TITLE VII AS PRECEDENT: PAST AND PROLOGUE FOR FUTURE LEGISLATION

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Congress passed the Civil Rights Act of 1964 after nearly ninety years in which it enacted no major civil rights legislation.[1] The 1964 Act stood out then—as it stands out now—as Congress acting at its best rather than its worst. It confronted the historic problem of race in America, it overcame partisan divisions and sectional obstruction, and it acted to enforce constitutional principles. This is not to say that sponsors of the legislation made no compromises in the 1964 Act. On the contrary, they had to do so, particularly in the Senate, to obtain the two-thirds majority then needed to close off debate and end a filibuster.[2] The resulting legislation, compromises and all, then became the foundation for all of employment discrimination law, providing the

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1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-718, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2011)). The most recent previous major civil rights legislation was the Civil Rights Act of 1875, 18 Stat. 335, whose provisions on public accommodations were struck down in the *Civil Rights Cases*, 109 U.S. 3 (1883).

2. *See infra* notes 21-23, 42-49 and accompanying text.

template for prohibitions against discrimination on the basis of age and disability.[3] Even more remarkably, the legislation was consistently extended and reinforced, often over the narrowing interpretations imposed by the Supreme Court. Long after the Civil Rights Era had ended, Congress continued to pass expansive and progressive legislation, with virtually no examples to the contrary.[4] The few restrictive or qualifying provisions that Congress enacted invariably came as compromises, like those in the 1964 Act, added in order to pass expanded prohibitions against discrimination.[5] This Article recounts this pattern of legislation, the role that Title VII played in it, and possible explanations for it.

This history reveals a surprisingly consistent pattern of extension of the principle against discrimination, both in terms of the grounds for discrimination that are prohibited and the strength of the prohibitions themselves. Employment discrimination law now covers age and disability and soon appears likely to cover sexual orientation and identity.[6] The burden of proof upon plaintiffs has generally been lowered and the remedies for discrimination expanded.[7] The breadth and consistency of this trend represents a major achievement which has entrenched protections against discrimination into a fundamental element of public life. Despite continuing disputes over the need for and effect of these prohibitions,[8] no serious effort has been mounted to repeal them and none has succeeded.[9] Title VII has taken on the force of a precedent, operating in the legislative process to provide both a model for subsequent legislation and a justification for it. It has, ironically, proved to be more persuasive with Congress than with the Supreme Court, whose narrowing interpretations have often led to superseding legislation. A necessary element in any explanation for these developments has been the force of the principle of discrimination once it received the democratic endorsement of Congress in the Civil Rights Act of 1964. The succeeding parts of this Article document these claims.

Part I puts Title VII in the context of previous civil rights legislation and in the circumstances that led to the passage of 1964 Act. The usual explanations for passage of the 1964 Act, such as civil rights activism, presidential personalities, and political alignments, have little staying power when they are applied to the legislative descendants of Title VII, such as the Age

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3. *See infra* Part I.B.

4. *See infra* Parts II.B, II.C.

5. *See infra* notes 93-98 and accompanying text.

6. *See infra* note 156.

7. For instance, the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, accomplished all of these objectives. *See infra* notes 95-100 and accompanying text.

8. For the most prominent such critique, see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

9. Again, a good example is the Civil Rights Act of 1991, which contained a few restrictive provisions in the midst of expansionary legislation. *See infra* note 12 and accompanying text.

Discrimination in Employment Act of 1967 (ADEA)[10] and the Americans with Disabilities Act of 1990 (ADA).[11] These statutes, respectively, prohibited employment discrimination on the basis of age and on the basis of disability, in provisions directly modeled on or taken verbatim from Title VII. The ADA also adopted by cross-reference the enforcement provisions of Title VII. Yet for all their similarities to Title VII, their political origins take very different form. The civil rights groups that formed the core of support for the Civil Rights Act of 1964 had counterparts in the groups that sought prohibitions against age and disability discrimination, but had little overlap with them.

Part II examines the remarkable record of congressional amendments rejecting narrowing interpretations of employment discrimination laws. Occasionally, Congress has codified a narrowing interpretation, but as in the Civil Rights Act of 1991, almost always as part of a package of expansionary amendments, many explicitly rejecting decisions of the Supreme Court.[12] Far more common are amendments targeting narrowing interpretations by the Supreme Court and overruling those decisions. Such amendments have occurred under all the major civil rights statutes, as early as 1978 and as late as 2009. This Part brings together, for the first time so far as it appears,[13] this record of legislative activism in response to judicial conservatism.

Part III then examines possible explanations for this record, extending over most of the half century since Title VII was enacted. These explanations, like those for passage of the 1964 Act, extend over a wide range: from the simple selection effect of noticing only the statutes that are passed rather than those that fail, to an unholy alliance between plaintiffs' lawyers and big business, to the moral and ideological force of the principle against discrimination. No single explanation turns out to be wholly persuasive, leaving a persisting puzzle. An old adage of Lord Mansfield has it that "the common law . . . works itself pure by rules drawn from the fountain of justice."[14] It seems too much to hope, but too cynical to deny, that legislation, at least in employment discrimination law, could be drawn from the same sources in equity and law.

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10. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2012)).

11. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2011)).

12. *See* Civil Rights Act of 1991, sec. 105, § 703(k) (codified at 42 U.S.C. § 2000e-2(k)) (2011)) (superseding parts of Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) and incorporating other parts).

13. Several articles have examined important amending legislation like the Civil Rights Act of 1991 without, however, connecting the common expansionary tendency in these discrete pieces of legislation. *See generally* Kevin Barry, *Toward Universalism: What the ADA Amendments Act of 2008 Can and Can't Do for Disability Rights*, 31 BERKELEY J. EMP. & LAB. L. 203 (2010); Symposium, *The Civil Rights Act of 1991: Theory and Practice*, 68 NOTRE DAME L. REV. 911 (1993); Symposium, *The Civil Rights Act of 1991: Unraveling the Controversy*, 45 RUTGERS L. REV. 887 (1993). For additional articles on specific acts, see *infra* notes 43-45, 81, 205.

14. JOHN HOLLIDAY, THE LIFE OF WILLIAM LATE EARL OF MANSFIELD 122-23 (1797).

I. TITLE VII AS ARCHETYPE AND MODEL

A. The Circumstances and Passage of the 1964 Act

The long gap between the end of Reconstruction and the beginning of the Civil Rights Era, in which the regime of Jim Crow grew, prospered, and became established, has been recounted and debated in volumes, if not libraries, of scholarship.[15] The neglect of civil rights in this period, after the promising start in the Reconstruction Amendments and civil rights legislation, bears directly on the significance of the 1964 Act. As the first major congressional commitment to the renewal of civil rights, the Act took on the status of a foundational precedent, one which defined the terms in which discrimination would be prohibited and enforcement of equality would be pursued.[16] It established a model for politically feasible civil rights legislation, which could be imitated in subsequent enactments, and it provided the template of statutory language which, once it was upheld by the Supreme Court, insulated future acts from constitutional challenge.[17]

The 1964 Act was not quite the first of the modern civil rights acts, since it was preceded by the Civil Rights Act of 1957.[18] That statute broke the logjam of southern resistance to any legislation promoting racial equality, but it did so in the form of modest changes to existing voting practices,[19] which had to be completely overhauled by the Voting Rights Act of 1965 to reverse decades of black disenfranchisement.[20] The political significance of the 1957 Act rests on the efforts of then Senator Lyndon Johnson to overcome the efforts of his fellow southern senators to obstruct any civil right legislation.[21] The same skills came into play when Johnson, as president, forced the 1964 Act through the Senate over a southern filibuster.[22] Presidential personalities, as this example

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15. For a comprehensive history of the establishment of Jim Crow in the late nineteenth century to its demise in the middle of the twentieth, see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

16. HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972, at 152 (1990) (summarizing the significance of the 1964 Act).

17. GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 132-37 (2013) (summarizing the basis of the 1964 Act in the Commerce Clause and the decisions subsequently upholding it).

18. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634. The Act was supplemented by the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86, which augmented its enforcement provisions.

19. ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 910-1012 (2002).

20. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2011)).

21. CARO, *supra* note 19, at 1003-12.

22. ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: PASSAGE OF POWER 558-70

demonstrates, played a crucial role in the passage of the 1964 Act.[23] President Eisenhower's phlegmatic support for civil rights oscillated between extremes: military enforcement of school desegregation in Little Rock, Arkansas; his comment that he "didn't completely understand" the 1957 Act; and his decision nevertheless to sign the bill into law.[24] President Kennedy proposed the 1964 Act to Congress shortly before he was assassinated, and President Johnson could then take up the legislation as a legacy of his martyred predecessor.[25] Johnson's experience in Congress, notably as Senate majority leader, enabled him to persuade, compromise, blandish, and if necessary, browbeat members of Congress into doing the right thing and passing the 1964 Act.[26]

Yet the actions of these presidents, and the key figures in Congress, do not explain why they took the extraordinary steps necessary to pass the 1964 Act. Any plausible explanation for the background conditions that made the Act possible must take account of *Brown v. Board of Education*,[27] although not in the manner of Whig history that discerns a direct connection between constitutional doctrine and legislative action. Just to take one well-documented example, supporters of the 1964 Act deliberately avoided any invocation of the power of Congress to enforce the Fourteenth Amendment, the basis for the decision in *Brown*, on the grounds that it would inflame regional opposition to the legislation and that it would raise constitutional objections under the *Civil Rights Cases*,[28] one of the decisions that sounded the death knell of Reconstruction and inaugurated the era of Jim Crow.[29] The 1964 Act instead was based on the Commerce Clause and the spending power.[30] The influence of *Brown* instead must be sought in political channels through the demonstrations of the civil rights movement, the alignment of the political parties on matters of race, and the passage of civil rights legislation in northern states.[31] The last might be of secondary importance, but it exercised a direct influence over the substantive terms in which Title VII was cast, most of which were taken from state law.[32]

(2012).

23. GRAHAM, *supra* note 16, at 134-35, 141-42; CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 77-90 (1985).

24. KLARMAN, *supra* note 15, at 326, 366.

25. GRAHAM, *supra* note 16, at 134-35; WHALEN & WHALEN, *supra* note 23, at 77-79.

26. CARO, *supra* note 22, at 558-70.

27. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

28. 109 U.S. 3 (1883); *see* George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1560-61 (2012) (explaining Civil Rights Act supporters' reliance on the Commerce Clause instead of the Thirteenth Amendment due to fears of regional resentment caused by Reconstruction).

29. Rutherglen, *supra* note 28, at 1552-53.

30. *Id.* at 1560.

31. *See infra* notes 33-41.

32. *See* MICHAEL I. SOVERN, LEGAL RESTRAINTS ON DISCRIMINATION IN EMPLOYMENT

In an article that frames the contours of the debate over the influence of *Brown*, Professor Michael Klarman has found the pervasive influence of social change, other than the decision itself, to support long-term prospects for racial integration in the middle of the twentieth century.[33] The "great migration" of blacks to the North, the effects of World War II on integration of the armed forces, the high profile that racial equality assumed in international relations during the Cold War, the increased levels of black literacy and an expanding black middle class, and the growing political power of blacks in cities throughout the nation—all provided the conditions that would have led eventually to increased racial equality.[34] *Brown* only accelerated this process by inciting a backlash in the South to radical racist politics, which was then exploited by the civil rights movement through nonviolent demonstrations that led to violent responses.[35] When these were carried on national media, especially television, they swung opinion outside the South strongly against the regime of Jim Crow, leading directly to the passage of the 1964 Act.[36] Scholars as notable as Professors Mark Tushnet and David Garrow have criticized this account for giving too little credit to *Brown* in legitimizing the demands of the civil rights movement and inspiring its participants, for instance, to continue the Montgomery bus boycott.[37] On the opposite side, Professor David Rosenberg has argued that Klarman gives too much credit to *Brown* and should have attended more closely to the social conditions that he identifies.[38]

Others have elaborated on this debate, and it need not be resolved here. The debate concerned the causal mechanism that resulted in passage of the 1964 Act which, once it crystallized in the statute, created a new source for far more effective enforcement of civil rights.[39] There was, for instance, little actual school desegregation before passage of the Act, which threatened the

216-19, 245-46 (1966) (reproducing the prohibitions in Title VII and New York law). The procedures for enforcement of Title VII, however, marked a sharp break with state law. Title VII relied largely on private litigation, while state law relied mainly on administrative agencies. David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1073-74 (2011).

33. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 129-49 (1994).

34. *Id.*

35. *Id.* at 85.

36. *Id.* at 142-46.

37. David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 154-60 (1994); Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173, 177-82 (1994). For Klarman's response, see Michael J. Klarman, Brown v. Board of Education*: Facts and Political Correctness*, 80 VA. L. REV. 185 (1994).

38. Gerald N. Rosenberg, Brown *Is Dead! Long Live* Brown!*: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161, 169-71 (1994).

39. Klarman, *supra* note 33, at 139, 147 (referring to the 1964 Act as "transformative legislation" and "landmark legislation").

cut-off of federal funds to segregated school districts in the provisions in Title VI, but effective abolition of de jure segregation thereafter.[40] The Act took on a life of its own, which contributed another cause to the progress of laws against discrimination. Some of the provisions of the Act, like the prohibition against sex discrimination unexpectedly added to Title VII, bear only the most distant relationship to any of the causal factors identified as crucial to the passage of the Act as a whole.[41]

As the example of sex discrimination illustrates, the parliamentary maneuvers that led to passage of the Act made it truly exceptional, and for that very reason, hardly likely to be repeated in subsequent civil rights legislation. As noted earlier, the Senate invoked cloture to end debate over the Act for the first time ever on civil rights legislation.[42] The 88th Congress has been duly celebrated for such accomplishments—and rightly so—partly because they created a pattern for legislation that did not have to run the same gauntlet of opposition.[43] The most detailed examination of the Act's legislative history, by Professors Weingast and Rodriguez, finds the key to passage in the votes of pro-business Republicans.[44] The Democratic leadership in Congress had to make up for the defection and staunch opposition of southern Democrats, who also controlled key committees in the Senate.[45] The leadership therefore needed bipartisan sponsorship of the legislation. To assure Republican support, particularly on the decisive cloture vote in the Senate, a series of compromises were made, inserting special provisions into the statute, limiting its scope on issues such as affirmative action, testing, and seniority.[46] To avoid referring the legislation to committee, where it would have been vulnerable to the power of southern committee chairmen, all these compromises were worked out while the bill was under debate on the Senate floor.[47] Moreover, once a deal was made and debate was closed off, approval of the legislation of the Senate was

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40. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2011)); *see* Klarman, *supra* note 33, at 9-10.

41. The debate over this provision has concerned the issue whether this provision was added by Representative Smith of Virginia only to defeat the act, or whether he also had a genuine commitment to women's equality. Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 765, 767-69 (2002).

42. WHALEN & WHALEN, *supra* note 23, at 126-31, 194-200.

43. *See* George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 844-45 (1972) (indicating passage of the Equal Employment Opportunity Act by large majorities in the House and Senate).

44. Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1474-98 (2003).

45. WHALEN & WHALEN, *supra* note 23, at 149-93.

46. 42 U.S.C. § 2000e-2(h), (j); *see* Rodriguez & Weingast, *supra* note 44, at 1501-21.

47. Rodriguez & Weingast, *supra* note 44, at 1490-97.

quickly followed by passage of it unchanged by the House of Representatives.[48] This tortuous path towards passage has since raised several difficult issues of interpretation because the compromises necessary for passage left important issues unresolved, such as the permissibility of tests with adverse impact upon minorities and women.[49] Yet even as the legislative history created uncertainty over what the law required, it reduced uncertainty over what could be accomplished. It made Title VII the model for subsequent legislation.

That model itself had roots in state law and, in particular, the New York fair employment practice act that provided much of the statutory language incorporated in Title VII.[50] This state law, like others enacted before Title VII, reflected the renewed support for civil rights that grew up outside the South after World War II, and even more strongly, after *Brown*.[51] State fair employment practice laws became the visible manifestation of a fundamental change in the politics of race.[52] They could equally well have become the model for statutes passed after Title VII, but they did not. In fact, state fair employment practice laws became more widely adopted and more effectively enforced after enactment of the 1964 Act than before, a development attributable most likely to the several provisions in Title VII openly inviting state and local cooperation with the federal government in enforcing laws against employment discrimination.[53] Just as with other explanations for the passage of the 1964 Act, the previous enactment of state laws became transformed and absorbed into the Act as an independent source of new developments. The causes and conditions for the Act's passage cannot be erased from its history, and they set the stage to make the Act effective. But neither do they detract from the Act as a new model, on a national scale, with a predominant influence on subsequent developments.

B. Direct Statutory Descendants of Title VII

Statutes patterned on Title VII were enacted as early as the Age Discrimination in Employment Act of 1967, which was based on a report

48. *Id.* at 1474.

49. *See id.* at 1498-1521.

50. Engstrom, *supra* note 32, at 1073; *see* SOVERN, *supra* note 32, at 216-19, 245-46 (reproducing text of Title VII and New York law).

51. Engstrom, *supra* note 32, at 1072-84; Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963-1976*, STUD. AM. POL. DEV. 23, 29-30 (2009).

52. *See* Engstrom, *supra* note 32, at 1130-31.

53. *See* SOVERN, *supra* note 32, at 31-60 (analyzing deficiencies in enforcement of state laws before Title VII). After passage of the statute, nearly all states enacted fair employment practice laws as part of the mechanism in Title VII for joint enforcement of the law. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 706, 708-709, 78 Stat. 241, 259-64 (codified as amended at 42 U.S.C. §§ 2000e-5, 2000e-7, 2000e-8 (2011)); *see also* 29 C.F.R. § 1601.80 (2013) (listing state and local agencies enforcing laws against employment discrimination).

commissioned by Congress in the 1964 Act,[54] and as late as the Americans with Disabilities Act of 1990. In between these early and late descendants of Title VII, two statutes stand among the many landmark statutes enacted during the Civil Rights Era: the Equal Employment Opportunity Act of 1972, which expanded the coverage and enhanced the enforcement provisions of Title VII,[55] and the Civil Rights Attorney's Fees Awards Act of 1976,[56] which extended the model of fee shifting in favor of prevailing plaintiffs from the 1964 Act to civil rights laws generally.[57] The ADEA and the ADA constitute free-standing statutes that made the prohibitions against discrimination on the basis of race, sex, national origin, color, and religion applicable to discrimination on the basis of age and disability. Claims could be made under the ADEA and the ADA without relying upon Title VII. The other acts augmented existing prohibitions and remedies in pre-existing statutes. They did not support independent causes of action. Yet all the statutes either incorporated or extended the terms of Title VII.

The ADEA contains basic prohibitions and important defenses lifted in their entirety from Title VII. The congressional draftsmen just took the language identifying prohibited grounds of discrimination in the earlier statute and substituted "age" in the later statute.[58] In doing so, the ADEA took up a theme itself sounded in Title VII by expanding the scope of prohibited discrimination. "Sex" was added to Title VII's prohibitions in floor debates in the House of Representatives, partly as an effort by southern representatives to defeat the bill but one taken up by supporters of women's rights to greatly expand the previously narrow prohibitions against sex discrimination.[59] The ADEA itself had no such ironic origins but deliberately followed a report by the Secretary of Labor identifying age discrimination, particularly in hiring older workers, as a national problem.[60] The only irony, if there is one in the ADEA, lies in its use mainly by plaintiffs alleging discrimination in firing and layoffs rather than discrimination in hiring. The ADEA preserves the existing

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54. SEC'Y U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965) [hereinafter SECRETARY'S REPORT]. Section 715 of the Civil Rights Act of 1964 directed the Secretary of Labor to prepare a report to Congress. Civil Rights Act of 1964 § 715, 78 Stat. at 265. Congress then acted upon it in the ADEA. Smith v. City of Jackson, 544 U.S. 228, 232-33 (2005).

55. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 2, § 701, sec. 4, § 706, 86 Stat. 103, 103-07 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-5 (2011)).

56. Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (codified as amended at 42 U.S.C. 1988(b) (2011)).

57. *Id.*

58. *Compare* 29 U.S.C. § 623(a)-(c) (2012) (prohibiting employment discrimination on the basis of age), *with* 42 U.S.C. § 2000e-2(a)-(d) (2011) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

59. *See* Case, *supra* note 41, at 767-69 (highlighting supporters of the addition of "sex" to Title VII).

60. SECRETARY'S REPORT, *supra* note 54, at 5-17.

jobs of older workers rather than opening up new jobs to them.[61] The ADEA also incorporated several of the defenses available under Title VII, notably the "bona fide occupational qualification" (BFOQ) based on sex, religion, or national origin.[62] Applying the BFOQ to age recognized the legitimacy of considering age in a variety of situations, many recognized in other provisions of the ADEA, such as those applicable to pensions.[63] The ADEA also has an exception for seniority systems, like the one in Title VII, but subject to the requirement that they are "not intended to evade the purposes of this chapter."[64] This qualification, like others to be addressed in the next Part of this Article, concerns the correlation between age and tenure of employment.

The ADA also incorporates wholesale provisions from Title VII,[65] although its relation to the earlier statute is complicated by intervening events in the twenty-six years between passage of the two laws. The ADA itself expands upon the Rehabilitation Act of 1973, which included provisions against discrimination on the basis of disability by recipients of federal funds.[66] This provision had its predecessor in Title VI of the 1964 Act and it was subsequently expanded by the ADA to apply to other institutions: employers, state and local governments, and providers of public accommodations.[67] The last of these extensions followed the model of Title II of the 1964 Act,[68] which also addressed discrimination in public accommodations. The ADA adopted by reference the procedures and remedies from Title VII, and its general prohibition against discrimination has key provisions nearly identical to those in Title VII.[69] Another prohibition, against practices with adverse impact, was adopted in the ADA simultaneously with the consideration of an earlier version of the Civil Rights Act of 1991.[70] The most significant incorporation from Title

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61. *See* George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL. STUD. 491, 510 (1995).

62. 29 U.S.C. § 623(f)(1); 42 U.S.C. § 2000e-2(e).

63. 29 U.S.C. § 623(i), (*l*), (m).

64. *Id.* § 623(f)(2); 42 U.S.C. §2000e-2(h).

65. *Compare* 42 U.S.C. § 2000e-2(a) (defining prohibited discrimination under Title VII), *with* 42 U.S.C. § 12112(b) (2011) (defining prohibited discrimination under the ADA).

66. Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2012)).

67. Respectively, in Titles I, II, and III of the ADA. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 101-309, 104 Stat. 327, 330-67 (codified as amended at 42 U.S.C. §§ 12111-12189 (2011)).

68. Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201-207, 78 Stat. 243 (codified as amended at 42 U.S.C. §§ 2000a to 2000a-6 (2011)).

69. *Compare* 42 U.S.C. §§ 12112, 12117 (ADA prohibition and remedies), *with* 42 U.S.C. §§ 2000e-2, 2000e-5 (2011) (corresponding and cross-referenced Title VII provisions).

70. *See* Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 982-99 (1993) (describing compromises that resulted in § 703(k)). *Compare* 42 U.S.C. § 12112(b)(6) (ADA prohibition on disparate impact), *with* 42 U.S.C. § 2000e-2(k) (Title VII prohibitions on disparate impact).

VII concerns the duty of reasonable accommodation and warrants a close look for what it reveals about the zigzag course of statutory developments in this field.[71]

Congress added reasonable accommodation of religious practices to the scope of Title VII in anticipation of judicial decisions narrowly interpreting the statute's prohibition against discrimination on the basis of religion.[72] Religion was defined in the statute to include religious practices "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[73] That language received a very narrow interpretation by the Supreme Court, allowing an employer to show undue hardship based on a "more than *de minimis* cost,"[74] but it nevertheless made its way into regulations under the Rehabilitation Act and then into the ADA.[75] In the legislative history of the ADA, however, Congress expressly disavowed the narrowing interpretation applicable under Title VII.[76] In this instance, as in so many others after passage of Title VII, Congress took a more expansionist approach to legislation than the Supreme Court did.

The Equal Employment Opportunity Act of 1972 added the expanded definition of religion to Title VII.[77] It also accomplished a variety of other expansions of the statute as well, adding coverage of government employers and educational institutions, facilitating class actions and authorizing public actions by the Equal Employment Opportunity Commission (EEOC), and lengthening the statute of limitations for bringing claims.[78] The Equal Employment Opportunity Act also reduced the floor on coverage of private employers to those with fifteen or more employees.[79] Altogether, these changes in the statute carried forward the principle against discrimination announced in the 1964 Act but with less extended debate and less determined opposition.[80]

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71. *See infra* notes 72-76 and accompanying text.

72. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 2, § 701(j), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(j) (2011)); *see* Dewey v. Reynolds Metals Co., 402 U.S. 689, 689 (1971) (per curiam) (affirming, by an equally divided court, a decision finding no discrimination based on religious practices).

73. Equal Employment Opportunity Act of 1972 sec. 2, § 701(j).

74. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

75. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102(b)(5), 104 Stat. 327, 332 (codified as amended at 42 U.S.C. § 12112(b)(5) (2011)); 29 C.F.R. § 32.13 (2013).

76. H.R. REP. NO. 101-485, pt. 2, at 67 (1990); S. REP. NO. 101-116, at 33 (1989).

77. Equal Employment Opportunity Act of 1972 sec. 2, § 701(j).

78. *See* Sape & Hart, *supra* note 43, at 847, 862, 865, 876-77 (summarizing the main provisions of the 1972 Act).

79. Equal Employment Opportunity Act of 1972 sec. 2, § 701(b) (codified as amended at 42 U.S.C. § 2000e(b) (2011)).

80. Sape & Hart, *supra* note 43, at 836-46 (recounting legislative history of the 1972 Act).

The Civil Rights Attorney's Fees Awards Act of 1976 pursued the implications of the principle against discrimination and enhanced enforcement efforts with an even broader provision.[81] In reaction to a decision of the Supreme Court endorsing the "American rule," leaving the costs of hiring attorneys on each side of litigation, regardless of who prevailed on the merits,[82] Congress authorized fee-shifting in favor of prevailing plaintiffs. Claims under the Reconstruction Civil Rights Acts, Title VI of the 1964 Act, and a newly enacted statute against sex discrimination in education now supported the award of fees.[83] This fee-shifting provision had the obvious aim and direct effect of fostering enforcement of these statutes through private litigation.[84] Plaintiffs' attorneys, whether affiliated with civil rights groups or simply in private practice, now had an assured source of compensation for all the claims on which they succeeded in court. "Private attorneys general," as they were then called, now had the incentive to litigate in favor of plaintiffs alleging a wide range of civil rights claims, often at levels of compensation that exceeded those of the public attorneys general themselves.[85] The civil rights bar gained a continuing source of support, one that could be enhanced with every alteration of the law in the plaintiffs' favor and that some see as the impetus for the subsequent legislative expansion of civil rights law, a subject taken up in the last part of this Article.[86] Other statutes, like the Civil Rights Restoration Act of 1987,[87] were aimed directly at restrictive decisions of the Supreme Court. That act expanded the scope of federal prohibitions against discrimination by recipients of federal funds, superseding a decision of the Supreme Court that had narrowed the definition of "programs" subject to such prohibitions.[88] Other legislation amended Title VII, the ADEA, and the ADA for the very same reason, as discussed in the next Part of this Article.

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81. *See* Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (codified at 42 U.S.C. § 1988(b) (2011)). For a discussion of the law's effects, see Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1, 8-9 (2009).

82. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

83. 42 U.S.C. § 1988(b) (2011) (referring to claims under these statutes).

84. *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561, 563, 575 (1986) (plurality opinion); *see also* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

85. The Fifth Circuit warned against this problem in an early decision:

> [C]ourts must remember that they do not have a mandate under Section 706(k) [the fee-shifting provision in Title VII] to make the prevailing counsel rich. Concomitantly, the Section should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general.

Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 719 (5th Cir. 1974).

86. *See infra* notes 173-178 and accompanying text.

87. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, §§ 2-6, 102 Stat. 28, 28-29 (1988) (codified in scattered sections of U.S.C.).

88. Grove City Coll. v. Bell, 465 U.S. 555, 571-74 (1984) (holding that Title IX coverage is limited to the particular activity receiving federal financial assistance).

II. INTERPRETATION AND AMENDMENT

A. Title VII

The changes to Title VII in response to decisions of the Supreme Court began with isolated responses to particular decisions in the 1970s, which swelled into a massive rejection of the Court's approach in 1991 and continued into the present century. The amendments began with the expanded definition of religious discrimination, recounted earlier, which did not so much reject a decision of the Supreme Court, but amended the statute in anticipation of one that might be adverse to protecting religious practices.[89] The Pregnancy Discrimination Act of 1978 took a more confrontational approach, specifically identifying in its legislative history the decisions to be overruled.[90] These decisions had brought into Title VII the narrow definition of sex discrimination in constitutional law, which excluded discrimination on the basis of pregnancy.[91] With an exception for medical insurance for abortion, Congress amended the statute to add discrimination on the basis of pregnancy and related medical conditions.[92] This amendment set the pattern for similar amendments in the future, involving clearly identifiable victims of what could easily be characterized as discrimination. Civil rights groups could then mobilize to get Congress to act to protect them. Arguments rejected as a matter of law by the Supreme Court took on a second life as matter of politics before Congress.

This tendency reached its high point in the Civil Rights Act of 1991, which superseded or modified a long list of the Supreme Court decisions: on the defense to claims of disparate impact, the burden of proving discrimination in "mixed motive" cases, the circumstances in which a judgment can be collaterally attacked, the award of expert witness fees, and the award of fees against the federal government.[93] The 1991 Act also superseded decisions limiting claims of discrimination under § 1981,[94] a statute dating to

89. *See supra* notes 72-74 and accompanying text.

90. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, sec. 1, § 701(k), 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k) (2011)); *see* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 676-80 (1983) (describing legislative history).

91. Nashville Gas Co. v. Satty, 434 U.S. 136, 143-44 (1977); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 132-36 (1976).

92. Pregnancy Discrimination Act of 1978 sec. 1, § 701(k).

93. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, secs. 104-13, §§ 701, 703, 705, 706, 722, 105 Stat. 1071, 1074-79 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-2, 2000e-5 (2011)). The superseded decisions were: *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (on mixed motive cases); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) (on liability for disparate impact); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 912-13 (1989) (on statute of limitations); *Martin v. Wilks*, 490 U.S. 755, 768 (1989) (on collateral attack on race-conscious remedies); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 446 (1987) (on expert witness fees).

94. Civil Rights Act of 1991 sec. 101, § 1977 (codified as amended at 42 U.S.C. § 1981 (2011)).

Reconstruction, which provided damage remedies to victims of discrimination on the basis of race and national origin.[95] The 1991 Act made clear that § 1981 applied to private discrimination, contrary to doubts expressed by some Justices that it did not, and the 1991 Act made clear that the earlier statute applied to all forms of discrimination in contracting, not just to making or enforcing contracts.[96] The 1991 Act also extended a variant of the damage remedy under § 1981 to victims of intentional discrimination on the basis of sex, religion, and disability.[97] All but the last of these provisions singled out specific decisions by name to be disapproved, either because they limited claims that civil rights plaintiffs previously believed they had or limited the remedies available to acknowledged victims of discrimination.[98]

The most controversial of the issues addressed in the 1991 Act concerned liability for disparate impact. The criticism of that theory of liability under Title VII focused on the incentives that it gave to employers to adopt "quotas"—to adopt practices that assured a degree of balance in terms of race, national origin, and sex in the composition of the work force in order to avoid the burden of having to justify practices with a disparate impact on these grounds.[99] Whether or not this criticism was sound, it was adopted by the Supreme Court in *Wards Cove Packing Co. v. Atonio*, which significantly limited disparate impact as a basis for liability under Title VII.[100] The 1991 Act expressly turned the clock back to the day before *Wards Cove* was decided in resolving most of these issues, although on one particular issue, it tacitly accepted the decision.[101] This issue concerned the plaintiff's initial burden of proving disparate impact, which generally must connect the adverse effects upon the relevant group to a specific employment practice.[102] The exceptional treatment of this one holding stood in marked contrast to the rejection of the rest of the decision, and in particular, on the defendant's burden of justifying a practice with disparate impact. The 1991 Act put the burden of proof on this issue squarely on the

95. *See, e.g.*, Johnson v. Ry. Express Agency, Inc., 421 U.S. 455, 463 (1975); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414 (1968) (interpreting companion statute, 42 U.S.C. § 1982 (2011), to prohibit private discrimination). For the interpretation of this entire line of decisions, see RUTHERGLEN, *supra* note 17, at 137-58.

96. Civil Rights Act of 1991 sec. 101, § 1977(b)-(c) (codified as amended at 42 U.S.C. § 1981(b)-(c) (2011)); Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989) (limiting statute to formation and enforcement of contracts); Runyon v. McCrary, 427 U.S. 160, 195-205 (1976) (White, J., dissenting).

97. Civil Rights Act of 1991 sec. 102, § 1977A (codified as amended at 42 U.S.C. § 1981a (2011)).

98. *See supra* note 93.

99. *See* Devins, *supra* note 70, at 983-99 (describing President George H. W. Bush's anti-quota rhetoric in his assessment of the 1991 Act).

100. 490 U.S. 642, 652, 659-60 (1989) (burden of persuasion always remains on plaintiff, and courts limited to "reasoned review" of business justification).

101. Civil Rights Act of 1991 secs. 3(2), 105(a), § 703(k), 105 Stat. 1071, 1074-75 (codified at 42 U.S.C. § 2000e-2(k) (2011)).

102. *Id.* sec. 105(a), § 703(k)(1)(B) (codified at 42 U.S.C. § 2000e-2(k)(1)(B) (2011)).

defendant and required a showing that the practice in question was "job related for the position in question and consistent with business necessity."[103] The limited endorsement of *Wards Cove* was the exception that proved the rule. The other provisions of the 1991 Act had no such kind words, implicit or explicit, for any recent decision of the Supreme Court.[104]

A defender of the Court's record before Congress might nevertheless insist that the basic terms of the 1991 Act appropriated and endorsed earlier decisions that initially expanded the scope of Title VII, not to mention the Reconstruction statute, § 1981. *Griggs v. Duke Power Co.* first recognized liability for disparate impact under Title VII,[105] and *Jones v. Alfred H. Mayer Co.* extended the companion statute to § 1981 to reach private discrimination.[106] In the 1991 Act, Congress did not reject everything the Supreme Court had done in the field of employment discrimination. Congress only rejected restrictive interpretations that cut back on the previous expansion of the law, and it did not reject all of the restrictive decisions.[107] Nevertheless, the one-way direction in which the 1991 Act went cannot be overstated. Congress did not balance expansion of Title VII in some respects with restriction in others. Nor is the record of congressional action since passage of Title VII marked by any such balanced approach. Where Congress has acted, it has invariably expanded the law to the benefit of plaintiffs.

The Lilly Ledbetter Fair Pay Act of 2009 illustrates both features of this consistent pattern of congressional action: intermittent amendments but in a single direction.[108] Nearly two decades had elapsed since the passage of the 1991 Act when Congress responded to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[109] That decision barred the plaintiff's claim because it was not brought within 180 days of the time that she first received an allegedly discriminatory paycheck.[110] Responding to Justice Ginsburg's call in her dissent for superseding legislation,[111] Congress greatly relaxed the time limits for bringing claims of pay discrimination under Title VII.[112] The statute of limitations for such claims now begins to run from the latest of three dates: when the pay practice was adopted, when the plaintiff became subject to it, or when the plaintiff received the latest paycheck under

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103. Civil Rights Act of 1991 sec. 105(a), § 703(k)(1)(A)(i) (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2011)).

104. Civil Rights Act of 1991 §§ 2, 3 (references not formally codified).

105. 401 U.S. 424, 432-36 (1971).

106. 392 U.S. 409, 436-44 (1968).

107. *See supra* notes 103-4 and accompanying text.

108. *E.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, sec. 3, § 706(e)(3), 123 Stat. 5, 5-6 (codified at 42 U.S.C. § 2000e-5(e)(3) (2011)).

109. 550 U.S. 618 (2007).

110. *Id.* at 628-29.

111. *Id.* at 661 (Ginsburg, J., dissenting).

112. *See* Lilly Ledbetter Fair Pay Act of 2009 sec. 3, § 706(e)(3).

it.[113] A companion piece of legislation, the Paycheck Fairness Act, addressed the merits of pay discrimination claims, but it eventually failed to survive a filibuster in the Senate.[114] This bill would have amended the Equal Pay Act, which prohibits sex discrimination in pay.[115] As with the 1991 Act, the legislation in 2009 did not cure every deficiency in existing law from the plaintiff's perspective, but neither did it add to them.

B. The Age Discrimination in Employment Act

Congress progressively expanded the ADEA through seemingly technical amendments that nevertheless have had far-reaching consequences. The original coverage of the statute reached only workers ages 40 to 65,[116] but the ceiling on coverage was lifted in a series of amendments until it was eliminated altogether.[117] Some limits have since occasionally been applied to occupations as different as firefighters, law enforcement officers, and college professors.[118] This increase in coverage set the stage for a fractious dispute between the Supreme Court and Congress on the issue of mandatory retirement. The Court twice upheld retirement plans that limited benefits on the basis of age, effectively requiring employees to retire to obtain full benefits under the plans.[119] In both cases, the Court held that the plans were not intended to evade the ADEA, but in response, Congress amended the statute to make clear that such age-based restrictions were illegal.[120] The current version of the statute provides for voluntary retirement plans but prohibits any plan that "shall require or permit the involuntary retirement" of any covered employee based

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113. *See id.*

114. Paycheck Fairness Act, S. 3772, 111th Cong. (2010); Paycheck Fairness Act, H.R. 12, 111th Cong. (2009). For the vote against cloture in the Senate, see 156 CONG. REC. 7928 (2010)).

115. Equal Pay Act of 1963, Pub. L. No. 88-38, sec. 3, § 6, 77 Stat. 56, 56-57 (codified as amended at 29 U.S.C. § 206(d) (2011)); H.R. 12, 111th Cong. (2009) (proposing more effective remedies for gender-based wage discrimination)).

116. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607.

117. Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, sec. 2(c), § 12, 100 Stat. 3342, 3342 (codified as amended at 29 U.S.C. § 631(a) (2011)). The age limit was earlier raised to seventy by Age Discrimination in Employment Amendments of 1978, Pub. L. No. 95-256, sec. 3, § 12, 92 Stat. 189, 189.

118. Age Discrimination in Employment Act Amendments of 1986 sec. 3, § 4, sec. 6, § 12. The current exemption for firefighters and law enforcement officers is codified at 29 U.S.C. § 623(j) (2011).

119. *See* Pub. Emps. Ret. Sys. v. Betts, 492 U.S. 158, 166, 169, 182 (1989); United Air Lines, Inc. v. McMann, 434 U.S. 192, 193, 203 (1977).

120. *Betts*, 492 U.S. at 182, *superseded by statute*, Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 101, 104 Stat. 978, 978 (1990); *McMann*, 434 U.S. at 193, 203, *superseded by statute*, Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189.

on age.[121] Special provisions also allow voluntary retirement plans for college professors.[122] Other amendments to the ADEA expanded time limits for filing claims under the statute and imposed detailed conditions upon agreements to waive claims under the statute. These went in the same direction as those on mandatory retirement, but without the prompting of restrictive decisions by the Supreme Court.[123]

C. The Americans with Disabilities Act

The ADA had an uneventful history of congressional amendment until growing dissatisfaction with the Supreme Court's limitations on coverage led to the ADA Amendments Act of 2008. Like the Civil Rights Act of 1991, the ADA Amendments Act identified a series of decisions to be superseded and criticized them by name, but also like the 1991 Act, it stopped short of fully repudiating what the Supreme Court had done.[124] The flash point for disagreement was a series of decisions between 1999 and 2002, limiting the definition of covered disabilities under the ADA. The first in the series, *Sutton v. United Air Lines, Inc.*, concerned the effect of mitigating measures on coverage, with the Supreme Court holding that a disability had to be assessed in its mitigated state.[125] The particular disability afflicting the plaintiffs in that case was poor eyesight, which could be corrected by eyeglasses.[126] Once corrected, according to the Supreme Court, the disability no longer substantially limited the plaintiffs in any major life activity, with the end result that they were no longer covered by the Act.[127] This reasoning led to the ironic consequence that the plaintiffs could be denied a job, in the particular case as airline pilots, because of their poor eyesight. The employer would not have found plaintiff disabled because the disability could be corrected.[128] Moreover, the plaintiffs could not, according to the Court, acquire coverage under the Act on the ground that the employer "regarded" them as disabled.[129] Once the employer learned that the applicants were severely nearsighted, it required them to take the test without eyeglasses, an option they refused to take.[130]

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121. 29 U.S.C. § 623(f)(2)(B) (2011).

122. *Id.* § 623(m).

123. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 115, § 7(e), 105 Stat. 1071, 1079 (codified as amended at 29 U.S.C. § 626(d)(1) (2011)); Older Workers Benefit Protection Act, Pub. L. No. 101-433, sec. 201, § 7, 104 Stat. 978, 983 (1990) (codified at 29 U.S.C. § 626(f) (2011)).

124. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-54.

125. 527 U.S. 471, 475 (1999).

126. *Id.*

127. *Id.* at 492-94.

128. *See id.*

129. *Id.* at 491.

130. *See id.* at 475-76.

Something plainly was wrong with this reasoning—the employer found the plaintiffs disqualified because of their disability, and yet it had to make no showing on the merits that good eyesight without eyeglasses was a legitimate prerequisite for the job. Perhaps this could go without saying for the position of airline pilot, but the Supreme Court did not rely on this ground, and instead, extended its reasoning to two companion cases involving different jobs and different disabilities.[131]

When Congress re-examined *Sutton* in the ADA Amendments Act, it found the reasoning of the decision wanting, and expressly repudiated it, but oddly agreed with the result.[132] The statute now requires disabilities to be assessed in their uncorrected or active dormant state, but it contains a convoluted exception for vision impairments that can be corrected by "ordinary eyeglasses or contact lenses."[133] Other elements of the opinion also came in for criticism. The statute now has a broad definition of coverage based on a condition "regarded as" a disability.[134] The condition need not, even in the way the employer regards it, constitute a disability. It simply needs to be "an actual or perceived physical or mental impairment."[135] Congress qualified this extension of coverage only by excluding impairments that are "transitory and minor" and by exempting employers from any duty to reasonably accommodate individuals "regarded as" disabled.[136] Congress also altered the findings that serve as a preamble to the ADA to eliminate any reference to a determinate number of individuals who might be covered by the Act.[137] The Court had relied upon the number given by Congress, forty-three million individuals with disabilities, to put some kind of upper limit on the Act's coverage.[138] In a final provision repudiating the Court's reasoning, Congress expressly delegated to the EEOC the authority to issue regulations implementing all the provisions of the ADA, including those on coverage.[139]

Congress treated the other major decision in this series, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[140] with the same ambivalence as *Sutton*. Congress made clear that it was dissatisfied with the reasoning in *Toyota* without being very clear about what it would put in its place.[141] The

131. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565-66, 577-78 (1999); Murphy v. UPS, Inc., 527 U.S. 516, 518-19 (1999).

132. *See* ADA Amendments Act, Pub. L. No. 110-325, secs. 2(a)(4), 3, 4(a), §§ 2, 3, 122 Stat. 3553, 3554-56 (codified at 42 U.S.C. § 12102 (2011)).

133. *Id.* sec. 4(a), § 3(4)(E) (codified at 42 U.S.C. § 12102(4)(E) (2011)).

134. *Id.* sec. 4(a), § 3(1)(C) (codified at 42 U.S.C. § 12102(1)(C) (2011)).

135. *Id.* sec. 4(a), § 3(3)(A) (codified at 42 U.S.C. § 12102(3)(A) (2011)).

136. *Id.* sec. 4(a), § 3(3)(B) (codified at 42 U.S.C. § 12102(3)(B) (2011)).

137. *Id.* sec. 3, § 2(a)(1) (codified at 42 U.S.C. § 12101(a)(1) (2011)).

138. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 484-85 (1999).

139. ADA Amendments Act sec. 6(a)(2), § 506 (codified at 42 U.S.C. § 12205(a) (2011)).

140. 534 U.S. 184 (2002).

141. *See* ADA Amendments Act § 2(a)(5)-(7), (b)(4)-(5).

main issue in *Toyota* concerned the connection between an impairment and its effect on a major life activity.[142] The definition of an actual "disability" under the ADA is "a physical or mental impairment that substantially limits one or more major life activities."[143] *Toyota* held that "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."[144] Congress rejected the first part of this holding but left the second undisturbed.[145] Congress also enacted a list of "major life activities" that went further than the Supreme Court had, for instance, in including work within that term,[146] and also including "the operation of a major bodily function," such as operation of the immune system.[147] As to those bodily functions, Congress built into the statute a presumption that any substantial impairment of them also impaired a major life activity. As to other major life activities, Congress believed that the connection with an impairment required by *Toyota* was too strong but could not agree on any language that would make the connection weaker.[148] It confined itself, as it had in the Civil Rights Act of 1991, to simply condemning the reasoning of the Supreme Court.[149]

The overall effect of the ADA Amendments Act was to greatly enlarge the number of individuals protected by the statute without increasing the duties that employers owed to any individual who was covered. The duty of reasonable accommodation, as noted earlier, was not expanded; if anything, it was narrowed to eliminate any obligation to individuals who were only "regarded as" disabled.[150]

Traces of a compromise with business interests can be discerned in this package of amendments. In particular, employers that were already large enough to support human resources departments could simply expand the scope of their policies on disability without incurring new obligations by extending existing obligations to more employees and applicants.[151] Disability rights

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142. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 187, 196-99 (2002).

143. 42 U.S.C. § 12102(1)(A).

144. *Toyota*, 534 U.S. at 198.

145. ADA Amendments Act sec. 4(a), § 3(3)(B)-(4) (codified at 42 U.S.C. § 12102(3)(B)-(4) (2011)).

146. *Id.* sec. 4(a), § 3(2)(A) (codified at 42 U.S.C. § 12102(2)(A) (2011)).

147. *Id.* sec. 4(a), § 3(2)(B) (codified at 42 U.S.C. § 12102(2)(B) (2011)).

148. This became evident when language that would have changed the requirement of "substantially limits" was deleted in the Senate. *See* 154 CONG. REC. 18,528 (Sept. 11, 2008) (remarks of Sen. Kennedy) (criticizing the House bill's definition as too stringent and noting that "our Senate bill avoids this problem.").

149. ADA Amendments Act § 2(a)(5), (b)(4)-(5).

150. *Id.* sec. 4, § 3(1)(C), sec. 6, § 501(h) (codified at 42 U.S.C. §§ 12102(1)(C), 12201(h) (2011)).

151. For the central role of human resources departments in administering laws against employment discrimination, see FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 6-12

groups and plaintiffs' attorneys, on the other hand, gained the advantage of litigating claims under the ADA without surmounting the previously large hurdle of proving that the plaintiff was an individual with a disability.[152] The gravamen of a complaint now shifted almost entirely to the issue whether the individual was qualified for the job, with or without a reasonable accommodation. Moving to the merits brings the ADA in line with Title VII, which covers all individuals,[153] and with the ADEA, which has a bright-line test for coverage of everyone age forty or older.[154] All three statutes now emphasize the issue of who is a victim of discrimination, and once a victim is identified by a decision on the merits, the statutes provide a remedy to her.

III. PROGRESS OR ILLUSION?

Just expanding the laws against employment discrimination cannot serve as an end in itself. The laws must prove themselves to be effective, both in their own terms of diminishing the forms of discrimination they prohibit, and in terms of more abstract goals of achieving equality in public life. Expansion of the law can miss these marks in many different ways: enforcement might be too weak, leaving law simply as an empty statement of principle; enforcement might be too strong, resulting in costs that outweigh any progress towards equality; the prohibited forms of discrimination might be the wrong ones if the law ends up protecting the better-off at the expense of the worse-off; and the law might not go far enough in leaving out forms of discrimination that should be prohibited. This Part begins with the last of these alternatives, by considering the possibility that the seeming expansion of laws against employment discrimination might result solely from the greater visibility of statutes that pass Congress rather than proposed legislation that fails. It then proceeds to explanations for the laws that were passed by identifying particular interest groups that might have benefited from each one and the mechanism by which these groups reached a compromise. The animating quest in this Part is to find common themes that unite the kaleidoscope of interest groups and their different alignments that support each piece of legislation. The final Part turns to the one-sidedness of legislation since Title VII, seeking to offer an explanation for the salience of statutes expanding the scope of the law and the minimal presence of statutes shrinking it.

(2009).

152. ADA Amendments Act sec. 4(a), § 3(3)(A) (codified at 42 U.S.C. § 12102(3)(A) (2011)) (defining who is regarded as having an impairment).

153. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)-(d), 78 Stat. 253, 255-56 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a)-(d) (2011)) (covering "any individual").

154. 29 U.S.C. § 631(a) (2011).

A. Selection Effects

Laws not passed invariably receive less attention than those that are. Bills that never become law do not change existing doctrine, do not have effects that can be assessed, and rarely give rise to continuing controversy. The catalogue of legislation compiled in the preceding Part of this Article does not include any examples of bills that wholly failed. At most, the record of enacted legislation reveals measures that anticipated those that were passed or that resulted in compromises that eventually became law. The bill entitled the "Civil Rights Act of 1990," vetoed by the first President Bush, set the stage for the passage of the Civil Rights Act of 1991, and it contained provisions, notably on liability for disparate impact, that were watered down in the final version of the law.[155] Legislation that comes close to passing reveals, as did the Paycheck Fairness Act on sex discrimination in pay and the Employment Nondiscrimination Act (ENDA) on discrimination on the basis of sexual orientation and sexual identity,[156] what remains on the legislative agenda. But it remains only the tip of a large iceberg of bills proposed in Congress and left to die in committee or in any of the several stages necessary to pass both houses of Congress.

Perhaps the many instances of failed legislation should be counted against the generalization that Congress has acted consistently to extend Title VII and the laws modeled on it. Inaction, on this view, constitutes a form of legislative restraint. Yet this observation occupies such a high level of generality that it hardly accounts for the distinctive features of the actual legislative record. Two of these stand out: first, the legislative program initiated by Title VII has resulted in so much significant follow-on legislation, and, second, the legislation all goes in one direction, towards expansion of the law. Against this background, any laws cutting back on the prohibitions against discrimination would have been instantly visible, as were the multiple decisions of the Supreme Court offering a narrow interpretation of the same prohibitions. None appears as prominently as the expansionary laws. Any selection effect from looking only at enacted legislation, if it were operative, would apply equally to restrictive bills and to expansionary bills. The selection effects on legislation unseen, because it remained unenacted, should cancel out between restrictive and expansionary bills. But the effects do not cancel out with respect to enacted

155. *See* Devins, *supra* note 70, at 982-99 (describing the legislative history of the 1990 and 1991 Civil Rights bills).

156. The most recent version of ENDA, S. 815, 113th Cong. (2013), passed the Senate on November 7, 2013. 159 CONG. REC. S7907 (daily ed. Nov. 7, 2013). Coincidentally, six years earlier to the day, another version of ENDA, H.R. 3685, 110th Cong. (2007), passed the House of Representatives. 153 CONG. REC. 30,392-93 (2007). The legislation has yet to pass both houses in the same Congress. *See* Leigh Ann Caldwell, *Senate Passes LGBT Anti-Discrimination Bill*, CNN (Nov. 8, 2013), http://www.cnn.com/2013/11/07/politics/senate-lgbt-workplace-discrimination (briefly summarizing the history of unsuccessful attempts to pass ENDA from 1994 to the present).

legislation. As recounted in Part II, expansionary legislation has a far better record of enactment than restrictive legislation.

A more subtle selection effect might be inferred from the limited scope of the laws passed after Title VII. Despite recurrent expressions of alarm, mainly from its opponents, civil rights legislation has embraced only a few new grounds of discrimination, principally age and disability, and it has done so with compromises that have kept the burden of proving discrimination on plaintiffs and made a wide range of defenses available to employers.[157] Less tractable forms of discrimination based on nebulous personal characteristics such as appearance, have not been enacted at the federal level.[158] Fears that liability for disparate impact would result in effectively requiring affirmative action—or "quotas" as opponents of disparate impact would have it—have not materialized.[159] Instead, Congress has repeatedly legislated against affirmative action.[160] So, too, despite the comprehensive changes in the ADA Amendments Act, Congress did not expand employers' duty of reasonable accommodation and instead limited it to exclude impairments only "regarded as" disabilities.[161]

None of this is to deny the significance of the legislation that has been passed, but only to emphasize that it is based on Title VII: on similarly identifiable grounds of discrimination, on a similar allocation of the burden of proof, and with similar deference to employers' business judgment. The revolution made by statutes like the ADEA and the ADA lies not in discarding the model of discrimination from Title VII but in extending its protections to a much wider segment of the population. As Title VII itself intimated with the addition of the prohibition against sex discrimination, civil rights laws now protect majorities as well as minorities. The lifting of the ceiling on coverage in the ADEA and the broadening of the definition of disabilities by the ADA Amendment Acts both underscore the magnitude of this change. What needs to be explained is why employers would accede to such dramatic increases in coverage and therefore in their exposure to liability.

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157. *See supra* notes 54-71 and accompanying text.

158. DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW 14-19 (2010).

159. For critiques of disparate impact theory along these lines, see Kingsley R. Browne, *The Civil Rights Act of 1991: A "Quota Bill," A Codification of* Griggs, *a Partial Return to* Wards Cove, *or All of the Above*, 43 CASE W. RES. L. REV. 287, 287-99 (1993); Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 622-24 (2011).

160. *See* Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(j), 78 Stat. 253, 257 (codified at 42 U.S.C. § 2000e-2(j) (2011)); Civil Rights Act of 1991, sec. 106, § 703(*l*), Pub. L. No. 102-166, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(*l*) (2011)).

161. ADA Amendments Act sec. 6(a)(1), § 501(h), Pub. L. No. 110-325, 122 Stat. 3553, 3558 (2008) (codified as amended at 42 U.S.C. § 12201(h) (2011)).

B. Interest Group Politics

For employers, the fundamental compromise at the core of antidiscrimination law is the promise of limited regulation: that they cannot consider race, sex, and other prohibited grounds of discrimination, but they can consider anything else. Laws like Title VII appeal to them because they preserve management autonomy.[162] For civil rights organizations, the narrow focus of such laws also has appealing features: it targets particular practices that work to the disadvantage of easily identified groups and gives their interests priority on the agenda of legal reform. With the advent of provisions shifting attorney's fees onto unsuccessful defendants, members of the plaintiffs' bar also emerged as beneficiaries of the expanding scope of civil rights laws, generally allied with civil rights groups but with crucial expertise in existing legal doctrine and how it might be changed for the benefit of plaintiffs, and indirectly for themselves.[163] Enforcement of the law meant compensation for their efforts, on behalf of individuals or public interest groups who could not otherwise finance litigation.[164] Along these three main divisions of interested parties, a multitude of public and private institutions and organizations could be aligned, from public enforcement agencies like the EEOC to units of state and local government to unions and employment agencies. These often had mixed interests, because they could be found on either side of a lawsuit, as unions found themselves under Title VII.[165] Legislative adjustment of all these competing interests explains the predictable complexity of the various statutory provisions, both on the substance of what was prohibited and on the procedures and remedies that would be used to enforce those prohibitions. Yet the central demands of the major participants remained constant: employers wanted to preserve their considerable control over the "legitimate, nondiscriminatory reason[s]"[166] that could enter into personnel decisions; civil rights groups wanted to obtain effective remedies for longstanding inequality; and plaintiffs' attorneys wanted to maintain the priority of private litigation as the means for enforcing the law.[167] A brief look

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162. *See* United Steelworkers v. Weber, 443 U.S. 193, 202-07 (1979) (finding the focus of Title VII to be eliminating racial discrimination while preserving management and union autonomy); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) (explaining that employers, not courts, should determine business practices).

163. Farhang, *supra* note 51, at 48-56.

164. *Id.*

165. *Compare, e.g.*, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (union as plaintiff), *with* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (union as defendant).

166. *Furnco*, 438 U.S. at 578 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

167. For an account of the interest groups supporting the Civil Rights Act of 1991, see Farhang, *supra* note 81, at 9-15.

at Title VII and the major legislation that followed it show how these interests played out.

As discussed earlier, the crucial votes for passage of Title VII came from conservative Republicans naturally inclined to favor business interests. As the price for their support, particularly in the crucial vote for cloture in the Senate, they insisted on a variety of amendments to Title VII orchestrated by Senator Dirksen, the leader of the Senate Republicans.[168] These amendments covered such issues as limitations on required affirmative action, limitations on actions for equal pay, defenses to claims of discriminatory testing, and general limits on the power of the EEOC.[169] The durability of these issues over the half-century since Title VII was enacted testifies to their significance. Republicans in both the House and the Senate also insisted upon the priority of private litigation as the means for enforcing the statute, progressively weakening the powers of the EEOC from the cease-and-desist authority exercised by the National Labor Relations Board to an investigatory and conciliatory role.[170] Republicans regarded with anathema any agency that exercised powers similar to those possessed by the National Labor Relations Board, the epitome of a pro-labor, anti-business agency of the New Deal.[171] As Professors Weingast and Rodriguez conclude in their detailed study of the voting patterns over amendments to Title VII, the changes made in the Senate were "systematic, meaningful, and limiting," and "were apparently intended to reduce the impact of the Act, especially in the North, and particularly among Republican business and middle-class constituents."[172]

The great irony in the Republican amendments concerns attorney's fees, which courts could award to prevailing plaintiffs as part of the substitution of litigation for administrative enforcement.[173] Having avoided the perils of administrative enforcement, Republicans planted the seed for creation of a vigorous plaintiffs' bar.[174] They might be excused for making this mistake because the provision enacted in Title VII (and a corresponding provision in Title II on litigation over public accommodations) authorized the award of fees to "the prevailing party," which seemingly encompassed prevailing defendants

168. Rodriguez & Weingast, *supra* note 44, at 1474-96.

169. *See supra* note 46 and accompanying text.

170. Farhang, *supra* note 51, at 31-42; *see also* Rodriguez & Weingast, *supra* note 44, at 1466-68, 1488-94 (describing Republican compromises in the House and Republican-sponsored amendments in the Senate).

171. According to an early account of the legislative history of Title VII, the amendments accepted by Senator Dirksen were "[c]onsistent with the objective of allaying the fear that the EEOC would develop into another expensive octopus like the NLRB." Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 450-51 (1966).

172. Rodriguez & Weingast, *supra* note 44, at 1497.

173. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(k), 78 Stat. 253, 261 (1964) (codified as amended at 42 U.S.C. § 2000e-5(k) (2011)).

174. Farhang, *supra* note 51, at 52.

along with prevailing plaintiffs.[175] This evenhanded language, however, soon received a one-sided interpretation: prevailing plaintiffs could recover fees in all but exceptional cases, while prevailing defendants could do so only if the claim had no reasonable basis in law or fact.[176] This judicial gloss on the statutory language arose out of concerns that the threat of an award of fees would unduly deter plaintiffs from bringing claims under Title VII at all.[177] At least as to matters of enforcement, employers and their Republican allies got more than they bargained for.

A similar irony played out in the enactment of the ADEA, although over a longer time period. As originally enacted, the statute limited coverage only to individuals between the ages of forty and sixty-five, and even among those employees it allowed retirement plans when they were "not a subterfuge to evade the purposes of this Act."[178] Those two provisions, along with the several defenses adapted from Title VII,[179] enabled employers to adapt to the new statute, essentially along the lines of the life-cycle theory of earnings. That theory proposed that employees could be compensated at the end of their careers at levels greater than their productivity because the net benefit to them over this period was offset by the net benefit to the employer during an earlier period, in the middle of their careers, in which their productivity exceeded their compensation.[180] This system of implied deferred compensation made sense only if the late period in an employee's career had a determinate endpoint. The ADEA's original ceiling on coverage and the terms on which retirement plans first were offered, generally imposing mandatory retirement at a specified age, conformed to the life-cycle theory of earnings.[181] The subsequent amendments to the ADEA dispensed with this crucial conformity to the life-cycle theory.[182]

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175. Title VII § 706(k) (codified as amended at 42 U.S.C. § 2000e-5(k) (2011)); Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 204(b), 78 Stat. 243, 244 (1964) (codified at 42 U.S.C. § 2000a-3(b) (2011)).

176. *Compare* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978) (directing lower courts to award fees to prevailing defendant under Title VII only where claim is "frivolous, unreasonable, or without foundation"), *with* Newman v. Piggie Park Enters., 390 U.S. 400, 402-03 (1968) (holding that prevailing plaintiffs can recover "unless special circumstances would render such an award unjust").

177. *Christiansburg*, 434 U.S. at 421-22.

178. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §§ 4(f)(2), 12, 81 Stat. 602, 603, 607.

179. *Id.* § 4(f)(1).

180. Edward P. Lazear, *Agency, Earnings Profiles, Productivity and Hours Restrictions*, 71 AM. ECON. REV. 606, 606-08 (1981).

181. *See* Metz v. Transit Mix, Inc., 828 F.2d 1202, 1220-21 (7th Cir. 1987) (Easterbrook, J., dissenting) (explaining how the ADEA could operate to protect certain older workers, at companies whose salary structure reflects the life-cycle theory of earnings, from opportunistic firings); Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 820-31 (1997) (explaining how elimination of mandatory retirement undermines the life-cycle theory as applied to the ADEA).

182. *See* 29 U.S.C. §§ 623(f)(2)(A), 631(a) (2011) (reflecting, respectively, an

And, in fact, the amendments jeopardized any rationale for requiring employers to maintain the compensation of older employees at a level in excess of their productivity as it declined. Imposing any such requirement presupposes that it can be done only for a limited period of time and that employers thereafter can take account of age as it affects productivity. The amendments to the ADEA virtually eliminated mandatory retirement as the employers' preferred response to dealing with employees in this situation.[183]

The deliberations over the amendments suggest that employers realized only belatedly how much they needed a substitute for mandatory retirement. Once this practice fell under the description of discrimination against older workers, it could no longer be defended in a legislative process that felt the influence of interest groups, like the AARP, which lobbied on behalf of older workers.[184] An exchange between Representative Claude Pepper and Gene Jankowski, a vice-president of CBS, in hearings over the 1978 amendments captures the predicament that employers found themselves in:

> Mr. Pepper. I believe it is reported in the media that your distinguished chairman is 75 and he's still going strong. Isn't he?
> Mr. Jankowski. Yes, sir, he is.
> Mr. Pepper. And CBS is doing pretty well under his management, isn't it?
> Mr. Jankowski. Yes, sir, we are.
> Mr. Pepper. Maybe that might cause you to hesitate about adjudicating as a firm policy matter that anybody else, other than Mr. Paley, is not competent to continue to do a good job for your company after 65.[185]

Anyone could, like Representative Pepper, identify some individuals beyond the age of retirement who still performed more than adequately at their jobs. But employers had to devise practices that dealt with older employees generally and still not fall into the trap of relying upon discredited stereotypes

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amendment in 1990 that removed an exemption for pensions and other retirement benefits and an amendment that extended protection to workers over seventy).

183. Issacharoff & Harris, *supra* note 181, at 820-31 (analyzing the consequences of the ADEA's ban on mandatory retirement).

184. *Id.* at 802-05.

185. *Retirement Age Policies (Part I): Hearing Before the H. Select Comm. on Aging*, 95th Cong. 35 (1977); *see also, e.g.*, *Working Americans: Equality at Any Age: Hearing Before the S. Spec. Comm. on Aging*, 99th Cong. 63 (1986) (statement of Mark A. de Bernardo, Labor Law Manager, U.S. Chamber of Commerce) (testifying against eliminating the then-current ceiling of coverage at age 70); *Amendments to the Age Discrimination in Employment Act of 1967: Hearing on H.R. 65 and H.R. 1115 Before the Subcomm. on Emp't Opportunities of the H. Comm. on Educ. and Labor*, 95th Cong. 78 (1977) (statement of Robert T. Thompson, Chairman of the Labor Relations Committee, U.S. Chamber of Commerce) ("[W]e view as totally unnecessary, unfortunate, and ill-advised legislation either to remove the 65 year cap on ADEA or to prohibit mandatory retirement ages in pension plans."); *Age Discrimination in Employment Amendments of 1977: Hearings on S. 1784 Before the Subcomm. on Labor of the S. Comm. on Human Res.*, 95th Cong. 162 (1977) (statement of Daniel E. Knowles, Director of Personnel, Grumman Aerospace Corporation) ("To change age 65 as the normal involuntary retirement date in industry at this time is going to immediately increase our already alarming unemployment rates.").

on the basis of age. A rigorously enforced prohibition against discrimination of age, without any ceiling on coverage, forced them into this dilemma.

Employers escaped from this dilemma only through the expedient of relying upon voluntary retirement plans. By 1990, after they had fought and lost battles over raising the ceiling on coverage and over mandatory retirement, employers obtained a provision explicitly allowing voluntary early retirement plans.[186] Another provision, dealing solely with early retirement of college professors, was added in 1998.[187] It was a compromise worked out by the Democratic administration then in power and Republican legislators to compensate for the provision specifically prohibiting mandatory retirement.[188] Observers have subsequently pointed out how successful employers have been in using the option of voluntary retirement to address the problem of older workers with fading productivity.[189] The end result took coverage under the ADEA closer to the universal coverage of Title VII. The ADEA now covers everyone age forty or older while Title VII has always covered "any individual."[190] It also accentuated the need for employers to adopt more sophisticated strategies for compliance with the statute, assuring that their retirement plans met the detailed requirements for being voluntary rather than mandatory.[191] Large employers, with personnel departments that already handled such matters, could adjust without exorbitant expense.[192] Small employers, on the other hand, could avoid such problems only by keeping their work force below twenty employees, thereby avoiding being covered by the law.[193] Lost in the shuffle over these matters of coverage and compliance was the provision for award of attorney's fees, which had been in the statute from the beginning and never was amended.[194]

The same pattern repeated itself in the enactment and then amendment of the ADA. Employers first obtained a statute that limited the range of individuals protected by the statute, and then, when those limitations were repealed, they succeeded primarily in preserving the limits on the duty of

186. Older Workers Benefit Protection Act, Pub. L. No. 101-433, sec. 103, § 4(2)(B(ii), 104 Stat. 978, 978-79 (1990) (codified at 29 U.S.C. § 623(f)(2)(B)(ii) (2011)).

187. Higher Education Amendments of 1998, Pub. L. No. 105-244, sec. 941(a), § 4(m), 112 Stat. 1581, 1834 (codified at 29 U.S.C. § 623(m) (2011)).

188. Mike Mills, *Senate Approves Revised Ban On Age Bias in Benefits*, 48 CONG. Q. WKLY. REP. 3113 (1990) (reporting compromise worked out in the Senate); Alyson Pytte, *GOP Opposition Stalls Action on Age-Discrimination Bill*, 48 CONG. Q. WKLY. REP. 996 (1990) (recounting compromise proposed by the general counsel for the EEOC).

189. RICHARD A. POSNER, AGING AND OLD AGE 339 & n.36 (1995).

190. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)-(d), 78 Stat. 253, 255-56 (codified as amended at 42 U.S.C. § 2000e(a)-(d) (2011)).

191. 29 U.S.C. § 623(*l*) (2011).

192. *See* DOBBIN, *supra* note 151, at 9.

193. 29 U.S.C. § 630(b).

194. *Id.* § 626(b) (incorporating by reference 29 U.S.C. § 216(b) (2011)).

reasonable accommodation.[195] All the while, the ADA incorporated by reference the procedures and remedies for enforcement of Title VII and similarly allowed for recovery of attorney's fees.[196] The legislation that became the ADA first appeared with the coverage based only on impairment, reaching any "physical or mental impairment, perceived impairment, or record of impairment."[197] Under pressure from Republican administrations at the request of business interests, this floor on coverage was raised so that the impairment must be one "that substantially limits one or more major life activities."[198] As recounted earlier, this augmented requirement for coverage then became the basis for several restrictive judicial decisions,[199] vindicating the employers' strategy to limit the consequences of expanding prohibitions against discrimination in this direction. The employers' success appears all the more impressive in light of the overwhelming bipartisan majorities that supported passage of the ADA in both the House and the Senate.[200] By the time the ADA came up for a vote, sentiment had crystallized against discrimination on the basis of disability, making wholesale opposition to a prohibition fruitless.[201]

Employers also obtained other concessions in the statute as enacted, mainly at the opposite end of the spectrum of coverage, limiting liability to anyone who was too disabled to work. The main provisions on employment protect only a "qualified individual" who "with or without reasonable accommodation, can perform the essential functions" of the job, and these provisions allow the employer to generate evidence of essential qualifications through written job qualifications.[202] Moreover, the central innovation in the ADA, imposing an affirmative duty upon employers to reasonably accommodate individuals with a disability, remained subject to the condition that the employer could make the accommodation without "undue hardship."[203] Together with the provisions setting a floor on coverage, these provisions also set a ceiling by limiting the scope of employers' duties, forcing plaintiffs to squeeze their claim into a narrow band of coverage: they had to prove a disability sufficient to gain

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195. *See supra* notes 150-151 and accompanying text.

196. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, §§ 107(a), 505, 104 Stat. 327, 336, 371 (codified at 42 U.S.C. §§ 12117(a), 12205 (2011)).

197. SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 44 & n.66 (2009).

198. Americans with Disabilities Act of 1990 § 3(2) (codified as amended at 42 U.S.C. § 12102(1)); BAGENSTOS, *supra* note 197, at 44-45.

199. *See supra* notes 124-49 and accompanying text.

200. Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 190-91 (2008) (vote of 403-20 in the House and 76-8 in the Senate).

201. *Id.*

202. Americans with Disabilities Act of 1990 §§ 101(8), 102(a) (codified as amended at 42 U.S.C. §§ 12111(8), 12112(a) (2011)).

203. *Id.* §§ 101(9)-(10), 102(b)(5)(A) (codified at 42 U.S.C. §§ 12111(9)-(10), 12112(b)(5)(A) (2011)).

coverage, but they also had to prove that it was not so severe that they were disqualified for the job. Hitting this target turned out to be difficult for plaintiffs, both as a matter of logic and as a matter of rhetoric. The evidence that supported basic coverage tended to undermine a finding of qualifications for the job, and arguments in one direction detracted from the force of arguments in the other. As Robert Burgdorf pointed out before passage of the ADA Amendments Act, plaintiffs must "prove how really disabled and disadvantaged they are in performing daily activities, a very unwelcome task for a person with a disability who is striving to prove to oneself and to others that he or she can be capable, independent and self-supporting."[204]

The principal goal of the ADA Amendments Act of 2008 was to get plaintiffs out of this bind.[205] The legislation sought to do so by returning to the terms of the ADA as originally proposed, making an impairment alone sufficient for coverage.[206] The statute now largely achieves this goal by broadly defining the "major life activities" that must be substantially affected by an impairment, so that, for instance, physiological functions themselves constitute major life activities,[207] virtually eliminating any distance between the impairment and its effects. The amendments also deleted from "regarded as" coverage any reference to major life activities at all.[208] All that is required for this branch of coverage is that the impairment not be "transitory and minor."[209] After extensive participation in the legislative process of formulating the amendments, employers principally succeeded in preserving the need for some connection to "major life activities," particularly as a prerequisite for the duty of reasonable accommodation.[210] The contours of the compromise, which also greatly enhanced the EEOC's power to define covered disabilities, were quite intricate. The provisions on vision impairments, discussed earlier, demonstrate how deeply contested the precise terms of the compromise were.

On the whole, however, employers would have preferred to leave intact the restrictions on coverage established by the Supreme Court.[211] The reason they

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204. Robert L. Burgdorf, Jr., *Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 570 (1997).

205. Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2040-45 (2013).

206. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), (b)(1), 122 Stat. 3553, 3553-54 (stating purpose of amendments to reinstate broad coverage of the ADA).

207. *Id.* sec. 4(a), § 3(2)(A) (codified at 42 U.S.C. § 12102(2)(A) (2011)).

208. *Id.* sec. 4(a), § 3(3)(A) (codified at 42 U.S.C. § 12102(3)(A) (2011)).

209. *Id.* sec. 4(a), § 3(3)(B) (codified at 42 U.S.C. § 12102(3)(B) (2011)).

210. *Id.* sec. 6(a)(1), § 501(h) (codified at 42 U.S.C. § 12201(h) (2011)); *see also* Befort, *supra* note 205, at 2044.

211. *See ADA Restoration Act of 2007: Hearing on H.R. 3195 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 50-60 (2007) (testimony of Lawrence Z. Lorber, U.S. Chamber of Commerce) (opposing a predecessor to the ADA Amendments Act of 2008).

could not reveals both the astute legislative strategy pursued by disability rights groups, led by Chai R. Feldblum, now a commissioner on the EEOC, and the breadth of support for protecting individuals from discrimination on the basis of disability. From the beginning, both Republicans as well as Democrats supported the amendments, notably Representative Sensenbrenner in the House.[212] The opposition to the amendments had to overcome the seemingly inevitable fall-out from the previous victories that business interests had achieved in decisions such as *Sutton v. United Air Lines, Inc.*[213] In a mirror image of the dilemma faced by plaintiffs under the ADA—showing sufficient disability to gain coverage but not so much as to defeat qualifications—employers had to recognize the ironic implications of the prevailing interpretation of the ADA. They had to concede that individuals with significant impairments continued to be victims of disability discrimination but that the statute failed to protect them because of the technicalities embedded in the provisions on coverage. Whether or not Congress meant to place those technicalities in the Act as originally passed, it later denounced them in the ADA Amendments Act as gaping loopholes that permitted continued discrimination.[214] Plaintiffs were denied a job and lost their claims, without any inquiry on the merits into their ability to perform the job itself. The logic of prohibitions against discrimination, along with the prevalence of impairments throughout the population, regardless of race, sex, social class, or political affiliation, superseded any attempt to maintain the narrow terms of the Act's original coverage. Like the ADEA, the ADA expanded to protect much of the population, bringing it much closer to the universal coverage of Title VII.

CONCLUSION

The enactment of the ADEA and the ADA, and the multiple amendments to these statutes and to Title VII, demonstrate the force of the precedent set by Title VII: in expanding the scope of prohibitions against discrimination, in the use of nearly identical statutory language, in providing a model for private enforcement, and in mobilizing political support for progressive legislation. Across all these registers, Title VII sounded a theme that then was imitated with variations. Unlike a judicial precedent, it could not exercise influence of its own force once it became embedded in the structure of the law. It had to renew itself in every setting in which it was invoked as a model. The need for continued legislative endorsement of the statute's basic principles and structure, down to the details of its language and implementation, makes its influence all the more remarkable. Basically similar statutes resulted from the alignment of

212. Feldblum et al., *supra* note 200, at 195-98.

213. 527 U.S. 471 (1999); *see supra* note 139 and accompanying text.

214. *See supra* notes 132-149 and accompanying text.

different groups seeking protection from discrimination in Title VII, the ADEA, and the ADA.

So, too, the political mechanisms that resulted in passage of these laws could hardly be more different. Only Title VII, for instance, faced a concerted effort to defeat the bill by filibuster. Yet the crucial step in framing the legislation for passage appears to have the same for each act: assembling a consensus that action against the group in question amounted to discrimination. Once this step was taken, opponents of the legislation, principally employers, were forced into the defensive position of fashioning exceptions to the substantive prohibitions or restrictions on procedures and remedies. Employers' opposition to the ADA, and after that to the ADA Amendments Act, took the form of rearguard actions that preserved limits, first on coverage, and then on limits to the duty of reasonable accommodation. Instead of supporting open forms of discrimination on the basis of disability, employers supported less visible qualifications to the main prohibitions. This structure can be found also in the ADEA and in the amendments to it, as well as in the numerous amendments expanding the scope of Title VII. All had a basis in Title VII as originally enacted, as did the main prohibitions in the ADEA and the ADA, which followed its language. In this sense, Title VII served as a precedent for subsequent legislation: primarily in demonstrating how a general prohibition against discrimination could be framed, and secondarily in providing an example of how it could be made amenable to the necessary legislative compromises. In hindsight, the pattern may appear to be entirely predictable and inevitable. Yet having such an enduring influence, and making it appear to be so natural, just demonstrates how momentous and enduring the influence of Title VII has been.