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**SPECIAL TREATMENT EVERYWHERE,
SPECIAL TREATMENT NOWHERE**

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INTRODUCTION	1155
I. BANNING DISPARATE TREATMENT AS REQUIRING SPECIAL TREATMENT.....	1158
A. <i>The Simplest Case: Identifying Victims, Restoring the Baseline</i>	1158
B. <i>The Deeper Problem: Using Protected Status to Identify Victims</i>	1159
C. <i>Deeper Still: Using Protected Status to Identify Victims Imperfectly</i>	1161
D. <i>An Example: The Teamsters Remedy</i>	1164
II. BEYOND DISPARATE TREATMENT.....	1167
A. <i>Third-Party Harasser Claims as Demands for Special Treatment, or Not</i>	1168
B. <i>Recasting ADA Nonaccommodation Claims in Remedial Terms</i>	1170
C. <i>“Special Treatment” Remedies for Pregnancy Disparate Impact Claims</i>	1174
CONCLUSION.....	1178

INTRODUCTION

This Essay argues that the best defense of civil rights law requires a strong offense. Instead, Title VII is entering its second fifty years with many civil rights advocates in a defensive crouch. Political and intellectual efforts focus on protecting a robust “core” of disparate treatment liability.¹

At its most ambitious, this consolidation around disparate treatment includes assertive attention to the ubiquity of “implicit bias,” which provides a ready explanation for how unequal outcomes can reflect disparate treatment without

* Professor of Law, UCLA School of Law. The author gratefully acknowledges the helpful feedback from audiences at the UCLA Critical Race Studies Program symposium “Whiteness as Property’: A Twenty-Year Appraisal” and at the Boston University School of Law symposium, The Civil Rights Act of 1964 at 50: Past, Present, and Future, as well as essential research assistance from Nick Frontera.

¹ See, e.g., Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 874 (2007).

positing an intentional, let alone bigoted, perpetrator.² But these dynamic efforts go hand-in-hand with construction of a firewall around disparate treatment liability, one that posits a fundamental difference from nonaccommodation or disparate impact analyses of discrimination.³ Only disparate treatment confines itself to a principle of colorblindness; implicit bias simply calls out how hard that can be to achieve.

In this context, affirmative action can receive at most a grudging, somewhat embarrassed defense. If the core mandate of antidiscrimination law is to avoid making decisions that turn on an individual's race, even without animus, then affirmative action is, well, awkward. As "special treatment" or "preferential treatment," affirmative action reeks of hypocrisy or bad faith *if* one supposes that the core error of discrimination is the act of deciding based on race, or other protected status.⁴

I aim to cast doubt on this defensive strategy by demonstrating its futility, or at least its deep vulnerability. The firewall will not hold. We see this as a conservative Court attempts to chip away at disparate treatment liability directly⁵ and invokes revulsion at "preferential treatment" in increasingly expansive ways. In doing so, it extends anti-affirmative action precedents into territory once thought analytically distinct.⁶

² See *id.* at 854; Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 646 (2015).

³ See, e.g., Green, *supra* note 1, at 875-83 (distinguishing disparate treatment liability from nonaccommodation liability); Tristin K. Green, *On Macaws and Employer Liability: A Response to Professor Zatz*, 109 COLUM. L. REV. SIDEBAR 107, 114 (2009); Kang, *supra* note 2, at 647 (distinguishing interventions in disparate treatment arising from implicit bias from interventions aimed at disparate impact not arising from such disparate treatment).

⁴ For a compelling effort nonetheless to ground affirmative action in and reorient it toward problems of implicit bias, see Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063 (2006).

⁵ See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (limiting the Civil Rights Act of 1991's provision for a "motivating factor" rather than "but-for" causal standard); *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013) (narrowly construing the definition of "supervisor" in hostile work environment claims); *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011) (suggesting various restrictions on the causal relationships that can establish disparate treatment liability); *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011) (restricting the ability to bring systemic disparate treatment claims as a class action); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (narrowly construing when actions that carry forward decisions taken with discriminatory intent are themselves actionable as disparate treatment).

⁶ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557 (2009) (relying on affirmative action precedents to limit employers' ability to reject policies that impose a disparate impact); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (relying on affirmative action precedents to limit school desegregation efforts); see also Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 112-18 (2010) (criticizing *Ricci*); Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69

Rather than denying continuity between disparate treatment and more controversial topics like reasonable accommodation or affirmative action, those of us who seek a robust civil rights jurisprudence should name and claim it.⁷ Ultimately, that requires an affirmative account of equality law, one that makes sense of disparate treatment liability without fetishizing it. I have been pursuing that project in other work,⁸ but for this Symposium I want to proceed indirectly.

The specter of “special treatment” haunts a robust legal prohibition of disparate treatment, just as much as it does a defense of affirmative action. Rather than trying to hide from “special treatment” accusations, we must learn to confront them. Disparate treatment liability provides particularly fertile ground to nourish those tactics because it seems so absurd to suppose that Title VII is self-defeating to the core. If avoiding “special treatment” means tolerating disparate treatment, somewhere our analysis has gone off the rails. Getting it back on track can begin our journey toward rethinking all of employment discrimination law.

Driving my argument is attention to *remedial* employer action. Employers can prevent or remedy discrimination as much as they can commit it. That idea is deeply embedded in Title VII jurisprudence: “The statute’s ‘primary objective’ is ‘a prophylactic one’; it aims, chiefly, ‘not to provide redress but to avoid harm.’”⁹ Yet this familiar idea is constantly undermined by what Cheryl Harris labeled “whiteness as property.”¹⁰ When the benefits of discrimination against others are taken as a baseline entitlement, an intervention’s remedial character becomes invisible. Instead, that equalizing intervention looks like special treatment, raw redistribution away from members of a dominant group who earned their place at the top. This dynamic simultaneously shields discrimination’s beneficiaries from acknowledgement of their windfall and derogates discrimination’s victims as undeserving when they receive relief.

Failure to appreciate the remedial context can lead to reckless accusations of “special treatment.” Often, a careful analysis reveals that an employer’s remedial conduct relies not on individuals’ protected status but only on their identification as victims of discrimination. Even a simple colorblindness

OHIO ST. L.J. 1321, 1322-23 (2008) (criticizing *Parents Involved*).

⁷ Cf. Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003) (arguing for the continuity of disparate treatment and nonaccommodation liability).

⁸ See generally Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009) [hereinafter Zatz, *Managing the Macaw*]; Noah D. Zatz, *Disparate Impact and the Unity of Equality Law* (2015) (unpublished manuscript) (on file with author) [hereinafter Zatz, *Disparate Impact*].

⁹ *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999) (citations omitted) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

¹⁰ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

standard is thereby satisfied.

This remedial character is signaled by intra-group distinctions. A remedy offered to African Americans is never offered to *all* African Americans; instead it is targeted to the individual or individuals who suffered discrimination because of their race.

Sometimes, though, identifying victims of discrimination also requires making *inter-group* distinctions. Allocating remedies for disparate treatment then requires more disparate treatment and thus can be characterized as “special treatment.” Such a remedy must be defended unapologetically, yet honestly. It *does* entail “disparate treatment.” The implication is *not* that “two wrongs make a right.” Instead, the availability here of the “special treatment” accusation signals the uncertain force of the accusation itself, an uncertainty that reveals deep confusion about what makes discrimination wrong in the first place.

I. BANNING DISPARATE TREATMENT AS REQUIRING SPECIAL TREATMENT

My claim in this Part is that employer compliance with a prohibition on disparate treatment can often be characterized as “special treatment.” Often those characterizations are simply confused, a confusion enabled by failure to acknowledge the relevant nondiscriminatory baseline. In others, however, they are accurate, yet surely miss the point.

A. *The Simplest Case: Identifying Victims, Restoring the Baseline*

Imagine that a supervisor passes over a Black worker because of his race and hires a white worker instead. A higher-ranking manager discovers this. To remedy the supervisor’s disparate treatment, the manager intervenes and hires the Black worker into another vacant position. Why did the Black worker get to jump the queue? After all, the manager does not typically make hiring decisions, and the second spot was not filled on a competitive basis. Special treatment? Of course not: the obviously correct answer is that the Black worker had lost the first job only because of his race. Hiring the Black worker into the second job repairs that breach.

That answer establishes two things. First, that the manager prioritized hiring the Black worker because of his prior subjection to discrimination, not because of his race. The “special treatment” accusation sees a Black person getting a job in a nonstandard way and jumps to the conclusion of racial favoritism. Yet this could all have happened without the manager considering the Black worker’s race. Perhaps the supervisor had written “Jean—wrong race” in her notes, or an outside review concluded that “Jean was rejected based on Jean’s race.” If so, the manager could identify the victim of discrimination by name and never even know Jean’s race. As it turns out, Jean just happens to be Black.

Second, the manager’s decision was not merely *nondiscriminatory* but also *antidiscriminatory*: necessary to remedy discrimination. Employers are not simply *permitted* to make decisions about employees based on their subjection

to race discrimination. They *must* do so because employers are obligated to avoid discriminating and, if they fail, to remedy the error.

All this is so obvious that it largely goes unstated in simple disparate treatment cases. Yet stating the obvious here provides a roadmap for other cases where the analysis routinely goes astray.

One way to go astray is to ignore the connection between court-ordered remedies and voluntary employer remedies. When an employer denies discrimination but a court ultimately imposes liability, the court's remedial order specifies something that the employer could have done on its own initiative. In the Jean hypothetical, the employer provided *sua sponte* the standard court-ordered remedy of reinstatement through priority hiring.¹¹ Once we recognize that, it becomes much harder to treat the employer's conduct as a potential independent violation; the "special treatment" allegation relies for its force on decontextualization, severing the link between remedial and discriminatory moments.¹² Instead, it is the underlying discrimination, the deviation from a nondiscriminatory baseline, that must take center stage.

B. *The Deeper Problem: Using Protected Status to Identify Victims*

In the simple example above, specifying the remedial posture annulled the "special treatment" charge. The worker receiving the remedy was not selected based on his race at all, but only based on his identification as a victim of discrimination. Even using a post- rather than pre-discrimination baseline, it was not *racial* disparate treatment for the employer to deviate from normal hiring practices and directly hire the Black worker. If an employer hires a white worker over a Black worker based on an honest, though mistaken, belief that the white worker is better qualified, the disparity in treatment is not race discrimination.¹³ Similarly, were an employer to "preferentially" hire someone for a job based on an honest, but mistaken, belief that she had been discriminated against, there would be no race discrimination, even if that mistake led the employer to hire a Black applicant over a white one.¹⁴ In such

¹¹ See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (upholding a remedy granting priority hiring with retroactive seniority to victims of hiring discrimination); *Waldorf v. Bd. of Comm'rs for the E. Jefferson Levee Dist.*, 857 F.2d 1047, 1054 (5th Cir. 1988) (discussing reinstatement remedies); BARBARA T. LINDEMANN, PAUL GROSSMAN & C. GEOFFREY WEINRICH, *EMPLOYMENT DISCRIMINATION LAW* 14-15 (C. Geoffrey Weinrich et al. eds., 5th ed. 2012) ("Specific make-whole remedies . . . include hiring, transfer, promotion, reinstatement, [etc.] . . .").

¹² Of course, a court's remedial order is not immune from such an attack, but courts generally receive significant leeway in light of the remedial function. See *Local 28 of Sheet Metal Workers' Int'l v. EEOC*, 478 U.S. 421, 478 (1986) (holding that Congress intended "to vest district courts with broad discretion to award . . . equitable relief").

¹³ See, e.g., *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006) (discussing the "honest belief" rule); *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 678 (7th Cir. 1997) (same).

¹⁴ The white applicant has no baseline entitlement to the job, only an entitlement not to

cases, the charge of “special” or “preferential” treatment fails to deliver what it promises, a violation of antidiscrimination principles, not mere deviations from procedure to which civil rights law is indifferent.

The deeper conceptual problems arise when recognizing this remedial context does *not* undermine the formal characterization of the employer’s conduct as “disparate treatment.” This occurs when an individual’s protected status is used to identify her as a victim of discrimination.

The premise here is that “disparate treatment” is defined by the employer’s use of an individual’s protected status as a basis for decision, such that the employer would have made a different decision about an otherwise identical individual with a different race.¹⁵ The import of this causal definition is that the employer’s *motive* for using the protected status is irrelevant to its characterization as disparate treatment. That is why employers commit “disparate treatment” when they use race or sex in an instrumentally rational way to advance a legitimate end, or use it paternalistically with a motive only to benefit those facing its discrimination.¹⁶ Just as stupid or obnoxious reasons are not disparate treatment if they do not rely on the plaintiff’s race, rational or benevolent ones *are* disparate treatment if they do so rely.

My earlier hypothetical avoided this problem because I stipulated that the employer could identify “Jean” as a victim of discrimination without utilizing, or even knowing, Jean’s race. We know Jean suffered race discrimination, and we know who Jean is. But what if the only way to uniquely identify Jean is by making racial distinctions? Let’s say there are two applicants named Jean, one white and the other Black. Neither gets the job, and the employer learns that “Jean didn’t get the job because the supervisor won’t hire Black people.” In order to fulfill its statutory obligations, the employer must allocate its remedy to the Black Jean, not the white Jean. The employer will have to use race to

lose the job because of his race. When the racial positions are reversed, courts routinely lecture Black plaintiffs about Title VII’s narrow limitation to cases of race discrimination, not cases of employer error or nonracial vice. *See, e.g.*, *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993) (affirming the district court’s rejection of plaintiff’s claim because “although [plaintiff] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated” (quoting *Hicks v. St. Mary’s Honor Ctr.*, 756 F. Supp. 1244, 1252 (E.D. Mo. 1991))).

¹⁵ I am ignoring the subtleties of but-for causation versus “motivating factor” causation, which are unimportant here.

¹⁶ *See, e.g.*, *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197-98 (1991) (holding that an employer could not prohibit female employees from working jobs based on potential fetal lead exposure if the women were pregnant, and even if running that risk were costly to the employer); *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (holding that an employer could not make female employees contribute more money toward their health insurance because women tend to live longer than men); *EEOC v. Joe’s Stone Crab*, 220 F.3d 1263, 1284 (11th Cir. 2000) (“[An employer may] be found liable under Title VII for intentional discrimination regardless of whether it also was motivated by ill-will or malice toward women.”); *see also* Bagenstos, *supra* note 7.

decide whom to hire as a remedy.

I find it hard to imagine that the white Jean could succeed on a Title VII claim against the employer in this case; certainly her claim ought to fail. And yet it is strikingly difficult to articulate why in a doctrinally cognizable way. The formal definition of disparate treatment is met. The benign motive is irrelevant.¹⁷ Notably, even existing affirmative action jurisprudence would be of little help, because that doctrine assumes a much more general practice of considering race (or sex) in order to overcome a “manifest imbalance . . . in ‘traditionally segregated job categories.’”¹⁸ Here, the employer’s instatement of Jean is appropriate even if Jean’s initial denial was an aberration in an otherwise integrated job category.

Furthermore, an employer that refused a remedy to the Black Jean could not, and should not, get any traction whatsoever from protesting that such a remedy would amount to “special treatment.” Black Jean is entitled to the race-conscious remedy. Otherwise, the prohibition on disparate treatment will go underenforced.

The foregoing analysis shows that the “special treatment” problem intrudes even on the narrow “core” of individual disparate treatment against individually identifiable victims. That leaves two choices.

First, one might concede that “special treatment” is not only permissible but sometimes necessary. Far from rescuing antidiscrimination law from incoherence in favor of consistent adherence to principle, rigorous suppression of disparate treatment leads to absurdity even within a conception of discrimination limited to disparate treatment. Thus, the mere ability to invoke “special treatment” as an objection is unimpressive. To the contrary, it may indicate an attempt to insulate discrimination from redress. The conversation can only continue with some substantive account of when disparate treatment is prohibited and when it is mandatory. “Special treatment” is everywhere, even in the core, but its presence turns out to be uninteresting.

Second, to rescue the accusation from irrelevance, one might limit its use to some subset of cases that are recognizably pernicious. Allocating remedies based on race, to the extent necessary to achieve a remedy, is just not within the meaning of “special treatment.” But then what *does* it mean, other than a bare accusation of impropriety? Again, we need an account richer than what a formal definition of disparate treatment can provide, and that has not been offered by purveyors of the accusation.

C. *Deeper Still: Using Protected Status to Identify Victims Imperfectly*

But wait, it gets worse. An even subtler problem arises when victims cannot be identified with precision, or even to the point of more likely than not, yet using protected status can substantially improve that precision. Now, not only

¹⁷ See sources cited *supra* note 16.

¹⁸ See *Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 631 (1987) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1978)).

do we need to use race or let discrimination go unremedied, but we need to use race *crudely* or let discrimination go unremedied.

Let's vary the hypo this way: presented with a pool of five well-qualified applicants, two white and three Black, the supervisor hires one of the whites. After discovering that this was disparate treatment, the manager uses another vacancy to provide a remedy. But who gets the remedy? One of the three Black applicants would have been hired but-for his race, while the other two would not have been hired regardless. Not knowing which is which, the manager might sensibly consider all three Black applicants for the vacancy and choose the strongest one.

Notice how the "special treatment" accusation comes roaring in. The manager constituted the pool for the second vacancy based on the applicants' race. Among the four disappointed applicants for the first opening, the manager considers three of them because they are Black and excludes the fourth because he is white. This sounds like a pretty good reverse discrimination claim, but only if you ignore the remedial context.

The proper analysis is this: the employer knows that one of the three Black applicants was denied a job based on his race and that the white applicant was not. To unscramble the egg as best she can, the manager must use the applicants' race as a proxy for having been discriminated against initially. Unlike my first hypothetical and like the second, this one really does involve disparate treatment by the employer, albeit rational disparate treatment to advance an otherwise legitimate, indeed mandatory, end.

The relevant baseline for evaluating the priority hiring has to be the world as it would have been without the supervisor's initial disparate treatment, not the world created by that discrimination. If there is no better way to identify the true victim of discrimination, then either we just throw up our hands and accept the discriminatory status quo, or we modify it with imperfect tools.

There are two respects in which the employer's remedy may not faithfully reconstruct the nondiscriminatory baseline. First, the manager might hire an African American *other* than the one who lost the first job due to her race.¹⁹ This Black worker would receive some benefit, relative to the nondiscriminatory baseline, and do so based on her race.²⁰ This, of course, is a standard charge against affirmative action. Second, at the nondiscriminatory baseline, the one remaining white applicant might have gotten the second position. That could happen if the white applicant who received the first job due to discrimination would, absent that discrimination, not have gotten the second job. As among the three remaining applicants (excluding the white worker who wrongly got the first position and the Black worker wrongly

¹⁹ There may be variations in reasonable judgment about which candidate is strongest, or subtle differences between the jobs that could affect whom to hire.

²⁰ This assumes that, absent discrimination with regard to the first position, this African American would not have been hired for the second position either, again absent discrimination. It is easy to construct plausible scenarios in which this is so.

denied it), the white one would have gotten the second job. This would reproduce yet another standard charge against affirmative action, that it displaces “innocent” whites, not just ones who did not commit the discrimination being remedied but even ones who did not benefit from that discrimination.

Rather than deny these possibilities of error, my question is “compared to what?” Crucially, the problem is *not* “who would have been hired for the second position given who was hired for the first position?” That formulation uses a baseline in which discrimination is accepted as a *fait accompli*. Rather, the correct question is “who would have been hired for these two positions absent any discrimination?”

Once we know that one African American has lost the first position to discrimination, then *any* scenario in which the second position is filled by the second white applicant fails to restore the nondiscriminatory baseline. Limiting the pool to the three remaining African Americans avoids certain failure, even though it does not guarantee success. Thus, to dismiss this remedy for its imperfections is to apply a double standard: the possible loss (of an accurate remedy) to the worker discriminated against is valued less than the possible loss (of an inaccurate remedy) to other workers, and in particular to the white worker.

I don’t mean to suggest that the employer’s remedy is obviously the best course of action from an antidiscrimination perspective. One can construct variations in which this remedy seems unwise, given sufficiently low odds of successfully remedying the initial discrimination and sufficiently high risk of misallocating the second position. But that conclusion is, at best, a tragic one, not a victory for the principle of colorblindness. It is a conclusion that acknowledges a racial injustice but despairs of remedying it.

Equally clear, however, is that the bare fact of employing racial distinctions is not the source of the tragedy. That is what the two-Jeans scenario established. Instead, the potential elusiveness of discrimination is what creates the dilemma. That creates difficulty specifying the appropriate baseline with sufficient precision to justify action. Moreover, it seems clear that *some* uncertainty in the precision of remedies must be embraced if we are to provide any remedies at all.

These are difficult questions, but we cannot escape them by retreating into some safe haven in which we scrupulously, yet still vigorously, suppress disparate treatment. The problems of the “special treatment” characteristic of affirmative action will still chase us down. All of employment discrimination law is vulnerable in the presence of baseline errors and imperfect information.

Having gotten into such a morass, I can hear stirring the siren song of so-called universal remedies offering a way out. Rather than getting into this nasty business of allocating remedies based on race, why not just include everyone? The rejected white applicant should get a second chance just like the rejected Black applicants. Or perhaps all four of them should get the job, just to make sure the white applicant doesn’t feel left out. No, no, no. Absent

discrimination, there is no reason to think that the rejected white applicant would have gotten either the first *or* the second job. He lagged behind both the white guy who got hired and the Black applicant who should have been hired instead. So why should the second white guy get a windfall because the employer discriminated in favor of another white guy, as if he was entitled to share in the fruits of injustice?

The contrast between universal and racially targeted remedies depends on a baseline error. Here is the universal, non-racially specific principle being implemented: the only individuals eligible for the second hire are those who may have lost the first job due to their race. After applying that principle universally, to all four disappointed applicants, only the Black applicants appropriately receive consideration for the second position. This, of course, is the same principle that explains the easy case with which we began: remedies are allocated on the basis of discriminatory loss. Applying this principle often will yield a racially specific result, but only insofar as the discrimination being remedied was itself racially specific.

D. *An Example: The Teamsters Remedy*

The 1977 *International Brotherhood of Teamsters v. United States*²¹ case illustrates both the vulnerability of disparate treatment jurisprudence to “special treatment” charges and the proper rebuttal with a baseline analysis. In *Teamsters*, the Court found that the defendant employer and union had systematically excluded workers of color from lucrative long-haul jobs and confined them to less desirable local routes.²² This was classic disparate treatment at the undisputed core of Title VII, the sort of discrimination that even Justice Scalia purports to abhor.²³ The Court upheld a remedy that gave priority hiring to all incumbent Black or Latino local drivers whose long-haul applications had been rejected because of their race.²⁴ As new openings were filled with these drivers of color, they received seniority retroactive to the date that they would have been hired absent discrimination.²⁵

This retroactive seniority award could be construed as “special treatment”: these Black and Latino drivers got something no white drivers got—seniority in excess of their actual time on the job.²⁶ But the Court previously had upheld

²¹ 431 U.S. 324 (1977).

²² *See id.* at 367.

²³ *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring) (allowing that “[i]t might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to ‘smoke out,’ as it were, disparate treatment”).

²⁴ *See Teamsters*, 431 U.S. at 331.

²⁵ *Id.* at 331-32, 362.

²⁶ *See Franks v. Bowman Transp. Co.*, 495 F.2d 398, 417-18 (5th Cir. 1974) (“Creating fictional employment time for newly hired Negroes would constitute preferential rather than remedial treatment.” (quoting *United States v. Local 189*, 301 F. Supp. 906, 995 (E.D. La.

such awards against the charge that they trammelled the interests of “innocent” white workers, noting that they simply were an effort to reconstruct the nondiscriminatory baseline that had been marred by the employer’s disparate treatment.²⁷

The *Teamsters* Court went further. It extended the priority hiring remedy to Black or Latino drivers who had *not* applied for line driver positions because rampant discrimination had deterred them from making a “futile gesture.”²⁸ The employer objected that this remedy constituted “preferential treatment . . . solely because of their race.”²⁹ That is, the employer attacked this remedy as a form of affirmative action.

Rather than rebutting this attack by *denying* the connection to affirmative action, I submit that the more productive and honest response is to say, “Bring it on.” *Teamsters* is an example of affirmative action, but seeing that helps to legitimize affirmative action rather than delegitimize the *Teamsters* remedy. The point is fairly simple: yes, access to the priority hiring pool was allocated in part based on race. Only Black and Latino city drivers were eligible; whites were not.³⁰ Therefore, if you focus only on the allocation of priority hiring itself, that allocation constitutes a benefit to Black and Latino drivers based in part on their race. But that obviously represents a baseline mistake of just the sort that Harris posited.³¹ The more appropriate baseline is the distribution of long-haul drivers that would have arisen in the absence of discrimination, and the *Teamsters* remedy merely uses race as a tool to reconstruct that baseline.

In order to tailor the remedy to this reconstructive purpose, the Court emphasized its principles of *intra*-group distribution. First, nonapplicants could be included in the priority pool only if they demonstrated that they would have applied for long-haul jobs absent the employer’s pattern of discrimination.³² Second, both for such nonapplicants and for actual applicants, the employer could exclude individuals from the priority hiring remedy by showing that they would not have been hired even absent discrimination.³³ Thus, although a specific racial status was necessary for inclusion in the remedy—and therefore all whites were excluded—it was far from sufficient. Relief was targeted to the subset of Blacks and Latinos who were most likely to have suffered from the

1969)), *rev'd*, 424 U.S. 747 (1976).

²⁷ *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 774 (1976). *But see Franks*, 424 U.S. at 792-93 (Powell, J., concurring in part and dissenting in part) (characterizing retroactive seniority awards as forms of “preferential treatment” analogous to those forbidden by Title VII).

²⁸ *Teamsters*, 431 U.S. at 366.

²⁹ *Id.* at 363.

³⁰ *Id.* at 331, 362.

³¹ *See Harris*, *supra* note 10.

³² *Teamsters*, 431 U.S. at 367.

³³ *See id.* at 362.

specific form of disparate treatment committed by the defendant employer.³⁴ Black workers, in other words, are not treated as interchangeable with one another, even if equally qualified for the job.

This attempt to target remedies toward victims of discrimination comes with some costs. The Court was most concerned about the possibility of overinclusiveness, of awarding a remedy to nonvictims.³⁵ It noted that not all Black local drivers necessarily would have applied for long-haul routes even in the absence of discrimination—the financial benefits might have been outweighed by other considerations, such as very different work schedules.³⁶ Thus, by requiring proof that the employer's discrimination had deterred application, the *Teamsters* Court took care to exclude drivers if they merely had a change of heart by the time the priority hiring remedy became available. The opinion emphasized the narrower scope of this remedy in contrast to the broader one ordered by the lower court.³⁷ The lower court's approach would have granted priority hiring to any incumbent Black or Latino local driver, regardless of actual prior application but still subject to the employer's "same decision" defense.³⁸

At first glance, the Court's limitation on nonapplicants appears necessary to avoid the "special treatment" charge. Otherwise, the remedy goes to Blacks and Latinos willy-nilly, regardless of whether they would have been hired absent discrimination. But not so fast.

First, notice that even the lower court's nonapplicant remedy was limited to *local drivers already working for the defendant employer*.³⁹ In other words, it provided no relief to someone who would have applied for a *local driver* position as a "foot in the door" on the way to a long-haul position, but who, knowing that door was slammed shut by racism, declined to take the initial step. That scenario is certainly plausible, but trying to distinguish it from other reasons for nonapplication creates daunting evidentiary challenges that would introduce significant risk of error.

Second, even as among the incumbent local drivers, the requirement to prove that discrimination deterred their application hardly ensures perfect identification of those who would have gotten long-haul jobs absent discrimination. The Court acknowledged that these incumbent nonapplicants faced a "not always easy burden."⁴⁰ A genuine victim of discrimination might receive no remedy because he lacked the evidence to prove the truth that he

³⁴ *See id.* at 367.

³⁵ *See id.* at 369.

³⁶ *Id.* ("The known prospect of discriminatory rejection . . . does not show which of the nonapplicants actually wanted such jobs, or which possessed the requisite qualifications."); *id.* at 370 n.55.

³⁷ *See id.* at 367.

³⁸ *Id.* at 333.

³⁹ *Id.*

⁴⁰ *Id.* at 368.

would have applied.

For these two reasons, the Court's evidentiary hurdles increased the risk of remedial *under*inclusiveness, even as they also tightened—and expressed—the connection between relief and prior discrimination, thereby reducing the risk of *over*inclusiveness. For this reason, the lower court's initial order could have been defended in the same terms as the Court's narrower one. Given the desirability of the long-haul jobs, and given that the Black and Latino drivers already were working for this employer as drivers, local driver incumbency was plausibly a sensible proxy for the set of individuals deterred from application. The lower court simply balanced the risks of *over*inclusiveness somewhat differently than the Supreme Court ultimately did. And by limiting the remedy to incumbents, the lower court still accepted some risk of excluding those genuinely injured relative to the nondiscriminatory baseline.

Finally, notice that there is no way to escape the need to balance these risks of remedial *over-* and *under-*inclusiveness. Even in the simplest individual disparate treatment case with which we began, there is always the risk of an erroneous liability determination. If that occurs, then the remedy allocated on the basis of a (mistaken) liability determination will confer “special treatment” relative to the nondiscriminatory baseline.⁴¹

Under conditions of uncertainty, *any* approach to liability and remedy will be a blunt tool. There is no bright line at which one switches over from “remedial” to “special” treatment. Instead, there is a spectrum. The ultimate question is really the relative weight to be placed on the risk of failing to provide a remedy to some individuals genuinely injured by discrimination versus the risk of providing one to those not so injured. A crucial insight of the “whiteness as property” framework is that claims of entitlement to white privilege simultaneously amplify the salience of the latter error while obscuring the existence of the former.

II. BEYOND DISPARATE TREATMENT

Part I established that grounding liability in individual disparate treatment provides no bulwark against “special treatment” charges. Instead, a serious rebuttal requires identifying both a nondiscriminatory baseline that the employer action (whether or not court-ordered) seeks to reconstruct and also the ways that the action is tailored to that end. In some cases, doing so guts the accusation by establishing that the individuals benefitting (relative to the discriminatory baseline) from the remedy have been identified based on their subjection to discrimination, not their protected status. In others, it demonstrates the indeterminacy of a formalist commitment to colorblindness and the need to weigh the risks of remedial *over-* versus *under-*inclusiveness under conditions of uncertainty.

⁴¹ Especially where, as seems likely if not inevitable, the liability determination itself relied in part on the plaintiff's race, in the sense that her race itself played a role in drawing the conclusion that she had faced race discrimination.

This Part extends the analysis to claims lying beyond conventional disparate treatment. Doing so demonstrates the folly of attempting to disparage these claims as inviting or requiring special treatment, in supposed contrast to disparate treatment claims. Instead, the genuine issue concerns the substance of the nondiscriminatory baseline. Making visible the remedial character of these claims tends to rebut the special treatment charge and amplify the moral intuitions supporting broader conceptions of discrimination.

A. *Third-Party Harasser Claims as Demands for Special Treatment, or Not*

Third-party harasser claims illustrate my general point that the potential for “special treatment” accusations haunts any antidiscrimination regime in the presence of baseline errors. These cases hold employers liable when an employee is harassed by a third party such as a customer, patient, or independent contractor.⁴² The doctrinal puzzle is that the employer’s liability turns on its failure to prevent or remedy the harassment, regardless of whether it failed to do so because of the plaintiff’s sex.⁴³ Instead, the “because of sex” requirement is satisfied if the harasser, not the employer, acted based on the employee’s sex. With that point established, an employer may be held liable even if it had a universal practice of ignoring all harassment, regardless of who the victim was or why she was harassed.

Now imagine an employer who does what Title VII requires without waiting for a court order. Three employees are being harassed by three different customers. One employee is harassed because she is a woman. Another employee is harassed because he is a Republican. A third employee is harassed because he is a smoker. Title VII requires the employer to prevent or remedy the harassment of the woman but says nothing about how it handles the others. So imagine that the employer takes preventive action only with regard to the woman. It bars her harasser from the premises, or allows her to avoid her harasser through a shift change, or whatever. When the other harassed employees ask for similar (yes) accommodations, the employer refuses. What do they cry? “Special treatment!” They claim that the employer is preferentially protecting women from harassment. Not so, I insist.

The key point is to recall the employer’s reasons for its action. The relevant baseline is not the actual workplace in which all three employees are harassed. Relative to that baseline, the employer is indeed selectively intervening on behalf of the woman. But the relevant baseline is one in which no worker suffers a hostile work environment *because of her sex*. Only the woman has suffered a deviation from that baseline, so targeting a remedy at her is not preferential treatment in the sense invoked by the accusation: preferential treatment *based on her sex*. Indeed, it is misleading to call the employer’s remedy “targeted” at all. Every worker is protected against sex-based discrimination, and every worker who has suffered sex-based discrimination

⁴² See, e.g., *Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689 (7th Cir. 2005).

⁴³ See generally *Zatz, Managing the Macaw*, *supra* note 8.

receives a remedy. In that sense, the remedy is “universal.”

The absence of special treatment crystallizes if we modify the hypo so that the smoker is a woman. Now the smoker is a woman who is harassed, but she is not harassed because she is a woman. Therefore, the employer who protects all its employees against sex discrimination, but not against other forms of harassment, will intervene on behalf of one woman but not the other. Of course, the employer is perfectly free to protect all its employees against harassment of any form. Doing that would effectively remedy the sex-based harassment. However, there is no reason grounded in sex discrimination law to require such an inclusive remedy; it is not the only remedy that avoids preferential treatment based on sex. To frame it otherwise simply commits a subtler version of the familiar baseline error.

To be clear, this point does not yet establish that the employer’s action is *mandatory*. It simply establishes that when an employer acts on the basis of whether an employee was harassed because of her sex, it does not act based on her sex. There is no “special treatment.” Therefore, even if Title VII did not *require* the employer to remedy or prevent sexual harassment by a third-party, the employer could choose to do so without committing disparate treatment.

A caveat is in order here. Although the employer does not select individuals for accommodations based on their sex, only based on their subjection to harassment because of their sex, it *does* treat sex-based injuries differently than non-sex-based injuries. In this sense, sexual harassment receives “special treatment” relative to political harassment, or smoker harassment. True enough, but uninteresting. This is just a generic concern about the way that employment discrimination law selects among potentially protected statuses and uses protected statuses to allocate employer obligations rather than some broader concept of “just cause.” Those concerns are serious ones, but it is a confusion to see them as arising with special force when liability is not grounded in the employer’s disparate treatment. To the contrary, the simple disparate treatment prohibition provides “special treatment” for victims of sex or race discrimination relative to victims of political or smoking discrimination.

To return to the main thread, the shift from *permitting* to *requiring* the employer to remedy third-party harassment requires further analysis of the conception of discrimination used to specify the relevant baseline. Imposing liability in third-party harasser cases implies that, absent employer intervention, a woman’s subjection to harassment disrupts the nondiscriminatory baseline that the employer must maintain. That can be so only if Title VII requires more from an employer than avoiding disparate treatment by its own agents. That is the only interesting question in these cases. If liability can attach even when the employer evenhandedly ignores all harassment by its non-agents, the special treatment problem quickly dissolves. In other words, the special treatment accusation really functions as a stalking horse for an underlying dispute about the concept of discrimination. Employer liability in third-party harassment cases has been surprisingly uncontested,

consistent with the absence of “special treatment” objections in the case law.

B. Recasting ADA Nonaccommodation Claims in Remedial Terms

The “reasonable accommodation mandate” of the Americans with Disabilities Act (“ADA”)⁴⁴ has widely been understood as a requirement of “special treatment” in favor of workers with disabilities. Such a requirement, in turn, is presented as a sharp departure from the “equal treatment” mandate of Title VII’s disparate treatment prohibition.⁴⁵ For many, this has been a reason to oppose, or at least limit, accommodation mandates. Others have accepted the characterization and the contrast but gone on to embrace nonaccommodation liability as nonetheless advancing some broader set of equality values uniting these two seemingly distinct methods.⁴⁶

Although I grant that nonaccommodation and disparate treatment liability are recognizably distinct, this section builds on the last to assert that the embrace of “special treatment” is not the basis of such distinction. Instead, the difference of interest concerns how the discriminatory baseline is specified. Getting to that point requires reinterpreting “accommodations” as *remedies*.

*U.S. Airways, Inc. v. Barnett*⁴⁷ is the leading case on reasonable accommodation under the ADA. Ordinarily, it is read as a zero-sum conflict between the plaintiff Barnett and another worker. Simplifying the facts somewhat, Barnett initially worked a job handling cargo for US Airways, but after a back injury, no reasonable accommodation would allow him to continue doing that work without imposing an undue hardship on his employer.⁴⁸ Rather

⁴⁴ Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213).

⁴⁵ See, e.g., Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. REV. 307 (2001); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 2 (1996) (writing that the ADA offers a “fundamentally different approach to . . . invidious discrimination than” Title VII); Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001); Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1199 (2003) (“[D]iscrimination under the ADA means something quite distinct from what it means under Title VII.”); J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 WM. & MARY L. REV. 1385, 1385 (2003) (“[T]raditional antidiscrimination statutes such as Title VII impose duties on employers that are conceptually distinct from the accommodation requirements embodied in more recent enactments such as the Americans with Disabilities Act . . .”).

⁴⁶ See, e.g., Bagenstos, *supra* note 7 (arguing that accommodation requirements reflect the same antisubordination commitments required to make sense of disparate treatment liability); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004) (arguing that the ADA reflects the same approach to accommodating difference reflected in Title VII disparate impact liability).

⁴⁷ 535 U.S. 391 (2002).

⁴⁸ *Id.* at 394. This was US Airways’s position; Barnett contested it, and the Ninth Circuit

than leave US Airways, Barnett used his seniority rights to transfer into a mailroom job that he could perform, his disability notwithstanding.⁴⁹ At some point, however, an employee with greater seniority sought to transfer into the mailroom and bump Barnett out.⁵⁰ Let's call the bumper Mailroom Guy.

Barnett argued that US Airways should let him stay in the mailroom as a reasonable accommodation, an exception to the ordinary operation of the seniority system.⁵¹ The Court adopted the employer's characterization of the case as a zero-sum conflict between Barnett and Mailroom Guy.⁵² According to the employer, Barnett sought "preferential treatment" based on his disability, something an antidiscrimination statute would never require.⁵³ The Court accepted the premise but rejected the conclusion. An accommodation would confer a "preference" by "permit[ting] the worker with a disability to violate a rule that others must obey"⁵⁴—i.e., the rule of seniority-based job bidding. Yet the Court held that the ADA "specifies . . . preferences [that] will sometimes prove necessary to achieve the Act's basic equal opportunity goal."⁵⁵ It's a preference, but that's OK, at least sometimes.⁵⁶

Now let's run a baseline analysis. If Barnett and Mailroom Guy are facing off for the mailroom job, Barnett does seem to seek a preference. Absent a disability, he could not demand reasonable accommodation. But why is that the right baseline? The Court's vague gesture at "equal opportunity" suggested an alternative but never specified it.

I read *Barnett* this way. Let's roll back the tape and turn from the Mailroom to Cargo. Were it not for Barnett's disability, he could have stayed in Cargo. That's what this case is really about. If we set a baseline in which Barnett can work in Cargo despite his impairment, then avoiding layoff by staying in the Mailroom looks like a partial remedy for Barnett's exclusion from Cargo.

Specifying this baseline reveals that Barnett is not receiving "special treatment" based on his disability at all. Instead, he is receiving special

found a triable issue of fact. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1121 (9th Cir. 2000). The Supreme Court, however, denied *certiorari* on this question, *U.S. Airways, Inc. v. Barnett*, 532 U.S. 970 (2001), so its opinion focused exclusively on the appropriateness of accommodating Barnett in some fashion other than enabling him to do the cargo job.

⁴⁹ *Barnett*, 535 U.S. at 394.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See id.* at 396.

⁵³ *See id.* at 397.

⁵⁴ *Id.* at 398.

⁵⁵ *Id.* at 397.

⁵⁶ The Court went on to rule against Barnett on narrower grounds, ones in which the "special treatment" framework continued to resonate by highlighting unfairness to those co-workers who received no "preference." *See id.* at 404 ("[T]o require the typical employer to show more than the existence of a seniority system might well undermine the employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend.").

treatment based on his injury relative to the nondiscriminatory baseline. In this respect he is no different than the Black or Latino local drivers in *Teamsters* (for whom priority hiring gave them special treatment relative to other applicants) or women sexually harassed by third parties (who receive special protection relative to victims of other forms of harassment).

Seeing this point requires comparing Barnett to a similarly impaired co-worker with no baseline claim to the Cargo job. There would be no plausible ADA claim by Junior Guy, freshly hired into the Mailroom at the bottom of the seniority hierarchy. If such a worker faced an attempted bump by Mailroom Guy, he would lose his US Airways job *without regard to his disability*; an equally junior worker with no disability would be in the same position. Junior Guy's disability simply makes no difference to his vulnerability to layoff. In that scenario, Justice Scalia's dissenting objections to reasonable accommodation liability for Barnett would have some force.⁵⁷

Barnett is in a different position. True, only because of his lesser seniority is he vulnerable to bumping. Yet equally true, and unlike Junior Guy, only because of his disability does Barnett's vulnerability to bumping from the Mailroom translate into layoff. But-for his disability, Barnett's seniority would allow him to bump into Cargo and avoid layoff. That is the sense in which, absent an accommodation, he would face injury "on the basis of [his] disability,"⁵⁸ and in which an accommodation was sought "to the known physical or mental limitations of an otherwise qualified individual with a disability"⁵⁹

Thus, the remedial principle underwrites *intra*-group distinctions among individuals with identical disabilities. The accommodation is allocated based on subjection to disability discrimination, not based on disability. This point becomes clear only after we frame the accommodation as a *remedy* for an underlying discriminatory harm.⁶⁰

This baseline analysis also enables another insight about *intra*-group distinctions, now among individuals *without* disabilities. To illustrate this, consider a fourth character, Cargo Guy. He replaced Barnett after Barnett had to leave Cargo. Later, when Mailroom Guy tried to bump him, Barnett had the seniority to turn around and bump Cargo Guy. But Barnett couldn't do that

⁵⁷ See *Barnett*, 535 U.S. at 413 (Scalia, J., dissenting) (distinguishing between the ADA's focus on "those barriers that would not be barriers *but for* the employee's disability" and "rules and practices that bear no more heavily upon the disabled employee than upon others—even though an exemption from such a rule or practice might in a sense 'make up for' the employee's disability").

⁵⁸ 42 U.S.C. § 12112(a) (2012).

⁵⁹ *Id.* § 12112(b)(5)(A).

⁶⁰ The same point also applies to so-called "universal" accommodations. What makes them "accommodations" is the fact that they cure the underlying discrimination. See Zatz, *Managing the Macaw*, *supra* note 8, at 1394. This point eludes definitions of reasonable accommodation that make it intrinsically individualized and based on the disability of the individual receiving the accommodation. *Id.*

because his disability disqualified him from the Cargo job. For the same reason that Barnett faced layoff because of his disability, Cargo Guy was protected from layoff by his own lack of a disability. Yet Cargo Guy's interests are never mentioned in *Barnett*, let alone questioned. The "special treatment" accusation against Barnett's accommodation claim is inextricably intertwined with a reification of Cargo Guy's claim to the discriminatory baseline.

Obscuring Cargo Guy's interests makes possible the narrative of *inter*-group conflict that dominates the Court's opinion: Barnett versus Mailroom Guy. Instead, against a baseline in which Barnett's disability does not exclude him from Cargo, the zero-sum conflict is between Mailroom Guy and Cargo Guy. Those two would be facing off over the mailroom job, and Barnett would be in Cargo, safely out of the crossfire. And as between Mailroom Guy and Cargo Guy, the conflict could be resolved by seniority in a straightforward way. Instead, the Court's baseline error channels Mailroom Guy's grievances toward Barnett, rather than toward either Cargo Guy or the employer they all share.

On this view, it *would* be troubling for Mailroom Guy to get shut out of the Mailroom in order to accommodate Barnett. But the redistribution in question is *not* inter-group from Mailroom Guy (who loses the position) to Barnett (who gains it). Instead, the redistribution is *intra*-group from Mailroom Guy to Cargo Guy, who would have been laid off in the absence of Barnett's disability-based exclusion from Cargo.

The unfairness to Mailroom Guy arises not from the bare fact of accommodating Barnett but from how its costs are distributed, and this unfairness does not sound in disability status itself. Instead of the employer restoring Barnett's baseline by shutting out Mailroom Guy, US Airways could satisfy both of them by creating an additional mailroom position or by providing the more typical remedy of front-pay pending priority hiring. Another way of putting this point is that if Cargo Guy's property interest in discrimination is to be preserved, surely the cost of that should be borne by US Airways before *either* Barnett *or* Mailroom Guy. Insofar as remedying disability-based disadvantage is a cost properly borne by employers, then Mailroom Guy's grievance should lie against US Airways, not Barnett.

Again, this dynamic has no specificity to nonaccommodation liability. It precisely tracks the problem of retroactive competitive seniority in disparate treatment remedies like those in *Teamsters*. No attempt is made to identify the incumbent white workers who were hired because of their race, strip them of their jobs or seniority, and redistribute it to the workers of color wrongly excluded. Instead, their jobs are preserved, their seniority at most partially diluted, and the costs shifted to workers of color who receive something short of full "make whole" relief and to junior white applicants who take a back seat to priority hiring and, even when hired, faced diluted seniority rights. The "special treatment" frame channels those junior white workers' grievances away from their fellow whites who benefitted from discrimination and from their employer who perpetrated it; it directs their ire instead to the workers of

color who already have received only a half loaf of racial justice.

As with the third-party harassment cases, setting the proper baseline is the whole ballgame in *Barnett*. I have relied on the idea that Barnett's exclusion from Cargo is discrimination his employer must try to avoid. That can be so only if the ADA requires more from an employer than avoiding disparate treatment, which of course it does. That is the crux of the case. Once you explain why US Airways could be liable for laying off Barnett, the special treatment problem quickly dissolves. The special treatment accusation really signals underlying confusion about whether discrimination exists.

C. "Special Treatment" Remedies for Pregnancy Disparate Impact Claims

Another prominent site for "special treatment" accusations is pregnancy discrimination jurisprudence. Indeed, as I write, the Supreme Court is considering *Young v. UPS*,⁶¹ the outgrowth of a long line of circuit court opinions that have refused relief to pregnant plaintiffs on the ground that they were seeking "special treatment"—not the "equal treatment" commanded by Title VII, as amended by the Pregnancy Discrimination Act ("PDA").⁶²

In an opinion with many similarities to *Barnett*, the Court first encountered this issue in *California Federal Savings & Loan Association v. Guerra* ("*CalFed*").⁶³ There, the Court considered whether pregnancy-specific accommodations were *permissible* under Title VII or were instead violations of the PDA as "special treatment" for pregnant women.⁶⁴ Although the Court upheld such accommodations, its analysis was cryptic and seemingly *ad hoc*. Perhaps for this reason, *CalFed* has not exercised much influence over the next-generation cases addressing whether pregnancy-specific accommodations are *mandatory* under the PDA. My contention in this section is that, as in my prior examples, proper specification of the remedial character of the employer's action, relative to the relevant nondiscriminatory baseline, provides a seamless explanation for why such accommodations are not only permissible but sometimes mandatory under Title VII.

At issue in *CalFed* was whether a California statute requiring employers to offer pregnancy disability leave required them to violate Title VII.⁶⁵ If it did, then it would have been void as preempted by Title VII.⁶⁶

The case for pre-emption was a straightforward "special treatment" critique. The California law appeared to require employers to offer a valuable

⁶¹ 134 S. Ct. 2898 (2014) (granting certiorari).

⁶² 42 U.S.C. § 2000e(k) (defining "because of sex" to include "because of . . . pregnancy").

⁶³ 479 U.S. 272, 284 (1987) ("Petitioners argue that the language of the federal statute itself unambiguously rejects California's 'special treatment' approach to pregnancy discrimination . . .").

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *See id.*

employment benefit—job-protected leave—only to pregnant women. The PDA had defined Title VII’s ban on discrimination based on sex to include discrimination based on pregnancy.⁶⁷ In conjunction with Title VII’s general principle of symmetry, by which whites are protected against race discrimination⁶⁸ and men against sex discrimination,⁶⁹ the PDA is susceptible to a reading that disallows employers from making any decisions based on an individual’s pregnancy or lack thereof, whether those decisions confer a relative burden or a benefit on pregnant women. Note, however, that this analysis focuses entirely on employer’s allocation of leave, not its conduct in the *absence* of such leave. In other words, it does not consider whether pregnancy-based leave can be construed as a remedy for pregnancy discrimination.

Remaining within this nonremedial framework, the Court rightly observed that an employer could comply with the California statute without restricting leave to pregnant women.⁷⁰ Instead, it could offer leave to workers with any condition that made them medically unable to work.⁷¹ This would avoid any pregnancy-based distinctions and thus any disparate treatment. This rationale is analogous to the point that employers often can avoid nonaccommodation liability under the ADA by modifying their facilities or structures in “universal” fashion. So long as people with disabilities can do their jobs, the ADA has no complaint about changes that make it easier for others to do so, too. This, however, was the Court’s secondary basis for decision.

More importantly, but opaquely, the Court also held that Title VII permitted an employer to allocate an employment benefit based on pregnancy. In well-known language, the Court reasoned that the PDA established a “floor . . . not a ceiling”⁷² for how well employers could treat pregnant women. In doing so, it relied heavily on its affirmative action jurisprudence, essentially conceding that this was a form of “special treatment” facially contrary to the statute’s command, but that this deviation was permitted because it advanced the statute’s broader equality goals, much as the Court later did in *Barnett*.⁷³

As in *Barnett*, the Court was not particularly precise about just how it was that the employer policies in question advanced those goals. It spoke broadly of advancing “equality of employment opportunities and remov[ing] barriers” to women’s employment,⁷⁴ and in particular to their ability to “participate fully and equally in the workforce, without denying them the fundamental right to

⁶⁷ 42 U.S.C. § 2000e(k).

⁶⁸ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976).

⁶⁹ See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998).

⁷⁰ *CalFed*, 479 U.S. at 290-91.

⁷¹ See *id.* at 291.

⁷² *Id.* at 285.

⁷³ *Id.* at 288.

⁷⁴ *Id.* at 272 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1970)).

full participation in family life.”⁷⁵ The implication, however, would have seemed to be that *without* such accommodations, women would be denied full equality at work. In that case, pregnancy leave should be understood as a *remedy* for the inequality that would otherwise exist in its absence. Yet the Court avoided addressing that implication by confining its holding to what Title VII permitted employers to do, not what it required of them.⁷⁶

In my view, the key to making sense of *CalFed* is a puzzling passage emphasizing the essential limitation of the California statute to the “period of actual physical disability” resulting from pregnancy.⁷⁷ In one sense, this passage represented an attempt to distinguish genuine “benefits” (which the PDA allowed) from stereotypical policies that might harm women in the long run, for instance by encouraging women (but not men) to take leave to care for a newborn.⁷⁸ Such a policy would not truly be based on pregnancy but instead on sex without resort to the PDA, at which point Title VII’s symmetry would kick back in.

But the reference to “actual physical disability”⁷⁹ also reflects an inchoate understanding of the underlying discrimination that pregnancy leave cures. This point comes clearly into view if one attempts to take seriously the “floor . . . not ceiling” language. Imagine, for instance, an employer who gave out substantial premium pay to any pregnant worker, or immunized such workers against discipline for any workplace error, or made pregnancy the basis for enhanced opportunities for promotion. Were the Court serious about the “floor . . . not ceiling” principle, then these policies should be permissible under Title VII so long as they were triggered by pregnancy; indeed, men should simply never have standing to bring a “reverse” pregnancy discrimination claim. Such an understanding would make pregnancy-favoring decisions permissible entirely without any anchor in a remedial framework.

Although case law has not addressed such policies, I find it difficult to imagine the *CalFed* Court upholding them. Its limitation to “actual physical disability” would provide the hook.⁸⁰ But the underlying point is the same one I made about *Barnett*. Pregnancy-based leave in *CalFed* was allocated only to women who needed it because of their pregnancy—that is, only to women who, in the absence of leave, would otherwise lose their jobs for absenteeism

⁷⁵ *Id.* at 289 (quoting 123 CONG. REC. 29658 (1977)).

⁷⁶ *Id.* at 287 (finding evidence of Congressional “intent not to require preferential treatment” but distinguishing this from any intent “to prohibit preferential treatment”).

⁷⁷ *Id.* at 290.

⁷⁸ *See id.* (“[The California law] does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers.”).

⁷⁹ *Id.*

⁸⁰ *Cf. Schafer v. Bd. of Pub. Educ.*, 903 F.2d 243, 247-48 (3d Cir. 1990) (holding that a policy granting a year of childrearing leave only to pregnant women was sex discrimination under Title VII, and distinguishing *CalFed* because the policy was not limited to the period of “actual physical disability” (quoting *CalFed*, 479 U.S. at 290)).

or refusal to undertake particular tasks because of their pregnancy. And, of course, the sex-specific nature of pregnancy means that, as the PDA states, loss of work because of one's pregnancy is loss of work because of one's sex.

From this perspective, the California statute at issue in *CalFed* does not mandate "special treatment" at all, at least not in any sense that differs from the remedial mandates of Title VII disparate treatment liability generally. Instead, it requires that employers provide a remedy to a group of employees, each of whom otherwise would suffer workplace harm because of her sex. In other words, the principle of distribution is not pregnancy, but rather pregnancy-based harm.

Understanding pregnancy leave in this remedial framework sheds new light on the idea that pregnancy leave, or other accommodations of the physical limitations that accompany pregnancy, is not just permitted but mandated by Title VII. This additional step requires establishing that Title VII's nondiscriminatory baseline is one in which women do not lose their jobs because of the physical limitations imposed by pregnancy. That step has always been challenging within Title VII jurisprudence because it requires going beyond disparate treatment liability, under which an employer could deny leave to pregnant women so long as it denied leave more generally and did not use pregnancy as a criterion for denying leave.

The obvious source for this baseline is disparate impact liability. It has long been understood that any policy that causes women to be harmed due to their pregnancy will have a disparate impact on women, all else being equal.⁸¹ Although a few courts initially adopted that reasoning, the dominant line of authority has rejected it. But why? The essential rationale is that recognizing such liability would require employers to engage in "special treatment," which is emphatically not what Title VII does. What I have shown here is that, to the contrary, Title VII does that all the time. Indeed, it could not be otherwise.

Rather than the vice of "special treatment," pregnancy-based accommodations reflect the targeting of remedies to victims of discrimination. We see that throughout employment discrimination law. Of course, employers *could* simply provide universally the accommodations that pregnant women seek. That would provide a remedy without engaging in "special treatment" on any account, as *CalFed* noted.⁸² But when employers choose a narrower remedy, they target discrimination more precisely.

Targeting pregnancy accommodations to those who need them due to pregnancy-based medical limitations reflects intra-group distinctions grounded in the experience of discrimination. Rather than giving medical leave to all women, or even to all pregnant women, accommodations are limited to

⁸¹ Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 *YALE L.J.* 929, 940-42 (1985). Indeed, the Supreme Court favorably cited Siegel's note in *CalFed*, 479 U.S. at 285 n.16, though without endorsing its reasoning on this point.

⁸² See *CalFed*, 479 U.S. at 291.

pregnant women who need them *because of their pregnancy*; a pregnant woman who needs leave for an unrelated reason does not qualify. If we could not identify with precision which pregnant women, or which women generally, faced lost employment opportunities due to their sex, then broader remedies—based on pregnancy or on sex—would raise the over- versus underinclusiveness problems we saw earlier in *Teamsters*.

Highlighting such intra-group distinctions is somewhat unusual in the context of disparate impact liability, which typically has been thought of as resting on a theory of harm to the group as a whole. But in fact disparate impact theory has long promoted attempts to isolate the sub-group within which race-based injury is concentrated, and to focus liability and remedies on that more narrowly defined sub-group.⁸³ Pregnancy discrimination simply provides the limit case, in which we can individually identify the women whose sex-based injuries underlie the disparate impact on the group. At this limit, disparate impact liability and its remedies converge with ADA-style nonaccommodation. But this does not make pregnancy accommodation alien to Title VII. To the contrary, it highlights the unity of employment discrimination law.⁸⁴ If pregnancy accommodation is “special treatment,” it is only so in the same way that *Teamsters* remedies are. If *Teamsters* remedies are not “special treatment,” then neither are pregnancy accommodations. Special treatment is just not the issue.

CONCLUSION

I have not yet quite closed the circle and followed the path from disparate treatment remedies all the way to conventional affirmative action. However, I have gone partway there, and completed the preparations for the final leg.

First, I have shown that “special treatment” accusations are nothing special. Whenever we refuse to acknowledge the remedial character of employer action, these accusations emerge because remedies typically are not given out willy-nilly: they are given out to those whose injury calls forth the remedy. When that injury is ignored, it mistakenly seems that the remedy was allocated based on race, sex, or disability, not based on subjection to race, sex, or disability discrimination.

Second, I have shown that it is often necessary to take individuals’ protected status into account in the very process of determining whether or to whom

⁸³ See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012) (requiring isolation of a “particular employment practice” that causes a disparate impact); *Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (allowing disparate impact claims by individuals excluded by one component of a selection process even if the process as a whole has no disparate impact); *Bradley v. Pizzaco of Neb., Inc.*, 939 F.2d 610, 613-14 (8th Cir. 1991) (allowing disparate impact challenge to a no-beard policy with a proposed remedy of exceptions for those medically unable to shave, the source of the disparate impact, but not universal rescission of the no-beard rule). See generally Zatz, *Disparate Impact*, *supra* note 8.

⁸⁴ See Zatz, *Disparate Impact*, *supra* note 8.

discrimination has occurred. Therefore, we routinely must provide race/sex/disability-conscious remedies or give up on the remedial project and accept discrimination. At a minimum, we cannot abide a formalism that condemns the use of protected status to identify victims of discrimination individually; that approach dissolves into arbitrariness. More robustly, we have no choice but to confront genuinely difficult questions about how to craft imprecise remedies, remedies that are likely both to withhold relief from some victims of discrimination and also to deliver a windfall to nonvictims on the basis of their protected status. I do not mean to minimize those difficulties but merely to insist that they cannot be avoided by fleeing for safety in simple theories of individual disparate treatment.

I have extended the first point beyond disparate treatment to illuminate cases of nonaccommodation. However they are categorized doctrinally, the Title VII third-party harasser, ADA nonaccommodation, and Title VII pregnancy disparate impact cases all share two common features: (1) absent remedial action (“accommodation”) by their employers, individually identifiable workers face workplace harm because of their protected status, and (2) they face this harm even in the absence of disparate treatment by their employers.

Having adapted the remedial framework from individual disparate treatment cases to individual nonaccommodation cases, the remaining step is to introduce uncertainty about exactly which individuals have suffered harm. In systemic disparate treatment cases like *Teamsters*, that uncertainty is what drives reliance on protected status as a partial proxy for discriminatory injury. In other work, I argue that disparate impact liability has an analogous relationship to individual nonaccommodation claims.⁸⁵

Like *Teamsters*’ remedies for disparate treatment, robust disparate impact remedies may be impossible without using race or sex as a partial proxy for individual harm. Perhaps conservatives are right that disparate impact liability implies affirmative action. But such a linkage provides no distinction from disparate treatment liability and its remedies. To the contrary, it highlights the continuity between treatment and impact. If we cannot have affirmative action, we cannot have any employment discrimination law at all. Anyone who cannot accept that outcome, and that is most everyone, must learn to love “special treatment.”

⁸⁵ See *id.*