroneous application of the incorrect legal standard may well have influenced its ultimate conclusion that the work environment was not intimidating or abusive to Harris, especially given that the court found this to be a "close case." P. 371.

976 F.2d 733 (CA6 1992), reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. SCALIA, J., and GINSBURG, J., filed concurring opinions.

Irwin Venick, Nashville, TN, for petitioner.

Jeffrey P. Minear, Washington, DC, for U.S. as *amicus curiae*, by special leave of the Court.

Stanley M. Chernau, Nashville, TN, for respondent.

For U.S. Supreme Court briefs, see:

1993 WL 302216 (Pet. Brief).

1993 WL 302223 (Resp. Brief).

Justice O'CONNOR delivered the opinion of the Court.

In this case we consider the definition of a discriminatorily "abusive work environment" (also known as a "hostile work environment") under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1988 ed., Supp. III).

I

Teresa Harris worked as a mana Forklift Systems, Inc., an equipment company, from April 1985 until Octobe Charles Hardy was Forklift's preside

The Magistrate found that, throu Harris' time at Forklift, Hardy often in her because of her gender and often her the target of unwanted sexual innu Hardy told Harris on several occasio the presence of other employees, "Yo woman, what do you know" and "We n man as the rental manager"; at least he told her she was "a dumb ass wo App. to Pet. for Cert. A-13. Again in of others, he suggested that the two of "go to the Holiday Inn to negotiate [H raise." *Id.*, at A-14. Hardy occasi asked Harris and other female employ get coins from his front pants pocket. He threw objects on the ground in fr Harris and other women, and asked th pick the objects up. *Id.*, at A-14 to He made sexual innuendos about Harri other women's clothing. *Id.*, at A-15.

In mid-August 1987, Harris complai Hardy about his conduct. Hardy said h surprised that Harris was offended, cl he was only joking, and apologized. A-16. He also promised he would sto based on this assurance Harris stayed job. *Ibid.* But in early September, h began anew: While Harris was arran deal with one of Forklift's custome asked her, again in front of other empl "What did you do, promise the guy [sex] Saturday night?". *Id.*, at A-17 October 1, Harris collected her paych quit.

Harris then sued Forklift, claimin Hardy's conduct had created an abusiv environment for her because of her g The United States District Court f Middle District of Tennessee, adoptin report and recommendatio of the M trate, found this to be "a close case," A-31, but held that Hardy's conduct d create an abusive environment. The found that some of Hardy's comment

fended [Harris], and would offend the reasonable woman," *id.*, at A-33, but that they were not

"so severe as to be expected to seriously affect [Harris'] psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

"Neither do I believe that [Harris] was subjectively so offended that she suffered injury. . . . Although Hardy may at times have genuinely offended [Harris], I do not believe that he created a working environment so poisoned as to be intimidating or abusive to [Harris]." *Id.*, at A-34 to A-35.

In focusing on the employee's psychological well-being, the District Court was following Circuit precedent. See *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (CA6 1986), cert. denied, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987). The United States Court of Appeals for the Sixth Circuit affirmed in a brief unpublished decision, 976 F.2d 733. (CA6 1992)

We granted certiorari, 507 U.S. ——, 113 S.Ct. 1382, 122 L.Ed.2d 758 (1993), to resolve a conflict among the Circuits on whether conduct, to be actionable as "abusive work environment" harassment (no *quid pro quo* harassment issue is present here), must "seriously affect [an employee's] psychological well-being" or lead the plaintiff to "suffe[r] injury." Compare *Rabidue* (requiring serious effect on psychological well-being); *Vance v. Southern Bell Telephone & Telegraph Co.*, 863 F.2d 1503, 1510 (CA11 1989) (same); and *Downes v. FAA*, 775 F.2d 288, 292 (CA Fed.1985) (same), with *Ellison v. Brady*, 924 F.2d 872, 877-878 (CA9 1991) (rejecting such a requirement).

II

[1, 2] Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). As we made clear in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), this language "is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment. *Id.*, at 64, 106 S.Ct., at 2404, quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1374, 55 L.Ed.2d 657 (1978) (some internal quotation marks omitted). When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," 477 U.S., at 65, 106 S.Ct., at 2405, that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," *id.*, at 67, 106 S.Ct., at 2405 (internal brackets and quotation marks omitted), Title VII is violated.

[3] This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, "mere utterance of an . . . epithet which engenders offensive feelings in a employee," *ibid.* (internal quotation marks omitted) does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

[4, 5] But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work

environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality. The appalling conduct alleged in *Meritor*, and the reference in that case to environments " 'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers,' " *supra*, at 66, 106 S.Ct., at 2405, quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (CA5 1971), cert. denied, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.

[6] We therefore believe the District Court erred in relying on whether the conduct "seriously affect[ed] plaintiff's psychological well-being" or led her to "suffe[r] injury." Such an inquiry may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, *Meritor, supra*, 477 U.S., at 67, 106 S.Ct., at 2405, there is no need for it also to be psychologically injurious.

[7] This is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises, nor specifically address the EEOC's new regulations on this subject, see 58 Fed. Reg. 51266 (1993) (proposed 29 CFR §§ 1609.1, 1609.2); see also 29 CFR § 1604.11 (1993). But we can say that whether an environment is "hostile" or "abusive" can be determined only by lo the circumstances. These may i frequency of the discriminatory c severity; whether it is physically t or humiliating, or a mere offensive and whether it unreasonably inte an employee's work performance. on the employee's psychological w of course, relevant to determinin the plaintiff actually found the e abusive. But while psychological any other relevant factor, may be account, no single factor is requi

III

[8] Forklift, while conceding quirement that the conduct serio psychological well-being is unfound that the District Court nonetheles applied the *Meritor* standard. W Though the District Court did co the work environment was not "in or abusive to [Harris]," App. to Pe A-35, it did so only after findin conduct was not "so severe as to b to seriously affect plaintiff's ps well-being," *id.*, at A-34, and that not "subjectively so offended th fered injury," *ibid.* The District plication of these incorrect stan well have influenced its ultimate especially given that the court fo be a "close case," *id.*, at A-31.

We therefore reverse the judgn Court of Appeals, and remand th further proceedings consistent wit ion.

So ordered.

Justice SCALIA, concurring.

Meritor Savings Bank v. Vinso 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 that Title VII prohibits sexual that takes the form of a hostile wo ment. The Court stated that sex ment is actionable if it is "sufficie

The United States Law Week

Extra Edition No. 1
Supreme Court Opinions

April 26, 1994 • THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C. • Volume 62, No. 40

EXECUTIVE OFFICE OF THE PRESIDENT
MAY 2 1994

OPINIONS ANNOUNCED APRIL 26, 1994

The Supreme Court decided:

CIVIL RIGHTS—Practice and Procedure

Section 101 of 1991 Civil Rights Act, which defines "make and enforce contracts" phrase in 42 USC 1981 to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," does not apply to cases that arose before its enactment. (*Rivers v. Roadway Express Inc.*, No. 92-938) ..... Page 4271

CRIMINAL LAW AND PROCEDURE—Interrogation

Interrogator's undisclosed and uncommunicated view that person being interrogated is not suspect has no bearing on whether person is "in custody" and thus entitled to warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966). (*Stansbury v. California*, No. 93-5770) ..... Page 4279

EMPLOYMENT DISCRIMINATION—Practice and Procedure

Section 102 of 1991 Civil Rights Act, which authorizes recovery of compensatory and punitive damages in actions under Title VII of 1964 Civil Rights Act, and which authorizes jury trials when such damages are claimed, does not apply to cases that arose before its enactment; federal statutes affecting substantive rights, liabilities, or duties presumptively do not apply to conduct occurring before their enactment absent clear congressional intent to contrary. (*Landgraf v. USI Film Products*, No. 92-757) ..... Page 4255

Full Text of Opinions

No. 92–757

BARBARA LANDGRAF, PETITIONER *v.* USI FILM PRODUCTS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Syllabus

No. 92–757. Argued October 13, 1993—Decided April 26, 1994

After a bench trial in petitioner Landgraf's suit under Title VII of the Civil Rights Act of 1964 (Title VII), the District Court found that she had been sexually harassed by a co-worker at respondent USI Film Products, but that the harassment was not so severe as to justify her decision to resign her position. Because the court found that her employment was not terminated in violation of Title VII, she was not entitled to equitable relief, and because Title VII did not then authorize any other form of relief, the court dismissed her complaint. While her appeal was pending, the Civil Rights Act of 1991 (1991 Act or Act) became law, §102 of which includes provisions that create a right to recover compensatory and punitive damages for intentional discrimination violative of Title VII (hereinafter §102(a)), and authorize any party to demand a jury trial if such damages are claimed (hereinafter §102(c)). In affirming, the Court of Appeals rejected Landgraf's argument that her case should be remanded for a jury trial on damages pursuant to §102.

Held: Section 102 does not apply to a Title VII case that was pending on appeal when the 1991 Act was enacted.

(a) Since the President vetoed a 1990 version of the Act on the ground, among others, of perceived unfairness in the bill's elaborate retroactivity provision, it is likely that the omission of comparable language in the 1991 Act was not congressional oversight or unawareness, but was a compromise that made the Act possible. That omission is not dispositive here because it does not establish precisely where the compromise was struck. For example, a decision to reach only cases still pending, and not those already finally decided, might explain Congress' failure to provide in the 1991 Act, as it had in the 1990 bill, that certain sections would apply to proceedings pending on specified preenactment dates.

(b) The text of the 1991 Act does not evince any clear expression of congressional intent as to whether §102 applies to cases arising before the Act's passage. The provisions on which Landgraf relies for such an expression—§402(a), which states that, "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment," and §§402(b) and 109(c), which provide for prospective application in limited contexts—cannot bear the heavy weight she would place upon them by negative inference: Her statutory argument would require the Court to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message. Moreover, the relevant legislative history reveals little to suggest that Members of Congress believed that an agreement had been tacitly reached on the controversial retroactivity issue or that *Congress* understood or intended the interplay of the foregoing sections to have the decisive effect Landgraf assigns them. Instead, the history conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct.

(c) In order to resolve the question left open by the 1991 Act, this Court must focus on the apparent tension between two seemingly contradictory canons for interpreting statutes that do not specify their temporal reach: the rule that a court must apply the law in effect at the time it renders its decision, see *Bradley* v. *Richmond*, 416 U. S. 696, 711, and the axiom that statutory retroactivity is not favored, see *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 208.

(d) The presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to

NOTICE: These opinions are subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released *** at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

Copyright © 1994 by The Bureau of National Affairs, Inc.
0148-8139/94/$0+$1.00

conform their conduct accordingly. It is deeply rooted in this Court's jurisprudence and finds expression in several constitutional provisions, including, in the criminal context, the *Ex Post Facto* Clause. In the civil context, prospectivity remains the appropriate default rule unless Congress has made clear its intent to disrupt settled expectations.

(e) Thus, when a case implicates a federal statute enacted after the events giving rise to the suit, a court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, there is no need to resort to judicial default rules. Where the statute in question unambiguously applies to preenactment conduct, there is no conflict between the anti-retroactivity presumption and the principle that a court should apply the law in effect at the time of decision. Even absent specific legislative authorization, application of a new statute to cases arising before its enactment is unquestionably proper in many situations. However, where the new statute would have a genuinely retroactive effect—*i.e.*, where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed—the traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result. *Bradley* did not displace the traditional presumption.

(f) Application of the foregoing principles demonstrates that, absent guiding instructions from Congress, §102 is not the type of provision that should govern cases arising before its enactment, but is instead subject to the presumption against statutory retroactivity. Section 102(b)(1), which authorizes punitive damages in certain circumstances, is clearly subject to the presumption, since the very labels given "punitive" or "exemplary" damages, as well as the rationales supporting them, demonstrate that they share key characteristics of criminal sanctions, and therefore would raise a serious question under the *Ex Post Facto* Clause if retroactively imposed. While the §102(a)(1) provision authorizing compensatory damages is not so easily classified, it is also subject to the presumption, since it confers a new right to monetary relief on persons like Landgraf, who were victims of a hostile work environment but were not constructively discharged, and substantially increases the liability of their employers for the harms they caused, and thus would operate "retrospectively" if applied to preenactment conduct. Although a jury trial right is ordinarily a procedural change of the sort that would govern in trials conducted after its effective date regardless of when the underlying conduct occurred, the jury trial option set out in §102(c)(1) must fall with the attached damages provisions because §102(c) makes a jury trial available only "[i]f a complaining party seeks compensatory or punitive damages."

968 F. 2d 427, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion.

JUSTICE STEVENS delivered the opinion of the Court.

The Civil Rights Act of 1991 (1991 Act or Act) creates a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964. See Rev. Stat. §1977A(a), 42 U. S. C. §1981a(a), as added by §102 of the 1991 Act, Pub. L. 102-166, 105 Stat. 1071. The Act further provides that any party may demand a trial by jury if such damages are sought.[1] We granted certiorari to decide whether these provisions apply to a Title VII case that was pending on appeal when the statute was enacted. We hold that they do not.

I

From September 4, 1984, through January 17, 1986, petitioner Barbara Landgraf was employed in the USI Film Products (USI) plant in Tyler, Texas. She worked the 11 p.m. to 7 a.m. shift operating a machine that produced plastic bags. A fellow employee named John Williams repeatedly harassed her with inappropriate remarks and physical contact. Petitioner's complaints to her immediate supervisor brought her no relief, but when she reported the incidents to the personnel manager, he conducted an investigation, reprimanded Williams, and transferred him to another department. Four days later petitioner quit her job.

Petitioner filed a timely charge with the Equal Employment Opportunity Commission (EEOC or Commission). The Commission determined that petitioner had likely been the victim of sexual harassment creating a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*, but concluded that her employer had adequately remedied the violation. Accordingly, the Commission dismissed the charge and issued a notice of right to sue.

On July 21, 1989, petitioner commenced this action against USI, its corporate owner, and that company's successor-in-interest.[2] After a bench trial, the District Court found that Williams had sexually harassed petitioner causing her to suffer mental anguish. However, the court concluded that she had not been constructively discharged. The court said:

> "Although the harassment was serious enough to establish that a hostile work environment existed for Landgraf, it was not so severe that a reasonable person would have felt compelled to resign. This is particularly true in light of the fact that at the time Landgraf resigned from her job, USI had taken steps . . . to eliminate the hostile working environment arising from the sexual harassment. Landgraf voluntarily resigned from her employment with USI for reasons unrelated to the sexual harassment in question." App. to Pet. for Cert. B-3-4.

Because the court found that petitioner's employment was not terminated in violation of Title VII, she was not entitled to equitable relief, and because Title VII did not then authorize any other form of relief, the court dismissed her complaint.

On November 21, 1991, while petitioner's appeal was pending, the President signed into law the Civil Rights Act of 1991. The Court of Appeals rejected petitioner's argument that her case should be remanded for a jury trial on damages pursuant to the 1991 Act. Its decision not to remand rested on the premise that "a court must 'apply the law in effect at the time it renders its decision, unless doing so would result in manifest

[1] See Rev. Stat. §1977A(c), 42 U. S. C. §1981a(c), as added by §102 of the 1991 Act. For simplicity, and in conformity with the practice of the parties, we will refer to the damages and jury trial provisions as §§ 102(a) and (c), respectively.

[2] Respondent Quantum Chemical Corporation owned the USI plant when petitioner worked there. Respondent Bonar Packaging, Inc., subsequently purchased the operation.

Published each Tuesday except first Tuesday in September, last Tuesday in July, and last Tuesday in December by The Bureau of National Affairs, Inc., 1231 Twenty-Fifth Street, N.W., Washington, D.C. 20037. Subscription rates (payable in advance) $750.00 first year and $709.00 per year thereafter. Second class postage paid at Washington, D.C., and at additional mailing offices.

injustice or there is statutory direction or legislative history to the contrary.' *Bradley* [v. *Richmond School Bd.*, 416 U. S. 696, 711 (1974)]." 968 F. 2d 427, 432 (CA 5 1992). Commenting first on the provision for a jury trial in §102(c), the court stated that requiring the defendant "to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. We apply procedural rules to pending cases, but we do not invalidate procedures followed before the new rule was adopted." 968 F. 2d, at 432–433. The court then characterized the provision for compensatory and punitive damages in §102 as "a seachange in employer liability for Title VII violations" and concluded that it would be unjust to apply this kind of additional and unforeseeable obligation to conduct occurring before the effective date of the Act. *Ibid.* Finding no clear error in the District Court's factual findings, the Court of Appeals affirmed the judgment for respondents.

We granted certiorari and set the case for argument with *Rivers* v. *Roadway Express, Inc.*, *post*, at ___. Our order limited argument to the question whether §102 of the 1991 Act applies to cases pending when it became law. 507 U. S. ___ (1993). Accordingly, for purposes of our decision, we assume that the District Court and the Court of Appeals properly applied the law in effect at the time of the discriminatory conduct and that the relevant findings of fact were correct. We therefore assume that petitioner was the victim of sexual harassment violative of Title VII, but that the law did not then authorize any recovery of damages even though she was injured. We also assume, *arguendo*, that if the same conduct were to occur today, petitioner would be entitled to a jury trial and that the jury might find that she was constructively discharged, or that her mental anguish or other injuries would support an award of damages against her former employer. Thus, the controlling question is whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992.

II

Petitioner's primary submission is that the text of the 1991 Act requires that it be applied to cases pending on its enactment. Her argument, if accepted, would make the entire Act (with two narrow exceptions) applicable to conduct that occurred, and to cases that were filed, before the Act's effective date. Although only §102 is at issue in this case, we therefore preface our analysis with a brief description of the scope of the 1991 Act.

The Civil Rights Act of 1991 is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964. Section 3(4) expressly identifies as one of the Act's purposes "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." That section, as well as a specific finding in §2(2), identifies *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), as a decision that gave rise to special concerns.[3] Section 105 of the Act, entitled "Burden of Proof in Disparate Impact Cases," is a direct response to *Wards Cove*.

Other sections of the Act were obviously drafted with "recent decisions of the Supreme Court" in mind. Thus, §101 (which is at issue in *Rivers*, *post*, at ___) amended the 1866 Civil Rights Act's prohibition of racial discrimination in the "mak[ing] and enforce[ment] [of] contracts," 42 U. S. C. §1981 (1988 ed., Supp. III), in response to *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989); §107 responds to *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989), by setting forth standards applicable in "mixed motive" cases; §108 responds to *Martin* v. *Wilks*, 490 U. S. 755 (1989), by prohibiting certain challenges to employment practices implementing consent decrees; §109 responds to *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244 (1991), by redefining the term "employee" as used in Title VII to include certain United States citizens working in foreign countries for United States employers; §112 responds to *Lorance* v. *AT&T Technologies, Inc.*, 490 U. S. 900 (1989), by expanding employees' rights to challenge discriminatory seniority systems; §113 responds to *West Virginia Univ. Hospitals, Inc.* v. *Casey*, 499 U. S. 83 (1991), by providing that an award of attorney's fees may include expert fees; and §114 responds to *Library of Congress* v. *Shaw*, 478 U. S. 310 (1986), by allowing interest on judgments against the United States.

A number of important provisions in the Act, however, were not responses to Supreme Court decisions. For example, §106 enacts a new prohibition against adjusting test scores "on the basis of race, color, religion, sex, or national origin"; §117 extends the coverage of Title VII to include the House of Representatives and certain employees of the Legislative Branch; and §§301–325 establish special procedures to protect Senate employees from discrimination. Among the provisions that did not directly respond to any Supreme Court decision is the one at issue in this case, §102.

Entitled "Damages in Cases of Intentional Discrimination," §102 provides in relevant part:

> "(a) Right of Recovery.—
>
> "(1) Civil Rights.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U. S. C. 2000e–5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U. S. C. 2000e–2 or 2000e–3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U. S. C. 1981), the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.
>
> "(c) Jury Trial.—If a complaining party seeks compensatory or punitive damages under this section—
>
> "(1) any party may demand a trial by jury."

Before the enactment of the 1991 Act, Title VII afforded only "equitable" remedies. The primary form of

[3] Section 2(2) finds that the *Wards Cove* decision "has weakened the scope and effectiveness of Federal civil rights protections," and §3(2) expresses Congress' intent "to codify" certain concepts enunciated in "Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U. S. 642 (1989)." We take note of the express references to that case because it is the focus of §402(b), on which petitioner places particular reliance. See *infra*, at 12–18.

monetary relief available was backpay.[4] Title VII's back pay remedy,[5] modeled on that of the National Labor Relations Act, 29 U. S. C. §160(c), is a "make-whole" remedy that resembles compensatory damages in some respects. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418–422 (1975). However, the new compensatory damages provision of the 1991 Act is "in addition to," and does not replace or duplicate, the backpay remedy allowed under prior law. Indeed, to prevent double recovery, the 1991 Act provides that compensatory damages "shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." §102(b)(2).

Section 102 significantly expands the monetary relief potentially available to plaintiffs who would have been entitled to backpay under prior law. Before 1991, for example, monetary relief for a discriminatorily discharged employee generally included "only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits such as vacation pay and pension benefits." *United States* v. *Burke*, 504 U. S. ___, ___ (1992) (slip op., at 9–10). Under §102, however, a Title VII plaintiff who wins a backpay award may also seek compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." §102(b)(3). In addition, when it is shown that the employer acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights," §102(b)(1), a plaintiff may recover punitive damages.[6]

Section 102 also allows monetary relief for some forms of workplace discrimination that would not previously have justified *any* relief under Title VII. As this case illustrates, even if unlawful discrimination was proved, under prior law a Title VII plaintiff could not recover monetary relief unless the discrimination was also found to have some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensation, or termination. See *Burke*, *supra*, at ___ (slip op., at 10–11). ("[T]he circumscribed remedies available under Title VII [before the 1991 Act] stand in marked contrast not only to those available under traditional tort law, but under other federal anti-discrimination statutes, as well"). Section 102, however, allows a plaintiff to recover in circumstances in which there has been unlawful discrimination in the "terms, conditions, or privileges of employment," 42 U. S. C. §2000e–2(a)(1),[7] even though the discrimination did not involve a discharge or a loss of pay. In short, to further Title VII's "central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination," *Albemarle Paper Co.*, 422 U. S., at 421, §102 of the 1991 Act effects a major expansion in the relief available to victims of employment discrimination.

In 1990, a comprehensive civil rights bill passed both Houses of Congress. Although similar to the 1991 Act in many other respects, the 1990 bill differed in that it contained language expressly calling for application of many of its provisions, including the section providing for damages in cases of intentional employment discrimination, to cases arising before its (expected) enactment.[8] The President vetoed the 1990 legislation, however, citing the bill's "unfair retroactivity rules" as one reason for his disapproval.[9] Congress narrowly failed to

---

[4] We have not decided whether a plaintiff seeking backpay under Title VII is entitled to a jury trial. See, *e.g.*, *Lytle* v. *Household Mfg., Inc.*, 494 U. S. 545, 549 n. 1 (1990) (assuming without deciding no right to jury trial); *Teamsters* v. *Terry*, 494 U. S. 558, 572 (1990) (same). Because petitioner does not argue that she had a right to jury trial even under pre-1991 law, again we need not address this question.

[5] "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . . or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable . . . ." Civil Rights Act of 1964, §706(g), as amended, 42 U. S. C. § 2000e–5(g) (1988 ed., Supp. III).

[6] Section 102(b)(3) imposes limits, varying with the size of the employer, on the amount of compensatory and punitive damages that may be awarded to an individual plaintiff. Thus, the sum of such damages awarded a plaintiff may not exceed $50,000 for employers with between 14 and 100 employees; $100,000 for employers with between 101 and 200 employees; $200,000 for employers with between 200 and 500 employees; and $300,000 for employers with more than 500 employees.

[7] See *Harris* v. *Forklift Systems, Inc.*, 510 U. S. ___, ___ (1993) (slip op., at 3) (discrimination in "terms, conditions, or privileges of employment" actionable under Title VII "is not limited to 'economic' or 'tangible' discrimination") (citations and internal quotation marks omitted).

[8] The relevant section of the Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess. (1990), provided:

"SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

"(a) APPLICATION OF AMENDMENTS.—The amendments made by—

"(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989 [the date of *Wards Cove Packing Co.* v. *Antonio*, 490 U. S. 642];

"(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989 [the date of *Price Waterhouse* v. *Hopkins*, 490 U. S. 228];

"(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989 [the date of *Martin* v. *Wilks*, 490 U. S. 755];

"(4) sections 7(a)(1), 7(a)(3) and 7(a)(4), 7(b), 8 [providing for compensatory and punitive damages for intentional discrimination], 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

"(5) section 7(a)(2) shall apply to all proceedings pending on or after June 12, 1989 [the date of *Lorance* v. *AT&T Technologies, Inc.*, 490 U. S. 900]; and

"(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989 [the date of *Patterson*, v. *McLean Credit Union*, 491 U. S. 164].

"(b) TRANSITION RULES.—

"(1) IN GENERAL.—Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

"(3) FINAL JUDGMENTS.—Pursuant to paragraphs (1) and (2), any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and vested, where the time for seeking further judicial review of such judgment has otherwise expired pursuant to title 28 of the United States Code, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure, shall be vacated in whole or in part if justice requires pursuant to rule 60(b)(6) of the Federal Rules of Civil Procedure or other appropriate authority, and consistent with the constitutional requirements of due process of law."

[9] See President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632–1634 (Oct. 22, 1990), reprinted in 136 Cong. Rec. S16418, 16419 (Oct. 22, 1990). The President's veto message referred to the bill's "retroactivity" only briefly; the Attorney General's Memoran-

override the veto. See 136 Cong. Rec. S16589 (Oct. 24, 1990) (66–34 Senate vote in favor of override).

The absence of comparable language in the 1991 Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue. Rather, it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement *not* to include the kind of explicit retroactivity command found in the 1990 bill.

The omission of the elaborate retroactivity provision of the 1990 bill—which was by no means the only source of political controversy over that legislation—is not dispositive because it does not tell us precisely where the compromise was struck in the 1991 Act. The Legislature might, for example, have settled in 1991 on a less expansive form of retroactivity that, unlike the 1990 bill, did not reach cases already finally decided. See n. 8 *supra*. A decision to reach only cases still pending might explain Congress' failure to provide in the 1991 Act, as it had in 1990, that certain sections would apply to proceedings pending on specific preenactment dates. Our first question, then, is whether the statutory text on which petitioner relies manifests an intent that the 1991 Act should be applied to cases that arose and went to trial before its enactment.

III

Petitioner's textual argument relies on three provisions of the 1991 Act: §§402(a), 402(b), and 109(c). Section 402(a), the only provision of the Act that speaks directly to the question before us, states:

> "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."

That language does not, by itself, resolve the question before us. A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.[10] Petitioner does not argue otherwise. Rather, she contends that the introductory clause of §402(a) would be superfluous unless it refers to §§402(b) and 109(c), which provide for prospective application in limited contexts.

The parties agree that §402(b) was intended to exempt a single disparate impact lawsuit against the Wards Cove Packing Company. Section 402(b) provides:

> "(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983."

Section 109(c), part of the section extending Title VII to overseas employers, states:

> "(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act."

According to petitioner, these two subsections are the "other provisions" contemplated in the first clause of §402(a), and together create a strong negative inference that all sections of the Act not specifically declared prospective apply to pending cases that arose before November 21, 1991.

Before addressing the particulars of petitioner's argument, we observe that she places extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute. Applying the entire Act to cases arising from preenactment conduct would have important consequences, including the possibility that trials completed before its enactment would need to be retried and the possibility that employers would be liable for punitive damages for conduct antedating the Act's enactment. Purely prospective application, on the other hand, would prolong the life of a remedial scheme, and of judicial constructions of civil rights statutes, that Congress obviously found wanting. Given the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect.

Petitioner, however, invokes the canon that a court should give effect to every provision of a statute and thus avoid redundancy among different provisions. See, *e.g.*, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837, and n. 11 (1988). Unless the word "otherwise" in §402(a) refers to either §402(b) or §109(c), she contends, the first five words in §402(a) are entirely superfluous. Moreover, relying on the canon *"[e]xpressio unius est exclusio alterius,"* see *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 509 U. S. ___, ___ (1993) (slip op., at 5), petitioner argues that because Congress provided specifically for prospectivity in two places (§§109(c) and 402(b)), we should infer that it intended the opposite for the remainder of the statute.

Petitioner emphasizes that §402(a) begins: "Except as otherwise specifically provided." A scan of the statute for other "specific provisions" concerning effective dates

---

dum to which the President referred was no more expansive, and may be read to refer only to the bill's special provision for reopening final judgments, see n. 8, *supra*, rather than its provisions covering pending cases. See Memoradum of the Attorney General to the President (October 22, 1990) ("And Section 15 unfairly applies the changes in the law made by S. 2104 to *cases already decided*") (emphasis added). App. to Brief for Petitioner A–13.

[10] The history of prior amendments to Title VII suggests that the "effective-upon-enactment" formula would have been an especially inapt way to reach pending cases. When it amended Title VII in the Equal Employment Opportunity Act of 1972, Congress explicitly provided:

"The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." Pub. L. 92–261, §14, 86 Stat. 113. In contrast, in amending Title VII to bar discrimination on the basis of pregnancy in 1978, Congress provided:

"Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment." §2(a), 92 Stat. 2076.

The only Courts of Appeals to consider whether the 1978 amendments applied to pending cases concluded that they did not. See *Schwabenbauer* v. *Board of Ed. of School Dist. of Olean*, 667 F. 2d 305, 310 n. 7 (CA2 1981); *Condit* v. *United Air Lines, Inc.*, 631 F. 2d 1136, 1139–1140 (CA4 1980). See also *Jensen* v. *Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 410 (CA5 1980) (Age Discrimination in Employment Act amendments designated to "take effect on the date of enactment of this Act" inapplicable to case arising before enactment); *Sikora* v. *American Can Co.*, 622 F. 2d 1116, 1119–1124 (CA3 1980) (same). If we assume that Congress was familiar with those decisions, cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 698–699 (1979), its choice of language in §402(a) would imply nonretroactivity.

reveals that §§402(b) and 109(c) are the most likely candidates. Since those provisions decree prospectivity, and since §402(a) tells us that the specific provisions are *exceptions*, §402(b) should be considered as prescribing a general rule of retroactivity. Petitioner's argument has some force, but we find it most unlikely that Congress intended the introductory clause to carry the critically important meaning petitioner assigns it. Had Congress wished §402(a) to have such a determinate meaning, it surely would have used language comparable to its reference to the predecessor Title VII damages provisions in the 1990 legislation: that the new provisions "shall apply to all proceedings pending on or commenced after the date of enactment of this Act." S. 2104, 101st Cong., 1st Sess. §15(a)(4) (1990).

It is entirely possible that Congress inserted the "otherwise specifically provided" language not because it understood the "takes effect" clause to establish a rule of retroactivity to which only two "other specific provisions" would be exceptions, but instead to assure that any specific timing provisions in the Act would prevail over the general "take effect on enactment" command. The drafters of a complicated piece of legislation containing more than 50 separate sections may well have inserted the "except as otherwise provided" language merely to avoid the risk of an inadvertent conflict in the statute.[11] If the introductory clause of §402(a) was intended to refer specifically to §§402(b), 109(c), or both, it is difficult to understand why the drafters chose the word "otherwise" rather than either or both of the appropriate section numbers.

We are also unpersuaded by petitioner's argument that both §§402(b) and 109(c) merely duplicate the "take effect upon enactment" command of §402(a) unless all other provisions, including the damages provisions of §102, apply to pending cases. That argument depends on the assumption that all those other provisions must be treated uniformly for purposes of their application to pending cases based on preenactment conduct. That thesis, however, is by no means an inevitable one. It is entirely possible—indeed, highly probable—that, because it was unable to resolve the retroactivity issue with the clarity of the 1990 legislation, Congress viewed the matter as an open issue to be resolved by the courts. Our precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance, and suggested that some provisions might apply to cases arising before enactment while others might not.[12] Compare *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204 (1988) with *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974). See also *Bennett* v. *New Jersey*, 470 U. S. 632 (1985). The only matters Congress did *not* leave to the courts were set out with specificity in §§109(c) and 402(b). Congressional doubt concerning judicial retroactivity doctrine, coupled with the likelihood that the routine "take effect upon enactment" language would require courts to fall back upon that doctrine, provide a plausible explanation for both §§402(b) and 109(c) that makes neither provision redundant.

Turning to the text of §402(b), it seems unlikely that the introductory phrase ("Notwithstanding any other provision of this Act") was meant to refer to the immediately preceding subsection. Since petitioner does not contend that any *other* provision speaks to the general effective date issue, the logic of her argument requires us to interpret that phrase to mean nothing more than "Notwithstanding §402(a)." Petitioner's textual argument assumes that the drafters selected the indefinite word "otherwise" in §402(a) to identify two specific subsections and the even more indefinite term "any other provision" in §402(b) to refer to nothing more than §402(b)'s next-door neighbor—§402(a). Here again, petitioner's statutory argument would require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message concerning the Act's effect on pending cases.

The relevant legislative history of the 1991 Act reinforces our conclusion that §§402(a), 109(c) and 402(b) cannot bear the weight petitioner places upon them. The 1991 bill as originally introduced in the House contained explicit retroactivity provisions similar to those found in the 1990 bill.[13] However, the Senate substitute that was agreed upon omitted those explicit retroactivity provisions.[14] The legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement.[15] The history reveals no evidence that Members believed that an agreement had been tacitly struck on the controversial retroactivity issue, and little to suggest that *Congress* understood or intended the interplay of §§402(a), 402(b) and 109(c) to have the

[11] There is some evidence that the drafters of the 1991 Act did not devote particular attention to the interplay of the Act's "effective date" provisions. Section 110, which directs the EEOC to establish a "Technical Assistance Training Institute" to assist employers in complying with antidiscrimination laws and regulations, contains a subsection providing that it "shall take effect on the date of the enactment of this Act." §110(b). That provision and §402(a) are unavoidably redundant.

[12] This point also diminishes the force of petitioner's "*expressio unius*" argument. Once one abandons the unsupported assumption that Congress expected that all of the Act's provisions would be treated alike, and takes account of uncertainty about the applicable default rule, §§109(c) and 402(b) do not carry the negative implication petitioner draws from them. We do not read either provision as doing anything more than definitively rejecting retroactivity with respect to the specific matters covered by its plain language.

[13] See, *e.g.*, H. R. 1, 102d Cong., 1st Sess. §113 (1991), reprinted in 137 Cong. Rec. H3924–H3925 (Jan. 3, 1991). The prospectivity proviso to the section extending Title VII to overseas employers was first added to legislation that generally was to apply to pending cases. See H. R. 1, 102d Cong., 1st Sess. §119(c) (1991), reprinted in 137 Cong. Rec. H3925–H3926 (June 5, 1991). Thus, at the time its language was introduced, the provision that became §109(c) was surely not redundant.

[14] On the other hand, two proposals that would have provided explicitly for prospectivity also foundered. See 137 Cong. Rec. S3021, S3023 (Mar. 12, 1991); 137 Cong. Rec. H3898, H3908 (June 4, 1991).

[15] For example, in an "interpretive memorandum" introduced on behalf of seven Republican sponsors of S. 1745, the bill that became the 1991 Act, Senator Danforth stated that "[t]he bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment *and shall not apply retroactively*." 137 Cong. Rec. S15485 (Oct. 30, 1991) (emphasis added). Senator Kennedy responded that it "will be up to the courts to determine the extent to which the bill will apply to cases and claims that were pending on the date of enactment." *Ibid.* (citing *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974)). The legislative history reveals other partisan statements on the proper meaning of Act's "effective date" provisions. Senator Danforth observed that such statements carry little weight as legislative history. As he put it, "a court would be well advised to take with a large grain of salt floor debate and statements placed in the CONGRESSIONAL RECORD which purport to create an interpretation for the legislation that is before us." 137 Cong. Rec. S15325 (Oct. 29, 1991).

decisive effect petitioner assigns them. Instead, the history of the 1991 Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct.

Although the passage of the 1990 bill may indicate that a majority of the 1991 Congress also favored retroactive application, even the will of the majority does not become law unless it follows the path charted in Article I, §7, cl. 2 of the Constitution. See *INS* v. *Chadha*, 462 U. S. 919, 946–951 (1983). In the absence of the kind of unambiguous directive found in §15 of the 1990 bill, we must look elsewhere for guidance on whether §102 applies to this case.

IV

It is not uncommon to find "apparent tension" between different canons of statutory construction. As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites.[16] In order to resolve the question left open by the 1991 Act, federal courts have labored to reconcile two seemingly contradictory statements found in our decisions concerning the effect of intervening changes in the law. Each statement is framed as a generally applicable rule for interpreting statutes that do not specify their temporal reach. The first is the rule that "a court is to apply the law in effect at the time it renders its decision," *Bradley*, 416 U. S., at 711. The second is the axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen*, 488 U. S., at 208.

We have previously noted the "apparent tension" between those expressions. See *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U. S. 827, 837 (1990); see also *Bennett*, 470 U. S., at 639–640. We found it unnecessary in *Kaiser* to resolve that seeming conflict "because under either view, where the congressional intent is clear, it governs," and the prejudgment interest statute at issue in that case evinced "clear congressional intent" that it was "not applicable to judgments entered before its effective date." 499 U. S., at 837–838. In the case before us today, however, we have concluded that the Civil Rights Act of 1991 does not evince any clear expression of intent on §102's application to cases arising before the Act's enactment. We must, therefore, focus on the apparent tension between the rules we have espoused for handling similar problems in the absence of an instruction from Congress.

We begin by noting that there is no tension between the *holdings* in *Bradley* and *Bowen*, both of which were unanimous decisions. Relying on another unanimous decision—*Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969)—we held in *Bradley* that a statute authorizing the award of attorney's fees to successful civil rights plaintiffs applied in a case that was pending on appeal at the time the statute was enacted. *Bowen* held that the Department of Health and Human Services lacked statutory authority to promulgate a rule requiring private hospitals to refund Medicare payments for services rendered before promulgation of the rule. Our opinion in *Bowen* did not purport to overrule *Bradley* or to limit its reach. In this light, we turn to the "apparent tension" between the two canons mindful of another canon of unquestionable vitality, the "maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821).

A

As JUSTICE SCALIA has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.[17] Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.[18] For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Kaiser*, 494 U. S., at 855 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation.[19] Article I, §10, cl. 1 prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I, §§9–10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. See, *e.g.*, *United States* v. *Brown*, 381 U. S. 437, 456–462 (1965). The Due Process Clause also protects the interests in fair notice and repose that may

[16] See Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed, 3 Vand. L. Rev. 395 (1950). Llewellan's article identified the apparent conflict between the canon that

"[a] statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect"

and the countervailing rule that

"[r]emedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction." *Id.*, at 402 (citations omitted).

[17] See *Kaiser Aluminum & Chemical Corp.* v. *Bonjourno*, 494 U. S. 827, 842–844, 855–856 (1990) (SCALIA, J., concurring). See also, *e.g.*, *Dash* v. *Van Kleeck*, 7 Johns. *477, *503 (N. Y. 1811) ("It is a principle of the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect") (Kent, C. J.); Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936).

[18] See *General Motors Corp.* v. *Romein*, 503 U. S. ___, ___ (1992) (slip op., at 9) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); Munzer, A Theory of Retroactive Legislation, 61 Texas L. Rev. 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance"). See also L. Fuller, The Morality of Law 51–62 (1964) (hereinafter Fuller).

[19] Article I contains two *Ex Post Facto* Clauses, one directed to Congress (§9, cl. 3), the other to the States (§10, cl. 1). We have construed the Clauses as applicable only to penal legislation. See *Calder* v. *Bull*, 3 Dall. 386, 390–391 (1798) (opinion of Chase, J.).

be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application. *Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1, 17 (1976).

These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. As Justice Marshall observed in his opinion for the Court in *Weaver v. Graham*, 450 U. S. 24 (1981), the *Ex Post Facto* Clause not only ensures that individuals have "fair warning" about the effect of criminal statutes, but also "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.*, at 28–29 (citations omitted).[20]

The Constitution's restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.[21] Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.

While statutory retroactivity has long been disfavored, deciding when a statute operates "retroactively" is not always a simple or mechanical task. Sitting on Circuit, Justice Story offered an influential definition in *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13,156) (CCDNH 1814), a case construing a provision of the New Hampshire Constitution that broadly prohibits "retrospective" laws both criminal and civil.[22] Justice Story first rejected the notion that the provision bars only explicitly retroactive legislation, *i.e.*, "statutes . . . enacted to take effect from a time anterior to their passage[.]" *Id.*, at 767. Such a construction, he concluded, would be "utterly subversive of all the objects" of the prohibition. *Ibid.* Instead, the ban on retrospective legislation embraced "all statutes, which, though operating only from their passage, affect vested rights and past transactions." *Ibid.* "Upon principle," Justice Story elaborated,

> "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ." *Ibid.* (citing *Calder v. Bull*, 3 Dall. 386 (1798) and *Dash v. Van Kleek*, 7 Johns. 477 (N. Y. 1811)).

Though the formulas have varied, similar functional conceptions of legislative "retroactivity" have found voice in this Court's decisions and elsewhere.[23]

A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, see *Republic Nat. Bank of Miami v. United States*, 506 U. S. ___, ___ (1992) (slip op., at 2) (THOMAS, J., concurring in part and concurring in judgment), or upsets expectations based in prior law.[24] Rather, the court must ask

---

[20] See *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 513–514 (1989) ("Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed") (STEVENS, J., concurring in part and concurring in judgment); *James v. United States*, 366 U. S. 213, 247, n. 3 (1961) (retroactive punitive measures may reflect "a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons").

James Madison argued that retroactive legislation also offered special opportunities for the powerful to obtain special and improper legislative benefits. According to Madison, "[b]ills of attainder, ex post facto laws, and laws impairing the obligation of contracts" were "contrary to the first principles of the social compact, and to every principle of sound legislation," in part because such measures invited the "influential" to "speculat[e] on public measures," to the detriment of the "more industrious and less informed part of the community." The Federalist No. 44, p. 301 (J. Cooke ed. 1961). See Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 693 (1960) (a retroactive statute "may be passed with an exact knowledge of who will benefit from it").

[21] In some cases, however, the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application. For if a challenged statute is to be given retroactive effect, the regulatory interest that supports prospective application will not necessarily also sustain its application to past events. See *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U. S. 717, 730 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1, 17 (1976). In this case the punitive damages provision may raise a question, but for present purposes we assume that Congress has ample power to provide for retroactive application of §102.

[22] Article 23 of the New Hampshire Bill of Rights provides: "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses." At issue in the *Society* case was a new statute that reversed a common-law rule by allowing certain wrongful possessors of land, upon being ejected by the rightful owner, to obtain compensation for improvements made on the land. Justice Story held that the new statute impaired the owner's rights and thus could not, consistently with Article 23, be applied to require compensation for improvements made before the statute's enactment. See 22 Fed. Cas., at 766–769.

[23] See, *e.g.*, *Miller v. Florida*, 482 U. S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'") (quoting *Weaver v. Graham*, 450 U. S. 24, 31 (1981)); *Union Pacific R. Co. v. Laramie Stock Yards*, 231 U. S. 190, 199 (1913) (retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"); *Sturges v. Carter*, 114 U. S. 511, 519 (1885) (a retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability"). See also Black's Law Dictionary 1184 (5th ed. 1979) (quoting Justice Story's definition from *Society*); 2 N. Singer, Sutherland on Statutory Construction §41.01, p. 337 (5th rev. ed. 1993) ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage . . . They describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act").

[24] Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards. See Fuller 60 ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever").

whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s]," see *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 476, 59 N. E. 1033, 1034 (1901) (Holmes, J.), and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent. Thus, in *United States* v. *Heth*, 3 Cranch 399 (1806), we refused to apply a federal statute reducing the commissions of customs collectors to collections commenced before the statute's enactment because the statute lacked "clear, strong, and imperative" language requiring retroactive application, *id.* at 413 (opinion of Paterson, J.). The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. Indeed, at common law a contrary rule applied to statutes that merely *removed* a burden on private rights by repealing a penal provision (whether criminal or civil); such repeals were understood to preclude punishment for acts antedating the repeal. See, *e.g.*, *United States v. Chambers*, 291 U. S. 217, 223–224 (1934); *Gulf, C. & S. F. R. Co.* v. *Dennis*, 224 U. S. 503, 506 (1912); *United States* v. *Tynen*, 11 Wall. 88, 93–95 (1871); *Norris* v. *Crocker*, 13 How. 429, 440–441 (1852); *Maryland* v. *Baltimore & Ohio R. Co.*, 3 How. 534, 552 (1845); *Yeaton* v. *United States*, 5 Cranch 281, 284 (1809). But see 1 U. S. C. §109 (repealing common-law rule).

The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.[25] The presumption has not, however, been limited to such cases. At issue in *Chew Heong* v. *United States*, 112 U. S. 536 (1884), for example, was a provision of the "Chinese Restriction Act" of 1882 barring Chinese laborers from reentering the United States without a certificate prepared when they exited this country. We held that the statute did not bar the reentry of a laborer who had left the United States before the certification requirement was promulgated. Justice Harlan's opinion for the Court observed that the law in effect before the 1882 enactment had accorded laborers a right to re-enter without a certificate, and invoked the "uniformly" accepted rule against "giv[ing] to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Id.*, at 559.

Our statement in *Bowen* that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result," 488 U. S., at 208, was in step with this long line of cases.[26] *Bowen* itself was a paradigmatic case of retroactivity in which a federal agency sought to recoup, under cost limit regulations issued in 1984, funds that had been paid to hospitals for services rendered earlier, see *id.*, at 207; our search for clear congressional intent authorizing retroactivity was consistent with the approach taken in decisions spanning two centuries.

The presumption against statutory retroactivity had special force in the era in which courts tended to view legislative interference with property and contract rights circumspectly. In this century, legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S., at 15–16; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 436–444 (1934). But while the *constitutional* impediments to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.

B

Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should "apply the law in effect at the time it renders its decision," *Bradley*, 416 U. S., at 711, even though that law was enacted after the events that gave rise to the suit. There is, of course, no conflict between that principle and a *presumption* against retroactivity when the statute in question is unambiguous. Chief Justice Marshall's opinion in *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801), illustrates this point. Because a treaty signed on September 30, 1800, while the case was

---

Moreover, a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." *Cox* v. *Hart*, 260 U. S. 427, 435 (1922). See *Reynolds* v. *United States*, 292 U. S. 443, 444–449 (1934); *Chicago & Alton R. Co.* v. *Tranbarger*, 238 U. S. 67, 73 (1915).

[25] See, *e.g.*, *United States v. Security Industrial Bank*, 459 U. S. 70, 79–82 (1982); *Clarid[illegible] Apartments Co.* v. *Commissioner*, 323 U. S. 141, 164 (1944); *United States* v. *St. Louis, S. F. & T. R. Co.*, 270 U. S. 1, 3 (1926); *Holt* v. *Henley*, 232 U. S. 637, 639 (1914); *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913); *Twenty Percent Cases*, 20 Wall. 179, 187 (1874); *Sohn* v. *Waterson*, 17 Wall. 596, 599 (1873); *Carroll* v. *Carroll's Lessee*, 16 How. 275 (1854). While the great majority of our decisions relying upon the anti-retroactivity presumption have involved intervening statutes burdening private parties, we have applied the presumption in cases involving new monetary obligations that fell only on the government. See *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160 (1928); *White* v. *United States*, 191 U. S. 545 (1903).

[26] See also, *e.g.*, *Greene* v. *United States*, 376 U. S. 149, 160 (1964); *White* v. *United States*, 191 U. S. 545 (1903); *United States* v. *Moore*, 95 U.S. 760, 762 (1878); *Murray* v. *Gibson*, 15 How. 421, 423 (1854); *Ladiga* v. *Roland*, 2 How. 581, 589 (1844).

pending on appeal, unambiguously provided for the restoration of captured property "not yet *definitively* condemned," *id.*, at 107 (emphasis in original), we reversed a decree entered on September 23, 1800, condemning a French vessel that had been seized in American waters. Our application of "the law in effect" at the time of our decision in *Schooner Peggy* was simply a response to the language of the statute. *Id.*, at 109.

Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Thus, in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921), we held that §20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates *in futuro*," and that the plaintiff had no "vested right" in the decree entered by the trial court. 257 U. S., at 201. See also, *e.g.*, *Hall* v. *Beals*, 396 U. S. 45, 48 (1969); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464 (1921).

We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. Thus, in *Bruner* v. *United States*, 343 U. S. 112, 116–117 (1952), relying on our "consisten[t]" practice, we ordered an action dismissed because the jurisdictional statute under which it had been (properly) filed was subsequently repealed.[27] See also *Hallowell* v. *Commons*, 239 U. S. 506, 508–509 (1916); *The Assessors* v. *Osbornes*, 9 Wall. 567, 575 (1870). Conversely, in *Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 607–608, n. 6 (1978), we held that, because a statute passed while the case was pending on appeal had eliminated the amount-in-controversy requirement for federal question cases, the fact that respondent had failed to allege $10,000 in controversy at the commencement of the action was "now of no moment." See also *United States* v. *Alabama*, 362 U. S. 602, 604 (1960) *(per curiam)*; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478 (1899). Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell*, 239 U. S., at 508. Present law normally governs in such situtations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties," *Republic Nat. Bank of Miami*, 506 U. S., at ___ (slip op., at 2) (THOMAS, J., concurring).

Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. For example, in *Ex parte Collett*, 337 U. S. 55, 71 (1949), we held that 28 U. S. C. §1404(a) governed the transfer of an action instituted prior to that statute's enactment. We noted the diminished reliance interests in matters of procedure. *Id.*, at 71.[28] Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive. Cf. *McBurney* v. *Carson*, 99 U. S. 567, 569 (1879).[29]

Petitioner relies principally upon *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1969), and *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969), in support of her argument that our ordinary interpretive rules support application of §102 to her case. In *Thorpe*, we held that an agency circular requiring a local housing authority to give notice of reasons and opportunity to respond before evicting a tenant was applicable to an eviction proceeding commenced before the regulation issued. *Thorpe* shares much with both the "procedural" and "prospective-relief" cases. See *supra*, at 29–31. Thus, we noted in *Thorpe* that new hearing procedures did not affect either party's obligations under the lease agreement between the housing authority and the petitioner, 393 U. S., at 279, and, because the tenant had "not yet vacated," we saw no significance in the fact that the housing authority had "decided to evict her before the circular was issued," *id.* at 283. The Court in *Thorpe* viewed the new eviction procedures as "essential to remove a serious impediment to the successful protection of constitutional rights." *Id.*, at 283.[30] Cf. *Youakim* v. *Miller*, 425 U. S. 231, 237 (1976) *(per curiam)* (citing *Thorpe* for propriety of applying new law to avoiding necessity of deciding constitutionality of old one).

Our holding in *Bradley* is similarly compatible with the line of decisions disfavoring "retroactive" application of statutes. In *Bradley*, the District Court had awarded attorney's fees and costs, upon general equitable princi-

---

[27] In *Bruner*, we specifically noted:

"This jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication. Compare *United States* v. *St. Louis S. F. & T. R. Co.*, 270 U. S. 1, 3 (1926), with *Smallwood* v. *Gallardo*, 275 U. S. 56, 61 (1927)." 343 U. S., at 117, n. 8.

[28] While we have strictly construed the *Ex Post Facto* Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case. See, *e.g.*, *Dobbert* v. *Florida*, 432 U. S. 282, 293–294 (1977); see also *Collins* v. *Youngblood*, 497 U. S. 37 (1990); *Beazell* v. *Ohio*, 269 U. S. 167 (1925).

[29] Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case. See, *e.g.*, Order Amending Federal Rules of Criminal Procedure, 495 U. S. 969 (1990) (amendments applicable to pending cases "insofar as just and practicable"); Order Amending Federal Rules of Civil Procedure, 456 U. S. 1015 (1982) (same); Order Amending Bankruptcy Rules and Forms, 421 U. S. 1021 (1975) (amendments applicable to pending cases "except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice"). Contrary to JUSTICE SCALIA's suggestion, *post*, at 5–6, we do not restrict the presumption against statutory retroactivity to cases involving "vested rights." (Neither is Justice Story's definition of retroactivity, quoted *supra*, at 24, so restricted.) Nor do we suggest that concerns about retroactivity have no application to procedural rules.

[30] *Thorpe* is consistent with the principle, analogous to that at work in the common-law presumption about repeals of criminal statutes, that the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one. Cf. *DeGurules* v. *INS*, 833 F. 2d 861, 862–863 (CA9 1987). Indeed, *Thorpe* twice cited *United States* v. *Chambers*, 291 U. S. 217 (1934), which ordered dismissal of prosecutions pending when the National Prohibition Act was repealed. See *Thorpe*, 393 U. S., at 281, n. 38; *id.*, at 282, n. 40.

ples, to parents who had prevailed in an action seeking to desegregate the public schools of Richmond, Virginia. While the case was pending before the Court of Appeals, Congress enacted §718 of the Education Amendments of 1972, which authorized federal courts to award the prevailing parties in school desegregation cases a reasonable attorney's fee. The Court of Appeals held that the new fee provision did not authorize the award of fees for services rendered before the effective date of the amendments. This Court reversed. We concluded that the private parties could rely on §718 to support their claim for attorney's fees, resting our decision "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U. S., at 711.

Although that language suggests a categorical presumption in favor of application of *all* new rules of law, we now make it clear that *Bradley* did not alter the well-settled presumption against application of the class of new statutes that would have genuinely "retroactive" effect. Like the new hearing requirement in *Thorpe*, the attorney's fee provision at issue in *Bradley* did not resemble the cases in which we have invoked the presumption against statutory retroactivity. Attorney's fee determinations, we have observed, are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial." *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 451–452 (1982). See also *Hutto* v. *Finney*, 437 U. S. 678, 695, n. 24 (1978). Moreover, even before the enactment of §718, federal courts had authority (which the District Court in *Bradley* had exercised) to award fees based upon equitable principles. As our opinion in *Bradley* made clear, it would be difficult to imagine a stronger equitable case for an attorney's fee award than a lawsuit in which the plaintiff parents would otherwise have to bear the costs of desegregating their children's public schools. See 416 U. S., at 718 (noting that the plaintiffs had brought the school board "into compliance with its constitutional mandate") (citing *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954)). In light of the prior availability of a fee award, and the likelihood that fees would be assessed under pre-existing theories, we concluded that the new fee statute simply "did not impose an additional or unforeseeable obligation" upon the school board. *Bradley*, 416 U. S., at 721.

In approving application of the new fee provision, *Bradley* did not take issue with the long line of decisions applying the presumption against retroactivity. Our opinion distinguished, but did not criticize, prior cases that had applied the anti-retroactivity canon. See 416 U. S., at 720 (citing *Greene* v. *United States*, 376 U. S. 149, 160 (1964); *Claridge Apartments Co.* v. *Commissioner*, 323 U. S. 141, 164 (1944), and *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913)). The authorities we relied upon in *Bradley* lend further support to the conclusion that we did not intend to displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment. See *Kaiser*, 494 U. S., at 849–850 (SCALIA, J., concurring). *Bradley* relied on *Thorpe* and on other precedents that are consistent with a presumption against statutory retroactivity, including decisions involving explicitly retroactive statutes, see 416 U. S., at 713, n. 17 (citing, *inter alia*, *Freeborn* v. *Smith*, 2 Wall. 160 (1865)),[31] the retroactive application of intervening *judicial* decisions, see 416 U. S., at 713–714, n. 17 (citing, *inter alia*, *Patterson* v. *Alabama*, 294 U. S. 600, 607 (1935)),[32] statutes altering jurisdiction, 416 U. S., at 713, n. 17 (citing, *inter alia*, *United States* v. *Alabama*, 362 U. S. 602 (1960)), and repeal of a criminal statute, 416 U. S., at 713, n. 17 (citing *United States* v. *Chambers* 291 U. S. 217 (1934)). Moreover, in none of our decisions that have relied upon *Bradley* or *Thorpe* have we cast doubt on the traditional presumption against truly "retrospective" application of a statute.[33]

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command,

---

[31] In *Bradley*, we cited *Schooner Peggy* for the "current law" principle, but we recognized that the law at issue in *Schooner Peggy* had expressly called for retroactive application. See 416 U. S., at 712, n. 16 (describing *Schooner Peggy* as holding that Court was obligated to "apply the terms of the convention," which had recited that it applied to all vessels not yet "*definitively* condemned") (emphasis in convention).

[32] At the time *Bradley* was decided, it was by no means a truism to point out that rules announced in intervening judicial decisions should normally be applied to a case pending when the intervening decision came down. In 1974, our doctrine on judicial retroactivity involved a substantial measure of discretion, guided by equitable standards resembling the *Bradley* "manifest injustice" test itself. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971); *Linkletter* v. *Walker*, 381 U. S. 618, 636 (1965). While it was accurate in 1974 to say that a new rule announced in a judicial decision was only *presumptively* applicable to pending cases, we have since established a firm rule of retroactivity. See *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. ____ (1993); *Griffith* v. *Kentucky*, 479 U. S. 314 (1987).

[33] See, *e.g.*, *National Treasury Employees Union* v. *Von Raab*, 489 U. S. 656, 661–662, and n. 1 (1989) (considering intervening regulations in injunctive action challenging agency's drug testing policy under Fourth Amendment) (citing *Thorpe*); *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 662 (1987) (applying rule announced in judicial decision to case arising before the decision and citing *Bradley* for the "usual rule . . . that federal cases should be decided in accordance with the law existing at the time of the decision"); *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 608 (1987) (in case involving retroactivity of judicial decision, citing *Thorpe* for same "usual rule"); *Hutto* v. *Finney*, 437 U. S., at 694, n. 23 (relying on "general practice" and *Bradley* to uphold award of attorney's fees under statute passed after the services had been rendered but while case was still pending); *Youakim*, 425 U. S., at 237 *(per curiam)* (remanding for reconsideration of constitutional claim for injunctive relief in light of intervening state regulations) (citing *Thorpe*); *Cort* v. *Ash*, 422 U. S. 66, 77 (1975) (stating that *Bradley* warranted application of intervening statute transferring to administrative agency jurisdiction over claim for injunctive relief); *Hamling* v. *United States*, 418 U. S. 87, 101–102 (1974) (reviewing obscenity conviction in light of subsequent First Amendment decision of this Court) (citing *Bradley*); *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 49, n. 21 (1974) (in action for injunction against enforcement of banking disclosure statute, citing *Thorpe* for proposition that Court should consider constitutional question in light of regulations issued after commencement of suit); *Diffenderfer* v. *Central Baptist Church*, 404 U. S. 412, 414 (1972) (citing *Thorpe* in holding that intervening repeal of a state tax exemption for certain church property rendered "inappropriate" petitioner's request for injunctive relief based on the Establishment Clause); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 419 (1971) (refusing to remand to agency under *Thorpe* for administrative findings required by new regulation because administrative record was already adequate for judicial review); *Hall* v. *Beals*, 396 U. S. 45, 48 (1969) (in action for injunctive relief from state election statute, citing *Thorpe* as authority for considering intervening amendment of statute).

the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

V

We now ask whether, given the absence of guiding instructions from Congress, § 102 of the Civil Rights Act of 1991 is the type of provision that should govern cases arising before its enactment. As we observed *supra*, at 15, there is no special reason to think that all the diverse provisions of the Act must be treated uniformly for such purposes. To the contrary, we understand the instruction that the provisions are to "take effect upon enactment" to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct.

Two provisions of §102 may be readily classified according to these principles. The jury trial right set out in §102(c)(1) is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date. If §102 did no more than introduce a right to jury trial in Title VII cases, the provision would presumably apply to cases tried after November 21, 1991, regardless of when the underlying conduct occurred.[34] However, because §102(c) makes a jury trial available only "[i]f a complaining party seeks compensatory or punitive damages," the jury trial option must stand or fall with the attached damages provisions.

Section 102(b)(1) is clearly on the other side of the line. That subsection authorizes punitive damages if the plaintiff shows that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The very labels given "punitive" or "exemplary" damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question. See *Turner Elkhorn*, 428 U. S., at 17 (Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness"); *De Veau* v. *Braisted*, 363 U. S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts"). See also *Louis Vuitton S. A.* v. *Spencer Handbags Corp.*, 765 F. 2d 966, 972 (CA2 1985) (retroactive application of punitive treble damages provisions of Trademark Counterfeiting Act of 1984 "would present a potential *ex post facto* problem"). Before we entertained that question, we would have to be confronted with a statute that explicitly authorized punitive damages for preenactment conduct. The Civil Rights Act of 1991 contains no such explicit command.

The provision of §102(a)(1) authorizing the recovery of compensatory damages is not easily classified. It does not make unlawful conduct that was lawful when it occurred; as we have noted, *supra*, at 6–8, §102 only reaches discriminatory conduct already prohibited by Title VII. Concerns about a lack of fair notice are further muted by the fact that such discrimination was in many cases (although not this one) already subject to monetary liability in the form of backpay. Nor could anyone seriously contend that the compensatory damages provisions smack of a "retributive" or other suspect legislative purpose. Section 102 reflects Congress' desire to afford victims of discrimination more complete redress for violations of rules established more than a generation ago in the Civil Rights Act of 1964. At least with respect to its compensatory damages provisions, then, §102 is not in a category in which objections to retroactive application on grounds of fairness have their greatest force.

Nonetheless, the new compensatory damages provision would operate "retrospectively" if it were applied to conduct occurring before November 21, 1991. Unlike certain other forms of relief, compensatory damages are quintessentially backward-looking. Compensatory damages may be *intended* less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants. They do not "compensate" by distributing funds from the public coffers, but by requiring particular employers to pay for harms they caused. The introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning.[35] In this case, the event to which the new damages provision relates is the discriminatory conduct of respondents' agent John Williams; if applied here, that provision would attach an important new legal burden to that conduct. The new damages remedy in §102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent.

In cases like this one, in which prior law afforded no relief, §102 can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced. Section 102 confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged, and the novel prospect of damages liability

[34] As the Court of Appeals recognized, however, the promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge. See n. 29, *supra*. Thus, customary practice would not support remand for a jury trial in this case.

[35] As petitioner and *amici* suggest, concerns of unfair surprise and upsetting expectations are attenuated in the case of intentional employment discrimination, which has been unlawful for more than a generation. However, fairness concerns would not be entirely absent if the damages provisions of §102 were to apply to events preceding its enactment, as the facts of this case illustrate. Respondent USI's management, when apprised of the wrongful conduct of petitioner's coworker, took timely action to remedy the problem. The law then in effect imposed no liability on an employer who corrected discriminatory work conditions before the conditions became so severe as to result in the victim's constructive discharge. Assessing damages against respondents on a theory of *respondeat superior* would thus entail an element of surprise. Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past. Cf. *Weaver*, 450 U. S., at 28–30 (*Ex Post Facto* Clause assures fair notice and governmental restraint, and does not turn on "an individual's right to less punishment"). The new damages provisions of §102 can be expected to give managers an added incentive to take preventive measures to ward off discriminatory conduct by subordinates *before* it occurs, but that purpose is not served by applying the regime to preenactment conduct.

for their employers. Because Title VII previously authorized recovery of backpay in some cases, and because compensatory damages under §102(a) are in addition to any backpay recoverable, the new provision also resembles a statute increasing the amount of damages available under a preestablished cause of action. Even under that view, however, the provision would, if applied in cases arising before the Act's effective date, undoubtedly impose on employers found liable a "new disability" in respect to past events. See *Society for Propagation of the Gospel*, 22 F. Cas., at 767. The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored.[36] Neither in *Bradley* itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment. See *Winfree* v. *Northern Pacific R. Co.*, 227 U. S. 296, 301 (1913) (statute creating new federal cause of action for wrongful death inapplicable to case arising before enactment in absence of "explicit words" or "clear implication"); *United States Fidelity & Guaranty Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U. S. 306, 314-315 (1908) (construing statute *restricting* subcontractors' rights to recover damages from prime contractors as prospective in absence of "clear, strong and imperative" language from Congress favoring retroactivity).[37]

It will frequently be true, as petitioner and *amici* forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully.[38] That consideration, however, is not sufficient to rebut the presumption against retroactivity. Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal. A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute. Indeed, there is reason to believe that the omission of the 1990 version's express retroactivity provisions was a factor in the passage of the 1991 bill. Section 102 is plainly not the sort of provision that *must* be understood to operate retroactively because a contrary reading would render it ineffective.

The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation. We are satisfied that it applies to §102. Because we have found no clear evidence of congressional intent that §102 of the Civil Rights Act of 1991 should apply to cases arising before its enactment, we conclude that the judgment of the Court of Appeals must be affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgments.

I.

I of course agree with the Court that there exists a judicial presumption, of great antiquity, that a legislative enactment affecting substantive rights does not apply retroactively absent *clear statement* to the contrary. See generally *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U. S. 827, 840 (1990) (SCALIA, J., concurring). The Court, however, is willing to let that clear statement be supplied, not by the text of the law in question, but by individual legislators who participated in the enactment of the law, and even legislators in an earlier Congress which tried and failed to enact a similar law. For the Court not only combs the floor

---

[36] The state courts have consistently held that statutes changing or abolishing limits on the amount of damages available in wrongful death actions should not, in the absence of clear legislative intent, apply to actions arising before their enactment. See, *e.g.*, *Dempsey* v. *State*, 451 A. 2d 273 (R. I. 1982) ("Every court which has considered the issue . . . has found that a subsequent change as to the amount or the elements of damage in the wrongful-death statute to be substantive rather than procedural or remedial, and thus any such change must be applied prospectively"); *Kleibrink* v. *Missouri-Kansas-Texas R. Co.*, 224 Kan. 437, 444, 581 P. 2d 372, 378 (1978) (holding, in accord with the "great weight of authority," that "an increase, decrease or repeal of the statutory maximum recoverable in wrongful death actions is *not* retroactive" and thus should not apply in a case arising before the statute's enactment) (emphasis in original); *Bradley* v. *Knutson*, 62 Wis. 2d 432, 436, 215 N. W. 2d 369, 371 (1974) (refusing to apply increase in cap on damages for wrongful death to misconduct occurring before effective date; "statutory increases in damage[s] limitations are actually changes in substantive rights and not mere remedial changes"); *State ex. rel St. Louis-San Francisco R. Co.* v. *Buder*, 515 S. W. 2d 409, 411 (Mo. 1974) (statute removing wrongful death liability limitation construed not to apply to preenactment conduct; "an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto"); *Mihoy* v. *Proulx*, 113 N. H. 698, 701, 313 A. 2d 723, 725 (1973) ("To apply the increased limit after the date of the accident would clearly enlarge the defendant's liability retrospectively. In the absence of an express provision, we cannot conclude that the legislature intended retrospective application"). See also *Fann* v. *McGuffy*, 534 S. W. 2d 770, 774, n. 19 (Ky. 1975); *Muckler* v. *Buchl*, 150 N. W. 2d 689, 697 (Minn. 1967).

[37] We have sometimes said that new "remedial" statutes, like new "procedural" ones, should presumptively apply to pending cases. See, *e.g.*, *Ex parte Collett*, 337 U. S., at 71, and n. 38 ("Clearly, §1404(a) is a remedial provision applicable to pending actions"); *Beazell*, 269 U. S., at 171 (*Ex Post Facto Clause* does not limit "legislative control of remedies and modes of procedure which do not affect matters of substance"). While that statement holds true for some kinds of remedies, see *supra*, at 29 (discussing prospective relief), we have not classified a statute introducing damages liability as the sort of "remedial" change that should presumptively apply in pending cases. "Retroactive modification" of damage remedies may "normally harbo[r] much less potential for mischief than retroactive changes in the principles of liability," *Hastings* v. *Earth Satellite Corp.*, 628 F. 2d 85, 93 (CADC), cert. denied, 449 U. S. 905 (1980), but that potential is nevertheless still significant.

[38] Petitioner argues that our decision in *Franklin* v. *Gwinnett County Pub. Schools*, 503 U. S. ___ (1992), supports application of §102 to her case. Relying on the principle that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong,'" *Id.*, at ___ (slip op., at 5) (quoting *Bell* v. *Hood*, 327 U. S. 678, 684 (1946)), we held in *Franklin* that the right of action under Title IX of the Education Act Amendments of 1972 included a claim for damages. Petitioner argues that *Franklin* supports her position because, if she cannot obtain damages pursuant to §102, she will be left remediless despite an adjudged violation of her right under Title VII to be free of workplace discrimination. However, Title VII of the Civil Rights Act of 1964 is not a statute to which we would apply the "traditional presumption in favor of all available remedies." *Id.*, at ___ (slip op., at 11). That statute did not create a "general right to sue" for employment discrimination, but instead specified a set of "circumscribed remedies." See *Burke*, 504 U. S., at ___ (slip op., at 10). Until the 1991 amendment, the Title VII scheme did not allow for damages. We are not free to fashion remedies that Congress has specifically chosen not to extend. See *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 97 (1981).

debate and committee reports of the statute at issue, the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, see *ante*, at 16-18, but also reviews the procedural history of an earlier, unsuccessful, attempt by a *different* Congress to enact similar legislation, the Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess. (1990), see *ante*, at 9-11, 18.

This effectively converts the "clear statement" rule into a "discernible legislative intent" rule—and even that understates the difference. The Court's rejection of the floor statements of certain Senators because they are "frankly partisan" and "cannot plausibly be read as reflecting any general agreement" *ante*, at 17, reads like any other exercise in the soft science of legislative historicizing,[1] undisciplined by any distinctive "clear statement" requirement. If it is a "clear statement" we are seeking, surely it is not enough to insist that the statement can "plausibly be read as reflecting general agreement"; the statement must *clearly* reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself. That has been the meaning of the "clear statement" retroactivity rule from the earliest times. See, *e.g.*, *United States* v. *Heth*, 3 Cranch 399, 408 (1806) (Johnson, J.) ("Unless, therefore, the words are too imperious to admit of a different construction, [the Court should] restric[t] the words of the law to a future operation"); *id.*, at 414 (Cushing, J.) ("[I]t [is] unreasonable, in my opinion, to give the law a construction, which would have such a retrospective effect, unless it contained express words to that purpose"); *Murray* v. *Gibson*, 15 How. 421, 423 (1854) (statutes do not operate retroactively unless "required by express command or by necessary and unavoidable implication"); *Schwab* v. *Doyle*, 258 U. S. 529, 537 (1922) ("a statute should not be given a retrospective operation unless its words make that imperative"); see also *Bonjorno*, *supra*, at 842-844 (concurring opinion) (collecting cases applying the clear statement test). I do not deem that clear rule to be changed by the Court's dicta regarding legislative history in the present case.

The 1991 Act does not expressly state that it operates retroactively, but petitioner contends that its specification of prospective-only application for two sections, §§ 109(c) and 402(b), implies that its other provisions are retroactive. More precisely, petitioner argues that since § 402(a) states that "[e]xcept as otherwise specifically provided, [the 1991 Act] shall take effect upon enactment"; and since §§ 109(c) and 402(b) specifically provide that those sections shall operate only prospectively; the term "shall take effect upon enactment" in § 402(a) must mean *retroactive* effect. The short response to this refined and subtle argument is that refinement and subtlety are no substitute for clear statement. "[S]hall take effect upon enactment" is presumed to mean "shall have prospective effect upon enactment," and that presumption is too strong to be overcome by any negative inference derived from §§ 109(c) and 402(b).[2]

II

The Court's opinion begins with an evaluation of petitioner's argument that the text of the statute dictates its retroactive application. The Court's rejection of that argument cannot be as forceful as it ought, so long as it insists upon compromising the clarity of the ancient and constant assumption that legislation is prospective, by attributing a comparable pedigree to the nouveau *Bradley* presumption in favor of applying the law in effect at the time of decision. See *Bradley* v. *Richmond School Bd.*, 416 U. S. 696, 711-716 (1974). As I have demonstrated elsewhere and need not repeat here, *Bradley* and *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969), simply misread our precedents and invented an utterly new and erroneous rule. See generally *Bonjorno*, 494 U. S., at 840 (SCALIA, J., concurring).

Besides embellishing the pedigree of the *Bradley-Thorpe* presumption, the Court goes out of its way to reaffirm the holdings of those cases. I see nothing to be gained by overruling them, but neither do I think the indefensible should needlessly be defended. And *Thorpe*, at least, is really indefensible. The regulation at issue there required that "before *instituting an eviction proceeding* local housing authorities . . . should inform the tenant . . . of the reasons for the eviction . . ." *Thorpe*, *supra*, at 272, and n. 8 (emphasis added). The Court imposed that requirement on an eviction proceeding *instituted eighteen months before the regulation issued*. That application was plainly retroactive and was wrong. The result in *Bradley* presents a closer question; application of an attorney's fees provision to ongoing litigation is arguably not retroactive. If it *were* retroactive, however, it would surely not be saved (as the Court suggests) by the existence of another theory under which attorney's fees might have been discretionarily awarded, see *ante*, at 33-34.

III

My last, and most significant, disagreement with the Court's analysis of this case pertains to the meaning of retroactivity. The Court adopts as its own the definition crafted by Justice Story in a case involving a provision of the New Hampshire Constitution that prohibited "retrospective" laws: a law is retroactive only if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Society for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (No. 13,516) (CCNH 1814) (Story, J.).

One might expect from this "vested rights" focus that the Court would hold all changes in rules of procedure (as opposed to matters of substance) to apply retroactively. And one would draw the same conclusion from the Court's formulation of the test as being "whether the new provision attaches new legal consequences to events completed before its enactment"—a test borrowed directly from our *ex post facto* Clause jurisprudence, see,

[1] In one respect, I must acknowledge, the Court's effort may be unique. There is novelty as well as irony in his supporting the judgment that the floor statements on the 1991 Act are unreliable by citing Senator Danforth's floor statement on the 1991 Act to the effect that floor statements on the 1991 Act are unreliable. See *ante*, at 17, n. 15.

[2] Petitioner suggests that in *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989), the Court found the negative implication of language sufficient to satisfy the "clear statement" requirement for congressional subjection of the States to private suit, see *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985). However, in that case it was the express inclusion of States in the definition of potentially liable "person[s]," see 42 U. S. C. § 9601(21), as reinforced by the limitation of States' liability in certain limited circumstances, see § 9601(20)(D), that led the Court to find a plain statement of liability. See 491 U. S., at 11 (noting the "cascade of plain language" supporting liability); 491 U. S., at 30 (SCALIA, J., concurring in part and dissenting in part)). There is nothing comparable here.

e.g., *Miller* v. *Florida*, 482 U. S. 423, 430 (1987), where we have adopted a substantive-procedural line, see *id.*, at 433 ("no *ex post facto* violation occurs if the change in law is merely procedural"). In fact, however, the Court shrinks from faithfully applying the test that it has announced. It first seemingly defends the procedural-substantive distinction that a "vested rights" theory entails, *ante*, at 31 ("[b]ecause rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive"). But it soon acknowledges a broad and ill defined (indeed, utterly undefined) exception: "Whether a new rule of trial procedure applies will generally depend upon the posture of the case in question." *Ante*, at 31, n.29. Under this exception, "a new rule concerning the filing of complaints would not govern an action in which the complaint had already been filed," *ibid.*, and "the promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge," *ante*, at 37, n.34. It is hard to see how either of these refusals to allow retroactive application preserves any "vested right." "'No one has a vested right in any given mode of procedure.'" *Ex parte Collett*, 337 U. S. 55, 71 (1949), quoting *Crane* v. *Hahlo*, 258 U. S. 142, 147 (1922).

The seemingly random exceptions to the Court's "vested rights" (substance-*vs.*-procedure) criterion must be made, I suggest, because that criterion is fundamentally wrong. It may well be that the upsetting of "vested substantive rights" was the proper touchstone for interpretation of New Hampshire's constitutional prohibition, as it is for interpretation of the United States Constitution's *ex post facto* Clauses, see *ante*, at 31, n. 28. But I doubt that it has anything to do with the more mundane question before us here: absent clear statement to the contrary, what is the presumed temporal application of a statute? For purposes of *that* question, a *procedural* change should no more be presumed to be retroactive than a *substantive* one. The critical issue, I think, is not whether the rule affects "vested rights," or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event. A new rule of evidence governing expert testimony, for example, is aimed at regulating the conduct of trial, and the event relevant to retroactivity of the rule is introduction of the testimony. Even though it is a procedural rule, it would unquestionably not be applied to *testimony already taken*—reversing a case on appeal, for example, because the new rule had not been applied at a trial which antedated the statute.

The inadequacy of the Court's "vested rights" approach becomes apparent when a change in one of the incidents of trial alters substantive entitlements. The opinion classifies attorney's fees provisions as procedural and permits "retroactive" application (in the sense of application to cases involving pre-enactment conduct). See *ante*, at 33–34. It seems to me, however, that holding a person liable for attorney's fees affects a "substantive right" no less than holding him liable for compensatory or punitive damages, which the Court treats as affecting a vested right. If attorney's fees can be awarded in a suit involving conduct that antedated the fee-authorizing statute, it is because the purpose of the fee award is not to affect that conduct, but to encourage suit for the vindication of certain rights—so that the retroactivity event is the filing of suit, whereafter encouragement is no longer needed. Or perhaps because the purpose of the fee award is to *facilitate* suit—so that the retroactivity event is the termination of suit, whereafter facilitation can no longer be achieved.

The "vested rights" test does not square with our consistent practice of giving immediate effect to statutes that alter a court's jurisdiction. See, *e.g.*, *Bruner* v. *United States*, 343 U. S. 112, 116–117, and n. 8 (1952); *Hallowell* v. *Commons*, 239 U. S. 506 (1916); cf. *Ex parte McCardle*, 7 Wall. 506, 514 (1869); *Insurance Co.* v. *Ritchie*, 5 Wall. 541, 544–545 (1867); see also *King* v. *Justices of the Peace of London*, 3 Burr. 1456, 97 Eng. Rep. 924 (K. B. 1764). The Court explains this aspect of our retroactivity jurisprudence by noting that "a new jurisdictional rule will often not involve 'retroactivity' in Justice Story's sense because it 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Ante*, at 30, quoting *Hallowell*, *supra*, at 508. That may be true sometimes, but surely not always. A jurisdictional rule can deny a litigant a forum for his claim entirely, see Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U. S. C. §§ 251–262, or may leave him with an alternate forum that will deny relief for some collateral reason (*e.g.*, a statute of limitations bar). Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.

Finally, statutes eliminating previously available forms of prospective relief provide another challenge to the Court's approach. Courts traditionally withhold requested injunctions that are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. See, *e.g.*, *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464 (1921). The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "[o]bviously, this form of relief operates only *in futuro*," *Deering*, *ibid.* Since the purpose of prospective relief is to affect the future rather than remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.[3]

[3]A focus on the relevant retroactivity event also explains why the presumption against retroactivity is not violated by interpreting a statute to alter the future legal effect of past transactions—so-called secondary retroactivity, see *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 219–220 (1988) (SCALIA, J., concurring) (citing McNulty, Corporations and the Intertemporal Conflict of Laws, 55 Calif. L. Rev. 12, 58–60 (1967)); cf. *Cox* v. *Hart*, 260 U. S. 427, 435 (1922). A new ban on gambling applies to existing casinos and casinos under construction, see *ante*, at 25, n. 24, even though it "attaches a new disability" to those past investments. The relevant retroactivity event is the primary activity of gambling, not the primary activity of constructing casinos.

I do not maintain that it will always be easy to determine, from the statute's purpose, the relevant event for assessing its retroactivity. As I have suggested, for example, a statutory provision for attorney's fees presents a difficult case. Ordinarily, however, the answer is clear—as it is in both *Landgraf* and *Rivers*. Unlike the Court, I do not think that any of the provisions at issue is "not easily classified," *ante*, at 38. They are all directed at the regulation of primary conduct, and the occurrence of the primary conduct is the relevant event.

JUSTICE BLACKMUN, dissenting.

Perhaps from an eagerness to resolve the "apparent tension," see *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U. S. 827, 837 (1990), between *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974), and *Bowen* v. *Georgetown University Hospital*, 488 U. S. 204 (1988), the Court rejects the "most logical reading," *Kaiser*, at 838, of the Civil Rights Act of 1991, 105 Stat. 1071 (Act), and resorts to a presumption against retroactivity. This approach seems to me to pay insufficient fidelity to the settled principle that the "starting point for interpretation of a statute 'is the language of the statute itself,'" *Kaiser*, at 835, quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980), and extends the presumption against retroactive legislation beyond its historical reach and purpose.

A straightforward textual analysis of the Act indicates that §102's provision of compensatory damages and its attendant right to a jury trial apply to cases pending on appeal on the date of enactment. This analysis begins with §402(a) of the Act, 105 Stat. 1099: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Under the "settled rule that a statute must, if possible, be construed in such fashion that every word has operative effect," *United States* v. *Nordic Village, Inc.*, 503 U. S. ___, ___ (1992) (slip op. 6), citing *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955), §402(a)'s qualifying clause, "[e]xcept as otherwise specifically provided," cannot be dismissed as mere surplusage or an "insurance policy" against future judicial interpretation. Cf. *Gersman* v. *Group Health Ass'n, Inc.*, 975 F. 2d 886, 890 (CADC 1992). Instead, it most logically refers to the Act's two sections "specifically providing" that the statute does not apply to cases pending on the date of enactment: (a) §402(b), 105 Stat. 1099, which provides, in effect, that the Act did not apply to the then pending case of *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), and (b) §109(c), 105 Stat. 1078, which states that the Act's protections of overseas employment "shall not apply with respect to conduct occurring before the date of the enactment of this Act." Self-evidently, if the entire Act were inapplicable to pending cases, §§402(b) and 109(c) would be "entirely redundant." *Kungys* v. *United States*, 485 U. S. 759, 778 (1988) (plurality opinion). Thus, the clear implication is that, while §402(b) and §109(c) do not apply to pending cases, other provisions—including §102—do.[1] "'Absent a clearly expressed legislative intention to the contrary, [this] language must . . . be regarded as conclusive.'" *Kaiser*, 494 U. S., at 835, quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The legislative history of the Act, featuring a welter of conflicting and "some frankly partisan" floor statements, *ante*, at 17, but no committee report, evinces no such contrary legislative intent.[2] Thus, I see no reason to dismiss as "unlikely," *ante*, at 14, the most natural reading of the statute, in order to embrace some other reading that is also "possible," *ibid.*

Even if the language of the statute did not answer the retroactivity question, it would be appropriate under our precedents to apply §102 to pending cases.[3] The well-established presumption against retroactive legislation, which serves to protect settled expectations, is grounded in a respect for vested rights. See, *e.g.*, Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 774, 784 (1936) (retroactivity doctrine developed as an "inhibition against a construction which . . . would violate vested rights"). This presumption need not be applied to remedial legislation, such as §102, that does not proscribe any conduct that was previously legal. See *Sampeyreac* v. *United States*, 7 Pet. 222, 238 (1833) ("Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed"); *Hastings* v. *Earth Satellite Corp.*, 628 F. 2d 85, 93 (CADC) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known"), cert. denied, 449 U. S. 905 (1980); 1 J. Kent, Commentaries on American Law *455–*456 (1854) (Chancellor Kent's objection to a law "affecting and changing vested rights" is "not understood to apply to *remedial* statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights").

At no time within the last generation has an employer had a vested right to engage in or to permit sexual harassment; "'there is no such thing as a vested right to do wrong.'" *Freeborn* v. *Smith*, 2 Wall. 160, 175

---

[1]It is, of course, an "unexceptional" proposition that "a particular statute may in some circumstances *implicitly* authorize retroactive [application]." *Bowen* v. *Georgetown University Hospital*, 488 U. S. 204, 223 (1988) (concurring opinion) (emphasis added).

[2]Virtually every Court of Appeals to consider the application of the 1991 Act to pending cases has concluded that the legislative history provides no reliable guidance. See, *e.g.*, *Gersman* v. *Group Health Ass'n, Inc.*, 975 F. 2d 886 (CADC 1992); *Mozee* v. *American Commercial Marine Service Co.*, 963 F. 2d 929 (CA7 1992).

The absence in the Act of the strong retroactivity language of the vetoed 1990 legislation, which would have applied the new law to final judgments as well as to pending cases, see H.R. 4000, 101st Cong., 2d Sess., §15(b)(3) (1990) (providing that "any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and vested . . . shall be vacated in whole or in part if justice requires" and the Constitution permits), is not instructive of Congress' intent with respect to pending cases alone. Significantly, Congress also rejected language that put pending claims beyond the reach of the 1990 or 1991 Act. See 136 Cong. Rec. H6747 (daily ed. Aug. 3, 1990) (Michel-LaFalce amendment to 1990 Act) ("The amendments made by this Act shall not apply with respect to claims arising before the date of enactment of this Act."); *id.*, at H6768 (Michel-LaFalce amendment rejected); 137 Cong. Rec. S3023 (daily ed. Mar. 12, 1991) (Sen. Dole's introduction of S. 611, which included the 1990 Act's retroactivity provision); *id.*, at H3898, H3908–3909 (daily ed. June 4, 1991) (introduction and defeat of Michel substitute for H.R. 1).

[3]Directly at issue in this case are compensatory damages and the right to a jury trial. While there is little unfairness in requiring an employer to compensate the victims of intentional acts of discrimination, or to have a jury determine those damages, the imposition of punitive damages for pre-enactment conduct represents a more difficult question, one not squarely addressed in this case and one on which I express no opinion.

[illegible] petitioners filed a complaint [illegible]ging that respondent had discharged them because of

(1865). See also 2 N. Singer, Sutherland on Statutory Construction §41.04, p. 349 (4th ed. 1986) (procedural and remedial statutes that do not take away vested rights are presumed to apply to pending actions). Section 102 of the Act expands the remedies available for acts of intentional discrimination, but does not alter the scope of the employee's basic right to be free from discrimination or the employer's corresponding legal duty. There is nothing unjust about holding an employer responsible for injuries caused by conduct that has been illegal for almost 30 years.

Accordingly, I respectfully dissent.

ERIC SCHNAPPER, New York, N.Y. (PAUL C. SAUNDERS, CRAVATH, SWAINE & MOORE, TIMOTHY B. GARRIGAN, STUCKEY & GARRIGAN, RICHARD T. SEYMOUR, MICHAEL SELMI, SHARON R. VINICK, CHARLES STEPHEN RALSTON, ELAINE R. JONES, CORNELIA T.L. PILLARD, KERRY SCANLON, and ELLIS BOAL, on the briefs) for petitioner; DREW S. DAYS III, Solicitor General (WILLIAM C. BRYSON, Acting Sol. Gen., JAMES P. TURNER, Acting Asst. Atty. Gen., LAWRENCE G. WALLACE, Dpty. Sol. Gen., ROBERT A. LONG JR., Asst. to Sol. Gen., DAVID K. FLYNN, DENNIS J. DIMSEY, and REBECCA K. TROTH, Justice Dept. attys., and DONALD LIVINGSTON, Equal Employment Opportunity Commission Gen. Counsel, on the briefs) for U.S. as amici curiae supporting petitioner; GLEN D. NAGER, Washington, D.C. (LAURIE F. CALDER, JONES, DAY, REAVIS & POGUE, JOHN T. LANDWEHR, THOMAS J. GIBNEY, EASTMAN & SMITH, DAVID N. SHANE, and BAKER & DANIELS, on the briefs) for respondents.

No. 92-938

MAURICE RIVERS AND ROBERT C. DAVISON, PETITIONERS *v.* ROADWAY EXPRESS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Syllabus

No. 92-938. Argued October 13, 1993—Decided April 26, 1994

Petitioners filed a complaint under, *inter alia*, 42 U. S. C. §1981, alleging that respondent, their employer, had fired them on baseless charges because of their race and because they had insisted on the same procedural protections in disciplinary proceedings that were afforded white employees. Before the trial, this Court issued *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 171, holding that §1981's prohibition against racial discrimination in the making and enforcement of contracts does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations. The District Court relied on *Patterson* in dismissing petitioners' discriminatory discharge claims. While their appeal was pending, the Civil Rights Act of 1991 (1991 Act or Act) became law, §101 of which defines §1981's "make and enforce contracts" phrase to embrace all phases and incidents of the contractual relationship, including discriminatory contract terminations. The Court of Appeals ruled, among other things, that §1981 as interpreted in *Patterson*, not as amended by §101, governed the case.

Held: Section 101 does not apply to a case that arose before it was enacted.

(a) *Landgraf* v. *USI Film Products*, *ante*, p. ___, in which this Court concluded that §102 of the 1991 Act does not apply to cases arising before its enactment, requires rejection of two of petitioners' submissions in this case: their negative implication argument based on §§402(a), 109(c), and 402(b), see *ante*, at ___, and their argument that *Bradley* v. *Richmond School Bd.*, 416 U. S. 696, controls here, rather than the presumption against statutory retroactivity, see *ante*, at ___.

(b) The fact that §101 was enacted in response to *Patterson* does not supply sufficient evidence of a clear congressional intent to overcome the presumption against statutory retroactivity. Even assuming that §101 reflects disapproval of *Patterson's* §1981 interpretation, and that most legislators believed that the case was incorrectly decided and represented a departure from the previously prevailing understanding of §1981's reach, the Act's text does not support petitioners' argument that §101 was intended to "restore" that prior understanding *as to cases arising before the Act's passage*. In contrast to the 1990 civil rights bill that was vetoed by the President, the 1991 Act neither declares its intent to "restor[e]" protections that were limited by *Patterson* and other decisions nor provides that its §1981 amendment applies to all proceedings "pending on or commenced after" the date *Patterson* was decided, but describes its function as "expanding" the scope of relevant civil rights statutes in order to provide adequate protection to discrimination victims. Taken by itself, the fact that §101 is framed as a gloss on §1981's original "make and enforce contracts" language does not demonstrate an intent to apply the new definition to past acts. Altering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes, and simply does not answer the retroactivity question. The 1991 Act's legislative history does not bridge the textual gap, since the statements that most strongly support retroactivity are found in the debates on the *1990* bill, and the statements relating specifically to §101 are conflicting and unreliable.

(c) Contrary to petitioners' argument, this Court's decisions do not espouse a "presumption" in favor of the retroactive application of restorative statutes even in the absence of clear congressional intent. *Frisbie* v. *Whitney*, 9 Wall. 187, and *Freeborn* v. *Smith*, 2 Wall. 160, distinguished. A restorative purpose may be relevant to whether Congress specifically intended a new statute to govern past conduct, but an intent to act retroactively in such cases must be based on clear evidence and may not be presumed. Since neither §101 nor the statute of which it is a part contains such evidence, and since the section creates substantive liabilities that had no legal existence before the 1991 Act was passed, §101 does not apply to preenactment conduct. Rather, *Patterson* provides the authoritative interpretation of the phrase "make and enforce contracts" in §1981 before the 1991 amendment went into effect.

973 F. 2d 490, affirmed and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion.

JUSTICE STEVENS delivered the opinion of the Court.

Section 101 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, defines the term "make and enforce contracts" as used in § 1 of the Civil Rights Act of 1866, Rev. Stat. 1977, 42 U. S. C. § 1981, to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." We granted certiorari to decide whether § 101 applies to a case that arose before it was enacted. We hold that it does not.

I

Petitioners Rivers and Davison were employed by respondent Roadway Express, Inc., as garage mechanics. On the morning of August 22, 1986, a supervisor directed them to attend disciplinary hearings later that day. Because they had not received the proper notice guaranteed by their collective-bargaining agreement, petitioners refused to attend. They were suspended for two days, but filed grievances and were awarded two days' backpay. Respondent then held another disciplinary hearing, which petitioners also refused to attend, again on the ground that they had not received proper notice. Respondent thereupon discharged them.

On December 22, 1986, petitioners filed a complaint alleging that respondent had discharged them because of

the State of Mississippi proved four aggravating factors, including that petitioner previously had been convicted of four crimes involving threat of violence to a person. The jury was instructed to find the facts based upon the evidence and to apply those facts to the law as charged; at the sentencing proceeding it was told that it must find that the aggravating factors outweighed the mitigating factors, and the prosecutor's argument stressed these aspects of the jury's singular duty. There is no indication in the record that the jury returned the death sentence on any basis other than the evidence adduced, nor is there any reason to question the jury's conclusion. Under those circumstances I do not think that the Eighth Amendment or any other provision of the Constitution requires that petitioner's death sentence be overturned.* I would affirm the judgment of the Mississippi Supreme Court.

*The Court notes that other state courts have condemned the type of argument challenged here, *ante*, at 334, and that the Mississippi Supreme Court, since its decision in this case, has also found such an argument to be reversible error. See *Williams* v. *State*, 445 So. 2d 798 (1984). But these facts suggest that draconic intervention by this Court in the name of the Eighth Amendment generally is not required to correct aspects of state procedure that appear less than ideal to all of us. Doctrinal development in the tradition of the common law, where state-court decisions commend themselves not by their authority but by their reason, ultimately bids fair to remedy such minor departures from procedural norms as may be involved in this case.

JOHNSON ET AL. v. MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-518. Argued April 22, 1985—Decided June 17, 1985*

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employers from discriminating on the basis of age against employees who are between the ages of 40 and 70 by, *inter alia*, discharging them or requiring them to retire involuntarily, except when age is shown to be "a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." When the ADEA was amended in 1974 and 1978 to extend it to federal employees and to eliminate substantially all federal age limits on employment, the provision of the federal civil service statute, 5 U. S. C. § 8335(b), which requires most federal firefighters to retire at age 55, was left untouched. Petitioners, firefighters employed by the city of Baltimore, brought an action in Federal District Court, challenging, on the ground that they violated the ADEA, the city's code provisions that establish for firefighters a mandatory retirement age lower than 70. The city defended on the ground that age is a BFOQ for the position of firefighters. After a trial, the District Court, holding that the city had failed to produce sufficient evidence to make out this defense, invalidated the challenged provisions. The Court of Appeals reversed. Relying on *EEOC* v. *Wyoming*, 460 U. S. 226, in which this Court observed that the ADEA tests a State's discretion to impose a mandatory retirement age "against a reasonable federal standard," the Court of Appeals held that 5 U. S. C. § 8335(b) furnished such a standard, that, since Congress had selected age 55 as the retirement age for most federal firefighters, as a matter of law the same age constitutes a BFOQ for all state and local firefighters as well, and that therefore the city was not required to make any factual showing as to the need for the mandatory retirement age.

Held: Title 5 U. S. C. § 8335(b) does not, as a matter of law, establish that age 55 is a BFOQ for nonfederal firefighters within the meaning of the ADEA. Pp. 360-371.

*Together with No. 84-710, *Equal Employment Opportunity Commission* v. *Mayor and City Council of Baltimore et al.*, also on certiorari to the same court.

(a) The "reasonable federal standard" to which this Court referred in *EEOC* v. *Wyoming*, *supra*, is the standard supplied by the ADEA itself, *i. e.*, whether the age limit is a BFOQ. Nothing in the ADEA or the decision in *EEOC* v. *Wyoming* warrants the conclusion that a federal rule, not found in the ADEA, and by its terms applicable only to federal employees, *necessarily* authorizes a state or local government to maintain a mandatory retirement age as a matter of law. The mere fact that some federal firefighters are required to cease work at age 55 does not provide an absolute defense to an ADEA action challenging state and local age limits for firefighters. Pp. 360–362.

(b) Neither the language nor the legislative history of the civil service provision indicates that the retirement age for federal firefighters is based on a congressional determination that age 55 is a BFOQ for firefighters within the meaning of the ADEA. Instead, the provision represents nothing more than a congressional decision that federal firefighters must retire, as a general matter, at age 55. The history of § 8335(b) makes clear that the decision to retire certain federal employees, including firefighters, at an early age was not based on actual occupational qualifications for the covered employment, but rather, in significant part, on an attempt to maintain the image of a youthful work force by making early retirement attractive and financially rewarding. Accordingly, it would be error for a court, faced with a challenge under the ADEA to an age limit for nonfederal firefighters, to give any weight to § 8335(b). Pp. 362–370.

731 F. 2d 209, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Solicitor General Lee argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 84–710 were *Deputy Solicitor General Wallace*, *Alan I. Horowitz*, *Johnny J. Butler*, and *Vella M. Fink*. *William H. Engelman*, *Harriet E. Cooperman*, and *Paul D. Bekman* filed a brief for petitioners in No. 84–518.

L. William Gawlik argued the cause for respondents in both cases. With him on the brief were *Benjamin L. Brown* and *Ambrose T. Hartman*.†

†*Alfred Miller* and *Steven S. Honigman* filed a brief for the American Association of Retired Persons urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of New York by *Robert Abrams*, Attorney General, *Robert Hermann*, Solicitor General, and *Harvey M. Berman*, Assistant Attorney General; for the State of Vermont by *Jeffrey L. Amestoy*, Attorney General, and *J. Wallace Malley, Jr.*, Assistant Attorney General; for the National Association for Rights Protection and Advocacy et al. by *Steven J. Schwartz*, *David Ferleger*, *David Shaw*, *Paul Jameson*, *Daniel Stormer*, and *Nonnie S. Burnes*; and for the National League of Cities by *Frederick Simpich*.

A brief for the Commonwealth of Massachusetts et al. as *amici curiae* was filed by *Francis X. Bellotti*, Attorney General of Massachusetts, *H. Reed Witherby* and *Thomas A. Barnico*, Assistant Attorneys General, and by the Attorneys General of their respective States as follows: *David L. Armstrong* of Kentucky, *LeRoy S. Zimmerman* of Pennsylvania, *Linley E. Pearson* of Indiana, *William J. Guste, Jr.*, of Louisiana, *Edwin Lloyd Pittman* of Mississippi, *William L. Webster* of Missouri, *Irwin I. Kimmelman* of New Jersey, *Anthony Celebrezze, Jr.*, of Ohio, and *W. J. Michael Cody* of Tennessee.

JUSTICE MARSHALL delivered the opinion of the Court.

The issue is whether a federal statute generally requiring federal firefighters to retire at age 55 establishes, as a matter of law, that age 55 is a bona fide occupational qualification (BFOQ) for nonfederal firefighters within the meaning of the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* (ADEA or Act).

I

Congress enacted the ADEA "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. § 621(b). To this end, the Act today prohibits virtually all employers from discriminating on the basis of age against employees or applicants for employment who are between the ages of 40 and 70 by, for example, discharging them or requiring them to retire involuntarily. §§ 623(a), 631(a). The Act contains one general exception to this prohibition: when age is shown to be "a bona fide occupational qualification reasonably necessary to the normal operation of the par-

ticular business," § 623(f)(1), an employee may be terminated on the basis of his age before reaching age 70.[1]

Since enacting the ADEA in 1967, Congress has amended its provisions several times. The ADEA originally did not apply to the Federal Government, to the States or their political subdivisions, or to employers with fewer than 25 employees, but in 1974 Congress extended coverage to Federal, State, and local Governments, and to employers with at least 20 workers. §§ 630(b), 633a.[2] Also, while the Act initially covered employees only up to age 65, in 1978 Congress raised the maximum age to 70 for state, local, and private employees and eliminated the cap entirely for federal workers. Age Discrimination in Employment Act Amendments of 1978, § 3(a), 92 Stat. 189, 29 U. S. C. § 631(b) (hereinafter 1978 Amendments).

[1] Federal employees are covered in a separate section of the Act and are treated differently from nonfederal employees in various ways not relevant to this case. See 29 U. S. C. § 633a (extending antidiscrimination provisions to federal employees, but providing such employees a different remedy for violations); § 631 (establishing 70 as a permissible retirement age for all but federal employees, for whom there is no permissible cap). Cf. *Vance* v. *Bradley*, 440 U. S. 93 (1979) (lower retirement age for federal employees covered by Foreign Service retirement system does not violate equal protection).

[2] See Senate Special Committee on Aging, Improving the Age Discrimination Law, 93d Cong., 1st Sess., 14, 17–18 (Comm. Print 1973); EEOC, Legislative History of the Age Discrimination in Employment Act 215, 231, 234–235 (1981) (hereinafter Legislative History).

The Act contains several minor exemptions not at issue here. See, *e. g.*, 29 U. S. C. §§ 630(f), 631(c)(1). It additionally empowers the Equal Employment Opportunity Commission (EEOC) to determine BFOQs for federal employees, 29 U. S. C. § 633a(b), and also to establish general exemptions from the ADEA if it finds them to be reasonable and "necessary and proper in the public interest." 29 U. S. C. § 628. In 1980, the EEOC examined the desirability of fixing a retirement age for local firefighters and concluded that such an exemption from the ADEA was not warranted. The Commission found that individual assessments of fitness would be feasible and that age alone would be a poor indicator of ability in this occupation. See App. 5–23.

The 1978 Amendments eliminated substantially all federal age limits on employment, but they left untouched several mandatory retirement provisions of the federal civil service statute applicable to specific federal occupations, including firefighters, air traffic controllers, and law enforcement officers, as well as mandatory retirement provisions applicable to the Foreign Service and the Central Intelligence Agency. Among the provisions that were left unaffected by the 1978 Amendments is 5 U. S. C. § 8335(b), which requires certain federal law enforcement officers and firefighters to retire at age 55 if they have sufficient years of service to qualify for a pension and their agency does not find that it is in the public interest to continue their employment.[3] As a result, most federal firefighters must retire at age 55, despite the provisions of the ADEA. At issue here is the effect of this age limit for federal firefighters on the ADEA's application to state and local firefighters.

A

Six firefighters brought this action in the District Court for the District of Maryland challenging the city of Baltimore's municipal code provisions that establish for firefighters and police personnel a mandatory retirement age lower than 70. They claimed that these provisions violate the ADEA. The Equal Employment Opportunity Commission (EEOC) subsequently intervened to support the six plaintiffs.

[3] Title 5 U. S. C. § 8335(b) provides:

"A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires."

Until 1962, all Baltimore employees, including firefighters, were covered by the Employees Retirement System (ERS), which provided for mandatory retirement at age 70. App. 4. In 1962, the city established the Fire and Police Employee Retirement System (FPERS), which generally requires that all firefighting personnel below the rank of lieutenant retire at age 55. See FPERS, Baltimore City Code, Art. 22, § 34(a) 1–4 (1983); App. 3. Lieutenants and other higher ranking officers may work until age 65. *Ibid.* When the FPERS was implemented in 1962, special provision was made for personnel hired before 1962, who were given the option of remaining in the ERS or transferring to the FPERS under a special grandfather provision. Firefighters hired before 1962 who chose to remain in the ERS may continue to work until age 70 even today. See 515 F. Supp. 1287, 1297, n. 10 (Md. 1981). Firefighters hired before 1962 who are covered by the newer FPERS may work until age 60 or, in some limited circumstances, until age 65. *Ibid.* The plaintiffs here include five firefighters covered by this grandfather clause who are subject to retirement at age 60, and one firefighter hired after 1962, who is subject to retirement at age 55.

The city[4] asserted as an affirmative defense that age is a BFOQ for the position of firefighter and that the mandatory retirement provision therefore was permissible under the ADEA. After a 6-day bench trial, at which each side presented expert and nonexpert testimony on the validity of the BFOQ defense, the District Court held that the city had failed to produce sufficient evidence to make out its BFOQ defense.[5] The court considered both the particular condi-

[4] The defendants were the Mayor and City Council of Baltimore and the Chairman and members of the Board of Trustees of the Fire and Police Employees Retirement System of the city of Baltimore. We refer to these defendants collectively as the "city."

[5] Plaintiffs did not argue that a retirement age of 65 would violate the ADEA but instead essentially sought the same retirement age applicable

tion of the plaintiff firefighters and the general operation of the Baltimore Fire Department, noting that "historically Baltimore firemen have always worked past [age 60] and even up to age seventy," 515 F. Supp., at 1297. It then applied the two-pronged test developed by the Court of Appeals for the Fifth Circuit in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (1976), and adopted by the Fourth Circuit.[6] The trial court concluded that the city had shown neither that "there is a factual basis for [it] to believe that all or substantially all Baltimore City firefighters between the ages of sixty and sixty-five, other than officers, would be unable to perform their job safely and efficiently," 515 F. Supp., at 1296, nor that "it is impossible or impractical to deal with firefighters between sixty and sixty-five on an individualized basis." *Ibid.* The court therefore struck down the city's mandatory retirement plan for firefighters.

A divided panel of the Court of Appeals for the Fourth Circuit reversed. 731 F. 2d 209 (1984). The majority did not take issue with the District Court's findings that the city had failed to prove that age was a BFOQ for firefighters. Instead, the court held that the city was entitled to the BFOQ defense as a matter of law. To reach that conclusion, the appellate court relied on language from this Court's decision in *EEOC* v. *Wyoming*, 460 U. S. 226 (1983), in which we upheld the constitutionality of Congress' extension of the ADEA to state and local governments. In that decision we observed

to lieutenants. The case therefore presented only the question whether mandatory retirement prior to age 65 violates the ADEA.

[6] The District Court required the city to show (1) that the BFOQ it invokes "'is reasonably necessary to the essence of its business' of operating an efficient fire department within the City of Baltimore, and (2) that defendants have 'reasonable cause, *i. e.*, a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.'" 515 F. Supp., at 1295 (quoting *Arritt* v. *Grisell*, 567 F. 2d 1267, 1271 (CA4 1977)).

that the ADEA tests a State's discretion to impose a mandatory retirement age "against a reasonable federal standard." *Id.*, at 240. The Court of Appeals undertook a "search for a 'reasonable federal standard'" by which to test the asserted BFOQ; it found that standard in the federal civil service statute, 5 U. S. C. § 8335(b), which generally requires federal firefighters to retire at age 55. See n. 3, *supra*. The court held that, because Congress has selected age 55 as the retirement age for most federal firefighters, as a matter of law the same age constitutes a BFOQ for all state and local firefighters as well. Therefore, the court concluded, the city was not required to make any factual showing at trial as to its need for the mandatory retirement age.[7]

Because this case presents serious questions about the administration of the ADEA, we granted certiorari to review the decision of the Court of Appeals. 469 U. S. 1156 (1985). We now reverse.

B

EEOC v. *Wyoming* arose out of a lawsuit filed by a Wyoming state game warden who was required under state law to retire at age 55. He brought an action against the State and various of its officials claiming that its mandatory requirement violated the ADEA. The District Court held that the ADEA violated the Tenth Amendment insofar as it regulated Wyoming's employment relationship with its game wardens and other law enforcement officers and dismissed the suit. In rejecting that argument, we explained that the ADEA did not unduly intrude into the exercise of governmental func-

[7] Chief Judge Winter dissented. He rejected the panel's conclusion that the civil service provision necessarily constituted a congressional determination that age 55 is a BFOQ for federal firefighters but asserted that even if it were a BFOQ for federal firefighters, that fact would not excuse the city from proving facts necessary to establish a BFOQ under 29 U. S. C. § 623(f)(1). Concluding that the District Court's factual findings on the city's proof were not clearly erroneous, he would have affirmed the District Court.

tions because it did not require employers to retain unfit employees, but only at most to make more individualized determinations about fitness. Moreover, we noted that, in light of the BFOQ defense, States might in fact remain free from the obligation even to make more individualized showings:

> "Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden. . . . Thus, . . . even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard." 460 U. S., at 240 (emphasis in original).

We remanded to give Wyoming an opportunity to prove at trial that age 55 was in fact a BFOQ for Wyoming game wardens.

In this case, the Court of Appeals interpreted our use of the term "reasonable federal standard" in the quoted passage to mean that the question whether an age limit for nonfederal employees is permissible under the ADEA may be resolved simply by reference to a federal statute establishing a retirement age for a class of federal employees. It seized on the retirement provisions of the federal civil service statute, which require that federal firefighters retire at age 55. Then, without considering the intent underlying that provision, it held that, as a matter of law, age must therefore be a BFOQ for local firefighters.

The "reasonable federal standard" to which we referred in *EEOC* v. *Wyoming*, however, is the standard supplied by the ADEA itself—that is, whether the age limit is a BFOQ. By use of that phrase, we intended only to reaffirm that the BFOQ standard permits an employer to maintain a mandatory retirement age as long as the employer makes the requisite showing that age is a BFOQ. Nothing in the ADEA or

our decision in *Wyoming* warrants the conclusion that a federal rule, not found in the ADEA, and by its terms applicable only to federal employees, *necessarily* authorizes a state or local government employer to maintain a mandatory retirement age as a matter of law. To make the fact that the Federal Government has imposed a mandatory age limit on its own firefighters automatically dispositive of the question whether the same age limit is appropriate for state and local officers, without in any way examining the provision, would extend the federal rule far beyond its scope. It would apply to state and local employees a statute applicable by its terms only to federal officers. The mere fact that some federal firefighters are required to cease work at age 55 does not provide an absolute defense to an ADEA action challenging state and local age limits for firefighters.

The Court of Appeals in this case failed to focus on the city's factual showing and instead centered its attention on the federal retirement provisions of the United States Code. We would be remiss, in light of Congress' indisputable intent to permit deviations from the mandate of the ADEA only in light of a particularized, factual showing, see H. R. Rep. No. 805, 90th Cong., 1st Sess., 7 (1967); Legislative History 80; S. Rep. No. 723, 90th Cong., 1st Sess., 7 (1967); Legislative History 111,[8] to permit nonfederal employers to circumvent this plan by mere citation to an unrelated statutory provision that is not even mentioned in the ADEA.

II

The city, supported by several *amici*, argues for affirmance nonetheless. It asserts first that the federal civil

[8] To this end, the lower courts have fashioned tests for finding a BFOQ that focus, first, on the individual employer's need for an age limit, and, second, on the factual basis for his belief that all workers above a certain age are not qualified and on his proof that individual testing is highly impractical. We have today elaborated on the precise standard to be applied. *Western Air Lines, Inc.* v. *Criswell, post,* at 412–417.

service statute is not just a federal retirement provision unrelated to the ADEA but *in fact* establishes age as a BFOQ for federal firefighters based on factors that properly go into that determination under the ADEA, see *Western Air Lines, Inc.* v. *Criswell, post,* p. 400. Second, the city asserts, a congressional finding that age is a BFOQ for a certain occupation is dispositive of that determination with respect to nonfederal employees in that occupation. We consider each of these contentions in turn.

A

We must first resolve whether the age-55 retirement for federal firefighters reflects a congressional determination that age 55 is a BFOQ within the meaning of the ADEA, as the city urges, or whether Congress established the mandatory retirement age based on an analysis different from that mandated by the BFOQ standard. On this question, the statute is silent. Section 8335(b), the federal civil service provision, does not by its terms or history evince an intent to cover nonfederal employees, or to limit the scope of the ADEA. Nor does the ADEA, which was passed later, cross-reference the civil service statute or in any way express a congressional desire to exempt any firefighters from the full effect of the Act's reach.[9] In other words, in the language of neither statute has Congress indicated that the civil service provision reflects anything more than a congressional decision that federal firefighters must retire, as a general matter, at the age of 55.

The history of the civil service provision, however, makes clear that the decision to retire certain federal employees at an early age was not based on BFOQs for the covered em-

[9] Recently, legislation to exempt state and local firefighters and law enforcement officers from the ADEA has been introduced in both the Senate and the House of Representatives. See S. 698, 99th Cong., 1st Sess. (introduced March 20, 1985); H. R. 1435, 99th Cong., 1st Sess. (introduced March 6, 1985).

ployment. This history demonstrates instead that Congress has acted to deal with the idiosyncratic problems of federal employees in the federal civil service. The Federal Government first introduced early retirement for certain employees in 1947 with passage of legislation *permitting* investigatory personnel of the Federal Bureau of Investigation to retire at age 50 at an enhanced annuity. Act of July 11, 1947, ch. 219, 61 Stat. 307. Congress in 1948 extended this program to anyone whose duties for at least 20 years were primarily the investigation, apprehension, or detention of persons suspected or convicted of federal criminal law violations, see Act of July 2, 1948, ch. 807, 62 Stat. 1221. In 1972, this voluntary retirement provision was further extended to federal firefighters. See Act of Aug. 14, 1972, Pub. L. 92–382, 86 Stat. 539.

The provision as initially passed was intended only to give certain employees the option to retire early. It was designed in part as an "added stimulus to morale in the Federal Bureau of Investigation . . . [to] stabilize the service of the Federal Bureau of Investigation into a career service. . . . [and to] act as an incentive to investigative personnel of the [FBI] to remain in the Federal service until a reasonable retirement age is reached." S. Rep. No. 76, 80th Cong., 1st Sess., 1–2 (1947). In addition, as then Attorney General Tom C. Clark explained, the Department of Justice sought to maintain the FBI "as a 'young man's service.'" He added that "men in their 60's and 70's, forced to remain in the service, faced with the rigors of arduous service demanded of special agents and others, [should not be] forced to carry on for lack of an adequate retirement plan to fit the needs of the FBI service." *Id.*, at 2.

In 1974, Congress amended the statute to provide that these same federal employees *must* retire at age 55 if they had completed 20 years of service, and it provided an enhanced annuity. As with the voluntary retirement scheme, one goal of the 1974 amendment was to maintain "relatively

young, vigorous, and effective law enforcement and firefighting workforces." H. R. Rep. No. 93–463, p. 2 (1973). The amendment also was designed to replace the existing provision, which was having an adverse impact on the quality of older federal employees, because "most of those who retire in their early fifties are the more alert and aggressive employees who have found desirable jobs outside of Government," *id.*, at 3; in contrast, the newer mandatory scheme would enable management to "retire, without stigma, one who suffers a loss of proficiency." Retirement for Certain Hazardous Duty Personnel: Hearing on H. R. 6078 and H. R. 9281 before the Subcommittee on Compensation and Employment Benefits of the Senate Committee on Post Office and Civil Service, 93d Cong., 2d Sess., 134 (1974) (testimony of Rep. Brasco, sponsor of House bill).

Congress undoubtedly sought in significant part to maintain a youthful work force and took steps through the civil service retirement provisions to make early retirement both attractive and financially rewarding. However, neither the language of the 1974 amendment nor its legislative history offers any indication why Congress wanted to maintain the image of a "young man's service," or why Congress thought that 55 was the proper cutoff age, or whether Congress believed that older employees in fact could not meet the demands of these occupations. Indeed, Congressmen who opposed the bill voiced their concern for the singling out of one group of employees for preferential treatment through enhanced annuities and early retirement, and did not even acknowledge that the exigencies of the job might have anything to do with Congress' willingness to accord special treatment to a group of employees. H. R. Rep. No. 93–463, *supra*, at 20. Moreover, the allowance that firefighters who had not yet served for 20 years could remain in their jobs, see *id.*, at 6, along with other exceptions to the general rule of retirement, casts serious doubt on any argument that Congress in fact believed that either the employee or

the public would be jeopardized by the employment of older firefighters.

The absence of any indication that Congress established the age limit based on the demands of the occupation raises the possibility that the federal rule is merely "an example of the sort of age stereotyping without factual basis that was one of the primary targets of the reforms of the ADEA," Brief for Petitioner in No. 84-710, p. 38, and surely belies any contention that the age limit is based on actual occupational qualifications. Without knowing whether Congress passed the statute based on factual support, legislative balancing of competing policy concerns, or stereotypical assumptions, we simply have no way to decipher whether it is consistent with the policies underlying the ADEA.[10]

Congress' treatment of the civil service provision when it extended the ADEA to federal employees in 1978 conclusively demonstrates that the retirement statute does not

[10] Congress, of course, may exempt federal employees from application of the ADEA and otherwise treat federal employees, whose employment relations it may directly supervise, differently from those of other employers, see, *e. g.*, 26 U. S. C. § 3306(c)(6) (unemployment compensation not applicable to federal employees); 29 U. S. C. § 152(2) (exempting federal employees from labor relations legislation); indeed it has done so elsewhere in the ADEA. While Congress at first exempted federal employees from the reach of the Act, it now applies even more protective rules to older federal employees than it imposes on other employers. See 29 U. S. C. §§ 631(a), 631(b) (federal employees generally cannot be forced to retire at any age, while similarly situated nonfederal employees may be forced to retire at age 70). It might be that congressional findings leading to the conclusion that age is a BFOQ for a certain federal occupation would be of relevance to a judicial inquiry into age as a BFOQ for other employers, even absent express congressional direction on this point. See *infra*. But this relevance derives from a recognition that Congress might already have engaged in the same inquiry that a district court must make, and a district court might find congressionally gathered evidence useful and congressional factfinding persuasive. Contrary to the suggestion of the Court of Appeals, 731 F. 2d 209, 212-213 (CA4 1984), Congress is not always required to treat federal and nonfederal employees in the same way.

represent a congressional determination that age is an occupational qualification for federal firefighters. The decision to retain mandatory retirement provisions for certain federal employees resulted not from a finding that the provisions met the standards of the ADEA, but rather from an agreement to provide to the congressional Committees with jurisdiction over the retirement programs at issue the opportunity to review those provisions. Instead of delaying passage of the ADEA while those Committees studied the mandatory retirement provisions in light of the proposed ADEA, Congress decided to preserve the status quo with respect to the retirement program, pending further study. This express purpose definitively rules out any conclusion that Congress approved the retirement programs in light of the ADEA.

As first reported out of Committee in 1977, the 1978 Amendments to the ADEA removed all age limitations on federal employment, *"notwithstanding any other provisions of Federal law relating to mandatory retirement requirements. . . ."* H. R. 5383, 95th Cong., 1st Sess., 5 (1977); Legislative History 396. Representative Nix, Chairman of the House Post Office and Civil Service Committee, thereafter expressed concern that the "broad general language" of the proposed bill would repeal various statutory provisions within the primary jurisdiction of his Committee. See 123 Cong. Rec. 29003-29004 (1977) (letter to Rep. Perkins, Chairman of the House Committeee on Education and Labor); Legislative History 400-401. He suggested that his colleagues' desire to expedite consideration of the bill could be accommodated through an amendment eliminating provisions of concern to his Committee. *Ibid.* This proposal met with approval, see *ibid.*, and accordingly, Representative Spellman offered an amendment, on behalf of the House Post Office and Civil Service Committee, to retain the mandatory retirement provisions applicable to certain specific federal occupations, including law enforcement officials and firefighters. See 123 Cong. Rec. 29002 (1977) (statement of Rep. Hawkins); Legis-

lative History 399. In so doing, Representative Spellman stated:

> "I hasten to point out that this amendment does not indicate opposition perse *[sic]* to elimination of mandatory retirement for air traffic controllers, firefighters, and other specific occupations.
>
> "However, since most of these mandatory retirement provisions are part of the liberalized retirement programs, our committee believes that such provisions should not be repealed until the individual retirement programs have been reexamined." 123 Cong. Rec. 30556 (1977); Legislative History 415.

Similarly, Representative Pepper, a sponsor of the 1978 Amendments, made clear:

> "For the record, Mr. Chairman, I should state what might appear to be obvious: That we in the House, in debating and passing this amendment, are making no judgment whatever on the desirability of retaining the ages now established by the various statutes affected for forced retirement. That judgment, I am sure, will be rendered when the committees involved bring subsequent legislation to the floor." *Ibid.*

And again, Representative Hawkins, Chairman of the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, stated that "[t]he sole purpose of this agreement is to afford the committees the opportunity to review these statutes." *Ibid.* The mandatory retirement provisions were, accordingly, retained when the 1978 Amendments were enacted. See Pub. L. 95–256, § 5(c), 92 Stat. 191; see also H. R. Conf. Rep. No. 95–950, pp. 10–11 (1978); Legislative History 521–522.[11]

[11] Thereafter, Representative Spellman's Subcommittee held hearings on the retirement provisions of 5 U. S. C. § 8335(b) and heard testimony on the mandatory provision. Special Retirement Policies for Law Enforcement Officers and Firefighters: Hearings before the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. (1977); Hearings on H. R. 7945 before the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. (1977). The Subcommittee also considered a report of the General Accounting Office, which found that "[r]etirement policies that disregard difference in physical abilities and productive capacity are costly and wasteful." Report to the House Committee on Post Office and Civil Service by the Comptroller General of the United States: Special Retirement Policy for Federal Law Enforcement and Firefighter Personnel Needs Reevaluation 10 (1977). The Subcommittee took no action to change the mandatory rules.

More recently, Congress has again been confronted with a Report suggesting that mandatory age limits for law enforcement personnel are unnecessary and wasteful. The Report, published by the House Select Committee on Aging, states that "it is impossible to justify mandatory retirement or maximum hiring age policies based on arguments of public safety or job-related performance." Chairman, House Select Committee on Aging, The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel, 98th Cong., 2d Sess., IV (Comm. Print 1984). Legislation also has been introduced in the House to eliminate mandatory retirement for all federal employees not currently covered by the ADEA, including firefighters. H. R. 1710, 99th Cong., 1st Sess. (introduced March 25, 1985).

In sum, almost four decades of legislative history establish that Congress at no time has indicated that the federal retirement age for federal firefighters is based on a determination that age 55 is a BFOQ within the meaning of the ADEA. Congress adopted what might well have been an arbitrarily designated retirement age in an era not concerned with the pervasive discrimination against the elderly that eventually gave rise to the ADEA. Thereafter, although Congress retained mandatory limitations in 1978, while questioning whether they continued to make good policy sense, it did so for the sake of expediency alone. On considering the language and history of the civil service provision, we find it quite possible that factors other than conclusive determinations of occupational qualifications might originally have

led to passage of this federal rule, and that the reason for its retention after 1978 further undercuts any argument that Congress has determined that age is a BFOQ for federal firefighters.

In the absence of an indication that Congress in fact grounded the age limit on occupational qualifications, we will not presume that it did so intend. The myriad political purposes for which Congress might properly make decisions affecting federal employees, and that body's uncontested authority to exempt federal employees from the requirements of federal regulatory statutes, simply do not permit the conclusion that Congress passed or retained this retirement provision because it reflects BFOQs.[12] We therefore conclude that this civil service provision does not articulate a BFOQ for firefighters; that its presence in the United States Code is not relevant to the question of a BFOQ for firefighters, and that it would be error for a court, faced with a challenge under the ADEA to an age limit for firefighters, to give any weight, much less conclusive weight, to the federal retirement provision.

B

Were there evidence that Congress in fact determined that a class of federal employees must retire early based on the same considerations that support a finding of a BFOQ under the Act, the situation might differ. Of course, if Congress expressly extended the BFOQ to nonfederal occupations, that determination would be dispositive. But if it did not, the federal exemption nevertheless might be relevant to an appropriate employer when deciding whether to impose a mandatory retirement age, and to a district court engaged in reviewing an employer's BFOQ defense. The evidence Congress has considered, and the conclusions it has drawn therefrom, might be admissible as evidence in judicial proceedings to determine the existence of a BFOQ for nonfederal employees. The extent to which these factors are probative would, of course, vary depending at least on the congruity between the federal and nonfederal occupations at issue. Indeed, the need to consider the actual tasks of the nonfederal employees and the circumstances of employment, in order to determine the extent to which congressional conclusions about federal employees in fact are relevant, would preclude the kind of wholesale reliance on the federal rule that the city suggests. See *supra*, at 362–363. Because in this case the evidence supports no such finding of congressional intent to establish a BFOQ, however, we decline to speculate on the manner in which a different federal rule might affect nonfederal employment.

[12] Nor do we have any reason to believe that, when the city imposed its mandatory retirement scheme in 1962, it was relying on a congressional determination of any kind. The history of the civil service provision up to that time reveals no congressional finding of an occupational qualification, and in fact in 1962 the congressional scheme remained completely voluntary. It was not until 1974 that Congress even rendered early retirement mandatory. Indeed, the city pointed out to the Court of Appeals that it instituted its mandatory retirement plan "more than a decade before the federal government did likewise." Answer of Appellant City to Petition for Rehearing with Suggestion for Rehearing en Banc in No. 81–1965 (CA4), pp. 9–10.

III

We accordingly reverse the Court of Appeals' holding that the federal retirement provision at issue in this case provides an absolute defense in an ADEA action. We remand to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

WESTERN AIR LINES, INC. *v.* CRISWELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-1545. Argued January 14, 1985—Decided June 17, 1985

The Age Discrimination in Employment Act of 1967 (ADEA) generally prohibits mandatory retirement before age 70, but § 4(f)(1) of the Act provides an exception "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." Petitioner airline company requires that its flight engineers, who are members of the cockpit crews of petitioners' aircraft but do not operate flight controls unless both the pilot and the copilot become incapacitated, retire at age 60. A Federal Aviation Administration regulation prohibits any person from serving as a pilot or copilot after reaching his 60th birthday. Certain of the respondents, who include flight engineers forced to retire at age 60 and pilots who, upon reaching 60, were denied reassignment as flight engineers, brought suit in Federal District Court against petitioner, contending that the age-60 retirement requirement for flight engineers violated the ADEA. Petitioner defended, in part, on the theory that the requirement is a BFOQ "reasonably necessary" to the safe operation of the airline. The physiological and psychological capabilities of persons over age 60, and the ability to detect disease or a precipitous decline in such capabilities on the basis of individual medical examinations, were the subject of conflicting expert testimony presented by the parties. The jury instructions included statements that the "BFOQ defense is available only if it is reasonably necessary to the normal operation or essence of [petitioner's] business"; "the essence of [petitioner's] business is the safe transportation of [its] passengers"; and petitioner could establish a BFOQ by proving both that "it was highly impractical for [petitioner] to deal with each [flight engineer] over age 60 on an individualized basis to determine his particular ability to perform his job safely" and that some flight engineers "over age 60 possess traits of a physiological, psychological or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age." The District Court entered judgment based on the jury's verdict for the plaintiffs, and the Court of Appeals affirmed, rejecting petitioner's contention that the BFOQ instruction was insufficiently deferential to petitioner's legitimate concern for the safety of its passengers.

Held:

1. The ADEA's restrictive language, its legislative history, and the consistent interpretation of the administrative agencies charged with enforcing the statute establish that the BFOQ exception was meant to be an extremely narrow exception to the general prohibition of age discrimination contained in the ADEA. Pp. 409–412.

2. The relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by safety interests are whether the job qualification is "reasonably necessary" to the overriding interest in public safety, and whether the employer is compelled to rely on age as a proxy for the safety-related job qualification validated in the first inquiry. The latter showing may be made by the employer's establishing either (a) that it had reasonable cause to believe that all or substantially all persons over the age qualification would be unable to perform safely the duties of the job, or (b) that it is highly impractical to deal with the older employees on an individualized basis. Pp. 412–417.

3. The jury here was properly instructed on the elements of the BFOQ defense under the above standard, and the instructions were sufficiently protective of public safety. Pp. 417–423.

(a) Petitioner's contention that the jury should have been instructed to defer to petitioner's selection of job qualifications for flight engineers "that are reasonable in light of the safety risks" is at odds with Congress' decision, in adopting the ADEA, to subject such decisions to a test of objective justification in a court of law. The BFOQ standard adopted in the statute is one of "reasonable necessity," not reasonableness. The public interest in safety is adequately reflected in instructions that track the statute's language. Pp. 418–420.

(b) The instructions were not defective for failing to inform the jury that an airline must conduct its operations "with the highest possible degree of safety." Viewing the record as a whole, the jury's attention was adequately focused on the importance of safety to the operation of petitioner's business. Pp. 420–421.

(c) There is no merit to petitioner's contention that the jury should have been instructed under the standard that the ADEA only requires that the employer establish "a rational basis in fact" for believing that identification of those persons lacking suitable qualifications cannot be made on an individualized basis. Such standard conveys a meaning that is significantly different from that conveyed by the statutory phrase "reasonably necessary," and is inconsistent with the preference for individual evaluation expressed in the language and legislative history of the ADEA. Nor can such standard be justified on the ground that an employer must be allowed to resolve the controversy in a conservative

manner when qualified experts disagree as to whether persons over a certain age can be dealt with on an individual basis. Such argument incorrectly assumes that all expert opinion is entitled to equal weight, and virtually ignores the function of the trier of fact in evaluating conflicting testimony. Pp. 421–423.

709 F. 2d 544, affirmed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the decision of the case.

Gordon Dean Booth, Jr., argued the cause for petitioner. With him on the briefs were *William H. Boice, Joseph W. Dorn*, and *Wm. John Kennedy*.

Raymond C. Fay argued the cause for respondents. With him on the brief were *Alan M. Serwer* and *Susan D. Goland*.

Deputy Solicitor General Wallace argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Solicitor General Lee, Harriet S. Shapiro, Johnny J. Butler*, and *Philip B. Sklover*.*

JUSTICE STEVENS delivered the opinion of the Court.

The petitioner, Western Air Lines, Inc., requires that its flight engineers retire at age 60. Although the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C.

*Briefs of *amici curiae* urging reversal were filed for the Air Line Pilots Association, International, by *Michael E. Abram* and *Jay P. Levy-Warren*; for American Airlines, Inc., by *Richard A. Malahowski*; for Delta Air Lines, Inc., by *James W. Callison, Robert S. Harkey*, and *Thomas J. Kassin*; for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell*, and *Thomas R. Bagby*; for Pan American World Airways, Inc., by *Robert S. Venning*; and for Trans World Airlines, Inc., by *Henry J. Oechler, Jr., Donald I. Strauber*, and *Peter N. Hillman*.

Briefs of *amici curiae* urging affirmance were filed for the American Association of Retired Persons by *Alfred Miller* and *Harry P. Cohen*; for the American Civil Liberties Union et al. by *Susan Deller Ross*; and for the Flight Engineers International Association, American Airlines Chapter, AFL–CIO, by *Asher Schwartz* and *David Rosen*.

Howard C. Eglit filed a brief for the National Council on the Aging, Inc., et al. as *amici curiae*.

§§ 621–634, generally prohibits mandatory retirement before age 70, the Act provides an exception "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business."[1] A jury concluded that Western's mandatory retirement rule did not qualify as a BFOQ even though it purportedly was adopted for safety reasons. The question here is whether the jury was properly instructed on the elements of the BFOQ defense.[2]

I

In its commercial airline operations, Western operates a variety of aircraft, including the Boeing 727 and the McDonnell-Douglas DC–10. These aircraft require three crew members in the cockpit: a captain, a first officer, and a flight engineer. "The 'captain' is the pilot and controls the aircraft. He is responsible for all phases of its operation. The 'first officer' is the copilot and assists the captain. The 'flight engineer' usually monitors a side-facing instrument panel. He does not operate the flight controls unless the captain and the first officer become incapacitated." *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 114 (1985).

[1] Section 4(f)(1) of the ADEA provides:

"It shall not be unlawful for an employer . . .

"(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ." 81 Stat. 603, 29 U. S. C. § 623(f)(1).

[2] In *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111 (1985), decided earlier this Term, TWA allowed flight engineers to continue working past age 60, and allowed pilots to downbid to flight engineer positions provided that they were able to find an open position prior to their 60th birthdays. See *id.*, at 115–116. Pilots who were displaced for any reason besides the Federal Aviation Administration's age-60 rule, however, were permitted to "bump" less senior persons occupying flight engineer positions without waiting for vacancies to occur. We held that this transfer policy discriminated among pilots on the basis of age, and violated the ADEA. Since TWA did not impose an under-age-60 qualification for flight engineers, however, it had no occasion to rely on the same BFOQ theory presented here by Western.

A regulation of the Federal Aviation Administration (FAA) prohibits any person from serving as a pilot or first officer on a commercial flight "if that person has reached his 60th birthday." 14 CFR § 121.383(c) (1985). The FAA has justified the retention of mandatory retirement for pilots on the theory that "incapacitating medical events" and "adverse psychological, emotional, and physicial changes" occur as a consequence of aging. "The inability to detect or predict with precision an individual's risk of sudden or subtle incapacitation, in the face of known age-related risks, counsels against relaxation of the rule." 49 Fed. Reg. 14695 (1984). See also 24 Fed. Reg. 9776 (1959).

At the same time, the FAA has refused to establish a mandatory retirement age for flight engineers. "While a flight engineer has important duties which contribute to the safe operation of the airplane, he or she may not assume the responsibilities of the pilot in command." 49 Fed. Reg., at 14694. Moreover, available statistics establish that flight engineers have rarely been a contributing cause or factor in commercial aircraft "accidents" or "incidents." *Ibid.*

In 1978, respondents Criswell and Starley were captains operating DC–10s for Western. Both men celebrated their 60th birthdays in July 1978. Under the collective-bargaining agreement in effect between Western and the union, cockpit crew members could obtain open positions by bidding in order of seniority.[3] In order to avoid mandatory retirement

[3] While this lawsuit was proceeding to trial, Criswell and Starley also pursued their remedies under the collective-bargaining agreement. The System Wide Board of Adjustment, over a dissent, ultimately ruled that the contract provision that appeared to authorize the pilots' downbidding was only intended to allow senior pilots operating narrow-body equipment to bid for first officer or flight engineer positions on wide-body aircraft. App. to Pet. for Cert. A84–A90. Since Criswell and Starley were already serving on wide-body aircraft, the provision did not apply to them. The Board also concluded that the provision would not support a transfer "for the obvious purpose of evading the application of [the] agreed retirement plan." *Id.*, at A89. Western relied on this ground in its motion for sum-

under the FAA's under-age-60 rule for pilots, Criswell and Starley applied for reassignment as flight engineers. Western denied both requests, ostensibly on the ground that both employees were members of the company's retirement plan which required all crew members to retire at age 60.[4] For the same reason, respondent Ron, a career flight engineer, was also retired in 1978 after his 60th birthday.

Mandatory retirement provisions similar to those contained in Western's pension plan had previously been upheld under the ADEA. *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192 (1977). As originally enacted in 1967, the Act provided an exception to its general proscription of age discrimination for any actions undertaken "to observe the terms of a . . . bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act."[5] In April 1978, however, Congress amended the statute to prohibit employee benefit plans from requiring the involuntary retirement of any employee because of age.[6]

Criswell, Starley, and Ron brought this action against Western contending that the under-age-60 qualification for

mary judgment, but the District Court concluded that material questions of fact remained on the question of whether age was a substantial and determinative factor in the denial of the downbids. *Id.*, at A81.

[4] The Western official who was responsible for the decision to retire the plaintiffs conceded that "the sole basis" for the denial of the applications of Criswell, Starley, and Ron was the same: "the provision in the pension plan regarding retirement at age 60." Tr. 1163. In addition, he admitted that he had "no personal knowledge" of any safety rationale for the under-age-60 rule for flight engineers, *id.*, at 2059, nor had it played any significant role in his decision to retire them. See *id.*, at 61, 2027–2033, 2056–2057. The airline sent Starley and Ron form letters informing them of its "considered judgment after examining all of the applicable statutory law that since you have been a member of our Pilot retirement plan, that we cannot continue your employment beyond the normal retirement date of age 60." See App. 89, 91.

[5] § 4(f)(2), 81 Stat. 603, 29 U. S. C. § 623(f)(2).

[6] 92 Stat. 189, 29 U. S. C. § 623(f)(2).

the position of flight engineer violated the ADEA. In the District Court, Western defended, in part, on the theory that the age-60 rule is a BFOQ "reasonably necessary" to the safe operation of the airline.[7] All parties submitted evidence concerning the nature of the flight engineer's tasks, the physiological and psychological traits required to perform them, and the availability of those traits among persons over age 60.

As the District Court summarized, the evidence at trial established that the flight engineer's "normal duties are less critical to the safety of flight than those of a pilot." 514 F. Supp. 384, 390 (CD Cal. 1981). The flight engineer, however, does have critical functions in emergency situations and, of course, might cause considerable disruption in the event of his own medical emergency.

The actual capabilities of persons over age 60, and the ability to detect disease or a precipitous decline in their faculties, were the subject of conflicting medical testimony. Western's expert witness, a former FAA Deputy Federal Air Surgeon,[8] was especially concerned about the possibility of a "cardiovascular event" such as a heart attack. He testified that "with advancing age the likelihood of onset of disease increases and that in persons over age 60 it could not be predicted whether and when such diseases would occur." *Id.*, at 389.

The plaintiffs' experts, on the other hand, testified that physiological deterioration is caused by disease, not aging, and that "it was feasible to determine on the basis of individual medical examinations whether flight deck crew members, including those over age 60, were physically qualified to con-

[7] Western also contended that its denials of the downbids by pilots Starley and Criswell were based on "reasonable factors other than age." 29 U. S. C. § 623(f)(1); see n. 10, *infra*.

[8] Although the witness had served with the FAA for seven years ending in 1979, he conceded that throughout his tenure at the FAA he never had advocated that the agency extend the age-60 rule to flight engineers. Tr. 1521.

tinue to fly." *Ibid.* These conclusions were corroborated by the nonmedical evidence:

> "The record also reveals that both the FAA and the airlines have been able to deal with the health problems of pilots on an individualized basis. Pilots who have been grounded because of alcoholism or cardiovascular disease have been recertified by the FAA and allowed to resume flying. Pilots who were unable to pass the necessary examination to maintain their FAA first class medical certificates, but who continued to qualify for second class medical certificates were allowed to 'downgrade' from pilot to [flight engineer]. There is nothing in the record to indicate that these flight deck crew members are physically better able to perform their duties than flight engineers over age 60 who have not experienced such events or that they are less likely to become incapacitated." *Id.*, at 390.

Moreover, several large commercial airlines have flight engineers over age 60 "flying the line" without any reduction in their safety record. *Ibid.*

The jury was instructed that the "BFOQ defense is available only if it is reasonably necessary to the normal operation or essence of defendant's business." Tr. 2626. The jury was informed that "the essence of Western's business is the safe transportation of their passengers." *Ibid.* The jury was also instructed:

> "One method by which defendant Western may establish a BFOQ in this case is to prove:
>
> "(1) That in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each second officer over age 60 on an individualized basis to determine his particular ability to perform his job safely; and
>
> "(2) That some second officers over age 60 possess traits of a physiological, psychological or other nature

which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.

"In evaluating the practicability to defendant Western of dealing with second officers over age 60 on an individualized basis, with respect to the medical testimony, you should consider the state of the medical art as it existed in July 1978." *Id.*, at 2627.

The jury rendered a verdict for the plaintiffs, and awarded damages. After trial, the District Court granted equitable relief, explaining in a written opinion why it found no merit in Western's BFOQ defense to the mandatory retirement rule. 514 F. Supp., at 389–391.[9]

On appeal, Western made various arguments attacking the verdict and judgment below, but the Court of Appeals affirmed in all respects. 709 F. 2d 544 (CA9 1983). In particular, the Court of Appeals rejected Western's contention that the instruction on the BFOQ defense was insufficiently deferential to the airline's legitimate concern for the safety of its passengers. *Id.*, at 549–551. We granted certiorari to consider the merits of this question. 469 U. S. 815 (1984).[10]

[9] After the judgment in the *Criswell* action, eight other pilots and one career flight officer filed a separate action seeking similar relief. A preliminary injunction was granted on behalf of the flight engineer, and Western appealed. The Court of Appeals consolidated the appeal with Western's appeal in *Criswell*, and affirmed the preliminary injunction. 709 F. 2d 544, 558–559 (CA9 1983). The plaintiffs in the collateral action are respondents here.

[10] One of Western's claims in the trial court was that its refusal to allow pilots to serve as flight engineers after they reached age 60 was based on "reasonable factors other than age" (RFOA), namely, a facially neutral policy embodied in its collective-bargaining agreement which prohibited downbidding. See nn. 3 and 7, *supra*. The jury rejected this defense in its verdict. On appeal, Western claimed that the instructions had improperly required it to bear the burden of proof on the RFOA issue inasmuch as the burden of persuasion on the issue of age discrimination is at all times on

II

Throughout the legislative history of the ADEA, one empirical fact is repeatedly emphasized: the process of psychological and physiological degeneration caused by aging varies with each individual. "The basic research in the field of aging has established that there is a wide range of individual physical ability regardless of age."[11] As a result, many older American workers perform at levels equal or superior to their younger colleagues.

In 1965, the Secretary of Labor reported to Congress that despite these well-established medical facts there "is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability."[12] Two years later, the President recommended that Congress enact legislation to abolish arbitrary age limits on

the plaintiff. Cf. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981); *Furnco Construction Co.* v. *Waters*, 438 U. S. 567 (1978). The Court of Appeals rejected this claim on the merits. 709 F. 2d, at 552–553. We granted certiorari to consider the merits of this question, 469 U. S. 815 (1984), but as we read the instructions the burden *was* placed on the plaintiffs on the RFOA issue. The general instruction on the question of discrimination provided that the "burden of proof is on the plaintiffs to show discriminatory treatment on the basis of age." App. 58. The instructions expressly informed the jury when the burden shifted to the defendant to prove various issues, *e. g.*, *id.*, at 60 (business necessity); *id.*, at 61 (BFOQ), but did not so inform the jury in the RFOA instruction, *id.*, at 62–63. Because the plaintiffs were assigned the burden of proof, we need not consider whether it would have been error to assign it to the defendant.

[11] Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment 9 (1965) (hereinafter Report), EEOC, Legislative History of the Age Discrimination in Employment Act 26 (1981) (hereinafter Legislative History). See also S. Rep. No. 95–493, p. 2 (1977), Legislative History 435 ("Scientific research . . . indicates that chronological age alone is a poor indicator of ability to perform a job").

[12] Report, at 21, Legislative History 37.

hiring. Such limits, the President declared, have a devastating effect on the dignity of the individual and result in a staggering loss of human resources vital to the national economy.[13]

After further study,[14] Congress responded with the enactment of the ADEA. The preamble declares that the purpose of the ADEA is "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment." 81 Stat. 602, 29 U. S. C. § 621(b). Section 4(a)(1) makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 81 Stat. 603, 29 U. S. C. § 623(a)(1). This proscription presently applies to all persons between the ages of 40 and 70. 29 U. S. C. § 631(a).

The legislative history of the 1978 Amendments to the ADEA makes quite clear that the policies and substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions. The House Committee on Education and Labor reported:

> "Increasingly, it is being recognized that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take

[13] "Hundreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people age 45 and over who are unemployed.

"In economic terms, this is a serious—and senseless—loss to a nation on the move. But the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families." H. R. Doc. No. 40, 90th Cong., 1st Sess., 7 (1967), Legislative History 61.

[14] See *EEOC* v. *Wyoming*, 460 U. S. 226, 230 (1983).

> into consideration actual differing abilities and capacities. Such forced retirement can cause hardships for older persons through loss of roles and loss of income. Those older persons who wish to be re-employed have a much more difficult time finding a new job than younger persons.
>
> "Society, as a whole, suffers from mandatory retirement as well. As a result of mandatory retirement, skills and experience are lost from the work force resulting in reduced GNP. Such practices also add a burden to Government income maintenance programs such as social security."[15]

In the 1978 Amendments, Congress narrowed an exception to the ADEA which had previously authorized involuntary retirement under limited circumstances. See *supra*, at 405.

In both 1967 and 1978, however, Congress recognized that classifications based on age, like classifications based on religion, sex, or national origin, may sometimes serve as a necessary proxy for neutral employment qualifications essential to the employer's business. The diverse employment situations in various industries, however, forced Congress to adopt a "case-by-case basis . . . as the underlying rule in the administration of the legislation." H. R. Rep. No. 805, 90th Cong., 1st Sess., 7 (1967), Legislative History 80.[16] Congress offered only general guidance on when an age clas-

[15] H. R. Rep. No. 95–527, pt. 1, p. 2 (1977), Legislative History 362. Cf. S. Rep. No. 95–493, p. 4 (1977), Legislative History 437 ("The committee believes that the arguments for retaining existing mandatory retirement policies are largely based on misconceptions rather than upon a careful analysis of the facts").

[16] "Many different types of employment situations prevail. Administration of this law must place emphasis on case-by-case basis, with unusual working conditions weighed on their own merits. The purpose of this legislation, simply stated, is to insure that age, within the limits prescribed herein, is not a determining factor in a refusal to hire." S. Rep. No. 723, 90th Cong., 1st Sess., 7 (1967), Legislative History 111.

sification might be permissible by borrowing a concept and statutory language from Title VII of the Civil Rights Act of 1964[17] and providing that such a classification is lawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U. S. C. § 623(f)(1).

Shortly after the passage of the Act, the Secretary of Labor, who was at that time charged with its enforcement, adopted regulations declaring that the BFOQ exception to the ADEA has only "limited scope and application" and "must be construed narrowly." 33 Fed. Reg. 9172 (1968), 29 CFR § 860.102(b) (1984). The Equal Employment Opportunity Commission (EEOC) adopted the same narrow construction of the BFOQ exception after it was assigned authority for enforcing the statute. 46 Fed. Reg. 47727 (1981), 29 CFR § 1625.6 (1984). The restrictive language of the statute and the consistent interpretation of the administrative agencies charged with enforcing the statute convince us that, like its Title VII counterpart, the BFOQ exception "was in fact meant to be an extremely narrow exception to the general prohibition" of age discrimination contained in the ADEA. *Dothard* v. *Rawlinson*, 433 U. S. 321, 334 (1977).

III

In *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (1976), the Court of Appeals for the Fifth Circuit was called upon to evaluate the merits of a BFOQ defense to a claim of age discrimination. Tamiami Trail Tours, Inc., had a policy of refusing to hire persons over age 40 as intercity bus drivers. At trial, the bus company introduced testimony supporting its theory that the hiring policy was a BFOQ based

[17] Section 703(e) of Title VII permits classifications based on religion, sex or national origin in those certain instances "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U. S. C. § 2000e-2(e)(1).

upon safety considerations—the need to employ persons who have a low risk of accidents. In evaluating this contention, the Court of Appeals drew on its Title VII precedents, and concluded that two inquiries were relevant.

First, the court recognized that some job qualifications may be so peripheral to the central mission of the employer's business that *no* age discrimination can be "reasonably *necessary* to the normal operation of the particular business."[18] 29 U. S. C. § 623(f)(1). The bus company justified the age qualification for hiring its drivers on safety considerations, but the court concluded that this claim was to be evaluated under an objective standard:

> "[T]he job qualifications which the employer invokes to justify his discrimination must be *reasonably necessary* to the essence of his business—here, the *safe* transportation of bus passengers from one point to another. The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving." 531 F. 2d, at 236.

This inquiry "adjusts to the safety factor" by ensuring that the employer's restrictive job qualifications are "reasonably necessary" to further the overriding interest in public safety. *Ibid.* In *Tamiami*, the court noted that no one had seriously

[18] *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (CA5), cert. denied, 404 U. S. 950 (1971), provided authority for this proposition. In *Diaz* the court had rejected Pan American's claim that a female-only qualification for the position of in-flight cabin attendant was a BFOQ under Title VII. The District Court had upheld the qualification as a BFOQ finding that the airline's passengers preferred the "pleasant environment" and the "cosmetic effect" provided by female attendants, and that most men were unable to perform effectively the "non-mechanical functions" of the job. The Court of Appeals rejected the BFOQ defense concluding that these considerations "are tangential to the essence of the business involved." 442 F. 2d, at 388.

challenged the bus company's safety justification for hiring drivers with a low risk of having accidents.

Second, the court recognized that the ADEA requires that age qualifications be something more than "convenient" or "reasonable"; they must be "reasonably necessary . . . to the particular business," and this is only so when the employer is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry.[19] This showing could be made in two ways. The employer could establish that it "'had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved.'"[20] In *Tamiami*, the employer did not seek to justify its hiring qualification under this standard.

Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is "'impossible or highly impractical'" to deal with the older employees on an individualized basis.[21] "One method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance

[19] *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (CA5 1969), provided authority for this proposition. In *Weeks* the court rejected Southern Bell's claim that a male-only qualification for the position of switchman was a BFOQ under Title VII. Southern Bell argued, and the District Court had found, that the job was "strenuous," but the court observed that that "finding is extremely vague." *Id.*, at 234. The court rejected the BFOQ defense concluding that "using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved." *Id.*, at 236. Moreover, the employer had made no showing that it was "impossible or highly impractical to deal with women on an individualized basis." *Id.*, at 235, n. 5.

[20] 531 F. 2d, at 235 (quoting *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d, at 235).

[21] 531 F. 2d, at 235 (quoting *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d, at 235, n. 5).

that cannot be ascertained by means other than knowledge of the applicant's membership in the class." *Id.*, at 235. In *Tamiami*, the medical evidence on this point was conflicting, but the District Court had found that individual examinations could not determine which individuals over the age of 40 would be unable to operate the buses safely. The Court of Appeals found that this finding of fact was not "clearly erroneous," and affirmed the District Court's judgment for the bus company on the BFOQ defense. *Id.*, at 238.

Congress, in considering the 1978 Amendments, implicitly endorsed the two-part inquiry identified by the Fifth Circuit in the *Tamiami* case. The Senate Committee Report expressed concern that the amendment prohibiting mandatory retirement in accordance with pension plans might imply that mandatory retirement could not be a BFOQ:

> "For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.
>
> "Accordingly, the committee adopted an amendment to make it clear that where these two conditions are satisfied and where such a bona fide occupational qualification has therefore been established, an employer may lawfully require mandatory retirement at that specified age." S. Rep. No. 95–493, pp. 10–11 (1977), Legislative History 443–444.

The amendment was adopted by the Senate, but deleted by the Conference Committee because it "neither added to nor

worked any change upon present law."[22] H. R. Conf. Rep. No. 95–950, p. 7 (1978), Legislative History 518.

Every Court of Appeals that has confronted a BFOQ defense based on safety considerations has analyzed the problem consistently with the *Tamiami* standard.[23] An EEOC regulation embraces the same criteria.[24] Considering the narrow language of the BFOQ exception, the parallel treatment of such questions under Title VII, and the uniform application of the standard by the federal courts, the EEOC, and Congress, we conclude that this two-part inquiry prop-

[22] Senator Javits, an active proponent of the legislation, obviously viewed the BFOQ defense as a narrow one when he explained that it could be proved when "the employer can demonstrate that there is an objective, factual basis for believing that virtually all employees above a certain age are unable to safely perform the duties of their jobs and where, in addition, there is no practical medical or performance test to determine capacity." 123 Cong. Rec. 34319 (1977), Legislative History 506. See also H. R. Rep. No. 95–527, pt. 1, p. 12, Legislative History 372.

[23] See, *e. g.*, *Monroe* v. *United Air Lines, Inc.*, 736 F. 2d 394 (CA7 1984), cert. denied, 470 U. S. 1004 (1985); *Johnson* v. *American Airlines, Inc.*, 745 F. 2d 988, 993–994 (CA5 1984), cert. pending, No. 84–1271; 709 F. 2d, at 550 (case below); *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F. 2d 743, 752–753 (CA7), cert. denied, 464 U. S. 992 (1983); *Tuohy* v. *Ford Motor Co.*, 675 F. 2d 842, 844–845 (CA6 1982); *Smallwood* v. *United Air Lines, Inc.*, 661 F. 2d 303, 307 (CA4 1981), cert. denied, 456 U. S. 1007 (1982); *Arritt* v. *Grisell*, 567 F. 2d 1267, 1271 (CA4 1977). Cf. *Harriss* v. *Pan American World Airways, Inc.*, 649 F. 2d 670, 676–677 (CA9 1980) (Title VII).

[24] 46 Fed. Reg. 47727 (1981), 29 CFR § 1625.6(b) (1984):

"An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact."

erly identifies the relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by considerations of safety.

IV

In the trial court, Western preserved an objection to any instruction in the *Tamiami* mold, claiming that "any instruction pertaining to the statutory phrase 'reasonably necessary to the normal operation of [defendant's] business' . . . is irrelevant to and confusing for the deliberations of the jury."[25] Western proposed an instruction that would have allowed it to succeed on the BFOQ defense by proving that "in 1978, when these plaintiffs were retired, there existed a *rational basis in fact* for defendant to believe that use of [flight engineers] over age 60 on its DC–10 airliners would increase the likelihood of risk to its passengers."[26] The proposed instruction went on to note that the jury might rely on the FAA's age-60 rule for pilots to establish a BFOQ under this standard "without considering any other evidence."[27] It also noted that the medical evidence submitted by the parties might provide a "rational basis in fact."

On appeal, Western defended its proposed instruction, and the Court of Appeals soundly rejected it. 709 F. 2d, at 549–551. In this Court, Western slightly changes its course.

[25] Record, Doc. No. 164 (objections to plaintiffs proposed BFOQ instruction).

[26] *Ibid.* (Defendant's Proposed Instruction No. 19) (emphasis added). In support of the "rational basis in fact" language in the proposed instruction Western cited language in the Seventh Circuit's opinion in *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859 (1974), cert. denied, 419 U. S. 1122 (1975), which had been criticized by the Fifth Circuit panel in *Tamiami* and which the Seventh Circuit later repudiated. *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F. 2d, at 752–753. Western also relied on the District Court's opinion in *Tuohy* v. *Ford Motor Co.*, 490 F. Supp. 258 (ED Mich. 1980), which was reversed on appeal, 675 F. 2d 842 (CA6 1982).

[27] Record, Doc. No. 164 (Defendant's Proposed Instruction No. 19.1).

The airline now acknowledges that the *Tamiami* standard identifies the relevant general inquiries that must be made in evaluating the BFOQ defense. However, Western claims that in several respects the instructions given below were insufficiently protective of public safety. Western urges that we interpret or modify the *Tamiami* standard to weigh these concerns in the balance.

Reasonably Necessary Job Qualifications

Western relied on two different kinds of job qualifications to justify its mandatory retirement policy. First, it argued that flight engineers should have a low risk of incapacitation or psychological and physiological deterioration. At this vague level of analysis respondents have not seriously disputed—nor could they—that the qualification of good health for a vital crew member is reasonably necessary to the essence of the airline's operations. Instead, they have argued that age is not a necessary proxy for that qualification.

On a more specific level, Western argues that flight engineers must meet the same stringent qualifications as pilots, and that it was therefore quite logical to extend to flight engineers the FAA's age-60 retirement rule for pilots. Although the FAA's rule for pilots, adopted for safety reasons, is relevant evidence in the airline's BFOQ defense, it is not to be accorded conclusive weight. *Johnson* v. *Mayor and City Council of Baltimore*, *ante*, at 370–371. The extent to which the rule is probative varies with the weight of the evidence supporting its safety rationale and "the congruity between the . . . occupations at issue." *Ante*, at 371. In this case, the evidence clearly established that the FAA, Western, and other airlines all recognized that the qualifications for a flight engineer were less rigorous than those required for a pilot.[28]

[28] As the Court of Appeals noted, the "jury heard testimony that Western itself allows a captain under the age of sixty who cannot, for health reasons, continue to fly as a captain or co-pilot to downbid to a position as

In the absence of persuasive evidence supporting its position, Western nevertheless argues that the jury should have been instructed to defer to "Western's selection of job qualifications for the position of [flight engineer] that are reasonable in light of the safety risks." Brief for Petitioner 30. This proposal is plainly at odds with Congress' decision, in adopting the ADEA, to subject such management decisions to a test of objective justification in a court of law. The BFOQ standard adopted in the statute is one of "reasonable necessity," not reasonableness.

In adopting that standard, Congress did not ignore the public interest in safety. That interest is adequately reflected in instructions that track the language of the statute. When an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is "reasonably necessary" to safe operation of the business. The uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution in a close case.[29] The employer cannot be expected to establish the risk of an airline accident "to a certainty, for certainty would require running the risk until a tragic accident would

second officer. [In addition,] half the pilots flying in the United States are flying for major airlines which do not require second officers to retire at the age of sixty, and . . . there are over 200 such second officers currently flying on wide-bodied aircraft." 709 F. 2d, at 552. See also *supra*, at 406–407.

[29] Several Courts of Appeals have recognized that safety considerations are relevant in making or reviewing findings of fact. See, *e. g.*, *Levin* v. *Delta Air Lines, Inc.*, 730 F. 2d 994, 998 (CA5 1984); *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F. 2d, at 755; *Tuohy* v. *Ford Motor Co.*, 675 F. 2d, at 845; *Murnane* v. *American Airlines, Inc.*, 215 U. S. App. D. C. 55, 58, 667 F. 2d 98, 101 (1981), cert. denied, 456 U. S. 915 (1982); *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d, at 863. Such considerations, of course, are only relevant at the margin of a close case, and do not relieve the employer from its burden of establishing the BFOQ by the preponderance of credible evidence.

prove that the judgment was sound." *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d, at 238. When the employer's argument has a credible basis in the record, it is difficult to believe that a jury of laypersons—many of whom no doubt have flown or could expect to fly on commercial air carriers—would not defer in a close case to the airline's judgment. Since the instructions in this case would not have prevented the airline from raising this contention to the jury in closing argument, we are satisfied that the verdict is a consequence of a defect in Western's proof rather than a defect in the trial court's instructions.[30]

Western's Statutory Safety Obligation

The instructions defined the essence of Western's business as "the safe transportation of their passengers." Tr. 2626. Western complains that this instruction was defective because it failed to inform the jury that an airline must conduct its operations "with the highest possible degree of safety."[31]

Jury instructions, of course, "may not be judged in artificial isolation," but must be judged in the "context of the overall charge" and the circumstances of the case. See *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973). In this case, the instructions characterized safe transportation as the "essence"

[30] Moreover, we do not find that petitioner's proposed instructions made any reference to the notion of deference to the expertise of the employer, except insofar as that concept was implicit in the "rational basis in fact" standard reflected in its proposed instructions. As we reject that standard as inconsistent with the statute, *infra*, at 421–423, we are somewhat reluctant to fault the trial judge for not giving an instruction that was not requested.

[31] This standard is set forth in the Federal Aviation Act, which provides, in part:

"In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Secretary of Transportation shall give full consideration to the duty resting upon air carriers to perform their services with *the highest possible degree of safety* in the public interest . . . ." 49 U. S. C. App. § 1421(b) (emphasis added).

of Western's business and specifically referred to the importance of "safe and efficient job performance" by flight engineers. Tr. 2627. Moreover, in closing argument counsel pointed out that because "safety is the essence of Western's business," the airline strives for "the highest degree possible of safety."[32] Viewing the record as a whole, we are satisfied that the jury's attention was adequately focused on the importance of safety to the operation of Western's business. Cf. *United States* v. *Park*, 421 U. S. 658, 674 (1975).

Age as a Proxy for Job Qualifications

Western contended below that the ADEA only requires that the employer establish "a rational basis in fact" for believing that identification of those persons lacking suitable qualifications cannot occur on an individualized basis.[33] This "rational basis in fact" standard would have been tantamount to an instruction to return a verdict in the defendant's favor. Because that standard conveys a meaning that is significantly different from that conveyed by the statutory phrase "reasonably necessary," it was correctly rejected by the trial court.[34]

[32] "We have tried to present, throughout the case, our view that safety is the essence of Western's business. It is the core, it is what the air passenger service business is all about. We have a duty to our passengers, which we consider to be the most important duty of all the business operations that we engage in, including making money. Our first duty is that the passengers and the crews on all our aircraft are safe. And we attempt to render to them the highest degree possible of safety." Tr. 2514.

[33] In this Court Western proposes a "factual basis" standard. We do not perceive any substantial difference between this standard and the instruction that it sought below, and we discuss the question as it was raised in the proposed instructions, and discussed in the Court of Appeals.

[34] This standard has been rejected by nearly every court to consider it. 709 F. 2d, at 550–551 (case below); *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F. 2d, at 755–756; *Tuohy* v. *Ford Motor Co.*, 675 F. 2d, at 845; *Harriss* v. *Pan American World Airways, Inc.*, 649 F. 2d, at 677; *Arritt* v. *Grisell*, 567 F. 2d, at 1271; *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d, at 235–236.

Western argues that a "rational basis" standard should be adopted because medical disputes can never be proved "to a certainty" and because juries should not be permitted "to resolve bona fide conflicts among medical experts respecting the adequacy of individualized testing." Reply Brief for Petitioner 9, n. 10. The jury, however, need not be convinced beyond all doubt that medical testing is impossible, but only that the proposition is true "on a preponderance of the evidence." Moreover, Western's attack on the wisdom of assigning the resolution of complex questions to 12 laypersons is inconsistent with the structure of the ADEA. Congress expressly decided that problems involving age discrimination in employment should be resolved on a "case-by-case basis" by proof to a jury.[35]

The "rational basis" standard is also inconsistent with the preference for individual evaluation expressed in the language and legislative history of the ADEA.[36] Under the Act, employers are to evaluate employees between the ages of 40 and 70 on their merits and not their age. In the BFOQ defense, Congress provided a limited exception to this general principle, but required that employers validate any discrimination as "reasonably necessary to the normal operation of the particular business." It might well be "rational" to require mandatory retirement at *any* age less than 70, but that result would not comply with Congress' direction that employers must justify the rationale for the age chosen. Unless an employer can establish a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position, the age selected for mandatory retirement less than 70 must be an age at which it

[35] *Supra*, at 411, and n. 16; 29 U. S. C. § 626(c)(2); *Lorillard* v. *Pons*, 434 U. S. 575 (1978).

[36] Indeed, under a "rational basis" standard a jury might well consider that its "inquiry is at an end" with an expert witness' articulation of any "plausible reaso[n]" for the employer's decision. Cf. *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 179 (1980).

is highly impractical for the employer to insure by individual testing that its employees will have the necessary qualifications for the job.

Western argues that its lenient standard is necessary because "where qualified experts disagree as to whether persons over a certain age can be dealt with on an individual basis, an employer must be allowed to resolve that controversy in a conservative manner." Reply Brief for Petitioner 8–9. This argument incorrectly assumes that all expert opinion is entitled to equal weight, and virtually ignores the function of the trier of fact in evaluating conflicting testimony. In this case, the jury may well have attached little weight to the testimony of Western's expert witness. See *supra*, at 406, and n. 8. A rule that would require the jury to defer to the judgment of any expert witness testifying for the employer, no matter how unpersuasive, would allow some employers to give free reign to the stereotype of older workers that Congress decried in the legislative history of the ADEA.

When an employee covered by the Act is able to point to reputable businesses in the same industry that choose to eschew reliance on mandatory retirement earlier than age 70, when the employer itself relies on individualized testing in similar circumstances, and when the administrative agency with primary responsibility for maintaining airline safety has determined that individualized testing is not impractical for the relevant position, the employer's attempt to justify its decision on the basis of the contrary opinion of experts—solicited for the purposes of litigation—is hardly convincing on any objective standard short of complete deference. Even in cases involving public safety, the ADEA plainly does not permit the trier of fact to give complete deference to the employer's decision.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL took no part in the decision of this case.