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## ARTICLES

### POST-RACIAL HYDRAULICS: THE HIDDEN DANGERS OF THE UNIVERSAL TURN

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*In recent years, antidiscrimination scholars have focused on the productive possibilities of the “universal turn,” a strategy that calls on attorneys to convert particularist claims, like race discrimination claims, into broader universalist claims that*

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We dedicate this article to the memory of Mike Zimmer, generous mentor, insightful scholar, inspiring teacher, and committed advocate for workplace fairness and equality. He will be sorely missed.

*secure basic dignity, liberty, and fairness rights for all. Scholars have urged litigators to employ universalist strategies in constitutional and voting rights cases, as well as in employment litigation. Thus far, however, arguments made in favor of universalism have largely been abstract and theoretical and therefore have failed to fully consider the second-order effects of universalist strategies on the ground. In this Article, we challenge the prevailing arguments in favor of universalism by exploring the market consequences as lawyers shift from particularist Title VII race discrimination claims to universalist Fair Labor Standards Act claims. Drawing on a review of case filing statistics and an inductive, purposeful sample of attorney interviews, we describe a phenomenon we call "post-racial hydraulics," which are a set of non-ideological, economic, and pragmatism-based drivers produced by the trend toward universalism. Post-racial hydraulics must be understood as key but previously unexplored factors in racial formation. Left unchecked, these non-ideological drivers will have substantive ideological effects, as they threaten to fundamentally reshape the employment litigation market and alter our understanding of race discrimination.*

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## INTRODUCTION

The moment a potential plaintiff enters a lawyer's office, the process of creation begins. The attorney listens to the client's winding tale of unfortunate events. She mines the client's account to find the larger justice considerations at stake, the fairness claims at the heart of the client's story, and the statutory, regulatory, and common law remedies designed to give effect to these understandings. Yet this litigation "creation story," like other creation myths, is a partial account steeped in romanticism and mystery. Lawyers are not mere idealists, but are pragmatists as well, and pragmatism plays a central if underappreciated role in how an attorney receives a client's story. The lawyer-pragmatist, first and foremost, considers how the story can translate into a viable litigation claim, and viability is determined by the kinds of claims she is accustomed to litigating, the stories she knows judges and juries will find sympathetic at trial, and the procedural and doctrinal hurdles that must be overcome. This pragmatism also includes the lawyer's profit-maximizing preference for cases that will cover costs and generate fees, as well as those that will secure her client the highest possible recovery using the most efficient means and strategy.<sup>1</sup> Lawyers, therefore, are not mere vessels or conduits of information who passively present a client's case. Rather, the decisions that lawyers make—which clients to represent and which to turn away, which stories to tell and which stories to save for another day—reveal lawyers to be powerful players in shaping litigation markets.

The push and pull between idealist commitments and pragmatic considerations has always shaped lawyers' decisionmaking processes, but the interplay between pragmatics and justice calculations has

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<sup>1</sup> This Article focuses solely on the decisionmaking calculus and incentives that drive employment attorneys who work in for-profit firms, as opposed to attorneys who work in nonprofit organizations or government agencies. For further discussion of the pragmatic decisionmaking calculus lawyers use in for-profit employment law firms, see Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 *MISS. L.J.* 443, 480 (2010) (considering fee-settlement ratios); see also David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 *U. PA. J. LAB. & EMP. L.* 73, 94 n.108 (1999) (using modeling approach to show how plaintiff-side employment lawyers monetize claims and choose claims based on winnability at trial as well as pretrial settleability, and noting distinctions between the two criteria). Throughout, we assume that this subgroup of employment lawyers pursue a pragmatic, profit-maximizing course in a manner consistent with their ethical obligation to act as fiduciaries and zealous advocates for their clients. We also recognize (and indeed hope) that pro bono and government attorneys that practice employment law may act in ways that counter or complicate some of the "post-racial hydraulics"—by which we mean market dynamics that tend to depress the number of race-based employment discrimination claims—that we identify.

larger normative significance in lawyers' handling of employment discrimination cases—particularly in the so-called “post-racial” era.<sup>2</sup> Increasingly, courts and the public have begun to embrace post-racialism, that is, the view that race discrimination is rare and race-based protections are no longer necessary.<sup>3</sup> In response, many pragmatic attorneys are adopting the “universal turn,”<sup>4</sup> a litigation strategy that involves replacing particularist race discrimination claims with race-neutral universalist claims that guarantee basic dignity, liberty, and fairness rights for all covered persons. This universal turn can happen in two ways. First, plaintiff-side attorneys may decline to represent clients alleging race discrimination in favor of clients with more lucrative status-neutral claims. Second, plaintiff-side attorneys may recharacterize a client's employment discrimination allegations as another claim type—replacing claims under Title VII of the Civil Rights Act of 1964 (Title VII), for example, with race-neutral wage and hour claims under the Fair Labor Standards Act (FLSA).

Pragmatists value universalist claims because they involve simpler legal inquiries than do particularist claims (they do not require thorny

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<sup>2</sup> Post-racialism is an ideological framework that posits that, in light of the significant racial progress that has been made in the United States from civil rights interventions, the state no longer needs to engage in race-based decisionmaking, nor create legal remedies based on race. Post-racialists tend to believe that most social actors do not see race as a central consideration or a critical variable that shapes life chances and daily interactions. See Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 976 (2010) (describing post-racialism in more general terms); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1601 (2009) (same); Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1502–03 (2014) (discussing how post-racialism shapes readings of race discrimination cases). For further discussion, see *infra* Section I.A.

<sup>3</sup> See *infra* Section I.A (describing post-racialism in more detail).

<sup>4</sup> The universal turn is a term coined to describe the wave of litigation and policy arguments that argue that race and gender inequality issues are often best served by “universal” race- and gender-neutral litigation strategies and policies. As Professor Jessica Clarke explains, these universal arguments “shift[ ] focus from equal rights [arguments] to [arguments about] universal rights like liberty or dignity.” Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1240 (2011). Various scholars have explored universalist arguments over the past ten years, arguing that they offer substantial advantages when attempting to address race-, gender-, disability-, and sexual orientation-based discrimination conflicts. These authors include Kenji Yoshino, Sam Bagenstos, Martha Fineman, Vicki Schultz, and Allison Hoffman. See, e.g., KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 187–89 (2006) [hereinafter YOSHINO, COVERING]; Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 228 & n.11 (2013); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 21–23 (2008); Vicki Schultz & Allison Hoffman, *The Need for a Reduced Workweek in the United States*, in PRECARIOUS WORK, WOMEN, AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS 131, 132–33 (Judy Fudge & Rosemary Owens eds., 2006); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011) [hereinafter Yoshino, *The New Equal Protection*].

proof of discriminatory intent),<sup>5</sup> they offer cheaper and faster discovery, and they are comparatively more winnable because they do not risk triggering judges' and juries' post-racial biases. Proponents of universalist litigation strategies suggest that this shift merely changes the number of court cases filed under different statutory rubrics. They imagine a world in which race discrimination claims neatly convert into universalist claims centering on wages and hours,<sup>6</sup> family leave rights,<sup>7</sup> generalized fair treatment mandates,<sup>8</sup> and healthy workplace requirements.<sup>9</sup>

This Article theorizes, however, that general arguments extolling the virtues of universalism fail to take into account the specific challenges universalism poses to discussions of race in the current cultural context. Our research reveals that the universal turn affects the market for race discrimination claims and has far more complicated, disturbing effects, setting into motion a series of second-order drivers we call "post-racial hydraulics." These post-racial hydraulics, collectively and over time, threaten to fundamentally change the employment litigation market and employment discrimination doctrine for

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<sup>5</sup> Numerous scholars have recognized that race discrimination today has multiple forms and, further, that subtler forms of discrimination predominate today due to contemporary norms discouraging explicitly discriminatory conduct. In short, discriminators' increased sophistication about expressing racial animus, as well as their embarrassment about possessing racially discriminatory attitudes, causes them to engage in various masking behaviors that make it more difficult to prove actionable discrimination than when race discrimination statutes were initially passed in the 1960s. For examples, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (explaining that "subtle, often unconscious forms of bias" predominate rather than "the deliberate discrimination prevalent in an earlier age"); Ann C. McGinley, *Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 420 (2000) (concluding that the proof structures developed under the Title VII discriminatory treatment doctrine fail to hold people accountable for unconscious, as well as conscious, discriminatory behavior); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–61 (2001) (observing that "smoking gun" evidence of discrimination has been replaced by subtler forms of discrimination that may be harder to prove in court).

<sup>6</sup> See, e.g., Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates—Aren't They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111, 129 (2003) (describing the wage and hour rights granted by the Fair Labor Standards Act as "universal").

<sup>7</sup> See Clarke, *supra* note 4, at 1226–33 (discussing arguments about replacing gender-bias claims with universalist arguments); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1342–45 (2012) (discussing replacement of race discrimination claims with universalist claims).

<sup>8</sup> Eyer, *supra* note 7, at 1344–45 (discussing the use of common law claims for wrongful discharge to recharacterize antidiscrimination claims).

<sup>9</sup> *Id.* at 1343–44 (discussing using healthy workplace laws to address issues otherwise covered by antidiscrimination claims).

race discrimination claims, as well as shape laypersons' and judges' views about race discrimination as a social problem.

We describe the forces triggered by the universal turn as hydraulic in nature because they are the predictable, if unanticipated, effect of litigators' abandonment of particularist race discrimination claims in favor of universalist claims under other employment statutes.<sup>10</sup> We developed our theory by observing the operation of the universal turn in employment cases and gathering real-world qualitative data from plaintiffs' lawyers who have shifted from claims brought under particularist employment discrimination statutes, such as Title VII, to universalist claims under the wage and hour protections found in the FLSA.<sup>11</sup>

The phenomenon we describe is freestanding from the current academic literature but is suggestive as to its effects. We do not assume that attorneys adopting universalist strategies are influenced by, or even aware of, the substantial academic literature exploring the advantages of universal claims over particular ones. Instead, we observe that the current employment litigation market has provided us with a natural experiment, one in which practicing attorneys have adopted universalist strategies for purely pragmatic reasons that often mirror claims made in the academic literature. In adopting this course, these for-profit employment lawyers have provided us with a window into the world that will be created if the universalist strategy urged by scholars actually takes hold. By revealing the ideological significance of these factors in the racial formation process, we hope that litigators may realize that universalism cannot be treated as a pragmatic short-term solution designed to capitalize on contemporary ideological conditions. Rather, the post-racial hydraulics that universalism puts into motion effectively solidify post-racial understandings and, in the process, draft as their foot soldiers lawyers who may not overtly endorse post-racialism.

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<sup>10</sup> Our use of the term "hydraulic" refers to the inverse relationship between universalist and particularist claims: where one decreases, the other increases. See, e.g., Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 219–20 (1994) ("As the federal piston pulls, state powers are accordingly diminished; as the state powers increase, the federal piston correspondingly decreases."). Hydraulic imagery has previously been used to describe dynamics in employment litigation, but was offered in a more salutary context. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687 (2008) (describing how deficiencies in the National Labor Relations Act have created a "hydraulic effect" in which workers' "continuing demand for collective action has forced open alternative legal channels").

<sup>11</sup> See *infra* Section II.B for a discussion of interviews with fifteen experienced employment litigators regarding their decision to shift their practice away from particularist Title VII claims to universalist FLSA claims.

At this early stage of our research, we have identified four side effects of the universal turn that will influence the employment litigation market in the long term. First, Title VII race discrimination doctrine will ossify; the legal definition of discrimination will stagnate due to a lack of litigation that stretches its contours. Ultimately, the statute will become unresponsive to contemporary discrimination patterns.<sup>12</sup> Second, the paucity of race discrimination litigation will bolster the courts' and the public's post-racial view that racism is a rare phenomenon. Third, as plaintiffs' attorneys shift their employment law practice away from Title VII particularist claims to handle FLSA universalist claims, they will reduce plaintiffs' access to justice and the overall redressability of workplace harms, particularly for low-wage workers. Plaintiffs who want to file Title VII race discrimination claims will find that there are far fewer lawyers willing to assist them, and the universalist FLSA claims offered to discrimination plaintiffs will be underinclusive in critical ways, functioning as poor substitutes for more comprehensive discrimination statutes. Fourth, race discrimination plaintiffs who do find lawyers may discover that they are being pressured to change the way they understand and represent their injuries, raising concerns about client agency and voice.

Our identification and discussion of these post-racial hydraulics is significant in two ways. First, this Article promises to be a key intervention in current debates about the value of universalism. The universal turn has been a central theme in civil rights scholars' work for more than a decade.<sup>13</sup> Advocates of the universal turn have praised the approach for its strategic and normative benefits but typically frame discussion of these issues at a relatively high level of abstraction.<sup>14</sup> Critics of universalism have offered largely theoretical work as

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<sup>12</sup> Other scholars have discussed the problem of statutory "ossification," the inability of law to respond to contemporary iterations of the phenomenon it was originally designed to address. *E.g.*, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1531 (2002); Sachs, *supra* note 10, at 2686.

<sup>13</sup> For example, voting rights scholars have argued that universalist statutes would be more effective at securing voting rights for minorities than particularist claims that seek to address discrimination against particular protected class groups. *See* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 61 (2014) (arguing that universalist voting rights protections might better achieve racial equality goals than more particularist voting rights legislation); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 113–24 (2013) (same); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 760–62 (2006) (same); Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 74 (2014) (same).

<sup>14</sup> Many prominent scholars who historically have worked on particularist employment discrimination claims have also offered arguments in praise of universalist strategies; however, most scholars writing on this issue discuss universalism in general terms, either



well, as scholars tend to focus on the conceptual and normative dangers that the switch to universalism poses.<sup>15</sup> This Article is the first to theorize about and assess what happens when litigators *operationalize* universalism and transport universalist arguments from academic discussions to norms that shape the employment litigation market itself. We conclude that scholars endorsing the universal turn have not fully appreciated the impacts this norm has on litigation markets on the ground. Specifically, our research suggests that litigators who adopt universalist norms will become *more* inclined to deny representation in race discrimination cases in favor of easier-to-litigate universalist

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stressing its normative or policy-based advantages or, relatedly, its workplace culture effects. See Bagenstos, *supra* note 4, at 229–31 (arguing that universal provisions of employment law can serve equality interests); Fineman, *supra* note 4, at 21 (arguing in favor of universalism because “the shared, universal nature of vulnerability draws the whole of society—not just a defined minority—under scrutiny” and therefore allows a “‘post-identity’ analysis of what sort of protection society owes its members”); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 95 (2001) (“The development of a [universalist] jurisprudence of workplace respect for all persons is the unfinished business of the project of feminist jurisprudence.”); Schultz & Hoffman, *supra* note 4, at 133 (arguing that universal measures like the shorter workweek prove that “equality for women can best be achieved through [strategies] that benefit all workers”); see also Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1158–59 (2009) (arguing that the universalist protections of the Family Medical Leave Act will better address workplace inequality than particularist gender discrimination claims under Title VII and the Pregnancy Discrimination Act); Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1108–12 (2010) (discussing, consistent with universalism, the benefits of a right allowing workers to request workplace accommodations and receive a written response from their employer for all employees, not just the disabled); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1509 (1996) (arguing that civil rights ends can also be reached by universalist just-cause termination standards). Arguments in the constitutional arena tend to take on the highest level of abstraction, as compared to discussions in other areas of civil rights law. For example, see YOSHINO, COVERING, *supra* note 4, at 192 (arguing in favor of liberty, equality, and dignity arguments in constitutional cases rather than potentially essentializing claims based on race, sexual orientation, or sex); see also Yoshino, *The New Equal Protection*, *supra* note 4, at 749–50 (refining this argument to provisionally advocate a shift in equal protection jurisprudence by the Court towards acknowledgement of the “links between liberty and equality,” with an emphasis on liberty).

<sup>15</sup> Clarke, *supra* note 4, at 1223–26. While Bagenstos is described as a “critic” of universalism here, he has also made universalist arguments, but has more recently stepped back to critically assess both the benefits and problems associated with the universal turn. See, e.g., SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 51–54, 145 (2009) (advocating universal health insurance and universal workplace accommodation requirements to address problems of disability inequality); cf. Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2841 (2014) [hereinafter Bagenstos, *Universalism and Civil Rights*] (cataloguing and assessing the benefits and the costs associated with the trend towards universalism).

cases.<sup>16</sup> Our work further suggests that universalism norms incentivize litigators to convince plaintiffs to reshape their claims in a universalist voice, imposing burdens on client agency and impeding our evolving cultural understanding of the frequency and kind of contemporary workplace discrimination.<sup>17</sup> In order to ensure that our insights were well grounded in the pragmatics and economic drivers that accompany attorneys' mass adoption of universalism, we mined comments from practicing litigators, focusing on the transition in employment litigation markets from Title VII race discrimination claims to universalist FLSA wage and hour claims.<sup>18</sup> This project then documents evidence of potential on-the-ground trends in attorney practice to consider their larger ideological effects.<sup>19</sup>

The Article makes a second contribution by revealing new important insights about dynamics in "racial formation." The study of racial formation is an analytical approach<sup>20</sup> created more than two decades ago by sociologists Michael Omi and Howard Winant.<sup>21</sup> It has since migrated from the sociological literature and, for legal scholars

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<sup>16</sup> See *infra* Section III.C.

<sup>17</sup> See *infra* Section III.D.

<sup>18</sup> Our methodology is described in greater detail in Parts II.A and B. In short, our focus on the specific hydraulic relationship between Title VII and FLSA claims stems from Eigen's observations of the shift between claim types during his work as an expert in employment cases, as well as Alexander's observation that the number of FLSA cases filed over the past several decades in federal court has co-occurred with a drop in Title VII case filings. Appendices A and B set out the case filing data that show these trends. See also Charlotte S. Alexander, *An Empirical Portrait of Federal Wage and Hour Litigation* (unpublished manuscript) (on file with author) (exploring possible reasons for FLSA boom). To investigate further, we selected a "purposeful" or "judgment" sample of fifteen senior, experienced employment discrimination lawyers to interview who had worked on both Title VII discrimination claims and FLSA claims and interviewed them about their claims-shifting practices. See *infra* notes 120–27 and accompanying text.

<sup>19</sup> See *infra* Part III.

<sup>20</sup> See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 55–61 (2d ed. 1994) (describing racial formation theory); HOWARD WINANT, *RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS* 23–24 (1994) (same); see also John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 *LAW & INEQ.* 25, 30–34 (1997) (discussing the significance of racial formation theory as an intervention in the sociological literature and commenting on challenges regarding its use as it was incorporated into Critical Race Theory); Rich, *supra* note 2, at 1509–10 (exploring the relevance of the distinction between micro and macro analyses in the study of racial formation or racial projects).

<sup>21</sup> OMI & WINANT, *supra* note 20, at 55–61; WINANT, *supra* note 20, at 23–24. Omi and Winant explain that racial formation is a term that describes "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed." OMI & WINANT, *supra* note 20, at 55. Racial formation is situated within both the political spectrum and "[e]veryday [e]xperience." *Id.* at 58–59; see also Rich, *supra* note 2, at 1509–10 (describing micro and macro analyses in the study of racial formation or racial projects).

working on issues of race, become one of the most valuable available frameworks for charting contemporary shifts in social and legal racial discourse.<sup>22</sup> Ironically, sociologists have criticized racial formation theory for failing to provide specific direction on how societies transition between different racial ideologies, while legal scholars for two decades have done work expanding on the framework's primary mechanisms, macro-level dynamics (understandings circulated at an institutional level), and micro-level dynamics (common sense laypersons' development of similar understandings).<sup>23</sup> This analysis adds to the body of legal scholars' work on racial formation theory by demonstrating that some of the most powerful drivers of shifts in racial discourse are actors who *do not* embrace the ideological vision they are promoting. Specifically, we suggest that many employment discrimination lawyers, many of whom *do not* hold post-racial views, drive post-racialism because they make market-based, pragmatic decisions about employment litigation cases that instantiate this particular ideological perspective. Our analysis therefore charts one of the key processes in racial formation theory that has gone unexplored—the way that micro-level decisions made by individual actors end up instantiating racial understandings that operate at the macro-level. Stated simply, lawyers adopting a universalist approach establish certain background norms in case selection procedures, case representation decisions, and litigation strategy that work at an institutional level in service of post-racialism.

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<sup>22</sup> See Laura E. Gómez, *Race Mattered: Racial Formation and the Politics of Crime in Territorial New Mexico*, 49 UCLA L. REV. 1395, 1396 (2002) (noting that, at the time of the article's publication, racial formation theory had already been cited in over 200 law review articles). For specific examples using the approach, see Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1399–1401 (1997) (using racial formation theory to discuss American responses to immigration and national borders conflicts in the United States), and Sumi K. Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035, 1061 (1997) (suggesting a racial formation analysis in the context of contemporary reactions to affirmative action).

<sup>23</sup> The dynamics of racial formation are best understood as a “multidirectional process [that] operates on a macrosocial level, involving the interplay between economic interests, government institutions, labor, religions, ideologies, and so on, [and] on a microsocal level, shaping and in turn being shaped by the formation of individual and group identities and by local practices of differentiation and discrimination.” Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CALIF. L. REV. 1143, 1173 (1997). However, some critiques suggest that racial formation theory does too little to explore individual subjectivity and dialectical relationships in the constitution of race. See, e.g., DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 82–83 (1993) (substituting the idea of “racial constitution” for “racial formation” to stress the importance of the subjective dimension involved in the dynamics or dialectical process of racial formation).

The Article proceeds as follows. Section I.A defines post-racialism and explores its connection to the growing judicial hostility toward employment discrimination claims. Section I.B then addresses scholars' solution for post-racialism, the universal turn, and for the first time explicitly frames universalism as a potentially problematic but practical response to post-racialism. Section I.C introduces our theory of post-racial hydraulics, using a case study to reveal the gaps and pressures created when lawyers map FLSA claims over Title VII race discrimination claims.

Part II, in Subparts A and B, provides early evidence of post-racial hydraulics from interviews of a purposeful sample of fifteen experienced employment litigators. We asked interviewees about their views of the viability of particularist Title VII race discrimination claims versus universalist FLSA claims and their own observations of the second-order drivers that we call post-racial hydraulics. Section II.C provides theoretical context for understanding the significance of these drivers, revealing their role as powerful (and thus far undisclosed) factors in the racial formation process. Subpart C also explains why lawyers' non-ideological pragmatic calculations in the case selection and case presentation process will effectively instantiate post-racialism.

Part III then engages in a closer examination of each of the four post-racial hydraulics we identify and their long-term consequences. These dynamics are: (1) the ossification of Title VII doctrine; (2) the stale nature of social understandings about discrimination; (3) issues of access to justice and redressability of workplace harms; and (4) concerns about client agency and voice. Part IV concludes.

## I

### POST-RACIALISM AND THE LURE OF THE UNIVERSAL TURN

#### A. *Understanding the Post-Racial Era and the Universal Turn*

Much ink has been spilled over the advent of the post-racial era,<sup>24</sup> but this discussion has often occurred in the absence of any clear definition of what post-racialism means. The Oxford Dictionary defines post-racial as referring to "a period or society in which racial prejudice and discrimination no longer exist."<sup>25</sup> Antidiscrimination scholars offer more nuanced definitions that highlight post-racialism's role as an aspirational vision or, variously, as a powerful and seductive, but

<sup>24</sup> See, e.g., sources cited *supra* note 2.

<sup>25</sup> *Post-Racial*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/post-racial](http://www.oxforddictionaries.com/us/definition/american_english/post-racial) (last visited Oct. 21, 2015).

dangerous, misdescription with profound political consequences. For example, Mario Barnes, Erwin Chemerinsky, and Trina Jones stress post-racialism's multiple nature, explaining that it is "a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America's and Americans' pronounced racial progress."<sup>26</sup> Key to post-racialism is "the belief that governments—both state and federal—should not consider race in their decision making";<sup>27</sup> this belief can result in a "retreat from race" by the courts in discrimination cases.<sup>28</sup>

Sumi Cho provides a historical frame, explaining that post-racialism is a modern update on the colorblindness discourse that dominated the 1980s and 1990s and that was used to support calls for race neutrality and the abolition of race-based affirmative action.<sup>29</sup> However, rather than being "merely a political trend or phenomenon or social fact," Cho explains, post-racialism is an evolving "twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decisionmaking or adopt race-based remedies, and [further] that civil society should eschew race as a central organizing principle of social action."<sup>30</sup> Cho observes that the post-racial ethos has four central features: (1) the theme of racial progress or transcendence; (2) the belief that race-neutral universal tools are the best way to address social problems; (3) moral equivalence—the proposition that all references to race are inappropriate, whether they are articulated by racially-biased parties or by parties interested in facilitating antidiscrimination efforts; and (4) a distancing move—the individual's desire to show that her refusal to discuss race is not based on what scholars call "dominative" racism.<sup>31</sup> She explains that, while all four beliefs are not required to establish that something fits within a post-racial ethos, the four themes are "central and common components of post-

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<sup>26</sup> Barnes et al., *supra* note 2, at 968.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 971 ("[The U.S. Supreme] Court's retreat from race began at least as early as *Regents of the University of California v. Bakke*."); Cho, *supra* note 2, at 1594 ("According to post-racial logic, the move is to effectuate a retreat from race." (internal quotation marks omitted)).

<sup>29</sup> See Cho, *supra* note 2, at 1593, 1597–99.

<sup>30</sup> *Id.* at 1594; see also *id.* at 1645–46 (giving the example of "electoral campaigns where 'strategic universalism' is a virtual necessity").

<sup>31</sup> *Id.* at 1600–04; Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 316 (2009). Dominative racism is the "traditional, blatant form" of racial bias. Pearson et al., *supra*, at 316. The dominative racist is the "type who acts out bigoted beliefs – he represents the open flame of racial hatred." *Id.* (quoting JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 54 (1970)).

racialist ideology and discourse.”<sup>32</sup> Cho further worries about post-racialism’s broad allure, noting that it appeals to people across the political spectrum by denying the continued importance of race and minimizing the continued occurrence of race discrimination.<sup>33</sup> As a result, post-racialism can dangerously “limit the acceptable political discourse for racial equality and . . . constrain the effectiveness of racial justice movements.”<sup>34</sup>

Concerned about the growing persuasive power of post-racialism, numerous scholars have introduced terminology to facilitate discussion about post-racial subjects’ preoccupations and concerns. Most of the terms scholars offer focus on post-racial subjects’ psychological exhaustion and racial anxiety; these include “equality fatigue,”<sup>35</sup> “racial exhaustion,”<sup>36</sup> “racial reticence,”<sup>37</sup> and “racial fatigue.”<sup>38</sup> All of the terms share one central understanding: Americans evince a strong commitment to equality, but are often deeply uncomfortable talking about how race discrimination shapes their daily lives.<sup>39</sup> While not all persons who experience racial anxiety engage in race discrimination, when the racially anxious do discriminate, their bias can take the form of “aversive racism.”<sup>40</sup> Persons suffering from aversive racism “sympathize with victims of past injustice, support principles of racial equality, and genuinely regard themselves as non-prejudiced, but at the same time possess conflicting, often non-conscious, negative feelings and beliefs about Blacks [and other minorities] that are rooted in basic psychological processes that promote racial bias.”<sup>41</sup> Indeed, aversive racists’ very self-esteem depends on their ability to maintain the view that they are not racially biased, so they find ways to express racial bias using seemingly neutral, generally applicable

<sup>32</sup> Cho, *supra* note 2, at 1600.

<sup>33</sup> See *id.* at 1593 (“[P]ost-racialism has great appeal for a wide range of actors—mostly from the political center to the radical Left . . .”).

<sup>34</sup> *Id.* at 1646.

<sup>35</sup> Yoshino, *The New Equal Protection*, *supra* note 4, at 794 (discussing equality fatigue).

<sup>36</sup> Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 922 (2009) (arguing that “[r]acial exhaustion rhetoric” promotes the idea that programs to address racial inequality are “redundant, unnecessary, or too burdensome or taxing”).

<sup>37</sup> Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 564 (2009) (explaining that “racially fatigued students” will “simply avoid people of color and discussion of racial issues often” because they “want to avoid self reflection”). As a result, racially fatigued students often stand mute when others are discussing race, demonstrating a kind of “racial reticence.” *Id.*

<sup>38</sup> *Id.* at 581.

<sup>39</sup> See *id.* at 564.

<sup>40</sup> See Pearson et al., *supra* note 31, at 316–18 (discussing aversive racism).

<sup>41</sup> *Id.* at 316.

policies and procedures.<sup>42</sup> Moreover, because aversive racists are invested in not seeing their own discrimination, they are for the most part reluctant to cast judgment on other parties' conduct. As Katie Eyer observes, over "a wide array of factual circumstances—ranging from traditional disparate treatment to more complex forms of bias—psychology scholars have documented that most people do not 'see' discrimination, except where there is effectively no plausible alternative."<sup>43</sup>

Scholars note that the judiciary appears to have been influenced by post-racial understandings as well. As Vicki Schultz and Stephen Petterson explain, "After a decade of efforts to enforce Title VII, federal judges apparently began to share the general public's belief that employment discrimination against minorities had been largely eradicated."<sup>44</sup> Trina Jones agrees, noting that race discrimination plaintiffs now have an uphill battle with both judges and juries in the post-racial era. "Because [discrimination] claims are premised on the continuing presence of racism, they are now counter to society's normative beliefs"<sup>45</sup> and therefore are more difficult to win. In addition, in an article that attempts to provide an insider's view on the challenges of resolving employment litigation, Judge Mark Bennett ultimately bolsters the conclusion that the judiciary has indeed embraced post-racial views.<sup>46</sup> Judge Bennett observes that the judiciary often views employment discrimination claims as unmeritorious and frivolous.<sup>47</sup> Judge Bennett also recognizes that racism has become "more subtle" and difficult to prove, and therefore judges may be moving too swiftly to

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<sup>42</sup> See *id.* at 318 (explaining that when persons suffering from aversive racism "are presented with a situation in which the normative response is clear[,] . . . [they] will be especially motivated to avoid feelings, beliefs, and behaviors that have been associated with racist intent," though unconscious beliefs will nonetheless result in discrimination where "one's actions can be justified or rationalized on the basis of some factor other than race").

<sup>43</sup> Eyer, *supra* note 7, at 1278 (summarizing sociological and psychological literature).

<sup>44</sup> Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1180 (1992).

<sup>45</sup> Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 433 (2010). Jones also notes that "[i]f judges believe that discrimination is rare and aberrant, . . . they will perceive no need to probe deeply an employer's justifications, even when those justifications are specious and proved false." *Id.* Instead, the burden shifts to "plaintiffs to come forth with additional proof to counter the colorblind, post-racial presumption." *Id.* at 433–34. She further argues, "this presumption is not supplied by law and is counter to 400 years of U.S. history and abundant evidence of continuing racial inequality." *Id.* at 434.

<sup>46</sup> Mark W. Bennett, *Essay: From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y. L. SCH. L. REV. 685 (2012–2013).

<sup>47</sup> *Id.* at 697–98; see also *id.* at 701 (listing six factors that have increased judicial unfriendliness).

award summary judgment to employers in employment discrimination cases.<sup>48</sup>

Even if the judiciary is not openly skeptical of Title VII claims, scholars have noted that judges have altered the Title VII inquiry in ways that make it more difficult to win race discrimination claims. As background, Title VII prohibits discrimination on the basis of race, sex, national origin, religion, and color.<sup>49</sup> In cases where the plaintiff alleges that she suffered disparate treatment, the plaintiff must prove that the employer took an “adverse employment action” because of her membership in a “protected class.”<sup>50</sup> The Title VII plaintiff bears the ultimate burden of proving discriminatory intent.<sup>51</sup> The doctrine can be particularly powerful in cases in which there is only circumstantial evidence of discrimination (the form taken by most contemporary discrimination claims), the employer proffers a legitimate non-discriminatory justification for his decision, and the employee must establish sufficient evidence to conclude the justification is mere pretext.<sup>52</sup> However, some scholars argue that the Title VII inquiry courts have constructed is simply ill suited to addressing modern forms of discrimination.<sup>53</sup> Courts have made Title VII cases more difficult to win in many jurisdictions by ratcheting up the proof required to establish that the employer’s justification is pretext.<sup>54</sup> Additionally, they

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<sup>48</sup> *Id.* at 705–06 (“In my view, while employers discriminate less today than decades ago, when they do discriminate, it is in more subtle ways.”); *see also* Nancy Gertner, *The Judicial Repeal of the Johnson/Kennedy Administration’s “Signature” Achievement* (Mar. 9, 2014) (unpublished manuscript), <http://ssrn.com/abstract=2406671> (describing the forces that cause Title VII claims to fare badly in federal courts, including judges’ beliefs that discrimination no longer occurs, meritless discrimination filings, the filing of more meritorious cases in state court to take advantage of more worker-friendly state laws, employer-friendly Supreme Court decisions that have narrowed Title VII doctrine, and case management pressures on judges that cause them to dispose of Title VII cases on procedural grounds without getting to the merits).

<sup>49</sup> 42 U.S.C. § 2000e-2(a) (2006).

<sup>50</sup> Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 752–53 (2005).

<sup>51</sup> 42 U.S.C. § 2000e-2(a) (prohibiting an employer’s decision “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” (emphasis added)).

<sup>52</sup> *See* Hart, *supra* note 50, at 753 (describing the framework).

<sup>53</sup> *See, e.g., id.* at 743 (arguing that the contemporary doctrine articulated by most courts does not respond to insights of social psychology about modern forms of discrimination); McGinley, *supra* note 5, at 445 (“[S]ince the nature of racist and sexist attitudes and behavior have [sic] changed since 1964, continuing to define discrimination in an outdated mode will underestimate by a large margin the number of racist and sexist decisions.”).

<sup>54</sup> *See, e.g.,* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1179 (2003) (discussing the shift from an assumption that an adverse employment action



have created constructs that weigh in favor of the employer in the pretext inquiry. These constructs include the “stray remarks” rule, in which discriminatory comments are not considered probative of discrimination unless directly linked to the allegedly discriminatory employment decision.<sup>55</sup> Some courts employ a “same actor” rule, which creates an inference that discrimination has not occurred if the alleged discriminatory actor took some positive action with regard to the complaining employee shortly prior to the disputed action.<sup>56</sup> Finally, courts allow employers to avoid liability when an employer demonstrates that he held an “honest belief” that the non-discriminatory justification offered was correct, even when the justification is patently untrue or is erroneous in some way.<sup>57</sup> Taken together, these doctrinal changes in Title VII would counsel a reasonable plaintiffs’ lawyer to conclude that disparate treatment employment discrimination cases are exceedingly hard to win. The specific effects of each of these doctrines have not been empirically established. However, empirical studies do show that employment discrimination plaintiffs fare far less well than plaintiffs in other categories of employment litigation,<sup>58</sup> as well as when compared against plaintiffs in litigation more generally.<sup>59</sup>

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was motivated by impermissible factors to a presumption of personal, and therefore permissible, animus); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 332–36 (2010) (discussing the “pretext-plus” standard used by some courts that requires Title VII plaintiffs to prove pretext and offer additional evidence that discrimination triggered the adverse employment action).

<sup>55</sup> See, e.g., Kerry Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 149–51 (2012) (outlining critique of stray comments doctrine).

<sup>56</sup> See generally Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1124–38 (2008) (explaining and subsequently criticizing the same actor rule); Julie S. Northup, *The “Same Actor Inference” in Employment Discrimination: Cheap Justice?*, 73 WASH. L. REV. 193, 199–208 (1998) (describing the evolution and influence of the same actor rule).

<sup>57</sup> See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1034–38 (2006) (explaining and subsequently criticizing the honest belief rule).

<sup>58</sup> Kevin Clermont and Stewart Schwab have demonstrated that, when compared to plaintiffs in other types of cases, employment discrimination plaintiffs “manage fewer resolutions early in litigation, and so they have to proceed to trial more often”; win less frequently at pretrial stages and at trial; experience appeals more often even when they do win below; and, on appeal, “have a harder time both in preserving their successes and in reversing adverse outcomes.” Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 103 (2009). This study is one of many that have produced similar findings. See Eyer, *supra* note 7, at 1282 n.27 (collecting numerous studies on case outcomes).

<sup>59</sup> Laura Beth Nielsen, Robert Nelson, and Ryon Lancaster offer similarly discouraging news about employment discrimination plaintiffs’ prospects in federal court. See Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment*

### B. Understanding the Universal Turn

In response to the rising tide of post-racial skepticism about civil rights claims, some scholars have argued that plaintiffs' lawyers should, when possible, reframe race discrimination claims as race-neutral dignity, fairness, and liberty claims. These scholars call on lawyers to adopt what Jessica Clarke calls the universal turn as a litigation strategy.<sup>60</sup> Universalist claims guarantee a minimum floor of rights or benefits for all persons, or at least guarantee a set of rights or benefits to a broad group of people not defined according to identity axes. Sam Bagenstos notes that what is crucial to the definition of universalism is the idea "that we can determine an individual's entitlement without considering identity groups at all."<sup>61</sup> Clarke similarly explains that "the new universalism endeavors to draw attention to problems once seen as issues of inequality without recourse to identity categories."<sup>62</sup> This version of universalism "chang[es] the axis of protection from identity traits to universal conditions like vulnerability, . . . shift[s] focus from equal rights to universal rights like liberty or dignity, or . . . mov[es] away from condemnation of prejudice toward banning disrespect or irrational decision making."<sup>63</sup> Clarke suggests that proponents of universal strategies may be taking their cue from European nations, which tend to rely on broad dignity and liberty rights to protect their citizens.<sup>64</sup>

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*Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 194–96 (2010) ("The law fails to seriously address discrimination, not because it excuses discriminatory behavior, but because of how it organizes the enforcement of legal rights."). In a 2010 study, the authors analyzed the outcomes of a random sample of employment discrimination lawsuits filed in seven federal district courts during the fifteen-year period from 1988 to 2003. *Id.* at 181 (describing data set). Nineteen percent of the cases in their sample ended in dismissal and fifty percent in early settlement, defined as settlement before the filing of a motion for summary judgment. *Id.* at 184. Of the cases that did not settle early, in fifty-seven percent of cases the plaintiffs ultimately lost at summary judgment; of the cases that survived summary judgment, forty-three percent proceeded to trial, where plaintiffs won "33 percent of the time, or in 2 percent of filings overall." *Id.* at 184, 187. It is important to note, however, that these studies do not demonstrate judicial predisposition or hostility against employee-plaintiffs. Rather, their findings are merely consistent with that theory. *See id.* at 181 (describing methodology); *see also id.* at 193 (finding that the "party of the deciding judge bears no relation to outcome").

<sup>60</sup> *See, e.g.*, Eyer, *supra* note 7, at 1341 (promoting adoption of "[e]xtra-discrimination remedies (EDRs) . . . that in some way address questions of discrimination (or that allow a putative victim of discrimination to challenge a discriminatory job action), but that do not ask the liability question of 'discrimination'").

<sup>61</sup> Bagenstos, *Universalism and Civil Rights*, *supra* note 15, at 2842.

<sup>62</sup> Clarke, *supra* note 4, at 1240.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 1230–33 (comparing the trend toward generalized anti-harassment law in the U.S. to existing laws in various European nations).

Bagenstos provides a useful account of universalism's strengths. First, he explains, universalism is tactically advantageous, as it secures political support for laws that promote civil rights interests and broader judicial implementation of these laws; civil rights claims promoted under a universal statute find broad support and resist political backlash.<sup>65</sup> Clarke agrees, noting that the primary appeal of universal rights claims is that litigators avoid public resentment based on the view that "special rights" are being created for racial minorities.<sup>66</sup> Second, Bagenstos explains, universal claims have substantive advantages because they attack the structures that lead to inequality, rather than focusing on race and identity axes.<sup>67</sup> Third, universal claims have expressive and symbolic value. These claims avoid essentializing identity characteristics and instead emphasize human commonality across groups.<sup>68</sup> Clarke notes that "[p]roponents of universalism seek to avoid 'essentialism,'" by promoting justifications based on "norms such as civility, dignity, liberty, and citizenship."<sup>69</sup>

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<sup>65</sup> Bagenstos, *Universalism and Civil Rights*, *supra* note 15, at 2848–51 (outlining the ways in which universalism is politically and judicially palatable).

<sup>66</sup> Clarke, *supra* note 4, at 1222–23.

<sup>67</sup> Bagenstos, *Universalism and Civil Rights*, *supra* note 15, at 2858 (describing the belief that universalism can address inequality more effectively than attacks on group-based discrimination).

<sup>68</sup> *Id.* at 2864 ("Universalist approaches . . . 'stress[ ] the interests we have in common as human beings rather than the demographic differences that drive us apart.'" (quoting Yoshino, *The New Equal Protection*, *supra* note 4, at 793)). See generally Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135, 1145–47 (2010) (discussing universalist strategies for coalition-building among social groups, with a particular focus on the transgender rights movement); Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447, 487 (2008) (discussing the ability of the universalist segregation framework, rather than "current anti-discrimination paradigms," to "avoid[ ] pitting workers against each other and . . . allow workers—both those hired and those rejected—to join together to create more desirable jobs"); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1363–64 (2011) (discussing the antibalkanization principle's ability to respond to concerns central to both minority and majority communities); Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 67–69 (2002) (advocating an approach to anti-discrimination law that protects intergroup solidarity, rather than a strictly group-based theory). In addition, as one of us has argued elsewhere, sometimes employers pursue race or gender neutral strategies as part of an effort to discriminate against a particular group and claim as secondary casualties some members outside of the targeted class. See Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1541, 1542 & n.143 (2010) (discussing the economic injuries that whites suffer as a result of minority-targeted discrimination that is effected through facially racially-neutral practices). Universalist solutions would provide a remedy to both the intended and incidental casualties of discrimination. See *id.* at 1542–44 (promoting a cause of action for whites based on economic injury that is the byproduct of racism).

<sup>69</sup> Clarke, *supra* note 4, at 1223.

While the account of universalism that Clarke and Bagenstos offer is helpful, some would argue that they do not challenge universalism's supporters sufficiently, as all of the "virtues" of universalism they describe are premised on fully accommodating or acquiescing to post-racial understandings. To be clear, both Clarke and Bagenstos are calling on scholars for a more precise accounting of the costs and benefits of universalism. However, in describing universalism's supposed benefits, they do not acknowledge that universalists are, in colloquial terms, "taking the easy way out." Supporters of universalism stress universalism's ability to *harness and build on the post-racial view that race is unimportant* and the belief that discrimination constructs are not a useful way for understanding social conflict.<sup>70</sup> This work is in direct contrast to other work that uses the rise of post-racialism as an opportunity to recast racial equality arguments in new frameworks and idioms and, in this way, convince post-racial subjects that they do have an interest in *racial justice*.<sup>71</sup>

Moreover, arguments that stress universalism's tactical or strategic value may strike antidiscrimination advocates as somewhat disturbing. Supporters of universalism who rely merely on tactical claims are basically conceding that discrimination is still *central* in understanding contemporary social conflicts, but they contend that it is

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<sup>70</sup> See, e.g., Eyer, *supra* note 7, at 1347 ("[P]reexisting beliefs about the commonality or rarity of a particular type of illegal or illicit behavior—beliefs that . . . typically decrease willingness to make attributions to discrimination—are unlikely to have a comparable effect on the adjudication of many [universalist extra discrimination remedies].").

<sup>71</sup> See generally RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* 221–29 (2011) (arguing that the rigid requirements of an antidiscrimination claim make individual rights lawsuits an ineffective tool in an era where an individual injustice is difficult to identify and proposing a shift toward broader regulation). The virtue of Ford's approach is that by shifting the inquiry away from individual intent he can avoid triggering the post-racial subject's anxiety about being labeled racist but he can still challenge workplace structures that have discriminatory effects. This approach may potentially still trigger what Rich calls "post-racial rage": the emotional resistance and anger post-racial subjects show when seemingly neutral practices are revealed to have discriminatory effects. See Camille Gear Rich, Professor of Law and Sociology, USC Gould Sch. of Law, Panel Discussion at the USC Gould School of Law: Race, Sexual Expression & Civil Rights Law: A Conversation About the Daniele Watts Controversy (Nov. 3, 2014), <https://www.youtube.com/watch?v=9pRhXU4IS7g&t=19m58s>. However, Ford finds a way to cast seemingly neutral discriminatory practices as less blameworthy but instead a negligence problem still in need of disruption. Rich's work attempts to engage with this issue as well, by showing post-racial subjects how whiteness injures even those subjects who claim white identities. See Rich, *supra* note 68, at 1541 (showing how race-neutral strategies for discriminating against blacks also injure low-status whites, giving whites an economic interest in disrupting minority targeted discrimination in the workplace). See generally Rich, *supra* note 37, at 546–47 (using neo-liberal discourse of personal responsibility to raise questions about the moral integrity of persons that refuse to identify by race and participate in conversations about racial diversity).

better to mask this issue, rather than argue with judges and juries who have adopted post-racial understandings.<sup>72</sup> Katie Eyer has been a strong defender of universalism based on its alleged strategic advantages. She acknowledges that race discrimination is ongoing and, further, that racism can take the form of more complex bias.<sup>73</sup> She further acknowledges that most laypersons and judges currently are ill informed about racism and ill equipped to recognize less overt discrimination patterns.<sup>74</sup> Her solution, however, is to urge litigators to use universalist claims to secure “wins” for race- and sex-discrimination plaintiffs, because universal claims are more socially palatable.<sup>75</sup> The mistake in such strategies is in emphasizing short term “wins” rather than taking on the more difficult project of educating and persuading persons who are unprepared to recognize contemporary racism. Supporters who stress universalism’s symbolic value are also accommodating (rather than challenging) post-racial understandings; universalism sends the symbolic message that race is no longer essential to understanding social inequality. Finally, arguments about universalism’s substantive advantages also have a connection to post-racialism. To accept these arguments, one must conclude that race is less helpful than other neutral variables in identifying social structures that lead to subordination.

By way of contrast, some of Clarke’s critiques do attempt to reveal universalism’s disturbing connection to post-racialism. In this way, her work dovetails nicely with Sumi Cho’s observation that universalism is one of the key pillars of post-racial thinking.<sup>76</sup> Specifically, Clarke warns that the displacement of particularist (discrimination) policies by more universal ones risks neglecting the core constituents who truly need antidiscrimination laws’ protection

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<sup>72</sup> See Eyer, *supra* note 7, at 1328 n.178 (promoting universalist extra-discrimination remedies as a “compromise” that “could potentially improve outcomes for putative victims of discrimination while not requiring the adoption of a legal regime that is deeply divergent from most people’s beliefs about what discrimination ‘is’”).

<sup>73</sup> *Id.* at 1278.

<sup>74</sup> *Id.* at 1278–79.

<sup>75</sup> See *id.* at 1280–81 (promoting universalist extra-discrimination remedies because of their independence from “highly charged views regarding the nature and extent of discrimination”).

<sup>76</sup> See Cho, *supra* note 2, at 1600–02 (discussing her critiques and arguments offered by John Powell). Cho explains that universal programs and policies historically have been “anything but universal.” *Id.* at 1602. Instead they were constructed to serve a “predictably narrow category of beneficiaries.” *Id.* For example, programs like the G.I. Bill and Social Security, while framed as universalist, “were all premised on a model recipient who was white, able-bodied, and male.” *Id.* Yet this history of failed or false universalism has been obscured in discussions of universalism in the post-racial era.

by forcing them to seek redress under general “fairness” laws.<sup>77</sup> She also expresses concern about universalism’s symbolic message, arguing that universalist programs fail to signal the need for continued vigilance against discrimination because they replace specific antidiscrimination norms with generic norms about fair treatment.<sup>78</sup> Bagenstos and Clarke both agree that universalist arguments can rob antidiscrimination laws of much of their moral command, as they require that race- and gender-based rights are swallowed into broader universalist protections.<sup>79</sup> Yet despite these concerns, both Bagenstos and Clarke endorse some role for universalism. Bagenstos believes that a mix of protections is probably best suited to addressing contemporary discrimination dynamics and warns litigators that eschewing universalist solutions may disadvantage their clients given universalist arguments’ high chance of success.<sup>80</sup> Clarke agrees but points to new dangers on the horizon in a universalist world. In her view, universal protections will merely become particularist again through interpretation or enforcement, as protected class groups will invoke these universalist protections more than others will.<sup>81</sup>

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<sup>77</sup> See Clarke, *supra* note 4, at 1247 (“Universal expansion of civil rights laws . . . could dilute the rights of disadvantaged groups by trivializing the more serious harms of discrimination and undermining support for antidiscrimination in general.”).

<sup>78</sup> See *id.* (“[A]ntidiscrimination norms might be lost if they are assimilated into universal norms.”).

<sup>79</sup> See Bagenstos, *Universalism and Civil Rights*, *supra* note 15, at 2852–53 (drawing on Clarke to note that the “‘civil rights’ label has a powerful cachet in American politics,” which may be eroded by universalist approaches that “push common understandings of civil rights beyond people’s limits”). Bagenstos further catalogs the strategic, substantive, and expressive dangers associated with relying exclusively on universalist solutions to civil rights problems. *Id.* at 2851–55, 2859–62, 2864–66 (respectively discussing tactical, substantive, and expressive problems).

<sup>80</sup> See *id.* at 2841 (“[A] mix of universalistic and particularistic [litigation] approaches is likely to offer the most traction in addressing [civil rights] problems.”).

<sup>81</sup> See Clarke, *supra* note 4, at 1270–75 (discussing how seemingly gender-neutral work-life accommodation policies are frequently “regarded as special accommodations for caretakers, or ‘mommy tracks’”). In some ways, Clarke’s argument that universal statutes will become marked in particularist ways frames these statutes as not being particularist at their inception. But even ostensibly universalist statutes are often far from race-neutral in effect, quite apart from the issues of popular interpretation that Clarke discusses. For instance, the Fair Labor Standards Act, while never explicitly referring to its beneficiaries as male or white, initially exempted domestic and agricultural workers from its protections, jobs disproportionately filled by minority and female workers. See Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1371–75 (1987) (describing the pervasive racism present in the legislative history of the initial Fair Labor Standards Act). Recognizing the statute as raced in this way provides insight into the way that universalism itself may be an impossible goal, as seemingly neutral statutes simply reflect an unarticulated orientation towards questions of race and gender.

Our work raises distinctly different concerns about the universal turn, ones generated by observing the operationalization of universalism by attorneys as they make plaintiff selection and claim selection decisions. Clarke and Bagenstos imagine a world with a mix of protections, particularist and universalist, each with its own role to play in advancing equality for protected class groups. In contrast, our research suggests that, rather than maintaining a balanced mix of claims, pragmatism is driving particularist claims to the margins of the employment litigation market. Specifically, pragmatism drives lawyers to strongly prefer universalist claims and, because of opportunity-cost concerns, decline to litigate particularist claims, causing these claims to recede in importance. If the trends we describe take hold, over the long term universalism will structure the employment litigation market—and it will do so because of pragmatic *attorney preferences*.

### C. *Understanding Post-Racial Hydraulics*

Scholars' discussion of universalism's virtues and shortcomings thus far have operated at a high level of abstraction and, as a consequence, have failed to engage with some of the market effects and operational difficulties triggered by the switch from particularist to universalist claims. In this Subpart, we introduce post-racial hydraulics, the second-order drivers that are set in motion by the universal turn. In order to give the reader insight into the pragmatic calculus attorneys make when choosing between particularist and universal claims, we offer a brief summary highlighting the similarities and differences between the particularist race-discrimination protections under Title VII and the universalist protections of the FLSA. We then invite the reader to consider what can happen when attorneys are incentivized to winnow away proof of discrimination in the course of shaping universalist claims by reevaluating a famous FLSA case, *Heath v. Perdue Farms*, as a thought experiment.

#### 1. *Title VII vs. the FLSA: Choosing Between Workplace Fairness Claims*

Both Title VII and the FLSA are fundamentally statutes aimed at guaranteeing workplace fairness; however, each statute pursues this aim differently. As noted earlier, Title VII of the Civil Rights Act of 1964 protects employees against discrimination on the basis of race, sex, national origin, religion, and color.<sup>82</sup> In disparate treatment cases, the plaintiff must prove that she suffered an adverse employment action *because of* her membership in a protected class; she, therefore,

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<sup>82</sup> 42 U.S.C. § 2000e-2(a) (2006).

bears the ultimate burden of proving that the defendant took adverse employment action against her *because of* discriminatory intent.<sup>83</sup> In recognition of the vast number of ways in which an employer can discriminate against and subordinate workers, the statute broadly prohibits “unlawful employment practice[s]” instead of providing a specific list of prohibited actions.<sup>84</sup> This approach gives the statute a certain flexibility and dynamism as it responds to the multiple and changing ways an employer may attempt to express bias against a worker on the basis of race.

For example, Title VII hostile work environment doctrine illustrates the capacious protections offered under the statute. A hostile work environment claim can be based on any number of factors: physical aggression, harassing remarks, offensive pictures, or even nicknames.<sup>85</sup> The hostile work environment inquiry focuses on identifying the full range of atmospheric conditions and concrete actions taken to marginalize a targeted worker. The plaintiff has a claim as long as she can allege sufficient facts to show that the hostile or harassing behavior was “severe or pervasive” enough to adversely affect the work environment.<sup>86</sup> Title VII also permits disparate impact cases, in which the plaintiff is required to show that a facially neutral employer practice produced results that were adverse to a protected class.<sup>87</sup> Prevailing plaintiffs can secure compensatory and punitive damages as well as injunctive relief.<sup>88</sup>

In contrast, the Fair Labor Standards Act of 1938 does not require an inquiry into protected class status, and instead guarantees all covered workers an hourly minimum wage and premium overtime

<sup>83</sup> *See id.* (prohibiting an employer’s decision “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” (emphasis added)).

<sup>84</sup> *Id.*

<sup>85</sup> *See, e.g.,* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1700, 1766 & n.439 (1998) (including name-calling and posting obscene drawings as forms of harassment). *See generally* Zev J. Eigen et al., *When Rules Are Made to Be Broken*, 109 *Nw. U. L. REV.* 109 (2014) (describing the history and current status of sexual harassment law).

<sup>86</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))).

<sup>87</sup> *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971) (holding that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”).

<sup>88</sup> Sandra Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 *OKLA. L. REV.* 701, 705–07 (2010).



pay for every hour worked above forty in a workweek.<sup>89</sup> Discriminatory intent is not necessary to establish an employer violation in an FLSA wage and hour case.<sup>90</sup> Prevailing plaintiffs can recover their unpaid back wages and, in most cases, an equal amount in liquidated damages, as well as attorneys' fees and costs.<sup>91</sup> Importantly, the FLSA covers a much narrower number of adverse employment actions than Title VII—focusing only on an employer's pay practices.<sup>92</sup> Consequently, any lawyer who prefers to bring a claim under the FLSA will have to set aside seemingly "smaller scale," race-based unfavorable treatment that would be actionable under Title VII and focus instead on the wage and hour issues covered by the FLSA.

When viewed side by side, the FLSA and Title VII create clear incentives for attorneys. The ubiquity of wage and hour violations in many workplaces—documented in repeated studies and acknowledged even by defense lawyers<sup>93</sup>—makes it relatively easy to find wage and hour issues when a client appears with a complaint about workplace discrimination. Also, as Noah Zatz has observed, "only an ostrich could fail to notice how often the lowest paid workers hail

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<sup>89</sup> 29 U.S.C. §§ 201–19 (2013).

<sup>90</sup> An employer's intent, however, is relevant in cases brought under the Equal Pay Act, which prohibits sex discrimination in pay and was codified as part of the FLSA. *See id.* § 206(d). Intent is also relevant to an inquiry under the FLSA's anti-retaliation provision. *See id.* § 215(a)(3) (prohibiting retaliation "because" an employee filed a suit). Finally, employer intent is relevant to the FLSA statute of limitations: A plaintiff who can prove that her employer violated the FLSA willfully can extend her statute of limitations by one year. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988) ("Ordinary violations of the FLSA are subject to the general 2-year statute of limitations. To obtain the benefit of the 3-year exception, the Secretary must prove that the employer's conduct was willful . . .").

<sup>91</sup> 29 U.S.C. § 216(b) (stating that an employer who violates the wage and hour provisions is liable to the affected employee or employees "in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages. . . . The court in such action shall . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action").

<sup>92</sup> The FLSA's anti-retaliation protections at section 215(a)(3) prohibit all manner of employer reprisals, whether pay-based or not.

<sup>93</sup> For statistics on the prevalence of wage and hour violations, see ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2–4* (2009), <http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf> (describing findings based on surveys of approximately 4300 low-wage workers in New York, Chicago, and Los Angeles of widespread FLSA violations); SIOBHÁN MCGRATH, BRENNAN CTR. FOR JUSTICE, *A SURVEY OF LITERATURE ESTIMATING THE PREVALENCE OF EMPLOYMENT AND LABOR LAW VIOLATIONS IN THE U.S.* (2005), [http://brennan.3cdn.net/bdeabea099b7581a26\\_srm6br9zf.pdf](http://brennan.3cdn.net/bdeabea099b7581a26_srm6br9zf.pdf) (compiling labor violation statistics from general reports and articles, Department of Labor compliance surveys, and targeted inspection data); *see also* Telephone and E-mail Interview by Zev J. Eigen with a defense-side lawyer (Aug. 14, 2014) (notes on file with *N.Y.U. Law Review*) ("Unfortunately for employers, there is almost always something that can be found wrong with a pay practice . . .").

from groups central to antidiscrimination projects . . . .”<sup>94</sup> FLSA violations may often be the cause of these low wages. Moreover, wage disparities and lower pay may be some of the simplest ways for an employer to express bias against a disfavored racial group. The FLSA makes it relatively easy to address this wrongful conduct, as it is agnostic about whether the employer is motivated by a conscious or unconscious desire to discriminate against the employee. Rather, once the plaintiff establishes that her wages fell below the statutory minimum or violated overtime requirements, the employer is liable and required to make the employee whole.

The issues described above become clearer and more concrete as we examine our next case, *Heath v. Perdue Farms*,<sup>95</sup> which is taught to students in employment law classes as a wage and hour case.<sup>96</sup> *Heath* functions well as a thought experiment, allowing us to consider what falls by the wayside when particularist Title VII race discrimination claims are recast under the FLSA’s universalist provisions.<sup>97</sup>

## 2. Case Study: Heath v. Perdue Farms

In *Heath*, a group of one hundred chicken catchers sued their employer, Perdue Farms, for unpaid overtime under the FLSA.<sup>98</sup> Chicken catching is, in the words of the *Heath* court, “physically arduous, dangerous and unpleasant.”<sup>99</sup> Steve Striffler describes abuses and violations in the industry: “Catchers go from farm to farm rounding up fully grown chickens in the middle of the night, stuffing them into cages, and loading them onto trucks for delivery . . . . Workers wear little protective clothing as they stoop down to pick up six or seven panicked birds by their powerful [talons].”<sup>100</sup> The *Heath* plaintiffs, who worked more than forty hours per week, alleged that they were paid only a flat fee per number of chickens caught, regard-

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<sup>94</sup> Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 6 (theorizing about the commonalities between anti-discrimination and minimum wage law).

<sup>95</sup> 87 F. Supp. 2d 452 (D. Md. 2000).

<sup>96</sup> See, e.g., MARION G. CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* 782–87 (2d ed. 2010) (excerpting *Heath*).

<sup>97</sup> To be clear, we have *no evidence* that the plaintiffs’ attorneys in *Heath* were motivated by the dynamics we describe here; however, this is exactly the kind of case that is likely to be fast tracked into an FLSA framework in the post-racial era.

<sup>98</sup> *Heath*, 87 F. Supp. 2d at 454.

<sup>99</sup> *Id.* at 455.

<sup>100</sup> STEVE STRIFFLER, *CHICKEN: THE DANGEROUS TRANSFORMATION OF AMERICA’S FAVORITE FOOD* 162 (2005); see also Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 359–60 (2012) (describing chicken catching).

less of the number of hours they worked and without the overtime premium required by the FLSA.<sup>101</sup>

Perdue defended by arguing that the chicken catchers were employed solely by middle-man crew leaders who contracted with Perdue, and not by Perdue itself; on this basis, Perdue denied the existence of an employment relationship between itself and the chicken catchers.<sup>102</sup> The court rejected Perdue's argument in its entirety, granted summary judgment to the plaintiffs on liability, and extended the plaintiffs' statute of limitations from two years to three years because Perdue's violation of the FLSA was "willful."<sup>103</sup> In reaching the determination that the violation was willful, the court relied on the fact that the Internal Revenue Service (IRS) had previously warned Perdue that its employment practices violated the FLSA, but the company had ignored this warning.<sup>104</sup> Ultimately, the one hundred *Heath* plaintiffs received approximately \$2 million from Perdue in back pay for unpaid overtime in settlement of their claims.<sup>105</sup>

*Heath* features many of the virtues of universalism identified by scholars. For example, universalism's supporters might say that the FLSA claims were symbolically helpful, as the remedy they offered—unpaid overtime—was available to all workers regardless of race. Indeed, there is no mention of the *Heath* plaintiffs' race in the record; the court was able to adjudicate their FLSA claims without reference to their membership in any identity group. Second, the FLSA victory was arguably substantively more helpful to a larger group of workers than just to those in a particular class protected by Title VII. By challenging their employer's attempt to deny an employment relationship, the *Heath* chicken catchers created precedent that would serve all workers subject to similarly structured work arrangements. (Indeed, workers in occupations as diverse as painting, construction, and janitorial services have all drawn on *Heath* to successfully claim employee status under the FLSA.<sup>106</sup>) Third, as a strategic matter, the

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<sup>101</sup> *Heath*, 87 F. Supp. 2d at 455–56.

<sup>102</sup> *Id.* at 456.

<sup>103</sup> *Id.* at 459, 462–63; *see also id.* at 457 (“Applying [FLSA joint employment] factors to the undisputed facts presented makes it abundantly clear that Perdue is the employer of both the crew leaders and the chicken catchers.”); *id.* at 459 (finding “no doubt that [the relationship between Perdue and the plaintiffs] is an employer/employee relationship for the purpose of the FLSA”).

<sup>104</sup> *Id.* at 461 (finding that Perdue's decision to rely on the argument that chicken catchers were not employees subsequent to the IRS warning was “reckless disregard”).

<sup>105</sup> Gail Gibson, *Perdue Agrees to Give \$1.7 Million to 100 Workers to Settle Lawsuit*, BALTIMORE SUN (May 10, 2001), [http://articles.baltimoresun.com/2001-05-10/news/0105100254\\_1\\_perdue-overtime-wages-overtime-pay](http://articles.baltimoresun.com/2001-05-10/news/0105100254_1_perdue-overtime-wages-overtime-pay).

<sup>106</sup> *See, e.g.*, *Calle v. Chul Sun Kang Or*, No. DKC 11-0716, 2012 WL 163235, at \*5–7 (D. Md. Jan. 18, 2012) (following *Heath* in FLSA case involving construction worker);

FLSA claims in *Heath* were likely easier, or more “winnable,” than theoretical Title VII race discrimination claims would have been. The inquiry in *Heath* focused on objective FLSA questions concerning the business relationships among Perdue, the crew leaders, and the plaintiffs and, ultimately, the number of hours the plaintiffs worked and the amount of their pay.<sup>107</sup> Also, the court found that the company willfully violated the statute given Perdue’s continued reliance on its compensation arrangement for chicken catchers despite the IRS’s warning that it was illegal.<sup>108</sup> In this way, the attorneys litigating the FLSA case had a much simpler task than if they had proceeded under Title VII, which would have necessitated messy bias inquiries.<sup>109</sup> Fourth, the universalist FLSA claim allowed the *Heath* plaintiffs to seek redress without first being subject to an essentializing inquiry about their race—an inquiry that is sometimes a threshold question in Title VII cases.<sup>110</sup>

However, *Heath* may start to look different when we learn that all one hundred chicken catcher plaintiffs were African American,

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Montoya v. S.C.C.P. Painting Contractors, Inc., 589 F. Supp. 2d 569, 572, 580–82 (D. Md. 2008) (describing the plaintiffs, who were painters “of Hispanic origin and native Spanish speakers,” as “akin to the chicken catchers in *Heath*” and concluding that plaintiffs were employees under the FLSA); Quinteros v. Sparkle Cleaning, Inc., 532 F. Supp. 2d 762, 771 & n.3 (D. Md. 2008) (concluding that, despite the fact that the plaintiff janitors signed a contract with the employer that labeled them as “subcontractors,” there was “a basis to define the relationship as that of employer/employee”).

<sup>107</sup> See *Heath*, 87 F. Supp. 2d at 456–59.

<sup>108</sup> See *supra* text accompanying note 104.

<sup>109</sup> The plaintiffs’ attorneys in *Heath* were also able to take advantage of the FLSA’s particularly broad definition of “employee” to attach liability to Perdue. See *Heath*, 87 F. Supp. 2d at 456 (“The relevant provisions of [the FLSA] have defined the employment relationship very broadly, consistent with the remedial purpose of the legislation.”); see also *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting then-Senator Hugo Black as describing the FLSA’s use of “employee” as having “the broadest definition that has ever been included in any one act” (internal quotation marks omitted)).

<sup>110</sup> Indeed, questions about how we define who is protected under Title VII against race discrimination have grown in importance in recent years. See, e.g., *Perkins v. Lake Cty. Dep’t of Utils.*, 860 F. Supp. 1262, 1265 (N.D. Ohio 1994) (considering whether the plaintiff is an American Indian for purposes of Title VII and, “if not, whether he can nevertheless obtain Title VII relief for discrimination based upon his and his employer’s mistaken belief that he is an American Indian”). Scholars have noted that discrimination seldom takes the form of old-style explicit discrimination in today’s world, and instead Title VII must address new forms of discrimination that stem from cognitive bias, like implicit discrimination, that are not adequately addressed by discrimination models that focus on clear intent evidence. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 5 (2006) (“[U]nconscious or subtle bias is a major contributor to today’s problems of workplace inequality.”); Krieger, *supra* note 5, at 1186–1217 (discussing the role of stereotypes in cognitive bias); Sturm, *supra* note 5, at 458 (arguing that although the judiciary’s traditional rule-based approach has been successful in reducing overt discrimination, “[i]t has been less effective in addressing more subtle and complex forms of workplace inequity” (emphasis omitted)).

and when we discover that only African Americans held these brutal, low-paying jobs where “[d]ust, feathers and ammonia choke[d] the air [inside] the chicken house[s], and fans turn[ed] it into airborne sandpaper, rubbing skin raw.”<sup>111</sup> Though the court documents are silent about race, secondary sources tell us that on the Delmarva Peninsula, where the events of *Heath* took place,<sup>112</sup> “African American involvement in commercial poultry production occurred in an environment of intense racial segregation . . . .”<sup>113</sup> It is a historical fact that chicken catchers were African American, while other poultry industry occupations were filled by Latinos or whites.<sup>114</sup>

*Heath* can therefore be read as a shadow case of race discrimination, where clear evidence of occupational segregation never saw the light of day. In an alternative version of the case, the plaintiffs could have challenged Perdue’s and the crew leaders’ recruitment and hiring practices, job arrangements, and promotion schemes that tracked minorities into disfavored, lower-paid job categories. Admittedly, the task of proving discriminatory intent would have been difficult, rendered even harder by the multi-layered employment relationship between chicken catchers, crew leaders, and Perdue. Indeed, while there is no established precedent that bars evidence related to the new, subtler forms of contemporary bias, there is no existing doctrinal vehicle that facilitates, much less requires, consideration of such evidence. However, plaintiffs have the potential to make, and win, such arguments under Title VII.<sup>115</sup> And historically we have relied on law-

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<sup>111</sup> Peter S. Goodman, *Eating Chicken Dust: In an Automated Industry, Catchers Still Must Grab Birds by Hand*, WASH. POST (Nov. 28, 1999), <http://www.washingtonpost.com/wp-srv/WPcap/1999-11/28/056r-112899-idx.html>.

<sup>112</sup> *Heath*, 87 F. Supp. 2d at 455.

<sup>113</sup> SOLOMON IYOBOSA OMO-OSAGIE II, COMMERCIAL POULTRY PRODUCTION ON MARYLAND’S LOWER EASTERN SHORE: THE ROLE OF AFRICAN AMERICANS, 1930S TO 1990S 133 (2012).

<sup>114</sup> See KIM BOBO, WAGE THEFT IN AMERICA 47 (2009) (“In the Delaware peninsula, which is known for its chicken processing, Central American immigrants dominate the chicken processing lines and African American workers are the chicken catchers.”); OMO-OSAGIE, *supra* note 113, at 133 (describing chicken catchers on the Lower Maryland Eastern Shore as “mainly African Americans”); Goodman, *supra* note 111 (“For years, catching has been dominated by African Americans.”); Steven Greenhouse, *Priest vs. ‘Big Chicken’ in Fight for Labor Rights*, N.Y. TIMES, Oct. 6, 1999, at A16 (describing “African-American chicken catchers, Hispanic slaughterhouse workers and white chicken farmers”).

<sup>115</sup> See, e.g., Hart, *supra* note 50, at 767–77 (discussing individual disparate treatment cases under Title VII challenging excessive subjectivity in decisionmaking processes); see also *Glass v. Phila. Elec. Co.*, 34 F.3d 188, 195 (3d Cir. 1994) (noting the “judicial inhospitality to blanket evidentiary exclusions in discrimination cases” and the critical nature of circumstantial evidence of discrimination). As an example of an occupational segregation claim, see Second Amended Complaint, *Colindres v. QuietFlex Manufacturing Co.*, No. 01-cv-04319, 2002 WL 34346793 (S.D. Tex. Nov. 1, 2002) (alleging violations of

yers to take on this struggle, to ensure that the law reflects (and in some ways advances) contemporary social understandings.

We have no evidence that the *Heath* attorneys consciously turned away from the possibility of bringing this case as a race discrimination case, and the case precedes the so-called post-racial era. However, *Heath* illustrates the costs that can flow from taking claims that could be brought as Title VII claims and translating them into a universal claim or set of complaints. For example, establishing the FLSA violation in *Heath* let chicken catchers recover overtime pay they were owed, but did not offer the workers a path out of chicken catching positions and into jobs that might pay more or have greater opportunities for advancement. Proving systemic discrimination in segregated hiring channels might open an entirely different—broader—class of remedies aimed at restructuring hiring processes more generally. It also could permit punitive or additional compensatory damages not available under the FLSA. Additional litigation to address the *Heath* plaintiffs' other injuries followed their pay claims, as well.<sup>116</sup> If the employer was motivated by discriminatory animus in *Heath*, this is exactly the pattern of universalist litigation that would ensue. The plaintiffs' injuries would be addressed by a broader group of seemingly unrelated fairness complaints, and the court would be deprived of considering the comprehensive way in which the plaintiffs were injured and the motivation for their treatment.

One thing is clear: when faced with a case like *Heath* in the post-racial era, the pragmatic lawyer would likely work the case up in its two alternative forms and then logically decide to winnow away the evidence of race discrimination from the easier, simpler FLSA suit. Pragmatics trump idealism; the universalist claim is mapped over the particularist one.<sup>117</sup> This observation gives the authors pause when we

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both the FLSA and Title VII arising out of employer's segregation of Latino workers into a single department and unlawful pay practices).

<sup>116</sup> *Trotter v. Perdue Farms, Inc.*, 168 F. Supp. 2d 277, 280 (D. Del. 2001) (alleging claims under the Employee Retirement Income Security Act of 1974).

<sup>117</sup> Some may observe that attorneys might simply bring both claims in the post-racial era, combining a race discrimination claim with an FLSA claim. In such cases, the presence of the race discrimination claim might incentivize settlement of the FLSA claim, or vice versa. However, there are procedural challenges to bringing a combined claim. To file a Title VII claim, one needs a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC") or to have exhausted state remedies, which requires a waiting period. 42 U.S.C. § 2000e-5(c), (f) (2006). During that waiting period, the FLSA statute of limitations continues to run, putting the claim at risk. Some lawyers may work around this problem by filing the FLSA claim and then amending their complaint after receiving a right-to-sue letter from the EEOC. Many lawyers, however, would simply want to avoid these complications. Additionally, we believe that the Title VII claim is the claim more likely to be dropped or settled in favor of the FLSA claim because it is more difficult to prove. As a result, we are deprived of the opportunity to consider key cases that involve

consider what happens when large groups of lawyers make this same calculation. In broader terms, what happens when universalism takes hold in civil rights communities, incentivizing employment attorneys to abandon Title VII litigation and pursue remedies under universalist statutes?

First, we hypothesize that the market would reshape itself in a manner that would cause plaintiffs to have difficulty finding employment lawyers to take their cases. For example, the chicken catcher plaintiffs in *Heath* may have viewed their wages and working conditions as causally connected with their race. They may have searched unsuccessfully for a lawyer who would bring a claim under the rubric of civil rights and ultimately abandoned their employment discrimination claims in favor of overtime claims under the FLSA. Second, we theorize that the legal standards needed to advance our understanding of discrimination would fail to emerge because the universal turn would decrease the number of race discrimination cases filed that involve close and murky discrimination questions. In other words, the precedents necessary to establish occupational segregation like that in *Heath* cannot be generated when the case is presented as an FLSA action. And the lack of litigation creates a third concern: that, as a general social matter, people are encouraged to believe race discrimination is rare and employment discrimination litigation is largely unnecessary. Fourth, we worry about client voice and agency. Did the plaintiffs in *Heath* feel satisfied with the resolution of their claims if they believed that discrimination was an important part of the story that they wanted to tell? There may have been additional facts that explained why some of the hardest and dirtiest work in poultry processing was allotted to a job category populated by African Americans. And there may have been other forms of subordination at work, such as racial harassment, that would have been part of a larger discrimination story but could not have been accommodated under the FLSA. In these circumstances, plaintiffs might feel robbed of an opportunity to fully address discrimination in the workplace in a comprehensive fashion. They are instead told (or disciplined) in a not-so-subtle fashion that society is no longer interested or invested in combatting problems associated with race discrimination.

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contemporary manifestations of discriminatory animus. Even if the combination Title VII and FLSA claim facilitates settlement on the wage matters, the settlement discussions on the Title VII claim, if it were the privileged claim, would provide broader benefits. Inquiry into the ways in which race discrimination has compromised employment opportunities brings opportunity for discussion of structural reforms that are not typically part of the conversation when one makes wage violations the central concern.

To organize and test these observations about the ways in which universalism shapes the employment litigation market and manifests itself in lawyer-client interactions, we initiated a series of conversations with a purposeful sample of fifteen senior, experienced employment litigators. These interviews are discussed in the next Part.

## II

### EVIDENCE AND THEORETICAL CONTEXT FOR POST-RACIAL HYDRAULICS

#### A. *Post-Racial Hydraulics—Origins and Methodology*

Our theory of post-racial hydraulics was produced by a unique cross-pollination opportunity between two empirical scholars working on FLSA and Title VII claims and another scholar who uses Title VII litigation to chart sociological changes in contemporary racial ideology. Alexander's ongoing work on the empirics of the recent FLSA litigation boom<sup>118</sup> led her to observe that the number of Title VII cases on federal courts' dockets has fallen since the late 1990s, while the number of FLSA cases has risen dramatically, at roughly the same time.<sup>119</sup> Eigen's work as an expert in wage and hour class actions for the past eight years has allowed him to observe and assess litigation strategies of plaintiff-side and defense-side attorneys as they shift between Title VII and FLSA claims, noting a clear preference for FLSA claims based on pragmatic assessments about the relative success of each class of claims. Rich provided a sociological context for understanding the ideological repercussions of the shift to universalism and its relationship to post-racialism. In this way, the authors created a framework for charting the effects of universalist strategies, both at the macro-level, in terms of institutional understandings, and at the micro-level, in terms of individual interactions.

Our discussions identified four primary drivers in the employment litigation market that have resulted from universalism. We call these drivers post-racial hydraulics because they are a direct result of the turn toward universalism and yet, while wholly predictable, have not been noticed or discussed in the literature on universalism. We developed a "purposeful" or "judgment" sample of fifteen senior, experienced employment lawyers who had worked on both Title VII race discrimination claims and FLSA wage and hour claims.<sup>120</sup> We

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<sup>118</sup> See Alexander, *supra* note 18; *infra* apps. A–B.

<sup>119</sup> For a discussion of the data we relied on to develop an understanding of FLSA and Title VII filing trends nationally, see *infra* app. A.

<sup>120</sup> A number of seminal works on lawyers' experiences have relied primarily on qualitative research. See, e.g., AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE*



selected this group because the attorneys are knowledgeable about universalist strategies and could comment on the hydraulic relationship, if any, between Title VII and FLSA claims. While there are obviously many other attorneys whom we could have interviewed, the goal was an inductive evaluation of the phenomenon.<sup>121</sup> In a qualitative study using a purposeful sample, researchers do not set out to construct a random sample. Instead, they actively select a group of research subjects who are, given the research project's aims, the most productive sample to address the research question posed.<sup>122</sup> Purposeful samples are often developed by targeting the variables of interest to the researchers and are based on the researchers' knowledge of the research area, as well as the available literature and evidence from the initial phase of the project itself.<sup>123</sup> It is most useful in the identification of variables to include in a model that predicts an outcome or set of outcomes. This method should not be used (and we do not use it this way) to lay claims to magnitudes of effects or the extent to which effects are mediated or moderated by other variables. Some therefore refer to this method as "exploratory," or inductive, as a means of beginning to develop theory.<sup>124</sup>

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LAWYERS AND THEIR CLIENTS 106–07 (1995) (discussing results of qualitative study of divorce lawyers); MARGARET THORNTON, *DISSONANCE AND DISTRUST: WOMEN IN THE LEGAL PROFESSION* 268–91 (Lucy Davison ed. 1996) (discussing results of qualitative study of female attorneys); see also Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 927–31 (Peter Cane & Herbert M. Kritzer eds. 2010) (discussing theoretical underpinnings of qualitative research more generally).

<sup>121</sup> We elected to use a snowball sampling technique, which refers to a process in which a researcher begins with a group of research participants known to her (or otherwise identified in advance in some way) and then asks each participant to provide details of someone else whom they consider to be a good research subject for the purposes of the study; in this way, the researcher gradually builds up a larger sample of participants. See Martin N. Marshall, *Sampling for Qualitative Research*, 13 *FAM. PRAC.* 522, 523–25 (1996).

<sup>122</sup> *Id.* at 523 (“Qualitative researchers recognize that some informants are . . . more likely to provide insight and understanding for the researcher. Choosing someone at random to answer a qualitative question would be analogous to randomly asking a passerby how to repair a broken down car, rather than asking a garage mechanic . . .”); see, e.g., Leslie C. Levin, *Guardians at the Gate: The Backgrounds, Career Paths, and Professional Development of Private US Immigration Lawyers*, 34 *LAW & SOC. INQUIRY* 399 (2009) (presenting the findings of a qualitative study of seventy-one immigration lawyers in private practice).

<sup>123</sup> Marshall, *supra* note 121, at 523.

<sup>124</sup> E.g., EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 52 (14th ed. 2015) (discussing the inductive method as a starting point for research in which researchers examine the variables of interest and “end up with a tentative conclusion about the pattern of the relationship between the two variables. The conclusion is tentative because the observations [researchers] have made cannot be taken as a test of the pattern—those observations are the source of the pattern [researchers have] created”).

Alexander's FLSA data and Eigen's general experience interacting with very experienced plaintiff and defense counsel over the last eight years gave us confidence that we had a firm basis for our descriptive and theoretical account of emerging market dynamics. Consequently, two of the authors began focused inquiries with their contacts in the employment bar to identify attorneys with established employment litigation practices in jurisdictions in which FLSA filings seemed to be rising and Title VII filings seemed to be falling.<sup>125</sup> We determined that we hit a saturation point—the point at which a sample has produced enough data to map the specific contours of a potential theory<sup>126</sup>—after our initial round of fifteen attorney interviews.<sup>127</sup> A broader empirical project would be necessary to expand on the magnitudes of variables identified here.<sup>128</sup> We have chosen to present the early results from our qualitative sample here because we have discovered issues of concern that are absent from the existing theory- and policy-focused literature on universalism.

Our interviews focused on the dynamics of employment law practice. Our goal was not to conduct a full-fledged qualitative study; the interviews are exploratory and inductive. Following the interviews, we formalized our theory. Our hope is that the phenomena and concepts introduced here will spur scholars to engage in more qualitative and quantitative study of the items we have uncovered.

### B. Attorney Interviews

Our interviews revealed attorneys' assessments of the relative viability of Title VII and FLSA claims. Attorneys described engaging in a process of shifting claims away from the particularist provisions of Title VII and toward universalist provisions of the FLSA (without using those labels). The interviews also illuminated specific mechanisms by which the post-racial hydraulic process occurs. The lawyers with whom we spoke are routinely declining representation to clients with Title VII claims and instead choosing to represent different clients with FLSA claims. In addition (or in the alternative), an attorney

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<sup>125</sup> Because our sample size was small, we have chosen to keep the identities of the research subjects private as a condition of their participation.

<sup>126</sup> See Marshall, *supra* note 121, at 523 (defining data saturation and noting that sample size is highly dependent on the kind of study being produced); see also Webley, *supra* note 120, at 933–35 (noting that qualitative research often focuses on “smaller number[s] of ‘observations’ or ‘data sources’”).

<sup>127</sup> Not all interviews are excerpted in this Article.

<sup>128</sup> For instance, the next phase of research in this area could be based on an “iterative process of qualitative study design.” Marshall, *supra* note 121, at 523. This process involves building one's general theory based on emerging data from the initial interviews and then selecting a larger sample to examine and develop this theory. *Id.*

may agree to represent a client who arrives at his office describing a race discrimination claim but encourage the prospective client to recharacterize his claim as a race-neutral or universal wage and hour violation.

As an initial matter, the attorneys in our sample were united in their judgment that winning a Title VII claim in federal court is much harder today than in the past and in their perception that FLSA claims can be substantially easier to litigate, and thus more viable, than Title VII claims. One plaintiffs' attorney, with twenty years' experience with all types of employment claims, commented on judicial hostility to Title VII cases, expressing the view that "[d]iscrimination cases are basically unwinnable in most federal circuits."<sup>129</sup> Another senior attorney who co-chairs the labor and employment department at her defense firm noted the problems for the plaintiffs' bar in litigating discrimination claims: "At the end of the day, recovering back pay for a worker was not all that much, attorney fees were not always assured, and emotional distress and punitive damage awards definitely were not a sure thing or even all that high at the end of trial."<sup>130</sup>

Similarly, the attorneys concurred in the view that, in the words of one attorney, "FLSA cases are easier."<sup>131</sup> The attorney explained that there are many procedural and substantive advantages to litigating FLSA claims, including avoiding the prohibitive cost of motions practice required to achieve Title VII class certification; the steep legal standard for Title VII class certification since *Wal-Mart v. Dukes*,<sup>132</sup> which made class actions significantly harder for plaintiffs to prove in instances in which employers delegate extensive authority to managers and exercise less centralized control over employment decisionmaking; the "low-hanging fruit" character of FLSA cases, given the ubiquity of employers' wage and hour violations; and the ability to litigate a wage and hour case without having to prove intent.<sup>133</sup> Two other plaintiffs' attorneys echoed these latter remarks about the difficulties of proving intent in Title VII cases. A plaintiffs' attorney with twenty-two years' experience described such proof as "elusive," in contrast with the "objective evidence, such as written employment

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<sup>129</sup> Interview by Charlotte S. Alexander with a plaintiff-side lawyer in Seattle, Wash. (Aug. 5, 2014) (notes on file with *N.Y.U. Law Review*).

<sup>130</sup> Telephone and E-mail Interview by Zev J. Eigen with a defense-side lawyer, *supra* note 93.

<sup>131</sup> Interview by Charlotte S. Alexander with a plaintiff-side lawyer, *supra* note 129.

<sup>132</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 357-58 (2011) (holding that the class action commonality requirement was not met in a case brought by female employees alleging a discriminatory, company-wide pay and promotion policy).

<sup>133</sup> Interview by Charlotte S. Alexander with a plaintiff-side lawyer, *supra* note 129.

policies and time and payroll records” that can be used to support FLSA and state wage and hour claims.<sup>134</sup> Another plaintiffs’ attorney with ten years’ experience summarized the advantages of the FLSA’s proof requirements:

Wage and hour claims are much more objectively provable; rarely do the supervisors’ intent or other subjective factors come into play. Unpaid overtime is unpaid overtime; missed meal periods are missed meal periods, allowing me to prove my case with the defendant’s records instead of trying to muster a whole lot of evidence about someone’s intent that they will never admit to. In that way, wage and hour claims feel more straightforward.<sup>135</sup>

And in the words of a defense attorney:

In the early days of the twenty-first century, the plaintiffs’ bar realized that the oft-considered ugly stepchild of the employment bar, the FLSA and comparable state wage and hours laws, was actually a lot prettier than it looked. It offered automatic attorneys’ fees, mandatory liquidated damages, and the legal standard was simply—either you paid properly or you didn’t; there was no wiggle room.<sup>136</sup>

These interviews also lend support to the model that forms the inner workings of our post-racial hydraulics theory—the actual mechanisms by which plaintiffs’ lawyers shift claims from Title VII to its now-prettier relative, the FLSA. Our interviews, along with other lawyers’ remarks in the media, suggest the existence of two, nonexclusive methods of claim shifting. First, lawyers may simply be accepting more FLSA cases and *declining representation* in employment discrimination cases. Second, attorneys may be “finding” wage and hour violations within workers’ complaints of discrimination and *recharacterizing* what previously would have been brought as a race discrimination case as a wage and hour case. The net result of these two methods is the same: a hydraulic flow away from the particularist Title VII and toward the universalist FLSA.

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<sup>134</sup> Telephone and E-mail Interview by Zev J. Eigen with a plaintiff-side lawyer (Aug. 15, 2014) (notes on file with *N.Y.U. Law Review*).

<sup>135</sup> Telephone and E-mail Interview by Zev J. Eigen with an employment lawyer (Aug. 17, 2014) (notes on file with *N.Y.U. Law Review*).

<sup>136</sup> Interview by Zev J. Eigen with a defense-side lawyer, *supra* note 93; see also *FLSA Litigator Q&A: Christopher W. Deering Considers Implications of Supreme Court and NLRB Rulings, DOL Enforcement Agenda*, BLOOMBERG BNA, Jan. 7, 2013 [hereinafter *Deering*] (quoting Ogletree Deakins management attorney Christopher Deering on plaintiffs’ burden in FLSA versus Title VII claims: “To move forward in a[n] . . . employment discrimination case, it is the plaintiff-employee who is charged with the initial burden of marshaling adequate evidence that the employer possessed an illegal, discriminatory motivation . . . [F]rom an evidentiary burden standpoint, it is easier for a plaintiff to prevail in an FLSA case . . .”).

With respect to declining representation, one plaintiffs' attorney noted that "[o]ver the last ten to fifteen years, plaintiff-side lawyers sought to allocate the risks of contingent practice by shifting from more difficult to prove cases based on more expensive to gather subjective testimony [Title VII cases], to cases largely proven with an employer's own records [the FLSA cases]."<sup>137</sup> Noting the relative ease and speed of proving FLSA allegations, he concluded that "[a]ll these factors have combined to drive this shift in plaintiff-side employment practice."<sup>138</sup> In a published interview, plaintiff-side employment lawyer David Borgen of the Oakland, California, firm Goldstein, Borgen, Dardarian & Ho described a similar shift in his own employment practice: "When I first came to the firm [in 1990], all of my time was spent on Title VII class actions. We started our wage/hour practice in 1997, and within a year, it swallowed up 100 percent of my professional work time."<sup>139</sup> Strikingly, he went on to describe this caseload shift in language that seems to confirm the post-racial hydraulics hypothesis of this Article—the replacement of particularist legal protections with universalist ones:

Wage and hour litigation allows us to recover wages that should have been paid to workers under the [FLSA] that [was] enacted many years ago for the protection of all workers (*not just unionized workers or women and minorities*). The issues usually involve claims for *basic fairness in the workplace* . . . .<sup>140</sup>

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<sup>137</sup> Telephone and E-mail Interview by Zev J. Eigen with a plaintiff-side lawyer, *supra* note 134.

<sup>138</sup> *Id.*

<sup>139</sup> *FLSA Litigator Q&A: David Borgen Discusses Supreme Court's Christopher v. GlaxoSmithKline Ruling, Implications for FLSA Litigation*, BLOOMBERG BNA, Oct. 1, 2012 [hereinafter *Borgen*] (noting also that the shift to FLSA litigation "provided an opportunity to diversify our firm's practice which had, until then, been almost exclusively limited to Title VII class action litigation"); *see also Deering, supra* note 136 (commenting from a defense perspective that "[t]he very early 2000s was when I really began handling FLSA cases in earnest. . . . FLSA litigation, including class and collective actions, easily consumes better than half of my practice time now"). Similarly, a plaintiffs' employment lawyer was quoted in 2002 as saying that "employment discrimination attorneys 'have morphed' into wage and hour attorneys over the last few years . . . [and] plaintiffs' firms looking to bring class actions have redirected their attention to the wage and hour area . . . ." Victoria Roberts, *Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits, Offer Strategies*, DAILY LABOR REPORT (BLOOMBERG BNA), Dec. 12, 2002, at C-1 to C-2; *see also* Jonathan A. Segal, *The New Workplace Revolution: Wage and Hour Lawsuits*, FORTUNE (May 29, 2012, 5:34 PM), <http://fortune.com/2012/05/29/the-new-workplace-revolution-wage-and-hour-lawsuits/> ("In the employment arena, the civil rights revolution has morphed into a kind of wage and hour revolution."); Rhonda Smith, *Aggressive Plaintiffs' Bar, Labor Secretary Spotlights FLSA Compliance, Speaker Says*, BLOOMBERG BNA, July 10, 2009 (quoting management attorney Nancy Patterson, who states that plaintiffs' employment attorneys "[o]ften . . . don't bring discrimination or state law claims but only file FLSA claims because they find them to be more lucrative").

<sup>140</sup> *Borgen, supra* note 139 (emphasis added).

The second hydraulic mechanism is the recharacterization of potential plaintiffs' claims of employment discrimination as claims of wage and hour violations. As one of the media accounts quoted above describes it:

[A] worker visits a plaintiffs' lawyer to complain about some form of discrimination and ends up talking . . . about . . . her work duties and whether . . . she took breaks. The lawyer begins to get a sense "of how compliant or noncompliant that employer is, and pretty soon you have a [FLSA] action going."<sup>141</sup>

One of our interview subjects concurs, describing situations in which an employee will meet with a plaintiffs' attorney and "complain[] about being wrongfully terminated. The attorney or paralegal will . . . try and ferret out the reasons for the termination. . . . While the attorneys will more often than not explain that there really is not a strong case for discrimination, they will typically ask to see a copy of a paystub" and will then discover an FLSA violation.<sup>142</sup> Another plaintiffs' lawyer describes a similar dynamic: "If a potential claimant walked through most plaintiff-side lawyers' door today, and presented a claim that seemed most closely aligned with a . . . discrimination claim, it is likely that the lawyer will test to see whether there are viable [FLSA] claims that the lawyer would prefer to bring instead."<sup>143</sup>

These preliminary interviews provide some initial evidence from attorneys that pragmatic concerns are causing lawyers to turn away from the particularist protections of Title VII and toward the universalist protections of the FLSA. While these qualitative data cannot and do not capture the breadth of this phenomenon or measure its strength in shaping the market for employment discrimination claims, the information provides a leverage point to theoretically unpack the phenomenon, document its occurrence, and better understand post-racial hydraulics.

### C. *Post-Racial Hydraulics as Dynamics in Racial Formation*

Our study of post-racial hydraulics points to a new layer of inquiry in understanding racial formation, the sociological framework that allows scholars to chart the ways in which social understandings

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<sup>141</sup> Susanne Scalfane, *As Wage & Hour Lawsuits Explode, Carriers Weigh in Against Insurability*, PROPERTYCASUALTY360 (June 9, 2008), <http://www.propertycasualty360.com/2008/06/09/as-wage-hour-lawsuits-explode-carriers-weigh-in-against-insurability>.

<sup>142</sup> Telephone and E-mail Interview by Zev J. Eigen with a defense-side lawyer, *supra* note 93.

<sup>143</sup> Telephone and E-mail Interview by Zev J. Eigen with a plaintiff-side lawyer (Sept. 8, 2014) (notes on file with *N.Y.U. Law Review*).

about race are absorbed, reflected, and transformed by institutional structures. More specifically, racial formation theory invites scholars to examine the tensions among competing racial ideologies.<sup>144</sup> Our account of post-racial hydraulics informs the literature on racial formation because the forces we describe operate as macro- and micro-level factors in the racial formation process.

Michael Omi and Howard Winant explain that contemporary discussions about race should be focused on the dynamics of racial formation: the social, economic, and political forces that determine the ideological content understandings we hold about race and discrimination, as well as the forces that drive these understandings.<sup>145</sup> Omi and Winant describe our substantive understandings about race and race discrimination as continuously evolving and being reworked in a process called “racial signification.”<sup>146</sup> The understandings associated with each given ideology about race are circulated and reworked by state agencies and other institutions in a continuous process. Omi and Winant show how different ideologies compete against one another over time, as each ideological framework attempts to instantiate itself as the dominant approach for understanding race in a given period. They explain that there is no end goal in this competition between ideologies or racial projects, as multiple ideologies are constantly in play, even if one framework may gain prominence during a particular period.

Racial formation can be studied by focusing on either macrodynamics or microdynamics. Because both approaches provide key insights in understanding a particular ideological formation’s social effects, the best work pays attention to both considerations. Studies that examine the macrodynamics of racial formation focus on the way that institutions—for example, the church or the state—produce and circulate racial definitions of race, race discrimination, and other social understandings. The macrodynamic approach is similar to

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<sup>144</sup> See, e.g., Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1035–36 (2010) (using racial formation theory to explain how the state has used language constructs and policy discussions about crime as ways of justifying punitive initiatives against minorities and the poor); cf. Devon W. Carbado, Afterword, *Critical What What?*, 43 CONN. L. REV. 1593, 1608–09 (2011) (discussing the ways in which critical race theory has rejected traditional narratives of linear progress in discussions about race in favor of a more dynamic model that recognizes countervailing cyclical pressures).

<sup>145</sup> See OMI & WINANT, *supra* note 20, at 55–56 (“First, we argue that racial formation is a process of historically situated *projects* in which human bodies and social structures are represented and organized. Next we link racial formation to the evolution of hegemony . . . Such an approach . . . can facilitate understanding of a whole range of contemporary [issues] involving race . . .”).

<sup>146</sup> *Id.* at 55.

Robert Post's "sociological" approach to the study of law. Post charges legal scholars to uncover the ways that institutions are involved in the sociological process of defining race for social actors, even as these institutions claim to simply be responding to the understandings of those they serve.<sup>147</sup> While macro-level or top-down approaches to the study of racial formation are helpful, they are incomplete without some accounting of how individuals use and rework institutional definitions and force institutions to respond to these changed understandings. Investigations that explore these questions focus on micro-level racial formation processes. These studies often employ sociology and psychology to describe the ways in which individuals redeploy institutional definitions of race and discrimination to serve their own identity maintenance purposes.

Specifically, thus far, macro-level discussions of racial formation tend to focus on the *substantive messages* communicated by social institutions about race, in the form of formal definitions of race and race discrimination. Our research allows scholars to consider the ways in which seemingly apolitical *structural changes in the employment litigation market* also sharply affect which messages about race are elaborated on and circulated. Because of the "voluntary," pragmatic choices litigators make to focus on universalist claims, the employment litigation market will be structured in a way that minimizes future opportunities to initiate legal cases that would challenge post-racial understandings or to update our understanding of discrimination. This observation is important because it shows how markets themselves, over time, for nonideological reasons, come to be structured in ways that minimize opportunities for certain kinds of racial discourse. This observation also helps explicate the ways in which certain ideologies become solidified through "voluntary" action of market players, even when the players may not themselves endorse or share the ideological vision promoted by their actions. Scholarly discussions of racial formation tend not to focus on examination of actors that comply with certain ideological understandings of race (or strategically harness certain ideological understandings of race for efficiency reasons). Additionally, discussions have not considered how these actors' efficiency calculations can fundamentally structure the market (and other institutions) in sticky ways that have long-term effects. One might be less concerned about sticky second-order ideological effects stemming from lawyers' pragmatism-motivated decisions in some con-

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<sup>147</sup> See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 31 (2000) (explaining that the sociological approach recognizes that law is a social practice structuring our understanding of race that attempts to shape other social practices about race).



texts. Here, however, pragmatism drivers threaten to play a critical role because post-racialism is arguably a “racial project” in ascendance. Once a set of racial understandings has sufficient impact to shape institutional structure or shape economic markets in particular ways, it could produce a significantly more pernicious domino effect.

Our study of post-racial hydraulics also provides insight into micro-level factors. Attorneys may be tracking their discrimination clients into universalist litigation claims for nonideological reasons. Lawyers have special fiduciary obligations in part because they play such a powerful role in helping individuals understand and represent their interests. Certainly, some lawyers believe that translating claims into a universal form is the best way to discharge their fiduciary obligations because they are assisting their clients in structuring claims that are most likely to succeed at trial. However, even with the most frank and supportive discussion, many clients will be intimidated. Other clients are very strongly inclined to simply trust the expertise of their attorneys. Finally, some may not realize the stakes of what it is that they are deciding when they “agree” to adopt a universalist framework. Our concern is that little attention has been paid to the ways in which attorneys may discipline discrimination targets to see their claims in a particular fashion. We believe that when attorneys stress the universalist turn, their more vulnerable clients may feel pressured to simply comply with the universalist ethos. Consequently, the lawyer-client interaction becomes a vehicle for imposing the post-racial ethos on persons least inclined to adopt it and either incentivizing or disciplining them to understand their experiences in a particular way.

We recognize that some lawyers may have made the universal turn because they believe we are in a post-racial moment. These attorneys honestly believe that we need to move beyond race in understanding social inequality, and universal claims are the best way to achieve this goal. Many, though, do not, and racial formation theory does not have a language for describing the nonideological endorsement of a particular racial frame. We can see, however, that pragmatics-focused attorneys are engaging in behavior that locks in post-racialism at a discursive and structural level. When attorneys in large numbers change their practice area from Title VII cases to FLSA litigation, they decrease opportunities for plaintiffs to promote an understanding of race and discrimination that would resist post-racialism. Most of the lawyers we interviewed had not considered the larger, long-term market consequences of the shift toward universalist claims. They did not appear to have reflected carefully on whether the changes would become so entrenched that they could not be undone. One might not expect lawyers to engage in this kind of reflection, as

some would argue that the daily experience of litigation practice tends to be driven by individual clients' short-term needs. Yet lawyers who practice in this area also often have collectivist interests as well, if they are committed to larger justice considerations or even concerns about maintaining a large enough market for employment claims to preserve opportunities for nimble litigation approaches that preserve and capitalize on all available means of victory. Part III will engage with these concerns about individualist versus collectivist practice decisions as part of our discussion of post-racial hydraulics.

### III

#### FOUR POST-RACIAL HYDRAULICS: A CLOSER LOOK

Part III turns from theory to practice, examining the ways in which post-racial hydraulics threaten to change the market for particularist employment discrimination and universalist replacement claims and to influence judges' and laypersons' beliefs about the continued problem of race discrimination and salience of race. This Part explores each of the four post-racial hydraulics introduced earlier in the discussion in more detail. First, we examine the ossification of Title VII doctrine. Second, we consider the social effects of lending the impression to judges and laypersons that race discrimination is more rare than it is. Third, we consider how the universal turn will affect plaintiffs' access to justice and the redressability of workplace harms. Finally, we examine issues of client agency and voice that are implicated when attorneys recharacterize discrimination claims as claims under alternative universalist statutes.

##### *A. The Ossification of Title VII and the Particularizing of the FLSA*

In her influential article, *The Ossification of American Labor Law*, Cynthia Estlund describes the process by which U.S. labor law has ceased to innovate in response to changes in the American workplace.<sup>148</sup> She labels the present body of labor law “ossified,” “moribund,” and “largely insulated from both internal and external sources of renovation.”<sup>149</sup> The first post-racial hydraulic pressure we identify represents a phenomenological instantiation of “ossification” as applied to Title VII race discrimination doctrine.

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<sup>148</sup> Estlund, *supra* note 12, at 1529–31 (suggesting that, were it not for American labor law's insulation from internal and external reforms, “change or experimentation . . . might have produced, over the past half-century, a body of labor law that was more responsive to the very different economic and social conditions that workers and employers face today”).

<sup>149</sup> *Id.*

When particularist discrimination claims are converted into universal claims, Title VII case law stagnates: Each time a claim is converted, Title VII loses an opportunity to update its understanding of discrimination and become more responsive to contemporary bias patterns. When a remedial statute becomes outdated in this fashion, it loses the confidence of those who rely on its protections. It may be perceived as “ossified,” as “stubbornly and powerfully resistant to the reinvention it so clearly needs.”<sup>150</sup> It could be the case that an ossified statute will de-ossify under the proper conditions. It is also possible that ossification will trigger a search for alternative rights and remedies as substitutes. Benjamin Sachs has argued that, to the extent labor law has ossified, workers’ desire for collective action and organizing has been accommodated in Title VII and FLSA litigation.<sup>151</sup> We are more critical of the hydraulic pressures that convert Title VII claims *into* FLSA claims because this conversion process creates information deficits in the definition of discrimination under Title VII case law that render the statute outdated. Unlike in the labor law arena, these information deficits have larger consequences for our evolving social understanding of race discrimination. Typically there may be no direct relationship between case law definitions of social phenomena and lay understandings. Title VII however, is a special case. The only guidance many Americans receive about what constitutes workplace discrimination comes in the form of employer education and diversity training programs, which are designed to address existing liability risks as defined by Title VII case law.<sup>152</sup> Therefore, there are more reasons for us to be sensitive to the ossification of Title VII definitions as they are the backdrop against which workplace policies, workplace instruction, and informal workplace norms are defined.

In order to understand the unique ossification risks that threaten Title VII, one needs an understanding of the critical changes that have occurred over the last fifty years in the nature of discrimination. Title VII doctrine, at present, is structured in a way that makes it keenly responsive to old style dominative racism—the explicit expression of racial prejudice.<sup>153</sup> However, social psychologists and sociologists

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<sup>150</sup> Sachs, *supra* note 10, at 2686.

<sup>151</sup> *Id.* at 2687 (describing the shift from traditional labor law to employment statutes).

<sup>152</sup> See, e.g., *Best Practices for Employers and Human Resources/EEO Professionals*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm> (last visited Oct. 26, 2015) (listing workplace training as the first best practice aimed at “prevent[ing] race and color discrimination” (capitalization altered)).

<sup>153</sup> See *supra* note 31 (discussing dominative racism).

agree that, to the extent dominative racism still exists, it accounts for a much smaller portion of contemporary discrimination than it did fifty years ago.<sup>154</sup> Instead, because most Americans embrace equality ideals, they discriminate in subtle, obfuscated, and sometimes unconscious ways. Consequently, if Title VII is still going to address discrimination in its modern form, case law and doctrinal tools must be developed to create standards for proving discrimination in more subtle forms, including implicit discrimination, aversive discrimination, or symbolic discrimination.

This observation is borne out well by our thought experiment, the *Heath* case.<sup>155</sup> Consider that, even if *Heath* were brought as a Title VII case, a judge or jury with no experience with subtle discrimination might make little of the employer's decision to effectively segregate the African American workers in the chicken catcher position. The judge could easily conclude that existing networks from the era of explicit segregation continued to produce a segregated workforce in the absence of *any* employer discrimination. The plaintiffs' lawyers in the case would likely not have evidence of explicit discrimination to rebut this claim. Instead, they would offer proof of more subtle forms of discrimination that effectively explain the tracking of African Americans into the chicken catcher job. Contemporary subtle forms of bias, such as aversive racism and implicit bias, could also effectively explain why a job that was associated with African Americans was structured to deny workers in that job category the wages and benefits that were normally given to other workers in similarly-situated job categories.<sup>156</sup> However, if Title VII ossifies and fails to take on the challenge of establishing these discrimination patterns, it will prove ineffective in a large number of contemporary discrimination cases.

### B. Instantiation of Post-Racial Outlook

The second post-racial hydraulic effect that we identify is the instantiation of post-racialism, or the process by which actors confirm their beliefs by collecting "proof" from their surroundings. When race discrimination cases are rare, social actors are more likely to conclude that race discrimination is not a broad-scale social problem. Social psychologists refer to this kind of spurious conclusion as overgeneral-

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<sup>154</sup> See Pearson et al., *supra* note 31, at 315–17 (discussing the replacement of dominative racism with other forms of bias, including aversive racism); *supra* note 110 and accompanying text (discussing implicit bias and structural racism).

<sup>155</sup> See *supra* Section I.C.

<sup>156</sup> See Pearson et al., *supra* note 31, at 316–17 (discussing aversive racism).

ization.<sup>157</sup> While we recognize that there is no clear and direct relationship between case filings and social attitudes, in general, the less one hears about race discrimination, the less likely one is to believe that race discrimination itself occurs in the workplace. The stronger the post-racial ethos becomes, the harder it is for *even universal strategies* to reach race discrimination problems. Jessica Clarke persuasively argues that universalist legislation and remedies, if they are repeatedly used by minority groups, will become marked and stigmatized as vehicles for minority interest despite their facially universalist language.<sup>158</sup> One can imagine a similar outcome with respect to the FLSA: If plaintiffs who bring minimum wage and overtime lawsuits are disproportionately workers of color,<sup>159</sup> the statute, despite its universalist focus, may come to be regarded as a special interest antidiscrimination measure. Ironically, this could increase the very stigma effect that universalists hope to reduce.

### C. *Access to Justice and the Redressability of Workplace Harms*

Third, post-racial hydraulics have troubling implications for workers' access to justice and ability to seek redress for workplace harms. Fewer lawyers will be available to assist plaintiffs who want to file Title VII claims. There will be a class of plaintiffs who are discriminated against but who are *not wronged under wage and hour statutes* and they will lose de facto legal protection, even while retaining de jure protection. Even if there are universalist statutes other than the FLSA that could potentially address other aspects of a discrimination plaintiff's wrongful treatment, the plaintiff is still denied a vehicle that comprehensively addresses how the full range of wrongful practices affects her as a whole and that allows her to demonstrate that these actions stem from a single form of discriminatory animus.

As an initial matter, we are keenly aware that the magnitude of the effects discussed is extremely important. Indeed, that question requires a rigorous empirical evaluation beyond the scope of this Article. Here, we merely outline the questions that lay the foundation for future work. In order to identify the role of post-racial hydraulics in blocking access to justice for potential discrimination plaintiffs, we need to account for the ways in which the imperfect overlap between Title VII and the FLSA causes some discrimination claims to drop out of the market entirely. Figure 1 below contemplates four categories of

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<sup>157</sup> See, e.g., Seymour Epstein, *Coping Ability, Negative Self-Evaluation, and Overgeneralization: Experiment and Theory*, 62 J. PERSONALITY & SOC. PSYCHOL. 826, 827 (1992) (describing overgeneralization as a process underlying general coping ability).

<sup>158</sup> See Clarke, *supra* note 4.

<sup>159</sup> *But see id.* (noting the racial history of FLSA coverage exceptions).

potential plaintiffs. Workers in quadrant 1 are those, like the *Heath* plaintiffs, who could potentially bring both Title VII and FLSA claims. The potential plaintiffs in quadrant 2 could bring a Title VII claim but have no potential FLSA claim. Those in quadrant 3 have no Title VII claim but do have an FLSA claim they could bring. Those in quadrant 4 have neither claim type available.

FIGURE 1: CLAIM TYPE AVAILABILITY

		FLSA claim available?	
		yes	no
Title VII claim available?	yes	1	2
	no	3	4

Quadrants 1 and 2 are the most important in discerning the degree to which our theory is supported empirically and determining the effects on plaintiffs’ access to justice. Quadrants 3 and 4 are less important because plaintiffs in those quadrants would have no Title VII claim upon which post-racial hydraulics could act. In quadrant 1, a potential plaintiff presents facts to an attorney that could be used to support either or both an FLSA claim or a Title VII claim. One would need to evaluate the fraction of total claims brought against employers that could have contained Title VII causes of action but did not (for example, claims that could have included Title VII causes of action divided by total claims that feasibly could have contained such causes of action). One would measure the extent to which this fraction has changed over time as one way of empirically vetting our theory.

In quadrant 2, an employee presents facts to support a Title VII claim, but no facts to support an FLSA claim. If the fraction of claims over time represents fewer Title VII claims filed, our post-racial hydraulics theory would be borne out. That is, one would measure the change in the percentage of cases filed against employers in which no FLSA claim could have been brought over time. Perhaps it is in quadrant 2 that one would observe the real dissonance between the two competing forces of pragmatism and idealism, between the individualist pursuit of a “win” and larger collectivist social justice goals. The individualist perspective considers an individual plaintiff’s (and attorney’s) chance of recovering an award; the collectivist force considers how the making of claims in a particular way affects an entire

class of putative plaintiffs in the same circumstance. In quadrant 2, one sees attorneys passing up particularist Title VII claims because they are either unlikely to win or too costly to pursue relative to their opportunity cost of finding other, more viable FLSA claims. This would result in the collective diminution in race discrimination claims that we theorize.

In thinking about the effects on quadrants 1 and 2 in Figure 1, a large-scale shift by attorneys away from Title VII and toward universalist claims like the FLSA will impede discrimination plaintiffs' access to justice and reduce the ability of workers—particularly low-wage workers—to seek redress for workplace harms. Indeed, if all or even most plaintiffs' employment attorneys take the pragmatic path described by the attorneys above, then wage and hour work will “swallow[ ] up 100 percent of [their] professional work time”<sup>160</sup> and dry up the market for employment discrimination claims. As an empirical matter, little is known about what actually happens to potential discrimination plaintiffs when they are denied representation or have difficulty locating an attorney to represent them. These claims may not be brought or they may be brought pro se. Plaintiffs who represent themselves are typically less likely to gain relief than if they were able to secure representation.<sup>161</sup> Alternatively, other lawyers may enter to fill the vacuum as plaintiffs' employment lawyers shift their practices away from Title VII claims; that is, if some lawyers are electing not to take cases in quadrant 2 in Figure 1, other lawyers may enter the market to meet this demand. Though we hypothesize that many such cases never make their way to court, contributing to the downturn in Title VII case filings observed by Clermont and Schwab and as shown in Appendix A, we acknowledge that more empirical work is required in this area to better map these trends onto the options presented in Figure 1.<sup>162</sup> Indeed, without more informa-

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<sup>160</sup> *Borgen*, *supra* note 139; *see also Deering*, *supra* note 136 (quoting a defense-side attorney on the increasing proportion of FLSA litigation as a composition of his caseload).

<sup>161</sup> In Nielsen, Nelson, and Lancaster's study of federal employment discrimination litigation, “[o]ne in five plaintiffs act[ed] as his or her own lawyer, operating pro se over the course of the lawsuit.” Nielsen et al., *supra* note 59, at 188. These plaintiffs were “almost three times more likely [than plaintiffs with legal representation] to have their cases dismissed, [were] less likely to gain early settlement, and [were] twice as likely to lose on summary judgment.” *Id.* Selection effects, however, make it difficult to use these figures to learn anything about how well pro se plaintiffs fare holding constant the viability of the evidence supporting their claims. In other words, pro se plaintiffs may be bringing cases that are weaker on the merits.

<sup>162</sup> *See Clermont & Schwab*, *supra* note 58, at 117; *infra* app. A. For example, it is theoretically possible that fewer cases are being filed in federal court but that more plaintiffs are participating in each case, producing little or no drop in the actual number of people being represented. The fact that much of federal courts' hostility toward Title VII

tion about the availability of alternative claims, little may be gleaned from the available empirical analyses about case filings and win rates.

Post-racial hydraulics also present significant problems for the plaintiffs who secure representation but ultimately bring FLSA rather than Title VII claims (those in Figure 1, quadrant 1). Here it is often only the relatively higher-paid plaintiffs with higher-value claims who proceed under the FLSA.<sup>163</sup> Though the chicken catcher plaintiffs in *Heath* were low-wage workers, they are the exception: Most FLSA cases filed today are on behalf of plaintiffs who occupy relatively higher-paid, higher-skilled jobs.<sup>164</sup> This can be explained by the incentives that the FLSA creates for both workers and attorneys, which skew representation in favor of workers who hold jobs that are at the higher end of the labor market.

Though the FLSA attempts to encourage workers to file suit in a variety of ways,<sup>165</sup> an FLSA claim may still provide only a low-dollar recovery, at great cost, for some categories of plaintiffs. The lower the worker's wage, the lower the value of the claim.<sup>166</sup> And to actually

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cases has taken the form of adverse decisions in class action cases, however, may cast doubt on this possibility. *See, e.g., supra* note 132 and accompanying text (discussing *Wal-Mart v. Dukes*).

<sup>163</sup> Alexander, *supra* note 18.

<sup>164</sup> *Id.*

<sup>165</sup> The FLSA offers plaintiffs liquidated (or double) damages, attorneys' fees and costs, and protection against retaliation. 29 U.S.C. §§ 215(a)(3), 216(b) (2013). One of us has referred to these elsewhere as "operational rights," or the "set of protections and inducements [offered by workplace laws] to entice workers to become law enforcers." Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1073 (2014) ("[T]hese incentives are miscalibrated in the case of many low-wage, front-line workers, whose fear of retaliation or doubt in the efficacy of complaining outweigh the benefits that would accrue from workplace law enforcement.").

<sup>166</sup> The starting point for calculating the value of an FLSA claim for a low-wage worker is usually a very low number: a wage shortfall of less than \$7.25 per hour for minimum wage claims or an overtime claim that is calculated on the basis of the plaintiff's regular "straight time" hourly wage. *See* U.S. DEP'T OF LABOR, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT 12-15 (2014), <http://www.dol.gov/whd/regs/compliance/wh1282.pdf> (noting available minimum wage and overtime remedies). Recovery for Title VII claims, by contrast, is not entirely indexed to the worker's wage. A claim for back pay after a discriminatory termination, demotion, or promotion denial, for example, is keyed to the amount of pay that the plaintiff lost. *See Remedies for Employment Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/remedies.cfm> (last visited Nov. 20, 2015) (stating that the Title VII remedy may include "back pay and benefits the person would have received"). Judges and juries may also award punitive damages and compensatory damages for non-economic losses such as emotional distress, which are generally unavailable under the FLSA, except in cases of retaliation. *See Richards v. Canyon Cnty.*, No. CV 12-00424-S-REB, 2014 WL 1270665, at \*3 (D. Idaho Mar. 26, 2014) ("Congress has chosen to do so in other employment discrimination settings, such as the 1992 amendments to the types of damages available in a Title VII claim, to add punitive damages and damages for emotional distress."); *Bogacki v.*



achieve a recovery for that relatively low-value claim, a worker faces what can be a lengthy, costly, and uncertain litigation process, during which she may risk losing her job in retaliation for her lawsuit (if she is suing her present employer). “Against these costs, the benefits of claiming appear paltry,” and rational low-wage plaintiffs may choose to forgo filing an FLSA claim as a substitute for filing a Title VII claim.<sup>167</sup>

Moreover, if many FLSA plaintiffs with individual small-dollar claims seek to reduce the costs of litigation by aggregating their claims into a single lawsuit, the statute’s collective action mechanism creates even more barriers to participation. Unlike in a typical class action brought under Federal Rule of Civil Procedure 23, each individual plaintiff in an FLSA case must affirmatively opt into the case.<sup>168</sup> This erects multiple barriers to participation: potential plaintiffs may never receive a notice about an FLSA suit; the notice may be written in indecipherable legalese; and, the prospect of participating in a lawsuit may appear too costly, lengthy, intimidating, futile, or dangerous.<sup>169</sup> With respect to the danger of retaliation, low-wage workers (particularly those who are unauthorized immigrants) may be especially reluctant to take the public step of affirmatively opting into a lawsuit against their employer.<sup>170</sup> Therefore, because the default in an FLSA lawsuit is set at non-participation, and plaintiffs must take affirmative steps to opt in, there are barriers to entry.<sup>171</sup>

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*Buccaneers Ltd.*, 370 F. Supp. 2d 1201, 1202–04 (M.D. Fla. 2005) (discussing availability of non-economic FLSA damages). Thus, even though Title VII damages are subject to statutory caps, they may still exceed those available under the FLSA on a per-plaintiff basis, because they are meant to compensate for a broader swath of injuries and are not entirely determined by the worker’s (sometimes extremely low) hourly wage.

<sup>167</sup> Alexander & Prasad, *supra* note 165, at 1106.

<sup>168</sup> *Id.* at 1106, 1114.

<sup>169</sup> Alexander, *supra* note 1, at 469–72 (exploring the litany of reasons that a potential plaintiff may not opt into an FLSA collective action).

<sup>170</sup> Studies have found that fear of retaliation in low-wage workplaces is widespread and many unscrupulous employers appear unmoved by the FLSA’s prohibition on such reprisals; workers may therefore have direct knowledge of or experience with the weakness of the FLSA’s retaliation protections and make the choice to keep their jobs instead of risking their livelihoods for an uncertain future payout. Alexander & Prasad, *supra* note 165, at 1089 (“Of the 43% of workers who decided not to make a claim about an identified workplace problem, the top . . . reasons workers gave for their decision were a fear of being fired and a belief that the claim would make no difference. The next two reasons . . . were also retaliation related . . .” (footnote omitted)); *id.* at 1092 (“[O]f all workers who had made claims about justiciable workplace problems, about 15% experienced unlawful retaliation, 28% experienced some other form of reprisal, another 15% had their claims addressed or promised to be addressed, and 42% were met with employer inaction or some other response.”).

<sup>171</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 83 (2008) (noting that “many people will take

The same set of factors that may dissuade low-wage workers from filing or joining an FLSA case may also lower the incentives for plaintiffs' lawyers to accept and fully pursue these workers' claims. Attorneys may decline representation of workers whose wage shortfalls are too insignificant to be worth the lawyers' time and attention.<sup>172</sup> Alternatively, plaintiffs' lawyers may adopt a "high-volume, small-case, quick-settlement" model, in which they accept many individual FLSA cases but do little except file a form complaint before agreeing to a nuisance settlement.<sup>173</sup> This model, while providing some plaintiff representation, provides little in the way of recovery of damages and may contribute to some judges' increasing frustration with the boom in FLSA litigation.<sup>174</sup>

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whatever option requires the least effort, or the path of least resistance" and concluding that "if for a given choice, there is a default option—an option that will obtain if the chooser does nothing—then we can expect a large number of people to end up with that option, whether or not it is good for them"). A study by one of the present authors of thirty-eight FLSA cases filed as collective actions in the U.S. District Court for the Southern District of Florida bears this out, showing a median opt in rate of only 15%, meaning that 85% of the workers who could have joined FLSA litigation did not do so. Alexander, *supra* note 1, at 466 ("Plaintiff opt in rates in these cases ranged from 0% to 48%, with a median of 15%."). In contrast, the opt out structure of Rule 23, under which Title VII class actions are brought, both encourages plaintiff participation and provides a measure of protection against employer retaliation. There, class members who fall within a court-approved class definition are automatically included in the litigation unless they opt out. FED. R. CIV. P. 23(c)(3)(b). (Of course, as one plaintiffs' attorney interviewed above commented, achieving court approval to proceed as a class in the first place is no small feat. *Supra* notes 132–33 and accompanying text. The Rule 23 class action mechanism is not perfect, but the FLSA collective action mechanism may be a less viable alternative in practice, particularly for low-wage or undocumented workers who lack resources and are extremely vulnerable to retaliation, than it initially appears to be.) A small number of plaintiffs must act as class representatives, thereby revealing their identities to the court and the defendant, but the bulk of the class members can remain anonymous until the very end of litigation when a settlement or judgment is distributed. Even then, collection of one's portion of the damages is unlikely to prompt retaliation by the defendant, as presumably many class members are doing the same, and it may be less likely that an employer would fire a large number of workers en masse.

<sup>172</sup> See Telephone and E-mail Interview by Zev J. Eigen with a plaintiff-side lawyer, *supra* note 143 ("It has become so expensive to try cases that it is really hard to actually litigate the individual cases . . . [M]y experience is that many individual wrongful termination cases are being turned down and it is hard for those people to find excellent attorneys to take the cases.").

<sup>173</sup> Alexander, *supra* note 1, at 458 (noting the "expensive notice and opt in process" under FLSA and recognizing that "FLSA's opt in requirement may actually decrease plaintiffs' recoveries in relation to attorneys' fees: . . . [M]any plaintiffs' attorneys have adopted a high-volume, small-case, quick-settlement approach that compensates them for their investment in the case but delivers only a minimal settlement to the plaintiffs"); see also Sherwyn, Tracey & Eigen, *supra* note 1, at 90–99 (using a modeling approach to show why plaintiffs' attorneys may adopt such a strategy).

<sup>174</sup> See, e.g., Leigh Kamping-Carder, *Despite Backlash, Florida to Remain FLSA Hotbed*, LAW360 (Nov. 18, 2009, 2:42 PM), <http://www.law360.com/articles/131435/despite-backlash-florida-to-remain-flsa-hotbed> (discussing one Florida federal judge's opinion that

Thus, post-racial hydraulics may be particularly problematic for the least powerful groups in the workplace—those who lack the knowledge, time, and resources to opt into an FLSA lawsuit; those who fear retaliatory job loss for suing their employer; and those who would bring low-dollar claims for unpaid minimum wages. Many workers who fall into these categories are the same workers who would be traditionally protected by antidiscrimination mandates.<sup>175</sup> These workers might therefore lose their particularist claim for discrimination under Title VII at the hands of pragmatic plaintiffs' employment lawyers but then also find it difficult to enforce a universalist claim under the FLSA, for all of the very same reasons that they need protections on the job in the first place.<sup>176</sup>

#### D. Client Agency

Our final concern centers on the potential that lawyer influence, rather than client choice, is the primary driver behind the shift toward universalism. We wondered whether lawyers were preemptively categorizing claims as FLSA claims before presenting plaintiffs with the option of filing a particularist Title VII race discrimination claim. Alternatively, lawyers might present both the Title VII and FLSA options, but strongly suggest to their clients that they would be financially better off if they converted their claims into FLSA claims. Relatedly, we questioned whether plaintiffs who agreed to have their discrimination claims converted to FLSA claims felt they had lost anything in the process. Would these FLSA plaintiffs have the same sense of justice after a victory as if they had found an attorney willing to assist them with filing a Title VII claim?

When the process of post-racial hydraulics substitutes a universalist FLSA claim for a particularist Title VII claim, there is a mismatch between naming and claiming—the plaintiff may recover for *some* harm that she suffered but not for the particular harm that first

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the “surge [in FLSA litigation in his jurisdiction] is a ‘lawyer’s retirement bill’ that has ‘gotten quite out of hand’”).

<sup>175</sup> See Zatz, *supra* note 94, at 6 (“[T]he lowest paid workers [often] hail from groups central to antidiscrimination projects . . .”).

<sup>176</sup> In fact, many workers at the bottom of the wage scale might not be covered by the FLSA at all, so they would have no substitute FLSA claim in the first place. Some home care workers, live-in domestic workers, and many agricultural workers are exempt from the overtime requirement or both the overtime and minimum wage requirements, as are workers who fall into the statute’s many other exemptions. Charlotte Alexander, Anna Haley-Lock & Nantiya Ruan, *Stabilizing Low-Wage Work*, 50 HARV. C.R.-C.L. L. REV. 1, 15 (2015). Moreover, Professor Marc Linder notes that the agricultural and domestic worker exemptions to the FLSA were explicitly racist from the outset, designed to exclude African American workers from the statute’s coverage. See Linder, *supra* note 81, at 1373 (referring to the testimony of John P. Davis).

brought her to a lawyer's office.<sup>177</sup> Cognitive dissonance should be expected when the plaintiff understands her injury as being produced by discrimination but never receives any judicial finding, or even lawyer recognition, that establishes the validity of her perspective.<sup>178</sup> Certainly, plaintiffs are not agency-less pawns directed by their attorneys. Some plaintiffs will prefer the substitution of a universalist claim for a particularist one. Their reasons for preferring universalism, however, may stem from disturbing factors that we should disrupt rather than accept as a matter of course. Social psychology studies show that workers who complain of race or sex discrimination in the workplace are generally disliked by coworkers and managers, even when conditions suggest that race or sex bias clearly played a role in their adverse treatment.<sup>179</sup> Given the real costs associated with claiming discrimina-

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<sup>177</sup> Noah Zatz offers an alternative view of the minimum wage as itself a civil rights protection. This account makes some progress toward harmonizing the differences between Title VII and FLSA claims that we identify. In Zatz's view, FLSA violations might act as a sort of disparate impact claim (though he does not use that particular explanatory framework): "[S]ufficiently low wages indicate that the worker's earnings have been suppressed by morally arbitrary factors [such as discrimination on the basis of race] . . . . Requiring an employer to pay supra-market wages is like making an employer provide an accommodation that allows an employee to work as productively as if she had no (morally arbitrary) impairment." Zatz, *supra* note 94, at 8. Instead of seeing an FLSA claim as an inadequate replacement for a Title VII claim, this view might see the FLSA as an additional, complementary tool for uncovering the effects of latent racism, sexism, or other forms of discrimination.

<sup>178</sup> William Felstiner, Richard Abel, and Austin Sarat offer that, in order for a problem to be transformed into a legal claim, a person must first "say[ ] to [her]self that a particular experience has been injurious," or *name* it; next "attribute[ ] [the] injury to the fault of another individual or social entity," or assign *blame*; then address her complaint "to the person or entity believed to be responsible and asks for some remedy," or make a *claim*. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635-36 (1980-1981). In a Title VII case, the plaintiff says, in effect: "Discrimination happened to me. I suffered as a result, and my employer was at fault. This is the reason I am suing." Even if the plaintiff does not win, her lawsuit nevertheless attempts to, as Cass Sunstein says, "change the social meaning of action through a legal expression or statement about appropriate behavior." Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031 (1996).

<sup>179</sup> Employees recognize that persons who claim discrimination are socially disfavored. People have negative reactions to those who allege discrimination, whether or not there is strong evidence to suggest that discrimination occurred. See Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 254, 259 (2001) ("The results of this study revealed that there are social costs associated with making attributions to discrimination. Specifically, an African American man was evaluated more negatively when he attributed a failure to discrimination rather than the quality of his work."). Even in cases where discrimination was readily apparent, reviewers rated the persons who complained of discrimination lower on favorability scales than those who did not make claims of racism. *Id.*; see also Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP

tion, discrimination plaintiffs may be relieved to have their claims converted to a universal form. For if they actually litigate particularist race discrimination claims, they risk returning to a workplace where they may be marginalized or seen by management and coworkers as hypersensitive, unlikeable troublemakers.<sup>180</sup>

In her book *Silent Racism*,<sup>181</sup> Barbara Trepagnier provides context for understanding why Americans mistreat people who complain of discrimination. She explains that, for many individuals, a key part of their self-esteem is maintaining a non-racist image.<sup>182</sup> Consequently, when individuals encounter people who accuse them of racially-biased behavior and destroy their sense of positive self-image, they may attempt to censure the accuser. In particularly explosive moments, people may erupt into what one of the present authors has called “post-racial rage” at the suggestion that they have been racially biased or insensitive.<sup>183</sup> That is, in the post-racial era, many whites are publicly committed to racial equality as a general matter, but they are also very angry and frustrated when people reveal that seemingly race neutral and “fair” arrangements have discriminatory effects and consequences. Cho makes similar observations that further illuminate the concept of post-racial rage, stating that “[u]nder post-racialism, race does not matter, and should not be taken into account or even noticed”; to highlight racial inequality is to “risk[ ] being characterized

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REL. 227, 234 (2003) (reporting results of a study showing “[a]n African American who claimed that discrimination was responsible for a job rejection was seen as more of a troublemaker than someone who claimed that the rejection was due to his interviewing skills or the quality of the other job applicants” and noting that this “occurred even when participants were directly exposed to highly prejudiced comments made by the person responsible for the hiring decision”). The authors conclude that the social costs of discrimination may discourage victims from coming forward. *Id.* at 236.

<sup>180</sup> See, e.g., Alexander M. Czopp & Margo J. Monteith, *Confronting Prejudice (Literally): Reactions to Confrontations of Racial and Gender Bias*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 532, 541–42 (2003) (explaining that when minority targets complained of discrimination there was a greater risk that they were perceived as “overreacting” than when non-minorities identified behavior as racially discriminatory); Donna M. Garcia et al., *Perceivers’ Responses to In-Group and Out-Group Members Who Blame a Negative Outcome on Discrimination*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 769, 770 (2005) (summarizing research showing that primarily White reviewers rated African Americans lower when they attribute their negative outcomes to discrimination instead of to other reasons, and that minority groups are aware of these social costs of claiming discrimination).

<sup>181</sup> BARBARA TREPAGNIER, *SILENT RACISM: HOW WELL-MEANING WHITE PEOPLE PERPETUATE THE RACIAL DIVIDE* (2010).

<sup>182</sup> See *id.* at 53 (“Apprehension about being perceived as racist keeps well-meaning white people from finding out more about racism.”); see also *id.* at 18 (“[A]versive racism occurs when negative feelings towards blacks are denied in order for well-intentioned whites to maintain a valued self-image as ‘not racist.’”).

<sup>183</sup> Rich, *supra* note 71.

as an obsessed-with-race racist who is unfairly and divisively ‘playing the race card’ . . . [and] who occupies the same moral category as someone who consciously perpetrates racial inequities.”<sup>184</sup>

Despite these facts, some individuals may still feel it is important to name discrimination when they see it and may feel that their injury is more significant when accurately named as a civil rights violation.<sup>185</sup> Consequently, some plaintiffs may feel that they have lost their voice if they are speaking to the court in terms of pay stubs and hours worked instead of acts of and resistance to discrimination.<sup>186</sup> In short, we theorize that the replacement of a Title VII discrimination claim with an FLSA claim may rob the plaintiff of her voice and her ability to name the particular reason that she was harmed: her sex, her race, her national origin, her color, or her religion.<sup>187</sup>

### CONCLUSION

Our discussion of post-racial hydraulics is designed to render visible some of the long-term consequences of the universal turn in employment litigation (though post-racial hydraulics may also be at work in other areas of law in which universalism has been urged). When litigators turn to universalism as a pragmatic, strategic choice, rather than because of faith in the substantive ideology that informs this outlook, they strengthen the persuasive hold that post-racialism already has on segments of the American public; discipline plaintiffs to re-interpret their injuries in a race neutral fashion; and cause Title VII case law on race to stagnate in ways that make it more difficult to bring future race discrimination claims. We attempt to provide readers with some understanding of the theoretical significance of this development, as well as the practical real-world consequences of the shift, in terms of employees’ access to justice and agency in shaping the legal claims that are brought to court in their name.<sup>188</sup>

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<sup>184</sup> Cho, *supra* note 2, at 1595.

<sup>185</sup> See, e.g., Bagenstos, *Universalism and Civil Rights*, *supra* note 15, at 2852 (“[T]he ‘civil rights’ label has a powerful cachet in American politics.”).

<sup>186</sup> Whether even Title VII claims, however, adequately allow plaintiffs to tell their stories is open to question. See, e.g., Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 *YALE L.J.* 763, 766–67 (1995) (noting the shortcomings of civil rights pleading as a story-telling device for plaintiffs).

<sup>187</sup> See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 *MICH. L. REV.* 485, 486 (1994) (describing theorists in the vein of “critical lawyering” who “posit that client voices have been muted by the narratives that lawyers tell on their behalf”).

<sup>188</sup> This Article leaves some questions unanswered. In this piece, our goal was to identify and initially map the post-racial hydraulic phenomena we identify. This project, therefore, was a necessary precondition to future broader qualitative and quantitative research. The preliminary interviews will help identify variables to include in future models. Our early

Literature and film are stocked with creation stories in which a creator's vision is realized, but her failure to fully consider the consequences of what she has wrought yields dire results.<sup>189</sup> The same message applies here: One should not create something simply because of its ease or expedience. Rather, creators have political, moral, and ethical obligations that should control their decisions as to what to create, when, and why. Through this Article, we hope to draw greater attention to the lawyer's role as creator, give lawyers pause as they turn away from discrimination claims in favor of universal ones, and allow them to consider the greater societal impact caused by the pursuit of an individual win. With more information and time for reflection, attorneys may view universalist strategies with a bit more skepticism. If they fail to heed the lessons offered here, those attorneys may find that post-racialism overtakes us sooner and for much longer than they otherwise expect.

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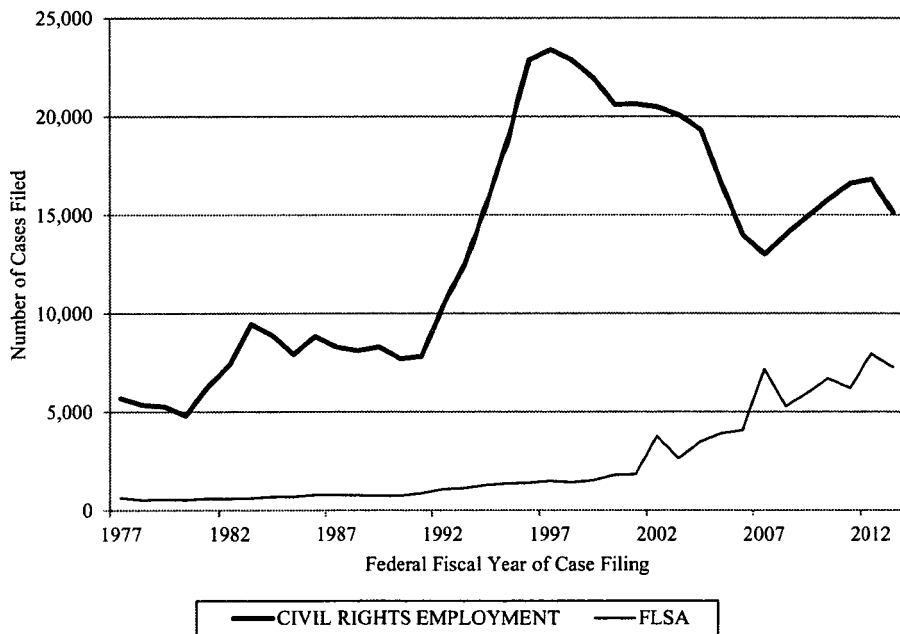
review of national data suggests that these hydraulics may be operating in certain jurisdictions in a robust way, but we cannot here offer any certainty about how broadly this occurs in other jurisdictions.

<sup>189</sup> See, e.g., MARY WOLLSTONECRAFT SHELLEY, *FRANKENSTEIN OR THE MODERN PROMETHEUS* (James Rieger ed., Univ. of Chi. Press 1982) (1818) (describing the creation of the monster Frankenstein and unexpected destruction wrought by the creature because of alienation and loneliness); 2001: *A SPACE ODYSSEY* (Metro-Goldwyn-Mayer 1968) (describing the destruction wrought by a self-aware computer designed to protect spaceship occupants).

APPENDIX A: CHARTING SHIFTS IN EMPLOYMENT DISCRIMINATION AND FLSA LITIGATION

Using data from the Administrative Office of the U.S. Courts, Figure 2 charts the number of employment discrimination and FLSA cases filed by private plaintiffs in all U.S. district courts between 1977 (the year that a separate “Civil Rights Employment” category was first used to track case types) and 2013 (the most recent complete year of available data).

FIGURE 2. TOTAL PRIVATE CIVIL RIGHTS EMPLOYMENT AND FLSA CASES FILED, ALL U.S. DISTRICT COURTS, FEDERAL FISCAL YEARS 1977–2013



As Figure 2 shows, the number of employment discrimination cases filed each year dropped from a high of 23,392 in 1997 to 15,108 in 2013, a thirty-five percent decrease.<sup>190</sup> In contrast, FLSA case fil-

<sup>190</sup> Other commentators have noted the same drop in employment discrimination cases on federal courts’ dockets. *See, e.g.*, Clermont & Schwab, *supra* note 58, at 117 (noting that the number of workplace discrimination cases disposed of by federal district courts experienced a “startling drop” in the late 1990s and early 2000s). Clermont and Schwab noted a peak in employment discrimination case *terminations* in 1998; it follows that a peak in *filings* (which Figure 1 captures) would register in the data in years prior to the termination peak, to account for the time it takes for a case to reach disposition after it is filed. *Id.* at 117 (“[T]he employment discrimination category has dropped in absolute number of terminations every year after 1998 . . .”).



ings held relatively steady from 1977 until around 2000, and then began to increase rapidly through 2013. The total number of FLSA cases filed in 2013 (7266) was 307% higher than the number filed in 2000 (1786), when the trend line began its rise, and 388% higher than the number of cases filed in 1997 (1490), the year of the civil rights employment case filing peak.<sup>191</sup>

Figure 2 draws on data from the Administrative Office of the United States Courts, which collects a variety of case filing statistics per federal fiscal year (October 1 through the following September 30).<sup>192</sup> These statistics categorize cases by “Nature of Suit” (NOS)

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<sup>191</sup> Though it is not the project of this Article to identify specific events that might explain each peak and valley of the 1997–2013 civil rights employment case filing trend line, a few are notable. Moving from left to right, case filing numbers rose sharply in 1992, possibly in response to the Civil Rights Act of 1991’s liberalizing many of Title VII’s substantive and procedural requirements. *Id.* at 116 (“[T]he Civil Rights Act of 1991 made Title VII law more favorable to plaintiffs, increasing the propensity to sue; its changes included a right to jury trial and the availability of compensatory and punitive damages.”). The reason for the timing of the 1997 peak is less clear, though it may be attributed to a number of court decisions around that time that created procedural barriers for discrimination plaintiffs. *See, e.g.,* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 821–22, 825 (2004) (describing a 1998 decision in which the Fifth Circuit “essentially concluded that the Civil Rights Act of 1991 had sufficiently changed the landscape of Title VII so that claims under the Act could no longer be brought as class actions under the Federal Rules of Civil Procedure” and noting that some other courts accepted parts of that decision). Figure 1 also shows a temporary increase in civil rights employment case filings beginning in 2007. This is perhaps the result of class actions being removed to federal courts from state courts in the aftermath of the Class Action Fairness Act of 2005, which enabled such removals. Class Action Fairness Act of 2005 § 4(a), 28 U.S.C. § 1332(d) (2013). The drop in filings in 2012, in turn, could be explained by the Supreme Court’s 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), which made Title VII class actions significantly harder for plaintiffs to prove in instances where employers delegate extensive authority to managers and exercise less centralized control over employment decisionmaking. *Id.* at 2556–57. The FLSA trend line shows fewer dramatic peaks and valleys than the civil rights employment line, but there are two appreciable spikes in case filings in 2001–2002 and 2006–2007. In a separate empirical project analyzing over 50,000 FLSA cases filed in federal court between 2000 and 2011, one of the present authors has identified over a thousand separate FLSA cases that were filed against a number of public school districts in the U.S. District Court for the Southern District of Mississippi, accounting for the 2001–2002 spike in FLSA case filings. A similar cluster of thousands of FLSA cases were filed against Dolgencorp, Inc., the corporate parent of Dollar General Stores, in the U.S. District Court for the Northern District of Alabama in 2006–2007. Alexander, *supra* note 18.

<sup>192</sup> Specifically, figures come from the Administrative Office’s annual Table C-2, “Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2012 and 2013.” For the years 1997–2013, the tables are available on the Administrative Office’s website at <http://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts> (select relevant year, click the Judicial Business Tables link for that year on the right, and search for “C-2”). Hard copy versions of the tables for the years 1977–1996 are on file with the authors. Table C-2 groups cases into “Private Cases,” which are split further into three columns reflecting bases of jurisdiction, and “U.S. Cases,” which are split into two columns for cases in which

code, a designation taken from the civil cover sheet that plaintiffs or their attorneys must complete when filing a case.<sup>193</sup> Plaintiffs are given a menu of NOS codes and must choose one that captures the core claims of their case; clerks' office staff record NOS codes and other data on federal courts' caseloads that are then combined and tabulated by the central Administrative Office.<sup>194</sup>

Figure 2 covers federal fiscal years 1977, the first year that a "Civil Rights Employment" NOS code was available, through 2013, the most recent complete year of available data. Throughout that period, the NOS code assigned to FLSA cases (710) remained the same. The civil rights employment NOS code (442) remained the same from 1977 to 2008, when an additional code (445) was carved out of 442 for Americans with Disabilities Act (ADA) employment discrimination cases in the statistics. (Previously, ADA cases were either categorized under 442 or under a separate "Other Civil Rights" code. Other cases categorized under 442 include those brought under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and 42 U.S.C. § 1981.) Figure 2 uses case filing totals for NOS code 442 for 1977–2007 and for 2008–2013 combines totals for NOS codes 442 and 445.<sup>195</sup>

Appendix B lists the Administrative Office case filing figures for federal fiscal years 1977–2013, showing the sub-totals and totals on which Figure 2 relies.

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the United States was a plaintiff and a defendant. The case filing totals we used are the sum of all "Private Cases" filed plus cases in which the United States was a defendant—cases in which the plaintiffs would, by definition, have been private. We exclude cases in which the United States was a plaintiff because of our focus on private plaintiffs' attorneys' motivations around case and claim selection. (We do not contend that government attorneys are completely immune to the post-racial hydraulic pressures that we describe, just that their motivations and incentives likely vary from those of private plaintiffs' attorneys in significant ways.)

<sup>193</sup> ADMIN. OFFICE OF THE U.S. COURTS, JS 44, CIVIL COVER SHEET (2012), <http://www.uscourts.gov/file/445/download>.

<sup>194</sup> For the resulting data tables, analysis, and reports, see *Statistics & Reports*, U.S. Cts., <http://www.uscourts.gov/statistics-reports> (last visited Dec. 22, 2015).

<sup>195</sup> Admittedly, this procedure may miss some pre-2008 ADA employment cases that were categorized as "Other Civil Rights" rather than NOS code 442. Clermont and Schwab note similar issues with comparing Administrative Office codes over time, noting that "[t]he coding is not perfect." Clermont & Schwab, *supra* note 58, at 104 n.4. In any event, as the table in Appendix B shows, the number of ADA employment discrimination cases at issue is quite small.

**APPENDIX B: U.S. COURTS ADMINISTRATIVE OFFICE  
CASE FILING DATA**

YEAR	FLSA			CIVIL RIGHTS EMPLOYMENT				
	TOTAL	U.S. as Defendant	Private Cases	TOTAL	Civil Rights Employment		ADA Employment	
					U.S. as Defendant	Private Cases	U.S. as Defendant	Private Cases
1977	634	40	594	5,685	592	5,093	-	-
1978	518	29	489	5,343	493	4,850	-	-
1979	558	26	532	5,269	465	4,804	-	-
1980	519	23	496	4,796	402	4,394	-	-
1981	603	24	579	6,290	667	5,623	-	-
1982	588	15	573	7,397	627	6,770	-	-
1983	615	15	600	9,443	811	8,632	-	-
1984	681	27	654	8,883	649	8,234	-	-
1985	688	26	662	7,916	744	7,172	-	-
1986	782	21	761	8,828	865	7,963	-	-
1987	778	36	742	8,288	954	7,334	-	-
1988	759	22	737	8,103	867	7,236	-	-
1989	741	25	716	8,299	931	7,368	-	-
1990	735	14	721	7,687	845	6,842	-	-
1991	861	19	842	7,806	717	7,089	-	-
1992	1,065	17	1,048	10,331	827	9,504	-	-
1993	1,124	12	1,112	12,465	872	11,593	-	-
1994	1,275	24	1,251	15,526	1,097	14,429	-	-
1995	1,367	20	1,347	18,649	1,275	17,374	-	-
1996	1,390	19	1,371	22,863	1,209	21,654	-	-
1997	1,490	25	1,465	23,392	1,241	22,151	-	-
1998	1,412	29	1,383	22,860	1,320	21,540	-	-
1999	1,518	26	1,492	21,941	1,326	20,615	-	-
2000	1,786	21	1,765	20,607	1,362	19,245	-	-
2001	1,827	27	1,800	20,641	1,270	19,371	-	-
2002	3,760	25	3,735	20,491	1,266	19,225	-	-
2003	2,626	31	2,595	20,062	1,294	18,768	-	-
2004	3,484	25	3,459	19,311	1,271	18,040	-	-
2005	3,906	21	3,885	16,510	1,166	15,344	-	-
2006	4,064	19	4,045	13,980	938	13,042	-	-
2007	7,159	18	7,141	13,006	838	12,168	-	-
2008	5,268	14	5,254	14,008	798	12,127	61	1,022
2009	5,939	24	5,915	14,910	682	13,060	40	1,128
2010	6,687	13	6,674	15,788	600	13,687	53	1,448
2011	6,196	16	6,180	16,612	678	14,218	47	1,669
2012	7,959	17	7,942	16,812	595	14,287	43	1,887
2013	7,266	15	7,251	15,108	483	12,719	53	1,853