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# DISAGGREGATED DISCRIMINATION AND THE RISE OF IDENTITY POLITICS

GEORGE RUTHERGLEN\*

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### INTRODUCTION

The onward march of employment discrimination law began with the passage of the Civil Rights Act of 1964.<sup>1</sup> It has proceeded in fits and starts since then, but almost always in the direction of expansion, resulting in the coverage of new grounds of discrimination and new groups protected by the law. This process began with the addition of sex to the prohibitions in Title VII.<sup>2</sup> It gained momentum in the enactment of wholly separate statutes, exemplified by the Age Discrimination in Employment Act of 1967 (ADEA)<sup>3</sup> and the Americans with Disabilities Act of 1990 (ADA).<sup>4</sup> The emerging coverage of discrimination on the basis of sexual orientation and gender identity represents only the most recent example of this trend, which has been met with overwhelming approval in scholarly commentary.<sup>5</sup>

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1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–18, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)) [hereinafter Title VII].

2. See Section III.B *infra*.

3. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–34 (2012)) [hereinafter ADEA].

4. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)) [hereinafter ADA].

5. For endorsement of the decisions on coverage of sexual orientation, see William

Despite the accolades that have usually greeted this trend, it has nevertheless left deepening concerns in its wake. The most troubling involves groups beyond the immediate focus of existing prohibitions against discrimination, typically identified as working-class whites. As the prohibitions against discrimination multiply, and claims of discrimination increase, these groups find themselves consigned only to claims of “reverse discrimination.”<sup>6</sup> The resulting resentment has led mainstream Democrats and other political moderates to attribute the election of Donald Trump to their party’s pursuit of “identity politics.”<sup>7</sup> This term itself resists definition, oscillating between political solicitude for minority groups, with varying degrees of justification; to the refusal to build coalitions by appealing to a wider constituency; to self-absorbed obsession with one’s own status as a victim.<sup>8</sup> Disaggregated discrimination, with its recognition of different rules for different forms of discrimination, and seemingly for different groups, appears to take a first, fateful step down this slippery slope. The next steps lead to political isolation of minorities and other historically disfavored groups and then to eventual defeat at the hands of erstwhile populists and narrow-minded nationalists. As William Butler Yeats said, in that situation, “The best lack all conviction, while the worst [a]re full of passionate intensity.”<sup>9</sup>

Further steps down the path towards self-defeating identity politics, however, hardly follow from the recognition of the fact of disaggregated discrimination, or so this Article argues. Part I distinguishes between discrimination as a denial of equal citizenship and discrimination as favoritism for “protected classes.” In fact, there are few such classes to be found in the laws against employment discrimination, which usually cover “any individual,” and those that have narrower coverage reach broadly defined classes, such as everyone age forty or older under the ADEA.<sup>10</sup> Identity politics, in the sense of an exclusive focus on certain “protected classes,” loses sight of the broad coverage of laws against discrimination, and with it, their foundation in principles of equal citizenship. Part II surveys the development of the specific provisions that implement the laws against employment

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N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 383 (2017). For a representative sample of essays on the occasion of the fiftieth anniversary of Title VII, see David F. Engstrom, *The Civil Rights Act at Fifty: Past, Present, Future*, 66 STAN. L. REV. 1195, 1197–1201 (2014); George Rutherglen, *Title VII as Precedent: Past and Prologue for Future Legislation*, 10 STAN. J. C.R. & C.L. 159, 160 (2014).

6. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xiii (1977).

7. MARK LILLA, *THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS* 14–15 (2017).

8. *Id.* at 15.

9. WILLIAM BUTLER YEATS, *THE SECOND COMING* (1919).

10. ADEA, 29 U.S.C. § 631(a) (2012).

discrimination. The expanded prohibitions in Title VII, the ADEA, and the ADA have been accompanied by numerous qualifications and exceptions. The law has mediated the harsh consequences of strict prohibitions by this means. Part III brings this point down to the concrete terms of current disputes over the expanded coverage of Title VII, with specific attention to affirmative action, sexual harassment, sexual orientation and gender identity, and religious accommodation. Part IV then examines the ways in which the ADEA and the ADA have transformed narrow provisions on coverage into broad protections of almost everyone. The more extreme claims for special treatment under these statutes have been transformed, deflected, and qualified to avoid the implications of identity politics. A brief conclusion acknowledges the inevitability of controversy over discrimination but takes it as an opportunity to bring the claims of rival groups to a successful settlement through compromises in implementation.

### I. IDENTITY POLITICS AND EQUAL CITIZENSHIP

As employment discrimination law has expanded in scope, so has its differentiation into specific provisions applied to different forms of discrimination. This trajectory needs explanation and interpretation, not deployment into a zero-sum game of “us against them,” in which the immediate beneficiaries of laws like Title VII gain at the expense of other groups. The overriding appeal of the law must be the ideal of equal citizenship—the opportunity that everyone should have to participate in public life, whether provided by the government or by private institutions in the marketplace of economics, education, and ideas. It is the opposite of “identity politics,” defined as the exclusive appeal to historically disfavored groups rather than those groups that feel disfavored today.<sup>11</sup>

Of course, any term that characterizes a political tendency or argument can be used to engage in “persuasive definition”: the effort to characterize opposing views as unworthy of acceptance.<sup>12</sup> Like the epithet, “political correctness,” “identity politics” can be deployed simply to portray any argument in favor of progressive causes as an exemplar of reflexive liberal conformity. People cannot, however, be expected to shed their identity when they enter the courthouse or the voting booth or the forum of public debate. Identity politics, in this sense, is unexceptional. The term is informative only to the extent

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11. LILLA, *supra* note 7, at 14–15.

12. Or, more precisely, as stated in the classic account by C.L. Stevenson: “A ‘PERSUASIVE’ definition is one which gives a new conceptual meaning to a familiar word without substantially changing its emotive meaning, and which is used with the conscious or unconscious purpose of changing, by this means, the direction of people’s interests.” C.L. Stevenson, *Persuasive Definition*, 47 MIND 331, 331 (1938).

that it refers to specific pathologies of political and legal argument. The particular pathology that the term identifies is the focus upon one or a few admissible identities, excluding all others and leading to a refusal to compromise on strict prohibitions by excluding rather than accommodating the legitimate concerns of people with competing identities.

“Identity politics” in this sense can be found as much on the right as on the left. Appeals to absolute prohibitions against discrimination, whether against any form of affirmative action or against any accommodation of religious practices, exclude from discourse the competing views of rival groups, and as a practical matter neglect the qualified and nuanced character of the law as it has evolved. The law does not give weight to the “external preferences” people have—preferences not directly over how to lead their own lives, but indirectly over their approval or disapproval of the preferences of others in leading their lives.<sup>13</sup> Distaste for the religious beliefs or the sexual practices of others cannot be used to exclude their views from consideration and to invoke abstract arguments to support absolute prohibitions. To invert an observation by Ronald Dworkin, what we need is “justificatory descent” to more concrete levels of analysis, rather than “justificatory ascent” to higher levels of abstraction.<sup>14</sup>

The development of employment discrimination law has not proceeded in a straight line. Nor should it. It has been marked by continuity in statutory prohibitions and departures in coverage and exceptions.<sup>15</sup> Sometimes minor differences in wording of different prohibitions have resulted in significant changes in interpretation.<sup>16</sup> The resulting discrepancies counsel against the quest for uniformity based on the essential nature of discrimination, rather than seeking workable adjustments that take account of the distinctive character of different forms of discrimination in different settings. Arguments of principle that have untoward consequences that impose undue burdens on innocent parties lose their force in this process. The charge of practicing identity politics through litigation underestimates the mediating role of reducing general principles to decisions in concrete cases.<sup>17</sup> The abiding and inherent defect of identity politics, on this view, lies in the neglect of legitimate interests opposed to strict enforcement of laws against discrimination. Individuals with those interests, who are not themselves the usual victims of discrimination, do not receive the “equal concern and respect” that they are entitled

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13. DWORKIN, *supra* note 6, at 234–35.

14. RONALD DWORKIN, *JUSTICE IN ROBES* 52–53 (2006).

15. Rutherglen, *supra* note 5, at 166–67.

16. *Id.* at 167.

17. LILLA, *supra* note 7, at 37.

to as citizens.<sup>18</sup> The charge of engaging in identity politics does not reliably pick out liberal or conservative results to be condemned, but the form that those results take and the failures of argument that lead to them. What might work to promote equal citizenship in some circumstances might defeat it in others.

The context in which different forms of discrimination trigger different legal treatment bears this out. The elaboration of legal doctrine to address particular problems reveals an affinity for variety as much as uniformity. This is not to argue that the concept of discrimination should be jettisoned in favor of some, as yet, unarticulated alternative. It is, instead, to recognize how much complexity the concept of discrimination invites, and as a practical matter, requires. This insight takes the law in a more pragmatic direction than adherence to a formal and conceptual approach to analyzing discrimination. Such an approach still has its uses, but these must be justified on pragmatic grounds, in terms of the results achieved rather than any basis in original meaning or abstract theory.

Philosophical theories of equality have moved in the same pluralistic direction. While some philosophers and historians have questioned the viability of appeals to equality generally,<sup>19</sup> others have sought to break them down into more compelling components, notably T.M. Scanlon in his recent book, *Why Does Inequality Matter?*<sup>20</sup> He identifies several different objections to inequality, which could equally apply to unlawful discrimination: denial of equal concern, preservation of status differences, lack of procedural fairness, limits on opportunity, and restrictions on political participation.<sup>21</sup> He also addresses several specific arguments over inequality: as related to liberty and coercion, to desert, and to unequal incomes.<sup>22</sup> His approach throughout looks to a variety of specific objections to inequality, not in terms of abstract theory but in terms of actual institutional practice.<sup>23</sup>

Scanlon's pluralist and concrete approach contrasts markedly with recently proposed theories of discrimination, which seek unity at a high level of conceptual abstraction. These theories have sought to

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18. DWORKIN, *supra* note 6, at 180 ("We might say that individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them.").

19. HARRY G. FRANKFURT, ON INEQUALITY xi (2015) ("[I]t is misguided to endorse economic egalitarianism as an authentic moral ideal."); WALTER SCHEIDEL, THE GREAT LEVELER: VIOLENCE AND THE HISTORY OF INEQUALITY FROM THE STONE AGE TO THE TWENTY-FIRST CENTURY 6–9 (2017) (plague, revolution, state collapse, and war have been the historic causes of increased equality).

20. T.M. SCANLON, WHY DOES INEQUALITY MATTER? 1 (2018).

21. *Id.*

22. *Id.* at 1–10.

23. *Id.* at 8–9.

justify prohibitions against discrimination by appeal to goals as various as preventing demeaning distinctions based on personal characteristics, like race and sex,<sup>24</sup> or dismantling bottlenecks to individual opportunity by creating a plurality of ways for people to advance,<sup>25</sup> or preventing comparative harm to the victims of discrimination,<sup>26</sup> or eliminating pervasive, abiding, and relative disadvantage among certain groups.<sup>27</sup> The very multiplicity of these theories undermines their claim to completeness. If more than one is plausible, then none appears to be complete and exclusive of the others. None provides the whole story of why discrimination is wrong. Moreover, these theories operate at such a high level of abstraction that they tacitly admit the need for compromise as they are reduced to operational prohibitions. The proliferation of legal prohibitions against employment discrimination, and the exceptions and qualifications that have accompanied them, reveal how expansion of coverage has generated divergence in content.

## II. PROHIBITIONS, EXCEPTIONS, AND EXTENSIONS

The expanding prohibitions against employment discrimination have resulted in multiplying variations, exceptions, and qualifications. Each new ground of discrimination and each issue of coverage raises questions about how it relates to established prohibitions. Expanded coverage challenges the understanding of existing prohibitions and requires them to be re-examined. The ongoing controversy over religious objections to serving gay customers illustrates how prohibitions against discrimination can collide, in this instance, between the emerging protection of sexual orientation and the longstanding protection of religious belief and practices.<sup>28</sup> Consensus easily forms around paradigm cases of discrimination, historically those on the basis of race, but the implications to be drawn from even the clearest cases invariably raise problems of their own. Affirmative action has been the site of such controversies from the beginning, dating back to the original congressional debates over Title VII.<sup>29</sup> Reasonable accommodation of religion, disability, and now to some extent, pregnancy, raises similar issues.<sup>30</sup> How can employers be required

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24. DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 169 (2008).

25. JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 82 (2014).

26. KASPER LIPPERT-RASMUSSEN, BORN FREE AND EQUAL? A PHILOSOPHICAL INQUIRY INTO THE NATURE OF DISCRIMINATION 8 (2014).

27. TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 18 (2015).

28. *See infra* Section III.D.

29. 110 Cong. Rec. 1518, 6549 (1964) (remarks of Sen. Humphrey); *id.* at 7213 (remarks of Sens. Clark and Case). *See infra* Section III.A.

30. *See infra* Section III.D.

to avoid discrimination on these grounds by taking account of the individual characteristic that they are otherwise required to disregard?

These are only the most salient questions arising from the expansion of Title VII. Different grounds of discrimination and different groups receive different treatment, resulting in the elaboration of legal doctrine as notable for its variability as for its uniformity. This is not to argue that the concept of discrimination should be discarded. It is, instead, to recognize how much complexity the concept of discrimination invites—and as a practical matter, requires—in the development of legal doctrine.

### A. Title VII

According to a leading decision of the Supreme Court, “disparate treatment” or intentional discrimination “is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.”<sup>31</sup> The complexity of the statutory prohibitions against employment discrimination belies this simplicity. They are complicated in their own right and their complications multiply as they are augmented by exceptions and extensions. We begin with Title VII and then move on to the prohibitions modeled on it in the ADEA and the ADA.

The main prohibition in Title VII reveals the immediate obstacles presented to any simple definition of prohibited discrimination. If the definition is so simple, why does the prohibition have to go on at such length? Section 703(a) makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual” and “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”<sup>32</sup> Additional prohibitions apply to employment agencies, labor unions, and joint labor-management committees.<sup>33</sup>

The likely purpose of such elaborate and redundant prohibitions appears to be to prevent evasion, drawing on the reaction of southern school districts to the desegregation ordered in *Brown v. Board of Education*.<sup>34</sup> Hence the meaning of “discriminate” is amplified by

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31. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

32. Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (2012).

33. Title VII § 703(b)–(d), 42 U.S.C. § 2000e-2(b)–(d) (2012).

34. 347 U.S. 483, 495 (1954). For an account of the reaction to *Brown*, see MICHAEL

“fail or refuse to hire or to discharge any individual” in subsection (a)(1) and by “limit, segregate, or classify” in subsection (a)(2).<sup>35</sup> Title VII disaggregates discrimination from the very beginning. The similar, but not identical, prohibitions applicable to employment agencies, labor unions, and joint labor-management committees make this tendency all the more explicit.<sup>36</sup>

The literal terms of the prohibitions in Title VII just start the process of disaggregation. Several exceptions and elaborations follow immediately upon them. Those of most general significance concern affirmative action, bona fide occupational qualifications, religious discrimination, seniority systems, testing, and mixed-motive cases.<sup>37</sup> Four separate provisions address affirmative action in one way or another: one allowing discrimination in favor of Native Americans on or near Indian reservations; another disclaiming any required form of affirmative action; another prohibiting affirmative action by adjusting test scores; and a final provision dealing with collateral attack upon court orders.<sup>38</sup> The last two of these provisions were added by the Civil Rights Act of 1991, along with an uncodified pronouncement that nothing in that act “shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.”<sup>39</sup> Right from the beginning, and continuing to the most recent systematic amendments to Title VII, affirmative action generated its own separate set of exceptions and extensions.

The exception for bona fide occupational qualifications (BFOQ) has not spawned as many different statutory provisions and it eventually received “an extremely narrow” interpretation.<sup>40</sup> Yet it has proved to be consequential, mainly for signaling the permissibility of some classifications on the basis of sex, although it also applies to national origin and religion. For national origin, the exception is still narrower than it is for sex because national origin has been assimilated to race in constitutional law.<sup>41</sup> As discussed more fully in the

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J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–442 (2004).

35. Title VII §§ 703(a)(1), (2), 42 U.S.C. § 2000e-2(a)(1), (2) (2012).

36. See Title VII §§ 703(b)–(c), 42 U.S.C. § 2000e-2(b)–(c) (2012).

37. See Rutherglen, *supra* note 5, at 179–80.

38. Title VII § 703(i), (j), (k), (n), 42 U.S.C. § 2000e-2(i), (j), (k), (n) (2012).

39. Civil Rights Act of 1991, Pub. L. No. 102-66, § 116, 105 Stat. 1071, 1075 (1991).

40. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

41. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 189–90 n.19 (1982) (raising the issue whether Japanese citizenship could be a BFOQ for certain positions in American subsidiary of Japanese corporation); *Fisher v. University of Texas*, 136 S. Ct. 2198, 2210, 2212 (2016) (affirmative action for Blacks and Hispanics must meet the standards of strict scrutiny).

next part, religion has received exceptional treatment mainly through exemptions from coverage, either express or implied, for religious institutions and ministerial positions.<sup>42</sup> It also has been protected through a duty of reasonable accommodation for religious practices.

The other special provisions in Title VII confirm the centrifugal tendencies created by extension to different grounds of discrimination and different employment practices. The provisions on testing, disparate impact, and mixed motives<sup>43</sup> have the greatest range and significance and will be taken up in the next part of this Article.<sup>44</sup> These provisions all address, in one way or another, the issue whether and to what extent intent must be proved to establish a violation of Title VII. These issues have captured much attention, particularly because they differentiate statutory prohibitions against discrimination from constitutional prohibitions. That, too, illustrates how disaggregated the laws against discrimination have become. The prohibitions against discrimination on the basis of age and the basis of disability exemplify the same tendencies.

### *B. The Age Discrimination in Employment Act*

The ADEA was based on a report from the Secretary of Labor commissioned by Title VII itself.<sup>45</sup> The ADEA's main prohibitions largely copy those in Title VII.<sup>46</sup> The exceptions start in the same vein, with a BFOQ and an exception for seniority, but then veer off to issues specific to age, such as retirement and pension benefits.<sup>47</sup> The Act also is notable for the provisions it does not carry over from Title VII, like those on mixed motives and disparate impact.<sup>48</sup> It does contain a defense for employment decisions based on "reasonable factors other than age,"<sup>49</sup> but this defense has proved to be of limited significance because of the prevalence of "legitimate, nondiscriminatory reason[s]" as a defense to all forms of discrimination.<sup>50</sup>

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42. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012).

43. Title VII § 703(h), (k), (m), 42 U.S.C. § 2000e-2(h), (k), (m) (2012).

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, 1501–02 (2003).

45. Title VII § 715, Pub. L. No. 88-352, 78 Stat. 265–66 (1964).

46. ADEA § 4(a)–(c), 29 U.S.C. § 623(a)–(c) (2012).

47. ADEA § 4(f), (i), 29 U.S.C. § 623(f), (i) (2012).

48. Title VII § 703(k), (m), 42 U.S.C. § 2000e-2(k), (m) (2012).

49. ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1) (2012).

50. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This particular provision in the ADEA applies mainly to shift the burden of proof onto the defendant in disparate impact cases to establish a "reasonable factor[] other than age." *Meacham v. Knolls Atomic Power Laboratory, Inc.*, 554 U.S. 84, 91–95 (2008).

The differences between the ADEA and Title VII take on added significance because of the expansion of the ADEA's coverage. The Act originally covered only individuals from age 40 to age 64, but the ceiling on coverage first was raised to age 69, and then abandoned altogether for most occupations.<sup>51</sup> The implications of this change are discussed in detail in the last part of this Article.<sup>52</sup> Of immediate significance is the limitation at the opposite end of the age spectrum. The floor on coverage has been invoked to reject claims of reverse discrimination under the Act—discrimination in favor of older workers against younger workers.<sup>53</sup> Even if both workers are covered by the Act, it protects only the older worker from discrimination on the basis of age.<sup>54</sup>

Translated into constitutional principles, no heightened scrutiny attaches to affirmative action in favor of older workers.<sup>55</sup> Indeed, a little thought reveals that any such heightened judicial review would call into question established programs like Social Security and Medicare. In fact, the Supreme Court has held that classifications on the basis of age, even if they operate against older individuals, receive only rational basis review.<sup>56</sup> This difference in the constitutional background presents a stark contrast with the forms of discrimination prohibited by Title VII, all of which trigger “strict scrutiny” or must have “an exceedingly persuasive justification” if the government engages in them.<sup>57</sup> The difference in constitutional standards illustrates, yet again, just how pervasively disaggregated the concept of discrimination is. It extends beyond technical differences in the wording of statutes to principles of constitutional law.

### C. *The Americans with Disabilities Act*

The ADA picks up where the ADEA leaves off by adding its own set of variations on the themes announced by Title VII. Where the ADEA permits discrimination in favor of older workers, the ADA requires discrimination in favor of disabled workers in the form of

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51. See *infra* notes 165–68 and accompanying text.

52. Rutherglen, *supra* note 5, at 174–75.

53. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586–94 (2004).

54. *Id.* (“[T]he ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young.”).

55. Rutherglen, *supra* note 5, at 174–75.

56. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (per curiam) (not necessary to subject age-based classifications to “strict judicial scrutiny”) (quotation marks omitted).

57. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018) (state’s clear hostility to sincere religious beliefs violates the First Amendment); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2209–10 (2016) (university has “continuing obligation to satisfy the burden of strict scrutiny” for consideration of race and national origin in admissions decisions); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (state classifications on the basis of gender must have “exceedingly persuasive justification”).

the duty of reasonable accommodation.<sup>58</sup> That particular phrase originated in the protection of religious practices under Title VII.<sup>59</sup> It made its way into the ADA by way of regulations under the Rehabilitation Act of 1973,<sup>60</sup> which then led to incorporation of the duty as one among several specific provisions adopted as a “construction” of the duty not to discriminate in the ADA.<sup>61</sup>

The need to crystalize the duty not to discriminate in more specific duties carried the trend towards disaggregation one step further, adding provisions on practices with adverse effects on individuals with a disability, protecting association with such individuals, and preventing contractual relationships that discriminate against such individuals.<sup>62</sup> The main prohibitions in Title VII survive in the general prohibition against discrimination and a provision on segregation.<sup>63</sup> Separate provisions restrict inquiries about disabilities and all of the prohibitions are subject to several defenses: for qualification standards that are “job-related and consistent with business necessity,” for standards that screen out individuals who pose “a direct threat” to the health or safety of others or who pose a risk of transmitting infectious or communicable diseases; and for exclusion based on the use of illegal drugs and the use of alcohol at work.<sup>64</sup> The duty of reasonable accommodation itself is subject to a defense for “undue hardship.”<sup>65</sup>

The proliferating prohibitions and exceptions under the ADA revolve around the distinction between disabilities that do or that do not detract from an individual’s qualifications for the job, with or without reasonable accommodation. Strictly speaking, the inquiry into qualifications goes to coverage since a plaintiff must be “a qualified individual” to be protected from discrimination on the basis of disability.<sup>66</sup> Who is protected by a statute, of course, is deeply intertwined with what they are protected from. In this respect, too, the ADA follows the ADEA in restricting coverage to select individuals, rather than to “any individual,” as under Title VII.<sup>67</sup> Focusing the act in this way brings out the tension between protecting individuals with a disability and allowing employers only to hire individuals qualified

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58. ADA § 102(b), 42 U.S.C. § 12112(b) (2012).

59. Title VII § 701(i), 42 U.S.C. § 2000e(i) (2012).

60. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 700–96); 34 C.F.R. § 104.12 (2017).

61. ADA § 102(a), (b), 42 U.S.C. § 12112(a), (b) (2012).

62. ADA § 102(b), 42 U.S.C. § 12112(b) (2012).

63. *Id.*

64. ADA §§ 102(b)(6), (7), (d), 103(a), (b), 104, 42 U.S.C. §§ 12112(b)(6), (7), (d), 12113(a), (b), 12114 (2012).

65. ADA § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (2012).

66. ADA § 102(a), 42 U.S.C. § 12112(a) (2012).

67. Title VII § 703(a)–(d), 42 U.S.C. § 2000e-2(a)–(d) (2012).

for the job. No such inherent tension arises under Title VII because race, national origin, color, sex, and religion almost never bear any relation at all to the ability to perform a job. The aspiration of the ADA might be, over the long term, to make disabilities similarly irrelevant to job performance, but it must be tempered by the immediate need for employers to make decisions based on existing qualifications and available accommodations.

### III. TITLE VII COVERAGE AND ITS CONSEQUENCES

Apart from the exceptions just noted in the ADEA and the ADA, the protection of laws against employment discrimination purports to be universal. This principle dates back to the Civil Rights Act of 1866 which protected “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed.”<sup>68</sup> The exclusion of Native Americans who remained subject to tribal jurisdiction has since been dropped, but it has influenced coverage on the defendant side, as we shall soon see. On the plaintiff side, coverage extended to everyone as a necessary corollary to the requirement of equal treatment. As a sponsor of the 1866 Act stated, “this bill applies to white men as well as black men.”<sup>69</sup> If it did not, the Act itself would have violated the requirement of equal treatment regardless of race. Yet universal coverage still admits of variation in how different groups are covered, inviting claims of special treatment and charges of identity politics. Nowhere is this more evident than with respect to affirmative action, which has posed problems of interpretation for decades under the Constitution and Title VII.

#### *A. The Prolonged Stalemate over Affirmative Action*

As noted earlier, the only clear and explicit provision in Title VII permitting affirmative action concerns employment of Native Americans on or near a reservation.<sup>70</sup> It is augmented by the exclusion of Native American tribes entirely from coverage under the statutory definition of “employer.”<sup>71</sup> To many this may appear to be a small point in a statute that otherwise comprehensively prohibits racial discrimination in employment. Yet that does not detract from its significance. If this exception to the prohibition against racial discrimination can be justified, why not others?

The Supreme Court addressed exactly this question in *Morton v. Mancari*, which extended the Native American exceptions in Title

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68. Civil Rights Act of 1866, § 1, 14 Stat. 27.

69. Cong. Globe, 39th Cong. 1st Sess. 599 (1866) (remarks of Sen. Trumbull).

70. Title VII § 703(i), 42 U.S.C. § 2000e-2(i) (2012).

71. Title VII § 701(b), 42 U.S.C. § 2000e(b) (2012).

VII to employment by the federal government.<sup>72</sup> Non-Indian employees of the Bureau of Indian Affairs alleged reverse discrimination in the Bureau's preference for Native Americans.<sup>73</sup> The Court held that the preference reflected longstanding federal policy, and while the preference was not within the literal terms of the exceptions in Title VII, those exceptions reflected continuation of the policy when Title VII was amended to apply to the federal government.<sup>74</sup> Moreover, the Bureau's policy conformed to the Constitution because it fostered the important interest in Indian self-government.<sup>75</sup>

Despite a disclaimer in the opinion, none of the rationales offered in *Morton v. Mancari* escapes from consideration of race. The federal policy favors members of federally recognized tribes, defined as having "one-fourth or more [degree of] Indian blood."<sup>76</sup> The constitutional principle of favoring Indian self-government also applies to Native Americans alone, as the Supreme Court made clear in invalidating a preference in favor of native Hawaiians.<sup>77</sup> From the specific policy of the Bureau of Indian Affairs to general propositions of constitutional law, the presence of race as a factor was decisive. To write off the decision, and the accompanying provisions in Title VII, as isolated exceptions simply begs the question. Each racial and ethnic group can argue for special treatment based on its legacy.

Surprisingly, the implications of special treatment reach deep into the prevalent theories of liability under Title VII. Thus the most widely cited method of proving individual claims of intentional discrimination, under *McDonnell Douglas v. Green*, begins by requiring proof that the plaintiff "belongs to a racial minority."<sup>78</sup> This requirement does not exclude claims of reverse discrimination by white employees,<sup>79</sup> but it does make it easier for minority plaintiffs to establish a prima facie case.<sup>80</sup> In most circuits, majority employees cannot take advantage of the structure of proof in *McDonnell Douglas*.<sup>81</sup> Likewise, majority employees cannot take advantage of claims of

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72. *Morton v. Mancari*, 417 U.S. 535, 545–51 (1974).

73. *Id.* at 539.

74. *Id.* at 547–48.

75. *Id.* at 553–54.

76. *Id.* at 553 n.24.

77. *Rice v. Cayetano*, 528 U.S. 495, 518–22 (2000).

78. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

79. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–85 (1976).

80. *See Martinez v. Cracker Barrel Old Country Store, Inc.*, 703 F.3d 911, 915 (6th Cir. 2013) (reverse discrimination plaintiff must typically "demonstrate background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority"). *But see Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011) (no need for reverse discrimination plaintiff to prove such "background circumstances").

81. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 523 (2003).

disparate impact, at least to the same extent as minority employees.<sup>82</sup> Otherwise, employers would be put in the untenable position of being exposed to liability no matter what employment practices they adopted. As Justice Stevens pointed out long ago, “[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.”<sup>83</sup>

The constitutional law of affirmative action has not moved much beyond the basic terms of the compromise decision in *Regents of the University of California v. Bakke*: explicit goals for minority enrollment violate the Constitution, while consideration of race among a variety of factors intended to promote diversity does not.<sup>84</sup> Critics of affirmative action have argued for its abolition, some in opinions of the Supreme Court.<sup>85</sup> The Court has nevertheless not yet declared that the time for affirmative action is up. The seesawing decisions in *Fisher v. University of Texas*<sup>86</sup> have, if anything, made the current state of the law murkier still.

Decisions under Title VII have exhibited more movement away from approval of affirmative action. In a sense, they had nowhere else to go, since they started from the very permissive standards for affirmative action adopted in *Weber v. United Steelworkers*.<sup>87</sup> That decision has not been disapproved by the Supreme Court, but neither has it been cited in recent decisions. The most recent, *Ricci v. DeStefano*, devises an elaborate structure of shifting burdens of proof that has little, if any, basis in the statute itself.<sup>88</sup> The Court created an exception to the statute’s prohibition on intentional discrimination in order to allow employers to engage in race-conscious actions in order to limit their liability for practices with discriminatory effects.<sup>89</sup>

82. *Id.* at 525–26; Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1526–27 (2004).

83. *City of Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 710 n.20 (1978) (emphasis in original).

84. 438 U.S. 265, 315–23 (1978) (opinion of Powell, J.).

85. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

86. 133 S. Ct. 2411, 2415 (2013) (reversing summary judgment for the university and remanding for reconsideration); 136 S. Ct. 2198, 2210 (2016) (affirming summary judgment for the university).

87. 443 U.S. 193, 208–09 (1979) (affirmative action by employers must be “designed to break down old patterns of racial segregation and hierarchy” and “not unnecessarily trammel the interests of white employees”).

88. 557 U.S. 557, 585 (2009) (race-conscious action by employer allowed to counter “a strong basis in evidence of an impermissible disparate impact”).

89. *Id.* at 630–31.

That exception is drawn far more narrowly than the standards for permissible affirmative action in *Weber*.

Critics of affirmative action would do away with all these complications by the simple doctrinal fix of abandoning affirmative action altogether. That proposal has appealing simplicity, but it would run into problems with the exceptions in Title VII for affirmative action on behalf of Native Americans. These might be dismissed as manageable problems in practice since Native Americans are a small percentage of the population. Yet that does not hold true in the southwest, where Native Americans are a significant minority, and in any event, the exceptional treatment of Native Americans under Title VII serves as a warning of larger problems. In individual claims of disparate treatment, membership in a minority group figures in proof of discrimination by circumstantial evidence and class claims of disparate impact do not work at all in favor of members of the majority, however that is defined. These problems, too, could be solved, most plausibly by expanding the availability of these theories of liability to all plaintiffs, whether minority or majority. That solution would, however, create problems of its own, like those under the ADEA of maintaining the distinction between federal claims of age discrimination and state claims of wrongful discharge. Would a plaintiff get to the jury just by showing good performance on the job and dismissal for reasons that the employer could not adequately defend? If the plaintiff were required to show worse treatment than someone from another racial group, that would either be too much or too little—too much in presuming that some racial group receives better treatment all the time or too little in inviting the plaintiff just to find one employee from a different group who received better treatment.

The difficulty in resolving all these issues arises from the disjunction between ostensibly universal coverage and racially sensitive theories of recovery. Seen in this light, differential standards for permissible affirmative action just constitute the most obvious manifestation of this tension. As long as the tension persists, the deadlock over affirmative action will persist. This observation offers one explanation for the uneasy stasis in the law of affirmative action—a grudging and uncomfortable acknowledgment that some affirmative action is necessary without any clear resolution of its permissible scope. A justification, rather than a description, of this compromise is harder to come by, as volumes of scholarship on affirmative action attest.<sup>90</sup>

The justification offered here is minimalist. The stalemate over affirmative action is exactly what should be expected as universal

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90. For a review of the literature, see Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1011 (2016).

coverage and equal treatment encounter the pragmatic needs of compliance and enforcement. In *Ricci v. DeStefano*, the Supreme Court accepted some version of this argument, as do the many decisions recognizing the need to inject some reference to racial groups in the proof of claims of discrimination.<sup>91</sup> Having accepted a degree of race consciousness in these situations, courts could accept affirmative action so long as it does not impose an undue burden on groups not favored by the program in question. Of course, they don't have to, and as currently constituted, the Supreme Court might not continue to do so. It certainly would not accept programs that impose concentrated burdens on individuals from other groups. The question whether to allow affirmative action subject to these constraints is open. The concept of discrimination does not, by itself, close it off.

### *B. Sexual Harassment*

The same pattern of interaction between coverage and substantive prohibitions also emerges in the cases on sexual harassment. Special standards apply to employer liability for sexual harassment under Title VII, for three separate reasons. First, under prevailing law in the circuits, the harassing employee is not an employer covered by Title VII.<sup>92</sup> Hence the primary wrongdoer can only be held liable under state law. Second, Title VII has had remarkable success in expanding the employment of women in the work force.<sup>93</sup> Whether or not it is solely or mainly responsible for the steady increase in women's employment since its enactment, it has coincided with this striking trend. The expanded employment of women has effectively expanded the coverage of the prohibition against sexual harassment. And third, a recurring practical problem in enforcement of this prohibition has been the reluctance of women to come forward to complain about sexual harassment. The #MeToo movement makes it clear that even very prominent women have been reluctant to complain if they fear retaliation. The special standards for liability for sexual harassment try to address this problem.

The failure of Title VII to cover harassing employees as defendants represents a serious omission, one that the lower federal courts have justified because of the numerical limit on coverage of employers.<sup>94</sup> Private employers must have at least fifteen employees to be covered under the statute.<sup>95</sup> This reasoning has some force, but

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91. *Id.* at 1068.

92. *Id.* at 1037–40.

93. *Id.* at 1049–50.

94. *Sheridan v. E.I. DuPont de Nemours*, 100 F.3d 1061, 1077–78 (3d Cir. 1996); *see Lenhardt v. Basic Inst. of Tech.*, 55 F.3d 377, 381 (8th Cir. 1995) (citing cases).

95. Title VII § 701(b), 42 U.S.C. § 2000e(b) (2012).

it neglects the coverage of “any agent of such a person” which appears immediately after the numerical threshold on coverage.<sup>96</sup> The practical significance of the exclusion of employees might be limited by the availability of claims against them under state law, as a matter of tort or of state fair employment practice laws. Nevertheless, it has needlessly complicated the standards for liability for sexual harassment. The Supreme Court has analyzed employer liability under the Restatement (Second) of Agency.<sup>97</sup> If the reference to “any agent” in the statute itself does not trigger individual liability,<sup>98</sup> how does a restatement on the same subject affect the scope of employer liability? In any event, the Supreme Court reasoned from the Restatement to the conclusion that employers could be held strictly liable for harassment by their supervisors, particularly if the plaintiff took reasonable steps to complain of the harassment.<sup>99</sup>

The practical consequences of Title VII have worked an effective expansion of coverage on the plaintiff side. In 1960, the labor force participation rate of women age 25 to 64 ranged from 30% to 48% depending upon age.<sup>100</sup> In 1990, the corresponding figures were 36% to 78%.<sup>101</sup> While the women with the lowest participation rate, age 60 to 64, did not change dramatically, the employment of younger women did.<sup>102</sup> Exactly how much of this increase is attributable to laws like Title VII remains a complicated question. Perhaps causation worked in the opposite direction: increased employment of women led to increased emphasis on laws against sex discrimination. That fundamental uncertainty in the economic data does not detract, however, from the increasing importance attached to claims of sexual harassment. The more women in the workplace, the more occasions for questionable encounters that support claims of sexual harassment and the greater likelihood that those claims will be pursued. The bad news seems to be that increased employment of women might increase the incidence of sexual harassment, but the good news might be that claims of sexual harassment acquire greater visibility and receive greater attention.

The rise of the #MeToo movement supports both inferences. It also raises significant questions about the adequacy of protection from retaliation, which constitutes the most plausible reason why

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96. *Id.*

97. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 755–65 (1998).

98. *Id.* at 772–73.

99. *Id.*

100. Historical Statistics of the United States, Vol. 2, Part B. Work and Welfare, Table Ba 404-16 (Millennial Edition, 2006).

101. *Id.*

102. *Id.*

victims of alleged harassment do not pursue their complaints. The weak link in enforcement appears right at the beginning of the chain of decisions that leads to litigation and liability. The apparatus for imposing strict liability upon employers never comes into play if individuals fail to complain of harassment and expose employers to a genuine risk that damages will be awarded against them.

The Supreme Court, however, has recently increased the threshold of liability on claims of retaliation, requiring proof by the plaintiff that her protected activity constituted a “but for” cause of an adverse employment action.<sup>103</sup> Liability for sexual harassment, as we have seen, is governed by a distinct set of rules, designed in part to encourage employers to facilitate complaints over sexual harassment. Retaliation, however, for actually complaining about sexual harassment is governed by the usual rules for proving retaliation. These rules place a heavier burden upon the plaintiff than the rules for proving discrimination on the basis of race, national origin, color, sex, or religion. For these forms of discrimination, the plaintiff need only prove that the characteristic in question was “a motivating factor” in an adverse employment decision.<sup>104</sup>

The Supreme Court reached this conclusion for much the same reason that it did for age discrimination. The provisions in Title VII on retaliation, like those in the ADEA, were not amended to require proof only of “a motivating factor.”<sup>105</sup> The default rule in interpreting “because” of opposition or participation is “but for” causation.<sup>106</sup> This reasoning, as noted earlier with respect to the ADEA, has something to be said for it in terms of the history of amendment of Title VII. The provisions in Title VII on discrimination on the basis of race, color, national origin, sex and religion were amended in the Civil Rights Act of 1991, but not those on retaliation or in the ADEA.<sup>107</sup> These considerations of text and legislative history were reinforced by concern over distinguishing claims of retaliation, like those for age discrimination, from claims for wrongful discharge. Taking steps to protest discrimination under Title VII should not generate the equivalent of civil service protection.

Yet this reasoning tacitly assumes that overenforcement poses a greater problem than underenforcement. It devalues claims of sexual

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103. *See* *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 351–60 (2013).

104. Title VII § 703(m), 42 U.S.C. § 2000e-2(m) (2012).

105. *Compare* Title VII § 703(m), 42 U.S.C. § 2000e-2(m) (2012) (“race, color, religion, sex, or national origin was a motivating factor”), *with* Title VII § 704(a), 42 U.S.C. § 2000e-3(a) (2012) (retaliation “because” plaintiff engaged in protected activity).

106. Title VII § 704, 42 U.S.C. § 2000e-3 (2012).

107. Civil Rights Act of 1991, Pub. L. No. 102-66, § 107(a), 105 Stat. 1071, 1079 (1991), codified at Title VII § 703(m), 42 U.S.C. § 2000e-2(m) (2012).

harassment and retaliation as exaggerated assertions of victimhood and identity politics. Yet the lesson of the #MeToo movement is just the opposite. Commitment to the ideal of sexual equality without protection of victims who complain about sexual harassment remains just that—an unrealized abstraction. If prominent women admitted that they feared economic sanctions for complaining, women with less visibility and fewer resources at their command would be intimidated far more.<sup>108</sup> When the harassment occurs within the employment relationship, the protection from retaliation appears to be highly inadequate. The easiest way to remedy this deficiency would be to reconsider the plaintiff's burden of proving retaliation. A Court that handed down the original decision on retaliation only few years ago, however, might well be reluctant to take this step.

A feasible alternative would be to consider the interaction of retaliation claims with claims for harassment, involving both sexual harassment and harassment on other grounds as well. The special standards for liability apply to all such forms of harassment and they make employers strictly liable for most forms of harassment by supervisors, subject to a limited defense. That defense places the burden of proof on the employer to show that it established reasonable precautions against harassment and that the plaintiff failed to take advantage of them.<sup>109</sup> The burden of proof on these issues rests with the employer, just as it does in proving a defense to claims of discrimination subject to the “motivating factor” analysis.<sup>110</sup> That analysis applies also to the underlying harassment claim. A plaintiff alleging sexual harassment need only show that sex was a motivating factor in the harassment.<sup>111</sup>

Requiring proof of retaliation as a “but for” cause does not fit well with the apparatus that governs the underlying claim of harassment. Following ordinary doctrinal rules, the Supreme Court requires each claim to be analyzed according to its own independent requirements.<sup>112</sup> But it is hard to see what sense a jury would make of instructions that sought to distinguish causation and liability on an harassment claim and the same issues on a retaliation claim. A way out of this doctrinal dead end would be to merge the standard of causation in proving retaliation with the standard on the underlying claim of harassment, or for that matter, any other kind of intentional discrimination.

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108. Nicole B. Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 50 (2018).

109. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 755–65 (1998).

110. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

111. *Id.* at 79–80.

112. See *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 461 (1975) (remedies for employment discrimination “are separate, distinct, and independent”).

Freestanding claims of retaliation, without any remaining claim of intentional discrimination, could still be treated differently, which describes the posture of the case before the Supreme Court when it laid down the requirement of proving “but for” causation.<sup>113</sup>

This solution to underenforcement of sexual harassment claims admittedly creates a mismatch with the problem it addresses. It might be regarded as too broad because it would extend to all cases involving multiple claims of discrimination. It might also be regarded as too narrow because it does not supply airtight reassurance to plaintiffs who complain about sexual harassment. Perhaps better alternatives could be devised. Changing the requirements for proof of retaliation is only a start, but it takes seriously two problems in the administration and enforcement of the law: the unwillingness of victims to complain and the opaque standards of causation in mixed cases of discrimination and retaliation. These problems amount to more than exaggerated claims of victimhood; they are structural defects in making the prohibition against sexual harassment effective.

### *C. Sexual Orientation and Gender Identity*

Charges of identity politics might also be leveled at the arguments to extend Title VII to prohibit discrimination on the basis of sexual orientation and gender identity.<sup>114</sup> Courts have begun to reach this conclusion in decisions that would undoubtedly have surprised the legislators who voted for Title VII,<sup>115</sup> and the Supreme Court has granted certiorari in three cases raising these issues.<sup>116</sup> Some might conclude that the gap between what Congress thought it was doing and what courts have interpreted it to have done is simply too great to be bridged.<sup>117</sup> Logic might see anti-gay discrimination along the same spectrum as sexual stereotyping or same-sex harassment, both of which constitute recognized forms of sex discrimination.<sup>118</sup> Attention to the contemporaneous meaning of “sex”

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113. *Nassar*, 570 U.S. at 345–46.

114. *LILLA*, *supra* note 7, at 37.

115. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571–81 (6th Cir. 2018) (gender identity); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 343–52 (7th Cir. 2017) (en banc) (sexual orientation).

116. *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019) (whether Title VII prohibits discrimination based on sexual orientation); *Bostock v. Clayton County*, 139 S. Ct. 2049 (2019) (same); *B.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (whether Title VII prohibits discrimination against transgender people).

117. *Hively*, 853 F.3d at 362–65 (Sykes, J., dissenting).

118. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79–80 (1998) (same-sex harassment prohibited by Title VII); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–52 (1989) (opinion of Brennan, J.) (sexual stereotyping prohibited by Title VII).

in 1964 would lead to a different conclusion, as do the fraught debates and the narrow votes that led to passage of the Civil Rights Act of 1964.<sup>119</sup> The argument that the prohibition against sex discrimination covered sexual orientation and gender identity would more likely have been made by opponents of the legislation who set out to discredit the Act.<sup>120</sup> We do not, as yet, know how the Supreme Court will resolve these arguments.

This section makes a different point: that the practical lessons from enforcing the prohibition against sex discrimination as traditionally understood pose few obstacles to extending the prohibition to sexual orientation and gender identity. Apart from sexual harassment, the prohibition against sex discrimination has received a formal interpretation, preventing employers from considering sex in any way except as allowed by exceptions exemplified by the narrow terms of the BFOQ.<sup>121</sup> That same approach works for most issues raised by an extended interpretation of Title VII. Where it breaks down, if at all, is with respect to religious objections to conforming to an extended prohibition, a topic taken up in the next section of this Article.<sup>122</sup>

A formal approach forbidding reliance on sexual orientation or gender identity, in most employment decisions, has the same advantages of simplicity in compliance and enforcement as existing decisions on sex discrimination under Title VII. Most of the time, employers have no reason to consider these individual characteristics in hiring, firing, and evaluating their employees. Who an employee is sexually attracted to and what gender identity they accept does not bear on the great majority of employment decisions. Where it does, the BFOQ can operate as it usually has—to allow decisions based on sex for a narrow range of positions.<sup>123</sup> For instance, an employer might plausibly claim that someone who has made a gender transition is better qualified than someone who has not, in advising individuals going through this process. This is not to say that such an invocation of the BFOQ automatically should succeed, but it reveals the narrow range of cases in which it might. By analogy, sex-based dress codes have been upheld, but only when they are equally burdensome to members of both sexes.<sup>124</sup>

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119. Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the Civil Rights Act*, 39 J. SOUTHERN HIST. 37, 38 (1983).

120. *See id.* at 44–45. This is the motive, among others, attributed to Representative Smith of Virginia, who introduced the prohibition against sex discrimination in Title VII but then voted against the Civil Rights Act of 1964 as a whole. *Id.*

121. Title VII § 703(e), 42 U.S.C. § 2000e-2(e) (2012).

122. Title VII § 702, 42 U.S.C. § 2000e-1 (2012).

123. *See supra* note 45 and accompanying text.

124. *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1112 (9th Cir. 2006) (en banc).

The same holds true of a nontextual exception to Title VII based on physical privacy, especially in facilities such as restrooms, locker rooms, and dressing rooms. Sex segregation in these facilities does not quite fall under the terms of the BFOQ, which deals only with qualifications for the job. Sex-segregated facilities go more toward conditions of employment. Analogous issues have arisen under Title IX of the Education Amendments of 1972, when transgender students have sought to use the facilities corresponding to their new gender identity.<sup>125</sup> These cases present conflicts between the gender identity of one student and the physical privacy concerns of other students. However this conflict is resolved, it is a familiar one from cases on the degree of physical privacy that employers can compel their employees to observe.

How broadly can employers define physical spaces that are accessible only to members of one sex? Many such restrictions, like those for restrooms, are taken for granted, while others, such as prohibiting doctors of one sex from examining patients of the opposite sex, are problematic. No matter where the courts eventually draw the line between acceptable and unacceptable gender discrimination, they must consider the legitimacy of concerns over privacy of employers, customers, and employees. Drawing the line for gender identity raises new issues, but not ones unknown to the law of sex discrimination.

Proposed legislation to prohibit discrimination on the basis of sexual orientation and gender identity has contained an exception for religious organizations,<sup>126</sup> modeled on one exception in Title VII. That exception allows such organizations to discriminate on the basis of religion.<sup>127</sup> The proposed legislation would have allowed religious organizations to discriminate on the basis of sexual orientation and gender identity.<sup>128</sup> It appears to be an evident compromise with religious groups over a subject they might regard as a contentious addition to the laws against employment discrimination.

A compromise typical of legislation, however, cannot easily be implemented through interpretation, leaving the practical problem of accommodating the legitimate concerns of religious groups with this expanded prohibition. The duty to reasonably accommodate religious practices will not quite work. That duty protects employees in the first instance, not employers. If it were used to modify duties not to discriminate, it would focus almost entirely upon co-employees and their religious beliefs and practices. The next section discusses the inherent limits of this approach.

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125. *See infra* note 164 and accompanying text.

126. H.R. 1397, S. 822, § 6, 112th Cong., 1st Sess. (2012).

127. *Id.*

128. *Id.*

### *D. Religion and Exceptionalism*

Equal and opposite to protection of sexual orientation and gender identity are claims for religious exceptions to these protections. Religion already receives exceptional treatment under several provisions of Title VII.<sup>129</sup> Like sex discrimination, it is subject to the BFOQ for occupations in which it is a legitimate qualification for employment.<sup>130</sup> The same also holds true, for that matter, for national origin under Title VII and for age under the ADEA.<sup>131</sup> In all these instances, however, the BFOQ remains “extremely narrow” and therefore seldom applied.<sup>132</sup> Two other exceptions in Title VII understandably allow religious discrimination by religious organizations, including religious educational institutions.<sup>133</sup> These exceptions have generated little controversy, probably because they are constitutionally compelled by the religion clauses of the First Amendment.<sup>134</sup>

In the opposite direction, the prohibition against religious discrimination extends to religious practices, in addition to religious belief, unless the employer can demonstrate that these practices cannot be reasonably accommodated without undue hardship.<sup>135</sup> This duty of reasonable accommodation, unlike the corresponding duty under the ADA, has proven to be quite limited. All the employer has to show to establish undue hardship is “more than a *de minimis* cost” in accommodating an employee’s religious practices.<sup>136</sup> This narrow construction of the duty of reasonable accommodation reflects constitutional doubts about any statute that favors one religion over another. To do so arguably constitutes an establishment of religion, also in violation of the First Amendment. As a result, the explicit statutory exceptions and extensions for religion in Title VII have not proven to be of great consequence or generated much controversy.

Where religion does receive distinctive treatment is in the non-statutory exception for religious ministers. Religious institutions can discriminate on any ground, not just on the basis of religion, in hiring, firing, and employing ministers. This exception, like the interpretation of the explicit exceptions and extensions in Title VII,

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129. Title VII § 701(j), 42 U.S.C. § 2000e(j) (2012).

130. Title VII § 701(e), 42 U.S.C. § 2000e(e) (2012).

131. Title VII § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1); ADEA § 4(f)(1), 29 U.S.C. § 623 (2012); *W. Air Lines v. Criswell*, 472 U.S. 400, 416–23 (1985) (upholding jury instruction limiting BFOQ for age); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 189 n.19 (1982) (raising the issue whether Japanese citizenship could be a BFOQ for certain positions in American subsidiary of Japanese corporation).

132. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

133. Title VII §§ 702(a), 703(e)(2), 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2) (2012).

134. *See* U.S. CONST. amend. I.

135. Title VII of the Civil Rights Act of 1964, § 701(j) 42 U.S.C. § 2000e(j) (2012).

136. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (emphasis added).

has its foundations in the First Amendment. As a matter of both free exercise and avoiding establishment of a religion, the government cannot interfere in a religious organization's choice of ministers.<sup>137</sup> The Supreme Court adopted this principle in an ADA case, making clear that the exception for employment of ministers cuts across all, otherwise prohibited, forms of discrimination.<sup>138</sup> The principle generates an exception to coverage in the sense that employment practices, with respect to ministers, do not fall within any of the statutes prohibiting employment discrimination. Ministerial positions fall completely outside the coverage of these statutes.

Reasonable accommodation began as an extension of the prohibition against religious discrimination in Title VII.<sup>139</sup> It added protection of religious practices, such as not working on the sabbath, to protection of religious belief, subject to a defense that the employer could not reasonably accommodate the religious practice without undue hardship.<sup>140</sup> That defense received a broad interpretation, making the duty to accommodate correspondingly narrow, so much so that the defense largely eclipsed the duty. In *Trans World Airlines, Inc. v. Hardison*, the Supreme Court required the employer only to prove that the requested accommodation involved "more than a *de minimis* cost."<sup>141</sup> The decision rested mainly on the concern that accommodating the plaintiff at the expense of other employees would favor his religious practices over theirs.<sup>142</sup> In particular, it would supersede their seniority rights to avoid working on the weekend, which is when the plaintiff sought protection for his observance of the sabbath.<sup>143</sup> In the Court's view, this preference for the plaintiff's religious observance raised constitutional issues under the religion clauses of the First Amendment by disfavoring other employees whose religion did not require them to observe the sabbath.<sup>144</sup> Under the Establishment Clause, the government cannot favor one religion over another, and under the Free Exercise Clause, it cannot inhibit the practice of one religion over another.<sup>145</sup>

These particular arguments based on the religion clauses faded in significance as the duty to accommodate was extended to disability,

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137. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181–90 (2012).

138. *Id.* at 186.

139. See Title VII § 701(i), 42 U.S.C. § 2000e(i) (2012).

140. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 64 (1977).

141. *Id.* at 85 (emphasis added).

142. *Id.* at 81.

143. *Id.* at 96.

144. *Id.* at 79–82. The Court later made clear that accommodation could go too far if it required employers to allow religious believers to avoid work on the sabbath without any exception for undue hardship. *Estate of Thornton v. Caldor*, 472 U.S. 703, 708–11 (1985).

145. *Caldor*, 472 U.S. at 710–11.

and then to pregnancy. Yet the concern with preserving equality among employees did not fade. The ADA specifically incorporated the language of Title VII, although with the alteration that the burden is upon the employee to show that the accommodation is reasonable, while the employer only needs to establish that the accommodation causes undue hardship.<sup>146</sup> The issues of reasonable accommodation and undue hardship overlap, but the Supreme Court separated their common components in a case, on its facts, much like *Hardison*. In *U.S. Airways, Inc. v. Barnett*, the Court held that the ADA did not, ordinarily, require an employer to assign a disabled employee to an open position to which other employees were entitled under an established seniority system.<sup>147</sup> The underlying reason, again, was to avoid unequal treatment of other employees.<sup>148</sup> So, too, in a recent case extending the duty to accommodate to pregnant workers, the Supreme Court emphasized that the fundamental inquiry was whether other employees were given an accommodation although they were “similar in their ability or inability to work.”<sup>149</sup> Accommodation was required only when the failure to accommodate amounted to discrimination against pregnant workers.<sup>150</sup>

Stepping back from the particulars of these decisions, the basic principle is clear: as more practices and more plaintiffs become eligible for accommodation, granting an accommodation poses a greater threat to the rights of other employees. As the duty to accommodate expands in coverage, it diminishes in force as it becomes subject to qualifications and exceptions. For affirmative duties, like the duty to accommodate, the negative correlation between coverage and content takes on greater significance. These duties require the employer to go out of its way for some employees but not others, enhancing the latter’s argument that they are denied equal treatment.

As applied to sexual orientation and gender identity, the duty to accommodate leaves little room for religious objections to minority sex employees. Take, for instance, the recent constitutional decision in *Masterpiece Cake Shop v. Colorado Civil Rights Commission*.<sup>151</sup> That case involved the refusal of the employer, not an employee, to provide a wedding cake for a same-sex marriage.<sup>152</sup> The cake shop refused to sell the cake to a same-sex couple, allegedly in violation

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146. ADA § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (2012).

147. 535 U.S. 391, 402–06 (2002).

148. *Id.* at 403–05.

149. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1348–55 (2015) (quoting Title VII § 701(k), 42 U.S.C. § 2000e(k) (2012)).

150. *Id.* at 1347.

151. 138 S. Ct. 1719 (2018).

152. *Id.* at 1735.

of a state law that required all organizations that serve the general public also to serve gays.<sup>153</sup> The Supreme Court held that the state law itself had been discriminatorily applied against expression of religious views.<sup>154</sup> This narrow ground for the decision greatly decreases its relevance to employment discrimination cases. First, the cake shop in question fell below the numerical limits on coverage of employers under Title VII, which requires regular employment of at least fifteen employees.<sup>155</sup> Small employers are left free of regulation by the statute. Second, assuming the cake shop was covered, it raises questions about prohibiting discrimination on the basis of sexual orientation only if the prohibition is itself enforced in a discriminatory fashion. The duty to accommodate intersects only with discriminatory enforcement, not with the prohibition itself.

Employers themselves are not entitled to accommodations under Title VII. Religious organizations, as noted in the previous section, do get the benefit of a ministerial exception which allows them complete freedom in choosing who will speak for their religion.<sup>156</sup> That categorical exception to coverage has no counterpart, however, in a duty to accommodate employers, as opposed to employees, based on religion. Moreover, if the employer relies indirectly on its duty to accommodate the religious practices of objecting employees, the accommodation must involve no “more than *de minimis* cost.”<sup>157</sup> Allowing discrimination against sexual minorities, in violation of otherwise applicable law, would not qualify as a *de minimis* cost. The Supreme Court interpreted the “undue burden” exception broadly in order to prevent benefits for some employees from coming at the expense of other employees.<sup>158</sup> Recognizing an exception to the duty not to discriminate based on a duty to accommodate would result in precisely such a zero-sum redistribution of benefits to one group of employees at the expense of another. Such reasoning has never generated an exception to prohibitions against discrimination on grounds other than sexual orientation.

Some might object at this point that the inadequacy of accommodation to inject flexibility into the duty not to discriminate against sexual minorities demonstrates why the latter duty should be enacted by legislation rather than recognized by interpretation. Even the proposed federal legislation that contained such an exception,

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153. *Id.* at 1728.

154. *Id.* at 1729–32.

155. § 701(b), 42 U.S.C. § 2000e(b) (2012).

156. H.R. 1397, S. 822, § 6, 112th Cong., 1st Sess. (2012).

157. Naomi C. Earp, *EEOC Compliance Manual* (2008), <https://www.eeoc.gov/policy/docs/religion.pdf>. See H.R. 1431, 110th Cong., 1st Sess. (2007).

158. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018).

however, limited it to religious organizations.<sup>159</sup> Reasoning from the duty to accommodate contains no such limitation. It carries flexibility to the extreme at the risk of nullification. It would make far more sense to amplify the scope of the BFOQ, and the related nonstatutory exception for physical privacy, to take account of circumstances, not necessarily based on religious belief or practices, in which adjustment is warranted. The outcome of the ongoing debate over bathroom and locker room privacy with respect to transgender students under Title IX might provide the degree of nuance to accommodate the interests of all employees with concerns about these issues under Title VII.<sup>160</sup> The accommodation in that manner would be a two-way street that recognizes interests in privacy all around, both of transitioning employees and their co-workers. The same would be true of a BFOQ applied to sexual orientation.

#### IV. AGE, DISABILITY, AND COMMON COVERAGE

##### *A. Paradoxes of Coverage Under the ADEA*

The ADEA might be taken as an exemplar of special interest legislation and identity politics. It only protects individuals who are at least 40 years old and only from discrimination because they are too old, not because they are too young.<sup>161</sup> Based on these limitations, the ADEA could be taken as a paradigm of a statute that identifies a “protected class.” As noted earlier, unlike Title VII, it does not protect “any individual.”<sup>162</sup> Yet this nominally limited coverage is effectively universal, in a way that surprisingly expands the constituency of those who benefit from employment discrimination law. The proverbial lower-class white male who is disaffected by civil rights law turns out to be the beneficiary of the ADEA as soon as he turns 40. As the Supreme Court said in denying strict scrutiny to age-based classifications by government, “even old age does not define a ‘discrete and insular’ group . . . . Instead, it marks a stage that each of us will reach if we live out our normal span.”<sup>163</sup>

The protection that the ADEA affords to everyone in this sense became even stronger as its coverage expanded unobtrusively but decisively to first raise, and then eliminate, the ceiling on the age of

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159. See note 131 *supra* and accompanying text.

160. See *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (order requiring bathroom access to transgender student vacated and remanded).

161. ADEA § 12, 29 U.S.C. § 631 (2012).

162. ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1) (2012).

163. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313–14 (1976) (*per curiam*).

covered plaintiffs. As noted earlier, when it was originally enacted in 1967, the Act only covered plaintiffs from age 40 to age 64.<sup>164</sup> An amendment in 1978<sup>165</sup> raised the ceiling to age 69 and another amendment in 1986<sup>166</sup> eliminated the ceiling altogether. An exception still applies the age 65 ceiling to employees in executive or policymaking positions in certain circumstances and another exception for firefighters and law enforcement officers remains now only in very limited form.<sup>167</sup> An exception for university professors was entirely repealed.<sup>168</sup>

The net effect of the expansion in coverage was effectively to ban mandatory retirement, as Congress made clear in successive amendments to the Act that superseded decisions of the Supreme Court preserving the practice in some form.<sup>169</sup> The Act, instead, permits voluntary retirement plans, which can take account of age, as can retirement plans and other fringe benefits made available to employees.<sup>170</sup> The latter provisions might seem to be unexceptional, since the cost of such benefits correlate with age, but they stand in marked contrast to the prohibition against sex discrimination in Title VII, which prohibits any consideration of sex in fringe benefit plans, regardless of its correlation with cost.<sup>171</sup>

The prohibition upon mandatory retirement in the ADEA subjects all decisions to discharge employees age 40 or older to re-examination for age discrimination. Since employers almost always know, by records or appearances, that an employee has reached age 40, the question whether they took the employee's age into account in making a discharge decision becomes an issue to be determined on all the facts of each case. Dispelling the inference of age discrimination usually turns on how well the employee has performed, and the relative qualifications of any individual hired as a replacement. That line of reasoning then causes age discrimination cases to resemble cases of wrongful discharge, which explicitly consider the employer's evaluation of the employee's performance and qualifications.<sup>172</sup> Once the

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164. ADEA § 12, Pub. L. No. 90-202, 81 Stat. 607 (1967).

165. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978).

166. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2, 100 Stat. 3342 (1986).

167. ADEA § 4(j), 29 U.S.C. § 623(j) (2012).

168. ADEA § 4(m), 29 U.S.C. § 623(m) (2012).

169. For an account of this development, see Rutherglen, *supra* note 5, at 174–75.

170. ADEA § 4(f), (i), 29 U.S.C. § 623(f), (i) (2012).

171. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 n.26 (1983); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716–17 (1978).

172. For analysis of the different terms and effects of laws against discrimination and against wrongful discharge, see Julie C. Suk, *Discrimination at Will: Job Security Protection and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 77–84 (2007).

ceiling on coverage of the ADEA was lifted, it became a likely vehicle for creating the effective equivalent in federal law of state wrongful discharge law.

The Supreme Court defused this risk in an important decision increasing the plaintiff's burden of proof in ADEA cases, just as it did later in retaliation cases under Title VII, as compared to the plaintiff's burden in other Title VII cases.<sup>173</sup> Amendments to Title VII allowed a plaintiff to prove intentional discrimination by establishing that race, national origin, color, sex or religion was "a motivating factor" in an employment decision.<sup>174</sup> This showing was then subject to a defense, applicable to compensatory remedies, if the defendant carried the burden of proving that it would have made the same decision anyway.<sup>175</sup> Those amendments did not extend to the ADEA, which preserved language drawn from the original version of Title VII.<sup>176</sup> The Supreme Court concluded from the absence of amendments that the ADEA followed the ordinary principle of tort litigation requiring proof of "but for" causation.<sup>177</sup> The plaintiff in an ADEA case must prove that age was a necessary factor in the disputed employment decision, in the sense that the defendant would not have reached the same decision without considering age.<sup>178</sup>

The Court's reasoning based on the history of amendments to Title VII, but not the ADEA, has some force. Exactly the difference between a "motivating factor" and a "but for" cause remains somewhat obscure, as does its compelling force as a general principle of tort law. How does causation, which usually applies to physical processes, apply to institutional decisions of employers based on the motivation of one or more supervisors? Leaving these considerations to one side, however, a further reason for limiting liability under the ADEA has to do with keeping it distinct from the law of wrongful discharge. Although not raised by the Court, this concern permeates employment discrimination law, which focuses on a restricted inquiry into an employer's reasons for a disputed decision. This decision can be made for no reason or any reason, so long as it is not a discriminatory reason. Wrongful discharge claims, instead, necessitate an inquiry into how good the employer's reasons are overall.<sup>179</sup> If the specific inquiry into age discrimination merges into this general

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173. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 177–78 (2009); see notes 104–08 *supra* and accompanying text.

174. Title VII § 703(m), 42 U.S.C. § 2000e-2(m) (2012).

175. Title VII § 706(g)(2)(B), 42 U.S.C. § 2000e-5(g)(2)(B) (2012).

176. See Title VII.

177. *Gross*, 557 U.S. at 173–79.

178. ADEA § 4, 29 U.S.C. § 623 (2012).

179. See, e.g., *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 370–73 (7th Cir. 1992).

inquiry into performance and qualifications, claims under the ADEA slide imperceptibly into claims for wrongful discharge. Increasing the plaintiff's burden of proof increases the barriers to sliding down this slippery slope. This whole process starts, however, with the breadth of the ADEA's coverage and its accompanying prohibition on mandatory retirement.

*B. Expanded Coverage and Limited Accommodation Under the ADA*

The ADA stands at the epicenter of controversies over coverage and special treatment by way of reasonable accommodation. It therefore appears to be another paradigm of special interest legislation. But appearances are deceiving. Like the ADEA, the ADA has nominally limited coverage, only of individuals who have a disability as defined under the statute, but coverage has expanded so that it has become potentially unlimited. Moreover, the combined effect of both statutes together affords increased protection to workers as they grow older. Such individuals are more likely to confront both age and disability discrimination, as they become more likely to suffer from physical or psychological impairments. They might not otherwise benefit from the laws against employment discrimination, but they increasingly come under the protection of these statutes as they age.

In a series of decisions, the Supreme Court took a strict approach to coverage under the Act, apparently animated by the fear that if coverage extended too broadly, then nearly anyone could make a claim under the Act.<sup>180</sup> In *Sutton v. United Air Lines, Inc.*,<sup>181</sup> the Court required disabilities to be evaluated in their corrected state, so that the plaintiffs' poor eyesight had to be evaluated as it was corrected by eyeglasses. That led directly to the conclusion that their impairment was not, as the Act required, one "that substantially limits one or more major life activities of such individual."<sup>182</sup> In reaching this conclusion, the Court relied on the estimate in the original version of the ADA that "43,000,000 Americans" have a covered disability and they constitute a "discrete and insular minority."<sup>183</sup> To cover vision problems would, the Court implied, push the estimated coverage of the Act much higher, making covered individuals a majority rather than a minority of Americans.<sup>184</sup> The Court reached a similar conclusion in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,<sup>185</sup>

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180. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–83 (1999).

181. *Id.*

182. ADA § 3(2), 42 U.S.C. § 12102(2) (2012).

183. *Sutton*, 527 U.S. at 485.

184. *Id.* at 494–95 (Ginsburg, J., concurring).

185. 534 U.S. 184, 200–01 (2002).

casting doubt on whether working could be a major life activity, so that exclusion from a particular job or range of jobs could trigger coverage under the Act.<sup>186</sup> This argument for coverage, if taken literally, posed a danger of circularity: a plaintiff denied a job because of an impairment could then argue that the denial itself demonstrated that the impairment limited a major life activity.

Further arguments in *Sutton* and *Toyota Motor* also reveal the Court's uneasiness with expanded coverage of the ADA. For instance, the Court also refused to defer to regulations of the Equal Employment Opportunity Commission that broadly interpreted the Act's provisions on coverage.<sup>187</sup> These features of the opinion need not detain us, because both decisions were largely overruled by the ADA Amendments Act of 2008, which disapproved of both decisions by name.<sup>188</sup> Congress rejected the Court's misgivings about extending coverage too broadly.<sup>189</sup> It dramatically lowered the barriers to a plaintiff who established that he or she met the initial threshold of coverage under the Act. Particularly if a plaintiff sought to prove coverage by "being regarded as having" an impairment that substantially limited a major life activity, the plaintiff need only show that the impairment was not "transitory and minor" and that the employer regarded it as substantially impairing a major life activity.<sup>190</sup> Moreover, the EEOC has promulgated, under authority newly conferred by the 2008 Act, a list of broadly defined impairments that support coverage.<sup>191</sup> In a similar vein, Congress also enacted a list of major life activities, which now includes working despite the suggestions to the contrary in *Sutton* and *Toyota Motor*.<sup>192</sup>

All these changes eased the plaintiff's burden of proving the existence of a covered impairment. That is not all there is to coverage, however. The plaintiff must also prove that he or she is a "qualified individual" who can perform the essential functions of the job "with or without reasonable accommodation."<sup>193</sup> This further inquiry into coverage often merges with the merits of the plaintiff's claim. Coverage, in this respect, becomes indistinguishable from the merits. Reasonable accommodation goes to the employer's obligations under the ADA and lack of qualifications constitutes a defense to any claim of employment discrimination.

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186. *Id.*

187. *Id.* at 193–94; *Sutton*, 527 U.S. at 479.

188. Pub. L. No. 110-325 § 2, 122 Stat. 3553 (2008).

189. ADA Amendments Act of 2008, Pub. L. No. 1110-325 (2008).

190. ADA § 3(3), 42 U.S.C. § 12102(3) (2012).

191. ADA § 5(6), 42 U.S.C. § 12205a (2012); 29 C.F.R. § 1630.2(h) (2018).

192. ADA § 3(2), 42 U.S.C. § 12102(2) (2012).

193. ADA §§ 101(8), 102(a), 42 U.S.C. §§ 12111(8), 12112(a) (2012).

Coverage under the ADA also merges with the merits in another way. Individuals who are covered only because they are “regarded as” disabled do not get the benefit of the duty of reasonable accommodation.<sup>194</sup> This result makes intuitive sense because it is difficult to understand how an employer can accommodate a disability that the plaintiff does not actually have. But it also responds to concerns that coverage of the Act extends too broadly. The affirmative obligation of an employer to reasonably accommodate comes into play only if the plaintiff can establish the existence of an actual disability or a record of having one. Despite the expansion of coverage in the 2008 Act, the ADA still limits the substantive obligations it imposes on employers.<sup>195</sup> These limitations derive from coverage in the sense that they mitigate the consequences of its expansion. The net effect runs counter to any simple, unifying theory of what constitutes unlawful discrimination. The actual contours of the law adjust to a wider range of competing tendencies than any such theory can admit, as noted throughout this Article.

#### CONCLUSION

The disjunction between principles of equality and limitations on coverage comes up at every level of discrimination law. At the highest level of abstraction, the implications of equality dictate universal coverage. Yet even when a statute literally commands such coverage, for instance, Title VII in protecting “any individual,”<sup>196</sup> qualifications and exceptions creep in as the statute is interpreted and enforced. At the most concrete level, statutory provisions on coverage inevitably make arbitrary distinctions at the margin. Why does the ADEA cover individuals age 40, but not individuals age 39? In most cases, these provisions can be rationalized in some way, but the rationale, more often than not, ranges over a variety of considerations, some of which bear only the most distant connection to abstract equality. If the law necessarily takes on an arbitrary edge on issues of coverage, then it also necessarily qualifies the goals that it seeks to achieve. Instead of lamenting departures from the logic of the law, it might be better to accept the lessons of experience and embrace pragmatic compromises that would be made anyway.

Inherently contested concepts, like discrimination, do not easily yield widespread acquiescence in their meaning, interpretation, and enforcement. In the current political climate, they are far more likely to generate flashpoints for heated disagreement. They could be taken

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194. ADA § 501(h), 42 U.S.C. § 12201(h) (2012).

195. ADA Amendments Act of 2008, Pub. L. No. 110-325 § 2, 122 Stat. 3553 (2008).

196. Title VII § 703(a)–(d), 42 U.S.C. § 2000e-2(a)–(d) (2012).

as the occasion for identity politics, both on the left by those seeking additional prohibitions against discrimination, and on the right by those left out of the ordinary application of those prohibitions. Disaggregating the concept of discrimination, and the legal prohibitions based on it, will not make these disagreements go away. It does, or so this Article has argued, offer the promise of channeling controversy to narrower issues more likely to generate constructive compromises among competing interests. It does not promise an end to the culture wars, but a *modus vivendi* that accommodates different visions of equality. These differing visions undermine claims for a unified theory of prohibited discrimination and the hope that it can resolve persistent disagreement. Entrenched differences are more likely to yield to pragmatic considerations characteristic of provisions on coverage and enforcement of existing law.