SOCIOECONOMIC STATUS UNDER TITLE VII: WHY SOCIOECONOMIC STATUS SHOULD BE PROTECTED AND HOW CLASS-BASED DISCRIMINATION ALREADY VIOLATES THE LAW

by
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Title VII of the Civil Rights Act was enacted with a goal to end workplace discrimination. However, many workers still face discrimination today based on factors that were intended to be protected by the statute. This Comment discusses the severity of socioeconomic discrimination and why prohibiting discrimination based on socioeconomic status is important, explores how the addition of socioeconomic status as a protected class under Title VII is supported by both legislative intent and judicial interpretation, and dissects how employers are already opening themselves up to liability under Title VII when they discriminate based on an individual's socioeconomic status.

* J.D., Lewis & Clark Law School, *cum laude*, 2023. I would like to thank Professor Stumpf for her guidance and thoughtful feedback on this Comment.

INTRODUCTION

Everyone has been unfairly judged at least once in their life. Whether based on the clothes someone wore, an accent someone may or may not have, or the job a person holds, humans are quick to make judgments. In fact, most people make substantial judgments about another person's life within mere seconds—sometimes even milliseconds.[1] While some of these judgments may be harmless, and some may even be correct, too many individuals are negatively affected by these baseless assumptions in extraordinary ways.

When individuals are assumed to be members of a lower class as a result of these quick judgments, they are more likely to be discriminated against in the workplace.[2] Individuals assumed to be in a lower class are less likely to get a job, less likely to get promoted, and more likely to be offered less money than someone assumed to be of a higher class.[3] Lower-income individuals also experience significantly higher unemployment rates and have a harder time finding full-time employment than higher-class individuals.[4] Although Congress intended to protect workers from the effects of socioeconomic discrimination to promote equitable work opportunities, socioeconomic status is regularly used to make harsh judgments against individuals that ultimately lead to frustrating and unfair circumstances.[5] These unfortunate realities provide the evidence to show why socioeconomic discrimination should be prohibited and why I suggest that socioeconomic status be considered a protected class under Title VII of the Civil Rights Act of 1964 (Title VII).[6]

This Comment will begin with a deep dive into what socioeconomic discrimination is and how such discrimination surfaces in the workplace today. By revealing how many individuals are affected by their socioeconomic status and showcasing

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[1] Michael W. Kraus, Brittany Torrez, Jun Won Park & Fariba Ghayebi, *Evidence for the Reproduction of Social Class in Brief Speech*, 116 PROC. NAT'L ACAD. SCIS. 22,998, 22,998–99 (2019); Jessica Stillman, *People Judge Your Character in 0.1 Second, According to Science*, INC. (Oct. 6, 2016), https://www.inc.com/jessica-stillman/people-judge-your-character-in-01-seconds-according-to-science.html.

[2] *See* Kraus et al., *supra* note 1, at 23,001–02; Daisy Grewal, *Americans Are Fast to Judge Social Class*, SCI. AM. (Dec. 3, 2019), https://www.scientificamerican.com/article/americans-are-fast-to-judge-social-class1/.

[3] Kraus et al., *supra* note 1, at 23,000–01; Paul Ingram, *The Forgotten Dimension of Diversity: Social Class Is as Important as Race or Gender*, HARV. BUS. REV. Jan.–Feb. 2021, at 58, 60, 62–63.

[4] 2018 U.S. BUREAU OF LAB. STAT. REP. 1087 tbl.8 (July 2020) [hereinafter BLS REP.]

[5] *See infra* Section II.B.

[6] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

the broad reach of discrimination based on this status, it will become apparent how much of an issue socioeconomic discrimination truly is. The Comment will then discuss who and what Title VII currently covers by examining its text and explaining how the statute has been expanded, limited, and interpreted by Congress and the courts thus far. After reviewing Title VII's current coverage, the Comment will expand on the meaning of and protections intended by Title VII by analyzing the legislative history of the law. Through legislative history, statutory interpretation, and a history of the judicial interpretation of the statute, it will become evident that protection of those affected by socioeconomic discrimination was intended by the Legislature when enacting antidiscrimination statutes. The final Part of the Comment will conclude by discussing the intersectionality of discrimination based on socioeconomic status and other protected classes under Title VII, proving how such discrimination is already unlawful under the law.

I. SOCIOECONOMIC DISCRIMINATION AND TITLE VII DEFINED

A. What Is Socioeconomic Discrimination and Why Is It Important?

For the purpose of this Comment, I define socioeconomic discrimination as the unfair treatment of a group or an individual based on actual or perceived economic and social standing. The main factor this type of discrimination is usually based on is perceived family income and net worth, but other factors that allude to one's socioeconomic status can include education, parents' wealth and education, home address, previous or current occupations, and even general appearance.[7] Whatever factors one may consider while forming their judgment against an individual, every one of these factors can be used to make a conclusion about that person's financial or social situation. Using these factors to come to an assumption about an individual's socioeconomic situation, and then treating that individual differently on the basis of this assumption, is socioeconomic discrimination.[8]

As an example, perhaps an employer is looking to hire an employee to fill a receptionist role, and the job requires the employee to sit at the front desk to greet customers. An individual comes in to interview after passing the first round of resume review. In fact, the employer was so excited to interview her because her background and work history are a perfect fit for this role. However, upon meeting this potential employee, the employer notices that her shoes are worn out and her blouse

[7] *Socioeconomic Status (SES)*, APA DICTIONARY OF PSYCH., https://dictionary.apa.org/socioeconomic-status (last visited May 21, 2023).

[8] *See* Miriam E. Van Dyke, Viola Vaccarino, Sandra B. Dunbar, Priscilla Pemu, Gary H. Gibbons, Arshed A. Quyyumi & Tené T. Lewis, *Socioeconomic Status Discrimination and C-Reactive Protein in African-American and White Adults*, PSYCHONEUROENDOCRINOLOGY, Aug. 2017, at 9.

looks a little old. The employer then looks outside and sees the parking lot is empty, so they ask the potential employee where she parked. The potential employee answers that she was dropped off because she does not currently own a car, but she assures the employer that this has never been an issue and she is always on time—in fact, she arrived 20 minutes early and waited outside before coming in. The employer then takes a look back at the potential employee's resume and notices the address listed is in a well-known lower income area. Combining all of these factors, the employer decides that this applicant would not be a great fit as a receptionist, reasoning that she would not be reliable, or maybe her appearance is not up to their standards for a receptionist. While the employer may believe this is a legitimate reason to not hire this individual, and this is not technically illegal under the current state of Title VII,[9] this is socioeconomic discrimination.

Such discrimination may seem like a small or discrete issue that is not as salient as discrimination based on other protected classes, but this is simply not the case. The unfortunate reality is that socioeconomic discrimination affects many workers on a broad scale. This discrimination has led to substantially limited economic mobility among a large class of people, and it perpetuates a level of inequality in the workplace that cannot be corrected without additional protections. In 2018, over 38 million people in the United States—almost 12% of the entire U.S. population—lived below the official poverty level.[10] For a family of two, this is an annual income of $16,460, and for a family of four, this is $25,100 in annual income.[11] Of these 38 million people, only about 7 million were able to find work for at least 27 weeks out of the year.[12] The U.S. Bureau of Labor Statistics classifies these 7 million people as the "working poor."[13] When compared to individuals above the poverty threshold who worked for at least 27 weeks, the working poor made up only 4.5% of the entire U.S. workforce.[14] Assuming the general population can be used as the relative labor market, it should be expected that lower-class workers make up about 11% of the entire workforce.[15] However, the almost 7% gap is a significant disparity that calls for a deeper analysis.

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[9] *See* 42 U.S.C. § 2000e-2(a) (prohibiting failure-to-hire decisions when they are made "because of such individual's race, color, religion, sex, or national origin").

[10] BLS REP., *supra* note 4 (citing KAYLA FONTENOT, JESSICA SEMEGA & MELISSA KOLLAR, U.S. CENSUS BUREAU, P60-263, INCOME AND POVERTY IN THE UNITED STATES: 2017, at 12 tbl.3 (2018)).

[11] Annual Update of the HHS Poverty Guidelines, 83 Fed. Reg. 2642, 2643 (Jan. 18, 2018).

[12] BLS REP., *supra* note 4, tbl.A.

[13] *Id.* tbl.1.

[14] *Id.* chart 1.

[15] FONTENOT ET AL., *supra* note 10, at 12 tbl.3 (reporting 11.2% of adults aged 18 to 64 living below the poverty rate).

When looking at the national unemployment rate of workers, one can see a similar pattern. In 2020, almost 30% of lower-income adults experienced unemployment for at least a portion of the year.[16] This was drastically higher than middle-class and upper-class workers, who experienced only 13.8% and 7.8% respectively.[17] Further, the unemployment rate of lower-class workers was almost double the rate among adults overall, which was 15%.[18] Looking at the national unemployment rate, which includes minors, there was still a large discrepancy. On average, the national unemployment rate in 2020 was 8.075%, with a high of 13% in the second quarter of the year and a low of 3.8% in the first quarter.[19] Although 2020 was a unique year for the nation's workforce as the world battled COVID-19, this trend was also prominent before the pandemic. In 2018, lower-class workers experienced an unemployment rate of 24%.[20] However, the rest of the population experienced a 49-year low in the national unemployment rate, which had fallen to only 3.8% by the end of the year.[21] Ultimately, lower-class workers experience unemployment at a higher rate than the rest of the population, which is a prominent issue that demands review and resolution.

In addition to one's economic situation, other social factors are included in the determination of an individual's socioeconomic status. For example, an individual's parents' background in education and history of wealth have been known to affect that individual's socioeconomic outcome.[22] These factors also tend to determine how successful that individual will be. Individuals who come from parents of a higher class are more likely to be successful, typically because of their vast access to

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[16] Rakesh Kochhar & Stella Sechopoulos, *COVID-19 Pandemic Pinches Finances of America's Lower- and Middle-Income Families*, PEW RSCH. CTR. (Apr. 20, 2022), https://www.pewresearch.org/social-trends/2022/04/20/covid-19-pandemic-pinches-finances-of-americas-lower-and-middle-income-families/.

[17] *Id.*

[18] *Id.*

[19] Sean M. Smith, Roxanna Edwards & Hao C. Duong, *Unemployment Rises in 2020, as the Country Battles the COVID-19 Pandemic*, U.S. BUREAU OF LAB. STAT. (June 2021), https://www.bls.gov/opub/mlr/2021/article/unemployment-rises-in-2020-as-the-country-battles-the-covid-19-pandemic.htm.

[20] BLS REP., *supra* note 4, at tbl.8.

[21] Andrew Blank & Roxanna Edwards, *Tight Labor Market Continues in 2018 as the Unemployment Rate Falls to a 49-Year Low*, U.S. BUREAU OF LAB. STAT. (May 2019), https://www.bls.gov/opub/mlr/2019/article/tight-labor-market-continues-in-2018-as-the-unemployment-rate-falls-to-a-49-year-low.htm.

[22] *See* Grace Bird, *The Impact of Parents' Education Levels*, INSIDE HIGHER ED. (Feb. 8, 2018), https://www.insidehighered.com/news/2018/02/08/students-postsecondary-education-arcs-affected-parents-college-backgrounds-study; Matthew A. Diemer & Saba Rasheed Ali, *Integrating Social Class into Vocational Psychology: Theory and Practice Implications*, 17 J. CAREER ASSESSMENT 247, 257 (2009).

resources.[23] Further, parents' education level has a significant impact on how successful their children will be and whether their children will be considered low or high class.[24] One's level of education can also have a strong impact on social outcomes and income distribution.[25] In the United States, only 25% of adults were raised by a parent with a degree, meaning three-quarters of adults in the United States are likely to be classified as lower class at some point in their lives.[26] This is not a small number by any means, and many workers in the United States face the reality of being subjected to socioeconomic discrimination as a result.

While multiple factors may play a role in the gap between employment of lower-class workers versus higher-class workers, socioeconomic discrimination undeniably plays a part in this discrepancy. A study by Yale University in 2019 revealed a pattern of discrimination against applicants who were judged as lower class, and the discrimination happened within mere seconds of meeting.[27] In the study, the researchers concluded that people interviewing for jobs are judged based on their social status after just a couple seconds of speaking, and this directly relates to how capable they are assumed to be for the job.[28] Through five experiments, it was found that despite having no information about the applicants' actual qualifications, the applicants who were assumed to be from a higher social class were judged by the perceivers[29] as more likely to be competent for the job, a better fit for the job, and more likely to be hired for the job than lower-class applicants.[30] Additionally, the perceivers stated they would offer the applicants judged as higher class a higher starting salary and signing bonus than the assumed-to-be lower-class applicants.[31] When asked about the study, Michael Kraus, assistant professor of organizational behavior

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[23] Diemer & Ali, *supra* note 22, at 257.

[24] *See* Bird, *supra* note 22; *see also* YANG JIANG, MERCEDES EKONO & CURTIS SKINNER, NAT'L CTR. FOR CHILD. IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN: CHILDREN UNDER 18 YEARS, 2013, at 5 fig.7 (Jan. 2015) (finding that 87% of children with parents who have less than a high school degree live in low-income families, while only 31% of children with at least one parent who has some college education live in low-income families).

[25] Reginald A. Noël, *Spotlight on Statistics: Race, Economics, and Social Status*, U.S. BUREAU OF LAB. STAT. (May 2018), https://www.bls.gov/spotlight/2018/race-economics-and-social-status/home.htm.

[26] Ingram, *supra* note 3, at 61.

[27] Kraus et al., *supra* note 1, at 23,000–01.

[28] *Id.*

[29] The study consisted of 274 perceivers with past hiring experience examining prospective job candidates recruited from their community. The perceivers were asked to either listen to or read a transcript of the candidates' answer to the question, "How would you describe yourself?" and then asked to make judgments of the candidates' professional qualities and perceived social class without hearing the rest of the interview or seeing the candidates' resumes. *Id.* at 23,000.

[30] *Id.* at 23,000–01.

[31] *Id.* at 23,001.

at the Yale School of Management, explained that "[w]hile most hiring managers would deny that a job candidate's social class matters, in reality, the socioeconomic position of an applicant or their parents is being assessed within the first seconds they speak—a circumstance that limits economic mobility and perpetuates inequality."[32]

Not only does socioeconomic status affect initial hiring, but it also plays a role in internal employment decisions, such as promotions. In 2021, a research study completed by Professor Paul Ingram of the Columbia Business School found that U.S. workers who come from a lower social class are 32% less likely to become managers than U.S. workers who come from a higher class.[33] This disadvantage is significantly higher than the disparity when comparing the promotion probability of Black versus white employees (25%), and the promotion probability of male versus female employees (27%).[34] From an individual standpoint, this is important because studies show that a promotion to a managerial role can lead to substantial job satisfaction, and employees who are promoted to managerial roles experience less stress and live longer lives than nonmanagers, ultimately meaning these roles are associated with better health.[35] Employers and organizations also have substantial reason to include lower-class workers in their managerial teams because lower-class workers have been found to be less self-centered, which correlates with more effective leadership.[36]

Although studies have begun to show a greater disparity between low-class and high-class workers than disparities in other categories such as race, this does not negate the fact that minority workers still endure discrimination on a large scale and often on a more frequent basis. On the contrary, as explained in depth in Part III, socioeconomic status discrimination often intersects with discrimination based on race and other protected characteristics, leading to "double discrimination."[37] For example, recent data from the Federal Reserve's *Survey of Consumer Finances* shows that the median net worth of a white family is $189,100, whereas a Black family's

[32] Jack Kelly, *Class Bias: Interviewers Will Hire and Pay More for a Job Applicant from a Higher Social Class Compared to a Lower-Status Candidate*, FORBES (Oct. 28, 2019), https://www.forbes.com/sites/jackkelly/2019/10/28/class-bias-interviewers-will-hire-and-pay-more-for-a-job-applicant-from-a-higher-social-class-compared-to-a-lower-status-candidate/?sh=478a1796471c.

[33] Ingram, *supra* note 3, at 60.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *See Double Discrimination & Intersectionality*, LEAN IN, https://leanin.org/education/what-is-double-discrimination (last visited May 21, 2023).

median net worth is $24,100.[38] Not only are Black workers likely to face discrimination on the basis of race, but they are also statistically more likely to face socioeconomic discrimination as well.[39] Women also face additional discrimination, as they are more likely to be classified as working poor than men,[40] leading to an overlap between gender discrimination and socioeconomic discrimination. Socioeconomic discrimination is a very real threat to working people in the United States, both in isolation and through intersectionality. Lower-class individuals deserve additional protections to help combat this discrimination and to achieve the equality in the workplace that was intended by Title VII.

B. Who and What Does Title VII Currently Cover?

Title VII of the Civil Rights Act of 1964 was enacted with the intention of prohibiting employment discrimination.[41] As written, the statute currently protects workers from discrimination based on five classes or characteristics: race, color, religion, sex, and national origin. The statute asserts that employers may not:

> [F]ail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . .
>
> . . . limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[42]

The statute is enforced by the Equal Employment Opportunity Commission (EEOC) and the Employment Litigation Section of the Department of Justice.[43]

Since its inception in 1964, Title VII has continually expanded in coverage to keep up with the nation's evolving social values. Such expansion has included broadening the definitions of protected classes under the statute. For example, Title VII was amended in 1978 to clarify—as a direct response to a Supreme Court ruling

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[38] *Survey of Consumer Finances, 1989–2019*, FED. RSRV. SYS., https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/ (Nov. 4, 2021) (choose "Net worth" from "Select household financial component" dropdown, and "Race or ethnicity" from "Distribute by" dropdown).

[39] *See* Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283, 1333–35 (2018).

[40] BLS REP., *supra* note 4, at tbl.2.

[41] PAUL M. DOWNING, CONG. RSCH. SERV., GGR100-2, THE CIVIL RIGHTS ACT OF 1964: LEGISLATIVE HISTORY; PRO AND CON ARGUMENTS; TEXT 2–3 (1965).

[42] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

[43] CHRISTINE J. BACK, CONG. RSCH. SERV., IF11705, THE CIVIL RIGHTS ACT OF 1964: ELEVEN TITLES AT A GLANCE 2 (2020).

that declared otherwise[44]—that discrimination "on the basis of sex" included discrimination based on pregnancy, childbirth, or related medical conditions.[45] In 1998, the Supreme Court expanded the definition of sex-based discrimination to include discrimination against a member of the same sex when it decided *Oncale v. Sundowner Offshore Services, Inc.*[46] The Court expanded this even further in 2020 when it ruled that "on the basis of sex" also includes discrimination against a worker because they are homosexual or transgender.[47] Thus, while the terms that define protected classes under the statute may seem uncomplicated, they have lived through many interpretations and have expanded with society's changing values.

To clarify what type of discriminatory actions are prohibited by Title VII, courts have also interpreted what it means to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."[48] In situations where an employee is fired on the basis of religion, an applicant is not hired on the basis of sex, or a white worker receives higher compensation than an equally qualified Black counterpart, it is generally an easy case.[49] However, in situations where the adverse action is not so clear, such as a change in contract terms or an adjustment of an employee's hours, the courts have had to step in to determine when such changes are considered to be discrimination.

In 2006, the Seventh Circuit heard a case that helped clarify when a change in employment terms rises to a discriminatory level.[50] The case involved a female employee who brought a suit against her employer on the basis of sex discrimination for demanding she work increased hours for no change in pay.[51] The district court held that the employer did not take any adverse action against the employee because she had not been demoted nor fired; the employer simply changed her job responsibilities.[52] However, the Court of Appeals reasoned that because the employee was required to work 25% longer hours to earn the same income as before, this was essentially the same as a 20% reduction in her pay.[53] This, the court said, was "a

[44] Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976).

[45] Act of Oct. 31, 1978, Pub. L. No. 95-555, sec. 1, § 701(k), 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)).

[46] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

[47] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

[48] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

[49] *See, e.g.*, *Significant EEOC Race/Color Cases (Covering Private and Federal Sectors)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/initiatives/e-race/significant-eeoc-racecolor-casescovering-private-and-federal-sectors (last visited May 21, 2023).

[50] Minor v. Centocor, Inc., 457 F.3d 632 (7th Cir. 2006).

[51] *Id.* at 633.

[52] *Id.* at 634.

[53] *Id.*

material change by any standard."[54] Since 2006, courts have continually ruled that for a difference in terms, conditions, or privileges of employment to rise to the level of discrimination prohibited by Title VII, such differences must be material and "central to the employment relation."[55] Economic impact is often considered to be a material change; other material changes have included extra work, a difference in schedules, and segregated rooms for work.[56]

Title VII prohibits both intentional discrimination (disparate treatment) and operating practices or patterns that have an indirect effect of discrimination (disparate impact) on members of protected classes.[57] Disparate treatment occurs against an individual when an employer treats an employee differently than another "similarly situated"[58] employee because of that individual's race, sex, color, religion, or national origin.[59] To establish an intentional discrimination claim under Title VII,[60] an employee generally must show: (1) that the employer had an intent to discriminate against the employee because of their membership to a protected class;[61] (2) there was an adverse employment action, such as a failure to hire, demotion, or alterations to certain terms and conditions of employment;[62] and (3) there is a causal link between the intent to discriminate and the adverse employment action.[63]

Disparate treatment can also occur systemically, rather than individually, and this can happen in one of two ways. An employer may have a formal employment policy that discriminates against a protected class on its face. For example, a policy

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[54] *Id.*

[55] *Id.*; *see, e.g.*, Ortiz-Diaz v. U.S. Dep't of Hous. & Urb. Dev., 831 F.3d 488, 491 (D.C. Cir. 2016); *see* Autumn George, Comment, *"Adverse Employment Action"—How Much Harm Must Be Shown to Sustain a Claim of Discrimination Under Title VII?*, 60 MERCER L. REV. 1075, 1082 (2008).

[56] *Minor*, 457 F.3d at 634; Tart v. Ill. Power Co., 366 F.3d 461, 475 (7th Cir. 2004)); Greer v. St. Louis Reg'l Med. Ctr., 258 F.3d 843, 846 (8th Cir. 2001); Ferrill v. Parker Grp., Inc., 168 F.3d 468, 471–72 (11th Cir. 1999).

[57] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), (k); *Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/fact-sheet/federal-laws-prohibiting-job-discrimination-questions-and-answers (Nov. 21, 2009).

[58] "Similarly situated" does not mean identical. However, it is something that should be looked at on a case-by-case basis and does not have a specific, precise definition. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1988-13, CM-604 THEORIES OF DISCRIMINATION § 604.3(a) (1988).

[59] *Id.* at § 604.2.

[60] 42 U.S.C. § 2000e-2(a).

[61] Slack v. Havens, No. 72-59-GT, 1973 WL 339, at *7, *aff'd*, 522 F.2d 1091 (9th Cir. 1975).

[62] 42 U.S.C. § 2000e-2(a)(1); Minor v. Centocor, Inc., 457 F.3d 632, 634 (7th Cir. 2006).

[63] Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

that states "no women may apply" would be a facially discriminatory policy.[64] This is fairly straight-forward, and employers have very limited available defenses to disproving discrimination in these cases.[65] More commonly, though, is when an employer has a general pattern or practice that leads to discrimination, rather than having an explicitly discriminatory policy. In order to succeed on this type of claim, an employee must show that the practice or pattern of discrimination was the employer's "standard operating procedure—the regular rather than the unusual practice."[66] This is generally done by showing a "gross disparity"[67] between the expected composition of the workforce based on the applicable labor market and the actual composition of the employer's workforce or position at issue.[68]

Disparate impact is another form of systemic discrimination by employers based on discriminatory policies and practices. In a case of disparate impact, however, an employee does not need to show that the employer *intended* to discriminate against them.[69] In order to prove a disparate impact claim under Title VII,[70] an employee must show: (1) that the employer uses a particular practice;[71] (2) the practice causes an adverse impact;[72] (3) the amount of impact is significant;[73] (4) the impact is to a protected class;[74] and (5) the impact is cognizable.[75]

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[64] Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Cass R. Sunstein, *Discrimination in the Age of Algorithms*, 10 J. LEGAL ANALYSIS 113, 121 (2018); *see, e.g.*, Reed v. Reed, 404 U.S. 71, 73, 76 (1971).

[65] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)–(i).

[66] Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977).

[67] A "gross disparity" has been defined as a difference of more than two or three standard deviations between the expected value and the observed number. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307, 308–09 n.14 (1977) (citing Castaneda v. Partida, 430 U.S. 482, 496–97 n.17 (1977)).

[68] *Teamsters*, 431 U.S. at 339–40 n.20; *Hazelwood*, 433 U.S. at 307.

[69] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

[70] 42 U.S.C. § 2000e-2(k).

[71] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656–57 (1989).

[72] *Id.* at 651–52.

[73] There are two ways to measure whether the impact is significant. One way is to use the "four-fifths rule" provided by the EEOC. If using this method, one must show that members of a protected group are selected by the employment practice at a rate less than four-fifths of their counterparts. 29 C.F.R. § 1607.4 (2021). The other method is by showing statistical significance, which is established by showing that the disparity between groups is two or more standard deviations away from the expected number. Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1526–27 (citing *Hazelwood*, 433 U.S. at 307, 308–09 n.14 (1977)).

[74] 42 U.S.C. § 2000e-2(k)(1)(A).

[75] Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971).

C. Where Do the Courts Stand on Socioeconomic Discrimination Today?

As a constitutional matter, the Supreme Court has rejected the idea that socioeconomic status should be considered a suspect class under the Equal Protection Clause of the Fourteenth Amendment.[76] However, the question of whether socioeconomic status can and should be protected under Title VII has yet to be considered by the courts.[77] Socioeconomic discrimination is a clear issue in today's workplace, and as discussed both previously and below in Section II(C), courts have the power to broaden the protections of workers under Title VII. It is time for socioeconomic discrimination in employment to be prohibited by law to ensure those who Congress intended to protect receive the equality that the statute signified.

II. HOW LEGISLATIVE INTENT AND JUDICIAL INTERPRETATION SUPPORT THE ADDITION OF SOCIOECONOMIC STATUS AS A PROTECTED CLASS UNDER TITLE VII

A. The Legislative History of Title VII

On January 31, 1963, Congress introduced several comprehensive civil rights bills.[78] Among these bills was proposed legislation to establish a Commission on Equality of Opportunity in Employment (which eventually became the EEOC) with the authority to enforce antidiscrimination laws in employment.[79] On June 19, 1963, President John F. Kennedy recommended more comprehensive legislation that included a section that stated the EEOC should be used to prevent racial discrimination in employment; this amended legislation became known as Title VII.[80] In January 1964, the House Rules Committee held hearings and debates to discuss these proposed laws and decide whether to enact, amend, or veto them.[81] Through its hearings and debates, the House ended up amending Title VII to not only prohibit discrimination on the basis of race, but also on the basis of sex, color, religion, and national origin.[82] On June 19, 1964, the Senate voted to adopt Title VII, along with the other titles in H.R. 7152, by a 73–27 roll-call vote.[83] The House

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[76] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.").

[77] By the time my research was complete, I was unable to find any case in which the courts had considered this question.

[78] DOWNING, *supra* note 41, at 1.

[79] *Id.*; H.R. 3140, 88th Cong. §§ 201, 203 (1963).

[80] DOWNING, *supra* note 41, at 4, 7–8.

[81] *Id.* at 15–16.

[82] *Id.* at 18–19.

[83] *Id.* at 32.

voted to adopt the Senate's amendments by a 289–126 roll-call vote on July 2,1964, and on the same day, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law.[84]

B. The Legislature's Intent When Enacting Employment Discrimination Laws

As demonstrated through the eventful history of antidiscrimination laws, Congress enacted Title VII with the intention of prohibiting discrimination against individuals negatively affected by specific characteristics that commonly overlap and intertwine with socioeconomic status. Although socioeconomic status was not explicitly included in these laws, Congress targeted characteristics that historically correlated with a lower socioeconomic status, acknowledging at least in part that lower-class individuals were the ones who most commonly suffered from workplace discrimination.[85] The initial bills intended to prohibit discrimination in the workplace went through multiple hearings and debates, ensuring all arguments for and against antidiscrimination laws were heard. These hearings and debates make it evident that the legislature intended to ensure all members of society are treated fairly, equally, and equitably in their course of employment. Further, these debates and hearings provide the evidence to show that protecting individuals from employment discrimination based on their economic status was a key factor Congress relied upon when voting to enact Title VII.

One of the main arguments for advancing antidiscrimination bills in employment, which has been used as far back as the 1940s, is to ensure a successful flow of commerce in the United States, which in turn helps ensure a healthy economy.[86] When trying to enact the Fair Employment Practices Act in 1944, Congress found that discriminating against qualified individuals in employment was disruptive to commerce and "deprives the United States of the fullest utilization of its capacities for production. . . ."[87] In a July 1963 hearing to discuss the implementation of antidiscrimination employment laws, Congress considered a Senate bill that explicitly said "[employment] discrimination interferes with the normal flow of commerce

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[84] *Id.*; Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–16, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000a–2000h).

[85] Jasjit Mundh, *Class as Protected*, CALIF. L. REV. BLOG (Jan. 2021), https://www.californialawreview.org/class-as-protected/.

[86] DOWNING, *supra* note 41, at 39; *see, e.g.*, *To Prohibit Discrimination in Employment Because of Race, Creed, Color, National Origin, or Ancestry: Hearings on H.R. 3986, H.R. 4004, and H.R. 4005 Before the H. Comm. on Lab.*, 78th Cong. 1 (1944) [hereinafter *Discrimination in Employment Hearings*] (explaining that "discriminating in employment against, properly qualified persons by reasons of their race, creed, color, national origin, or ancestry, foments domestic strife and unrest . . . and obstructs commerce.").

[87] *Discrimination in Employment Hearings*, *supra* note 86, at 1.

and with the full production of articles and commodities for commerce."[88] This argument was also used in hearings amongst the Senate and the House to discuss the passage of Title VII.[89] One of the main arguments for the passage of Title VII—although at the time this argument was specifically related to preventing discrimination against Black workers—was that individuals who are discriminated against at work will have insufficient income to pay bills, access hotels, or other places that may increase commerce.[90]

Preventing discrimination based on someone's socioeconomic status is in line with Congress's intent to rid the nation of employment discrimination in order to promote and advance commerce within the United States. Discriminating against an individual on the basis of socioeconomic status continues to encourage the disturbing prohibition of economic mobility in lower-income communities.[91] By failing to employ individuals based on their financial or social standing, employers are broadening the already-drawn lines that prevent members of our society from participating in the economy, which ultimately hurts Congress's goal of promoting national commerce.[92] When the nation refuses to provide protections to lower-class individuals—which is a substantial portion of the U.S. population, as discussed in Part I—it directly goes against the intent of Congress and every representative who ever pushed to implement antidiscrimination laws.

Other arguments that members of the House put forward to push for the enactment of Title VII included the following: (1) unemployment rates of nonwhite workers are "twice as high as among white workers"; (2) nonwhite workers are "channeled into unskilled kinds of work" with "less chance to exercise their qualifications"; (3) "[e]mployment discrimination perpetuates poverty"; (4) nonwhite workers "are excluded to a great extent from new kinds of technical work" because employment discrimination prevents them "from acquiring the technical qualifications" they need; (5) nonwhite workers have been excluded "because of discrimination in hiring and upgrading"; and (6) employment discrimination "means wasted personal abilities."[93]

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[88] *Equal Employment Opportunity: Hearings on S. 773, S. 1210, S. 1211, and S. 1937 Before the Subcomm. on Emp. & Manpower of the S. Comm. on Lab. & Pub. Welfare*, 88th Cong. 3 (1963) [hereinafter *Equal Employment Opportunity Hearings*] (quoting S. 773, 88th Cong. § 2 (1963)).

[89] DOWNING, *supra* note 41, at 39.

[90] *Id.* at 38–39.

[91] *See* Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 122 (2009); *Economic Mobility: Measuring the American Dream*, PD&R EDGE, https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_071414.html (last visited May 21, 2023).

[92] *Equal Employment Opportunity Hearings*, *supra* note 88, at 3.

[93] DOWNING, *supra* note 41, at 39.

Each one of these arguments can also be used to show the need for prevention of socioeconomic-status-based discrimination in employment. As discussed in Part I, the unemployment rate of lower-class workers is more than twice as high as the unemployment rate of higher-class workers.[94] When it comes to occupations, lower-class workers are more likely to work in "unskilled"[95] positions, whereas individuals in positions that require higher levels of education and are seen as more professional are the least likely to be classified as lower class.[96] Multiple scholars have shown that employment discrimination of any kind continues to perpetuate poverty, and this was not corrected with Title VII.[97] Members of a lower class have been denied access to education and have therefore been prevented from acquiring new skills that may be needed in higher-paying jobs.[98] As previously discussed, multiple studies have shown that individuals either perceived to be or who are actually from a lower class have been discriminated against in both hiring decisions and promotions.[99] Finally, by denying applicants and employees access to certain jobs simply based on a judgment made about their socioeconomic status, employers are wasting abilities they may not know about and missing out on perspectives that help shape a diverse workforce. All of these arguments provide a clear indication that, because Congress enacted antidiscrimination laws with the intent to promote successful commerce, Congress intended to prohibit socioeconomic discrimination. By protecting certain classes that most commonly overlap with lower socioeconomic status, Congress intended to promote equal economic status among U.S. workers and prevent discrimination against lower-class individuals. Therefore, while socioeconomic status itself is not explicitly considered a protected class as the law is written, such discrimination was intended to be prohibited through the enactment of Title VII.

Even though Title VII was ultimately passed, it is worth looking at the arguments some opposing members of Congress made to determine how similar arguments may hold up against the request for socioeconomic status protections. One of the main arguments against Title VII was that the statute deprived employers of

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[94] *See supra* Section I(A).

[95] While I personally do not agree with the description of "unskilled" occupations, I am using this term here to relate directly back to the arguments put forth on the floor during the Title VII debates in 1964. *See* DOWNING, *supra* note 41, at 39.

[96] BLS REP., *supra* note 4, at tbl.3.

[97] *See, e.g.*, Danyelle Solomon, Connor Maxwell & Abril Castro, *Systematic Inequality and Economic Opportunity*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), https://www.americanprogress.org/article/systematic-inequality-economic-opportunity/; Ruqaiijah Yearby, *The Impact of Structural Racism in Employment and Wages on Minority Women's Health*, 43 AM. BAR ASS'N HUM. RTS. MAG., no. 3, 2018, at 21, 22–23.

[98] *See* BLS REP., *supra* note 4, at tbls. 3 & 4.

[99] *See, e.g.*, Kraus et al., *supra* note 1; Ingram, *supra* note 3.

their "right to exercise their own judgment with respect to hiring and other employment decisions."[100] While this is likely the most common reason that would be put forth today in opposition to socioeconomic status being a protected class under Title VII, the argument is simply not strong enough. When hiring new employees, most employers' only wish is to hire the best employee for the position.[101] By discriminating against applicants on the basis of their socioeconomic status, employers are limiting their candidate pools. Limiting applicant and candidate pools from which an employer chooses runs the risk of hosting a homogenous workplace and limiting diversity, which has been ruled to be a compelling state interest in some contexts.[102] Additionally, where employers choose not to hire an unqualified candidate who also happens to be from a lower class, employers would not need to worry about discrimination claims more than they already do. There are still many legitimate, nondiscriminatory reasons that an employer may use to disqualify a candidate, although they may appear on the surface to be socioeconomic discrimination. For example, perhaps an employer posts a job opening for a delivery driver that requires the applicant to have a car. If an employer denies the position to a lower-class applicant because they do not have a car, this would be considered a legitimate, nondiscriminatory reason for taking the adverse employment action, rather than illegal socioeconomic discrimination. While not having a car may stem from the applicant's lower-class status, leading to the argument that the denial was based on their socioeconomic status, having a car is also a requirement of the delivery driver position. Because the applicant is unable to fulfill the job requirements, they would not be considered a qualified applicant. Even though they are a member of a protected class, they were not denied employment on the basis of their protected class, meaning there was no illegal discrimination.[103]

The other argument opposing members of Congress put forth to argue against the enactment of Title VII was that the statute would deprive employers of their

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[100] DOWNING, *supra* note 41, at 39.

[101] *See* Adam Bryant, *How to Build a Successful Team*, N.Y. TIMES: BUS. GUIDES, https://www.nytimes.com/guides/business/manage-a-successful-team (last visited May 21, 2023).

[102] Grutter v. Bollinger, 539 U.S. 306, 325–28 (2003) (reasoning that a diverse student body constitutes a compelling interest sufficient to justify affirmative action plans in law school admissions). *But see* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721–25 (2007).

[103] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

property rights,[104] which in turn would threaten all rights.[105] This argument would not gain much traction if used to fight against the inclusion of socioeconomic status under Title VII today because, since the enactment of Title VII, there has been no threat to other rights on this basis. The past 58 years provide a good indication of how other rights would be affected if Congress were to add a protected class under Title VII—they would remain unthreatened. Overall, the history of Title VII and other antidiscrimination laws provides strong evidence that Congress intended to protect individuals of a lower class through its enactment, and the arguments against such enactment fall short of success.

Ultimately, the history of the Civil Rights Act of 1964 and other equal employment laws shows a strong indication that Congress intended to promote equal economic status among U.S. workers and prevent discrimination against individuals who are commonly categorized as lower-class. Although Congress did not believe at the time that socioeconomic status was the main characteristic in need of protection, its arguments for protecting characteristics such as race align with the reasoning that socioeconomic discrimination should be prohibited. By implementing protections for certain classes that commonly overlap with a lower socioeconomic status, it is clear that, while not explicitly included as a protected class, discrimination on the basis of socioeconomic status was intended to be prohibited through the enactment of Title VII.

C. The Judicial Interpretation and Expansion of Title VII

Since the inception of Title VII, the categories of protected individuals under the statute have continually expanded in scope. For example, before Title VII became law, early drafts of the legislation proposed in the first discussions of the Civil Rights Act only included one protected class: race.[106] However, Congress amended these bills to expand the list of protected classes and decided to include four more categories: sex, color, religion, and national origin.[107] Since then, courts have used their power to interpret these terms and expand their meanings. The most recent occurrence of this was in 2020, when the Supreme Court decided the case *Bostock*

[104] Opposing members likely believed their property rights would be threatened based on the notion that enacting antidiscrimination laws could limit their ability to contract with whom they wish and deny employment to those with whom they do not wish to work with, if such denial was because of the employee being a member of a now protected class. *See, e.g.*, 110 CONG. REC. 2,791 (1964).

[105] DOWNING, *supra* note 41, at 40.

[106] *Id.* at 3.

[107] *Id.* at 18; Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255–57 (codified as amended at 42 U.S.C. § 2000e-2).

v. Clayton County.[108] In this case, the Court redefined the term "sex" as it pertains to Title VII.[109] The term "sex" was previously interpreted to apply only to discrimination based on an individual's sex, but it did not include discrimination against the individual's sexuality or gender identity.[110] However, the Court expanded this interpretation and held that the term "sex" under Title VII does include one's sexuality and gender identity, thereby preventing discrimination against an individual solely because they are gay or transgender.[111] This case demonstrates how the Court has utilized its judicial power to interpret terms in a broader and more inclusive way, expanding the protections of Title VII to ensure alignment with the nation's evolving social values. These changes in definitions through judicial interpretation and the expansion of protected classes provide reason to believe that the list of protected classes under Title VII is not static. The statute, as is true regarding all laws, is meant to adapt with society.

Just as the Court has expanded Title VII in some areas, it has also narrowed the statute in others. For example, in *Wards Cove Packing Company v. Atonio*, the Supreme Court narrowed its interpretation of Title VII by addressing the proper application of the statute's disparate impact theory of liability.[112] The plaintiffs in *Wards Cove* were a group of nonwhite employees who filed suit against their employer alleging discrimination on the basis of race.[113] Plaintiffs asserted that their employer's hiring and promotion practices caused a racially unequal workforce and led to them being denied employment in higher-paid positions on the basis of their race.[114] To prove their disparate impact claim, the plaintiffs presented statistics that showed a higher percentage of nonwhite workers in the lower-paid positions and a lower percentage of nonwhite workers in the higher-paid positions.[115] While insisting that statistics alone can, using certain methods, make out a disparate impact claim, the Court reversed the Court of Appeals' ruling for the plaintiffs, stating the lower court misunderstood "the purposes of Title VII."[116] Even though many previously understood that showing a racial imbalance in the workforce could in itself establish a prima facie case of disparate impact, the Court refuted this and ruled that a plaintiff must also point to a "specific" policy or practice that directly causes a

[108] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[109] *Id.* at 1754.

[110] *Id.* at 1739.

[111] *Id.* at 1754.

[112] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 649–50 (1989).

[113] *Id.* at 647–48.

[114] *Id.*

[115] *Id.* at 650.

[116] *Id.*

significant disparate impact.[117] By creating this new standard, the Supreme Court narrowed its interpretation of the protections offered under Title VII's disparate impact theory.

While the Court has at times been restrictive in its interpretation of Title VII, its reasoning for such restrictions neither apply to nor preclude the addition of socioeconomic status as a protected class under the statute. Since Title VII's enactment, the Supreme Court has expanded the interpretation of Title VII to cover forms of discrimination that likely were not even anticipated by Congress in the 1960s.[118] History has shown that when discrimination has caused a substantial hindrance to workplace equality, the Court has used its power to expand Title VII and bridge the newly-apparent gaps in the statute.[119] As discussed in Part I, socioeconomic status discrimination impacts a large majority of individuals in the United States and has created a substantial problem that has prevented the advancement of equity and equality in the workplace.[120] Just as the expansion of the term "sex" under Title VII has aided in combating severe discrimination against pregnant workers, transgender individuals, and persons based on their sexual identity, the addition of socioeconomic status as a protected class would help ensure that the protections for which Title VII was enacted are correctly and fully enforced.

D. Protected Classes and the Judicial Designation of Immutability

Lawfully protected classes have commonly been considered by the courts as needing heightened protection because the characteristics that define the class are immutable.[121] Immutable characteristics have generally been interpreted as traits that are not chosen and cannot be changed, such as race or national origin.[122] The Supreme Court's first explicit discussion of immutability was in 1973, when the Court was discussing suspect classes under the Equal Protection Clause of the Constitution.[123] Since then, many courts have relied upon immutability as being the factor that determines whether a class may be deemed lawfully protected.[124] Recently, however, gay rights advocates successfully persuaded numerous courts to

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[117] *Id.* at 657.

[118] Trina Jones, *Title VII at 50: Contemporary Challenges for U.S. Employment Discrimination Law*, ALA. C.R. & C.L. L. REV., 2014, at 45, 48.

[119] *Id.* at 48–53.

[120] *See supra* Section I(A).

[121] Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 4 (2015).

[122] *Id.*

[123] Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI-KENT L. REV. 597, 614–15 (2014) (citing Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973)); *see also* Lyng v. Castillo, 477 U.S. 635, 638 (1986).

[124] Clarke, *supra* note 121, at 4–5.

adopt a different, less strict definition of immutability.[125] Many courts now analyze whether a characteristic is a "trait or condition that one cannot or should not be required to abandon," rather than whether that characteristic is *unchangeable*.[126]

Socioeconomic status is a trait that, while likely seen as a mutable characteristic in the 1960s, is arguably more likely to be seen as immutable today. For several years, scholars have argued that socioeconomic status is an effectively immutable characteristic that mirrors other protected and suspect classes.[127] By showing how wealth and poverty are transmitted through generations,[128] and how individuals from low-income families have a significantly lower chance of achieving higher earnings than individuals from wealthier families,[129] legal scholars have made impactful arguments to push for the designation of socioeconomic status as an immutable trait. While the United States is known for the "American Dream," and the common perception is "through hard work, a person can rise from even a seriously disadvantaged background," the statistics and studies show that is simply not the case.[130]

A recent Northwestern University study—led by Thomas McDade, professor and faculty fellow at Northwestern's Institute for Policy Research—challenges the belief that socioeconomic status can be changed.[131] The study found evidence that poverty can become embedded in DNA and leave a mark on almost 10% of the genes within a person.[132] Emphasizing the point that there is no "nature vs. nurture"

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[125] *Id.* at 4 ("In response to the argument that sexual orientation might be changed and is therefore undeserving of protection, gay rights advocates have persuaded many courts . . . to adopt a different understanding of immutable characteristics." (citing Brief for American Psychological Ass'n et al. as Amici Curiae in Support of Petitioners at 7–17, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556))).

[126] *Id.* (quoting Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 990 (S.D. Ohio 2013), *rev'd sub nom. Obergefell*, 576 U.S. 644).

[127] *See, e.g.*, Evans Peterman, *supra* note 39, at 1327–31; Barnes & Chemerinsky, *supra* note 91, at 121–22; Mundh, *supra* note 85.

[128] Evans Peterman, *supra* note 39, at 1327.

[129] JULIA B. ISAACS, BROOKINGS INST., ECONOMIC MOBILITY OF FAMILIES ACROSS GENERATIONS 5 fig.4 (2007).

[130] Barnes & Chemerinsky, *supra* note 127, at 122.

[131] Hilary Hurd Anyaso, *Poverty Leaves a Mark on Our Genes*, NW. NOW (Apr. 5, 2019), https://news.northwestern.edu/stories/2019/04/poverty-leaves-a-mark-on-our-genes/ (citing Thomas W. McDade, Calen P. Ryan, Meaghan J. Jones, Morgan K. Hoke, Judith Borja, Gregory E. Miller, Christopher W. Kuzawa & Michael S. Kobor, *Genome-Wide Analysis of DNA Methylation in Relation to Socioeconomic Status During Development and Early Adulthood*, 169 AM. J. PHYSICAL ANTHROPOLOGY 3 (2019)).

[132] McDade et. al., *supra* note 131.

when it comes to socioeconomic status, McDade asserted that "[t]his pattern highlights a potential mechanism through which poverty can have a lasting impact."[133]

Although socioeconomic status may not initially be seen as a trait that is immutable, the statistics say otherwise. Socioeconomic status is embedded in genes, and the chances of someone "rising up" from their situation is much lower than what is commonly perceived. The unfortunate reality is people are unable to change their situation as easily as one may hope, and socioeconomic status is not something someone chooses or can abandon when asked.

III. INTERSECTIONALITY: HOW SOCIOECONOMIC DISCRIMINATION ALREADY VIOLATES TITLE VII

Employers who discriminate against persons based on their socioeconomic status may likely be liable under Title VII through both disparate treatment and disparate impact theories. As mentioned in Part I and discussed in-depth below, individuals who are most likely to be classified as having a lower socioeconomic status often fall within a lawfully protected class under Title VII.[134] Because of the commonality of lower-class individuals also falling within another protected class, such correlation may be used to help an individual prove intent to discriminate under a disparate treatment claim. Additionally, when individuals are directly discriminated against because of their economic or social status, this can lead to a significant disparate impact amongst minorities and other protected groups. Thus, regardless of initial intent, employers judging applicants based on their socioeconomic status or using socioeconomic-based criteria to make determinations about the qualifications of applicants and employees may violate Title VII.

A. The Intersection of Socioeconomic Status and Lawfully Protected Classes

People of color are more likely to suffer from the impacts of discrimination when employers make decisions based on an individual's socioeconomic status. In 2019, the net worth of the average white family in the United States was $189,100.[135] When compared to the average net worth of minority families, there is an extraordinary disparity. A Hispanic family's average net worth was $36,050, and a Black family's average net worth was $24,100.[136] Even when looking at total household income, there is still a large difference. A white family's average income

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[133] *Id.*

[134] *See supra* Section I(A).

[135] *Survey of Consumer Finances, 1989–2019*, *supra* note 38 (choose "Net worth" from "Select household financial component" dropdown, and "Race or ethnicity" from "Distribute by" dropdown).

[136] *Id.*

was $69,230, while both Black and Hispanic families made only $40,720.[137] Further, 15% of Black adults between the ages of 30 and 39 were classified as "poor" by the official poverty measure, whereas only 6% of white adults fell into this category.[138] In 2019, Black individuals accounted for 23.8% of the U.S. poverty population, while representing only 13.2% of the total population.[139] Thus, "the share of Blacks in poverty was 1.8 times greater than their share among the general population."[140] In contrast, non-Hispanic white individuals were underrepresented in the poverty population, accounting for 41.6% of the poverty population, but more than half of the general population at 59.9%.[141] Because persons of color are more likely to be classified as lower income than white individuals, they are the most vulnerable to socioeconomic discrimination.

Women are also more likely to be negatively impacted when economic and social status is used to make employment decisions. On average, men in the United States have a higher net worth than women, and women are more likely to be classified as lower-class.[142] More than one in eight women lived in poverty in 2015, and almost half of these women lived in extreme poverty, meaning their income was at or below 50% of the federal poverty level.[143] In 2018, the working poor rate for women was higher than men in every major occupational group tracked by the U.S. Bureau of Labor Statistics.[144] When employers choose to use socioeconomic class as a basis to pick and choose employees, women are more likely than men to be discriminated against.

Furthermore, the chances of being impacted by socioeconomic discrimination only escalate when multiple protected classes are intersected. For example, the disparity between wealth and net worth based on gender becomes even more prominent when an individual's race is also taken into account. In 2022, the median

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[137] *Id.* (choose "Before-tax family income" from "Select household financial component" dropdown, and "Race or ethnicity" from "Distribute by" dropdown).

[138] SCOTT WINSHIP, CHRISTOPHER PULLIAM, ARIEL GELRUD SHIRO, RICHARD V. REEVES & SANTIAGO DEAMBROSI, AM. ENTER. INST. FOR PUB. POL'Y RSCH., LONG SHADOWS: THE BLACK–WHITE GAP IN MULTIGENERATIONAL POVERTY 4 (2021).

[139] John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html.

[140] *Id.*

[141] *Id.*

[142] FONTENOT ET AL., *supra* note 10, at 9–10; BLS REP., *supra* note 4, at tbl.2.

[143] JASMINE TUCKER & CAITLIN LOWELL, NAT'L WOMEN'S L. CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES, 2015, at 1–2 (Sept. 14, 2016); 2015 U.S. BUREAU OF LAB. STAT. REP. 1068 tbl.8 (Apr. 2017).

[144] BLS REP., *supra* note 4, at tbl.2.

weekly earnings of white men was $1,194.[145] In contrast, the median weekly earnings of white women was $991 and, even worse, the median weekly earnings of Black women was only $856.[146] These statistics show that when employers discriminate against individuals on the basis of economic or social status, such discrimination is most likely to affect people of color and women. By looking at the intersection of lawfully protected classes and socioeconomic status, statistics provide the foundational support needed to illustrate the need to prohibit socioeconomic discrimination; those who Congress intended to protect by enacting Title VII are the individuals still facing harmful discrimination today.

B. Disparate Treatment Based on Socioeconomic Status

An employer who intentionally discriminates against an individual on the basis of their socioeconomic status risks being found liable under Title VII's disparate treatment theory. To succeed on a disparate treatment claim under Title VII, an employee must show they were discriminated against either individually or systemically. While employers are unlikely to be found liable through individual claims, they may be found liable under systemic claims due to the intersectionality of socioeconomic status and lawfully protected classes.

To establish an individual disparate treatment claim under Title VII,[147] the employee generally must establish three elements: (1) that the employer had an intent to discriminate against the employee because of their membership to a protected class;[148] (2) there was an adverse employment action, such as failure to hire, demotion, or certain terms and conditions of employment;[149] and (3) there is a causal link between the intent to discriminate and the adverse employment action.[150] Because socioeconomic status is not currently considered a protected class under Title VII, an employee likely could not fulfill these elements to show individual disparate treatment based on socioeconomic status.

On the other hand, to prove a systemic disparate treatment claim, an employee can allege that an employer has a general pattern or practice that leads to discrimination. In order to prove successful on this type of claim, however, an employee

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[145] U.S. BUREAU OF LAB. STAT., USDL-23-0072, USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS FOURTH QUARTER 2022, at 8 tbl.3 (2023).

[146] *Id.*

[147] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

[148] Slack v. Havens, No. 72-59-GT, 1973 WL 339, at *7, *aff'd*, 522 F.2d 1091 (9th Cir. 1975).

[149] 42 U.S.C. § 2000e-2(a)(1); Minor v. Centocor, Inc., 457 F.3d 632, 634 (7th Cir. 2006).

[150] Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

must show that the practice or pattern of discrimination was the employer's "standard operating procedure—the regular rather than the unusual practice."[151] This is generally done by showing a gross disparity[152] between the expected composition of the workforce based on the applicable labor market and the actual composition of the employer's workforce or position at issue.[153] Because of the high correlation between socioeconomic status and protected classes under Title VII, it is likely that by participating in socioeconomic discrimination, employers open themselves up to liability under a systemic disparate treatment theory.

As an example, perhaps an employer resides in a community that is made up of a population of 60% middle- to higher-class individuals and 40% lower-class individuals. As standard practice, the employer tries not to hire lower-class individuals on the assumption that they are unreliable. As a result, the employer's workforce is made up of 95% middle to higher-class workers, and only 5% of its workers are classified as lower class. Looking to the statistics illustrated in Section III(A) above that show lower-class individuals are more than twice as likely to be either a person of color, a woman, or both, this would likely lead to a racial or gender imbalance in the workplace. If such imbalance equates to more than two or three standard deviations between the expected value based on the relevant population and the observed number within the workforce,[154] then the employee has established a prima facie case, and the employer could be liable for discrimination under Title VII. Ultimately, if employers rely on socioeconomic status to make determinations about employment decisions, they are likely opening themselves to liability under the systemic disparate treatment theory of Title VII.

C. Disparate Impact Based on Socioeconomic Status

An employer who discriminates against employees and applicants on the basis of socioeconomic status also risks being found liable under the statute's disparate impact theory. Under this theory, facially neutral employment practices may violate Title VII even if there is no intent to discriminate on the employer's part.[155] To

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[151] Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977).

[152] A "gross disparity" has been defined as a difference of more than two or three standard deviations between the expected value and the observed number. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307, 308–09 n.14 (1977) (citing Castaneda v. Partida, 430 U.S. 482, 496–97 n.17 (1977)).

[153] *Id.* at 307–08 (citing *Teamsters*, 431 U.S. at 339–40).

[154] *Id.* at 308–09 n.14 (citing *Castaneda*, 430 U.S. at 496–97 n.17).

[155] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (explaining that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

succeed on a disparate impact claim under Title VII,[156] an employee must show (1) that the employer uses a particular practice;[157] (2) the practice causes an adverse impact;[158] (3) the amount of impact is significant;[159] (4) the impact is to a protected class;[160] and (5) the impact is cognizable.[161] Just as the intersection between protected classes and socioeconomic class leads to a higher risk of being liable under a systemic disparate treatment claim, the same can be said for disparate impact.

In the case of disparate impact, the employee must start by identifying a specific process or practice that the employer is using within its hiring or promotion procedures that the employee believes is the cause of discrimination.[162] The employee must then show that the specific process or practice causes an adverse impact against a protected class, generally through showing a disproportionality between the relevant labor market and the employer's workforce.[163] Next, the employee needs to show that this adverse impact is significant, which can be done in two ways. One way is to use the "four-fifths rule" provided by the EEOC. If using this method, one must show that members of a protected group are selected by the employment practice at a rate less than 80%, or four-fifths, of their counterparts.[164] The other method is by showing statistical significance, which is done by showing that the disparity between groups is two or more standard deviations away from the expected number.[165] If an employee can show that the adverse impact is significant in one of these ways, and that the impact is cognizable, then they can establish a prima facie case of disparate impact.[166]

Socioeconomic status is important in this analysis because, as discussed in Part II(A), this status commonly intersects with protected classes such as race and gender. If an employer uses a specific practice that implicates an employee or applicant's socioeconomic status, this will likely impact minorities in a disproportionate amount when compared to non-minorities. For example, perhaps an employer uses a hiring practice that specifically discriminates against individuals because of their socioeconomic status. Since this status is not a lawfully protected class, this can be

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[156] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k).

[157] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656–57 (1989).

[158] *Id.* at 651–52.

[159] Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1526–27 (citing *Hazelwood*, 433 U.S. at 307, 308–09 n.14 (1977)).

[160] 42 U.S.C. § 2000e-2(k)(1)(A).

[161] Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971).

[162] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989).

[163] *Id.*

[164] 29 C.F.R. § 1607.4 (2021).

[165] Groves v. Ala. State Bd. of Educ., 776 F. Supp. 1518, 1526–27 (citing *Hazelwood*, 433 U.S. at 307, 308–09 n.14 (1977)).

[166] U.S. DEP'T OF JUST., C.R. DIV., TITLE VI LEGAL MANUAL § VII, pt. C, at 24–26 (2021).

seen as a facially neutral policy. However, when looking at the composition of the employer's workforce that was built as a result of this policy, one sees that 90% of white men make it through the selection process, but only 30% of Black females are selected. Assuming the employee can show the policy is the reason for this discrepancy, the statistics would lead to a finding of a significant, cognizable adverse impact against a protected class. Therefore, even though the employer was using a "neutral" policy that only discriminated against individuals on the basis of their socioeconomic status, the intersection of such status with other protected classes opened them up to liability.

Although socioeconomic status is not a lawfully protected class under Title VII, it commonly intersects with other protected classes under the statute. The undeniable correlation between these classes creates a substantial risk for employers if they choose to participate in socioeconomic discrimination. Whether through disparate treatment or disparate impact, employers may be held liable for socioeconomic discrimination under Title VII. To ensure full protections of workers and awareness for employers, socioeconomic discrimination should be explicitly unlawful under Title VII.

CONCLUSION

Socioeconomic discrimination affects a large number of individuals within the United States and is a problem that must be evaluated and resolved. Individuals assumed to be in a lower class are less likely to get a job, less likely to get promoted, and more likely to be offered less money than someone assumed to be of a higher class.[167] Such individuals also experience significantly higher unemployment rates than those in a higher class, and have a more difficult time finding a full-time job than higher-class individuals.[168] By failing to provide remedies for individuals affected by socioeconomic discrimination, those who Congress intended to protect when enacting Title VII are still suffering in inequitable workplaces. Looking to the intersection of lawfully protected classes and socioeconomic status illustrates how socioeconomic discrimination already opens employers up to liability, and such discrimination is a substantial issue that cannot be dismissed. Therefore, socioeconomic discrimination must be prohibited by law to attain the intended protections of Title VII.

[167] Kraus et al., *supra* note 1, at 23,000–01; *see* Ingram, *supra* note 3, at 60, 62–63.

[168] BLS REP., *supra* note 4, at tbl.8.