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KIMEL AND GARRETT: ANOTHER EXAMPLE OF THE COURT UNDERVALUING INDIVIDUAL SOVEREIGNTY AND SETTLED EXPECTATIONS

*Julie M. Spanbauer**

The most marked trait of present life, economically speaking, is insecurity Insecurity cuts deeper and extends more widely than bare unemployment. Fear of loss of work, dread of the oncoming of old age, create anxiety and eat into self-respect in a way that impairs personal dignity. Where fears abound, courageous and robust individuality is undermined.¹

I. INTRODUCTION

Several recent United States Supreme Court decisions interpreting the Eleventh Amendment have had a dramatic impact upon the protection afforded state employees under federal employment discrimination law. Two key decisions, issued in 2000 and 2001, drastically restricted the rights of state employees. First, in *Kimel v. Florida Board of Regents*,² the Court ruled that when Congress extended the Age Discrimination in Employment Act (ADEA)³ to states in 1974, it lacked the power to abrogate the states' Eleventh Amendment immunity.⁴ This ruling precludes individual state employees from suing their state employers for damages under the ADEA.⁵ A year later, the Court applied this same analysis in *Board of Trustees v. Garrett*,⁶ to invalidate similar claims under Title I of the Americans with Disabilities Act (ADA).⁷

In its most recent pronouncement on this issue, however, a closely divided Court ruled differently. In *Nevada Department of Human Resources v. Hibbs*,⁸ the Court held that the Eleventh Amendment did not preclude private claims for damages made by state employees against their employers under the Family and

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1. JOHN DEWEY, *INDIVIDUALISM OLD AND NEW* 54-55 (1930). See Charles A. Reich, *The Individual Sector*, 100 *YALE L.J.* 1409, 1410 n.3 (1991) (noting that this personal liberty and sovereignty was not extended to all people prior to Fourteenth Amendment).

2. 528 U.S. 62 (2000).

3. 29 U.S.C. §§ 621-634 (2001).

4. *Kimel*, 528 U.S. at 68, 91-92.

5. *Id.* at 91.

6. 531 U.S. 356 (2001).

7. See *Garrett*, 531 U.S. at 363-64 (invalidating claims under 42 U.S.C. §§ 12101-12213 (2001)).

8. 123 S. Ct. 1972 (2003).

Medical Leave Act of 1993 (FMLA).⁹ The Court found significant the fact that the claim under the FMLA implicated gender as the protected class and thus required an intermediate level of scrutiny under the Fourteenth Amendment as opposed to the minimal scrutiny afforded age and disability-based claims under the Fourteenth Amendment—the rational basis standard.¹⁰ Thus, the Supreme Court has not entirely eviscerated the protection state employees enjoy under federal employment discrimination law.

It should also be noted that *Kimel* and *Garrett* have not entirely foreclosed ADEA and ADA claims by state employees against their employers. First, state employees are not precluded from pursuing ADEA or ADA claims against their employers for prospective injunctive and declaratory relief.¹¹ Second, the Eleventh Amendment does not prohibit those employed by municipalities and local governments from pursuing damage claims under these laws.¹² Third, the Eleventh Amendment does not bar the Equal Employment Opportunity Commission (EEOC) from intervening and pursuing litigation.¹³ Finally, claimants can seek to bring their federal age and disability discrimination claims in state courts, but only if the state has waived sovereign immunity for federal claims in state court.¹⁴

The problem presented by these alternatives is their inherent limitations. First, injunctive relief cannot make a victim of discrimination whole in the way that a remedy can when it includes both injunctive and monetary relief.¹⁵

9. See *Hibbs*, 123 S. Ct. at 1976-78, 1984 (holding that Eleventh Amendment did not preclude damages claims made by state employees against their employers under 29 U.S.C. §§ 2601-2654 (1994)).

10. *Id.* at 1978, 1981.

11. See *Alden v. Maine*, 527 U.S. 706, 756-57 (1999) (explaining some limitations of sovereign immunity). The United States Supreme Court first recognized this right in *Ex parte Young*, 209 U.S. 123, 166 (1908). See Brent W. Landau, Note, *State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws*, 39 HARV. J. ON LEGIS. 169, 197 & nn.226-28 (2002). It should also be noted that the Eleventh Amendment does not prohibit suits for damages against state officials in their individual capacity, which means that the relief must be sought from the official personally and the discriminatory conduct must be that of the individual. See Evelyn Corwin McCafferty, Comment, *Age Discrimination and Sovereign Immunity: Does Kimel Signal the End of the Line for Alabama's State Employees?*, 52 ALA. L. REV. 1057, 1071 (2001). There are obvious limitations with this strategy: the individual may not have financial resources to pay a judgment and may not even qualify as a proper defendant under the discrimination statutes. *Id.*

12. "In *Alden v. Maine*, the Court recently reaffirmed that a core principle of the sovereign immunity doctrine 'is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the state.'" Ivan E. Bodensteiner & Rosalie B. Levinson, *Litigating Age and Disability Claims Against State Government Employers in the New "Federalism" Era*, 22 BERKELEY J. EMP. & LAB. L. 99, 102 (2001) (quoting *Alden*, 527 U.S. at 756).

13. 42 U.S.C. § 2000e-6(e) (2001). The Eleventh Amendment does not bar lawsuits by the EEOC under both the ADEA and the ADA; these actions remain feasible. See Bodensteiner & Levinson, *supra* note 12, at 120 & n.95 (discussing ability and authority of EEOC to bring actions to protect individuals from employment discrimination).

14. See *infra* note 18 for discussion of different waiver arguments.

15. In fact, when damage remedies were made available via the Civil Rights Act of 1991, Congress explicitly declared:

Second, the fact that some governmental employees continue to be protected under these laws does not negate the fact that others are not. Collectively, the states employ more than 4.8 million people who are now without meaningful protection under these laws.¹⁶ It is also unlikely that many claimants' interests will be pursued by the EEOC. This problem is not of constitutional dimension, but is a pragmatic concern—the EEOC has limited resources.¹⁷ As to waiver, it has generally not occurred.¹⁸

Strengthening Title VII's remedial scheme to provide monetary damages for intentional gender and religious discrimination is necessary to conform remedies for intentional gender and religious discrimination to those currently available to victims of intentional race discrimination. Monetary [sic] damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity. Such relief is also necessary to encourage citizens to act as private attorneys general to enforce the statute. Monetary damages simply raise the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to *prevent* intentional discrimination in the workplace before it happens.

Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 336 (2001) (quoting H.R. REP. NO. 102-40(I), at 64-65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602-03).

16. See Landau, *supra* note 11, at 171 (discussing similarities and differences of public employees as compared to private employees, but noting that there are disputes between employer and employee in both sectors).

17. "As Justice Souter pointed out in his dissent in *Alden v. Maine*, it is unrealistic to assume that the federal government, by bringing suit itself, can adequately provide redress for violations of the Constitution and federal law, 'unless Congress plans a significant expansion of the National Government's litigating forces.'" See McCafferty, *supra* note 11, at 1068 (quoting *Alden*, 527 U.S. at 810 (Souter, J., dissenting)) (footnotes omitted) (discussing shortfall of government resources to litigate all of potential ADEA violations and further difficulties in providing damage rewards to state employees). It should be noted that the EEOC has approved a National Enforcement Plan by which it attempts to effectively utilize its admittedly limited resources for pursuing or intervening in litigation, but EEOC litigation statistics for 2002 support Justice Souter's statement. For example, the EEOC either filed suit, intervened, petitioned for preliminary injunctions or temporary restraining orders, or subpoenaed information relevant to discrimination charges in 364 of all employment discrimination litigation. See EEOC Litigation Statistics, FY 1992 through FY 2002, available at <http://www.eeoc.gov/stats/litigation.html> (last visited Feb. 24, 2004) (comparing break-down of employment discrimination lawsuits filed by the EEOC under various statutes from FY 1992 through FY 2002). Of these 364 lawsuits, forty-one represented claims pursued by the EEOC under the ADA and twenty-nine represented claims under the ADEA. *Id.*

18. "It is unlikely that these states would decide in the future to voluntarily consent to suits under the ADEA [and ADA] after claiming that they are immune under the doctrine of sovereign immunity." McCafferty, *supra* note 11, at 1066. In fact, since the Supreme Court decision in *Garrett*, only two states, Minnesota and North Carolina, have waived their sovereign immunity and consented to be sued in federal court pursuant to federal civil rights statutes. A bill, however, was recently introduced in the Illinois House of Representatives that would waive the state's sovereign immunity under the ADA, ADEA, FMLA, and FLSA. The majority Leader of the Illinois House has indicated that the bill will be amended to include a provision permitting suits under Title VII of the 1964 Civil Rights Act. Similar efforts have failed in four other states.

Joseph J. Shelton, Comment, *In the Wake of Garrett: State Law Alternatives to the Americans with Disabilities Act*, 52 CATH. U. L. REV. 837, 847-48 (2003) (footnotes omitted). Constructive waiver arguments appear to be foreclosed by the recent Supreme Court decision in *Florida Prepaid*

Kimel and *Garrett* are momentous decisions not only because they arguably reflect “fundamental changes in American constitutional law,”¹⁹ but also because they involve two important, frequently invoked pieces of federal legislation. The ADA, which was enacted in 1990, has been described as the single “most sweeping piece” of federal employment discrimination legislation since the Civil Rights Act of 1964.²⁰ The ADEA, originally enacted in 1967, has become increasingly important to an aging workforce. In fact, federal age and disability discrimination claims currently rank third and fourth, respectively, in terms of the total number of charges filed with the EEOC.²¹ Together, charges of age and disability discrimination represent 42.5%, nearly one-half, of all charges of discrimination filed with the EEOC.²² Although claims against state employers comprise only a small proportion of these figures, state employees are now treated differently under federal law than are other employees, such as those employed in the private sector, and state employees are now without the protections many had come to expect. Indeed, for some of the younger workers, federal age discrimination laws have been in existence since before they were born.

In Part II, this Article will provide a brief history of discrimination in this country followed by a discussion of the modern history of employment

Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 682-83 (1999). See also *GTE N., Inc. v. Strand*, 209 F.3d 909, 922 n.6 (6th Cir. 2000) (commenting that waiver argument no longer viable); *Chavez v. Arte Publico Press*, 204 F.3d 601, 604 (5th Cir. 2000) (referencing earlier decision of Sixth Circuit holding implied waiver theory no longer viable). But see *Erickson v. Bd. of Governors*, 207 F.3d 945, 952 (7th Cir. 2000) (finding implied waiver of sovereign immunity under ADA because Illinois has “opened its courts to claims based on state law, including its own prohibition of disability discrimination by units of state government”). See generally Stephanie Chapman, Note, *Constitutional Law: MCI Telecommunications Corp. v. Public Service Commission: The Tenth Circuit Rebuffs the Supreme Court Trend Supporting State Immunity*, 55 OKLA. L. REV. 175 (2002) (discussing potential impact of recent decisions finding waiver of immunity due to adherence to Telecommunications Act regulatory scheme). See also McCafferty, *supra* note 11, at 1066-69 for a discussion of other waiver arguments, which are also likely to be unsuccessful.

19. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1045 (2001). These decisions may also reflect a likelihood of more change on the horizon. Some argue that provisions of Title VII and the Pregnancy Discrimination Act may also suffer a similar fate. Shelton, *supra* note 18, at 839 & n.22-23. See also Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 82-83 (2001) (discussing potential effect of *Garrett* on future federal legislation regarding employment discrimination claims by public employees).

20. Tim Edwards, *Constitutional Limits on an Employer's Right to Dictate the Terms of an Addict's Recovery Under the ADA: Some Sobering Concerns*, 44 WAYNE L. REV. 1679, 1696 & n.81 (1999) (quoting 135 Cong. Rec. S10, 714 (daily ed. Sept. 7, 1989) (statement of Sen. Hatch)). See also IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT, at xiii (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (noting significance of ADA and how it provides support to already existing disability law).

21. Martha Neil, *Drawing the Line*, 88 A.B.A. J., May 2002, at 38, 40.

22. A total of 41.9% of ADEA and ADA charges were filed in 2001. *Id.* See EEOC Charge Statistics FY 1992 Through FY 2002, available at <http://www.eeoc.gov/stats/charges.html> (last visited Feb. 24, 2004) (summarizing number and type of individual charge filings by individuals from FY 1992 through FY 2002).

discrimination law, the latter of which will include a discussion of the somewhat parallel development of federal and state law in this arena and an analysis of the expansion of federal law over time.²³ Within this framework, the more recent history of the ADA and the ADEA will also be examined.²⁴ This discussion will be followed in Part III by an analysis of the constitutional challenges made to federal employment discrimination legislation, including the Supreme Court's more recent Eleventh Amendment jurisprudence and its effect in abruptly contracting two key pieces of federal employment discrimination law.²⁵ Next, in Part IV, this article will examine the rights/powers distinction in constitutional analysis, the role of the state as employer, the changing status of work in this country, and Supreme Court decisions in which the settled expectations of individuals have played a part in the Court's decision not to overrule precedent.²⁶ I will argue that the settled expectations of individuals should not

23. See *infra* notes 28-172 and accompanying text for a discussion of the development of discrimination law beginning with state legislation and expanding through federal legislation particularly providing protection in the areas of race, age, and disability. In terms of providing a brief history of discrimination in this country, the discussion will be focused on race discrimination because eradication of it was the immediate and urgent purpose underlying the enactment of Title VII of the Civil Rights Act of 1964. See *infra* note 32 and accompanying text for a discussion of the roots of employment discrimination against African Americans beginning with the importation of Africans as slaves. The purpose underlying Title VII, however, was also to create "a congressionally declared national policy of nondiscrimination, based on race, color, religion, sex, or national origin in matters of promotion and employment." Leah C. Myers, *Disability Harassment: How Far Should the ADA Follow in the Footsteps of Title VII?*, 17 *BYU J. PUB. L.* 265, 267 & n.16 (2003) (quoting U.S. Equal Emp. Opp. Comm'n, Legislative History of Titles VII and XI of Civil Rights Act of 1964, 3119 (1968)). See also 42 U.S.C. § 2000e-2(a)-(d) (2001) (prohibiting unfair employment practices by employers, employment agencies, and labor organizations, or through training programs with regard to race, color, religion, sex, or national origin). For a discussion of the history of discrimination and meaning of these four other protected classes under Title VII, see Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, in *Symposium: Race and the Law at the Turn of the Century*, 47 *UCLA L. REV.* 1705, 1734 & n.130 (discussing absence of legislative history for Title VII defining "color" and its relationship to "race" within meaning of statute); Myers, *supra*, at 267-70 (noting that federal legislation prohibiting religious discrimination in employment existed as early as 1883 when Congress enacted Civil Service Act of 1883); Rachel L. Adams, Comment, *English-Only in the Workplace: A New Judicial Lens Will Provide More Comprehensive Title VII Protection*, 47 *CATH. U. L. REV.* 1327, 1330 & n.18 (1998) (noting that very little legislative history exists to determine intended meaning of national origin because Title VII was primarily aimed at ending race discrimination). The inclusion of "sex" as a protected class within Title VII has been debated. Many argue that Representative Howard Smith proposed it in the House in hopes of defeating the entire bill. 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, 1468 & nn.168-69 (2003). But see Debra Lyn Bassett, *Ruralism*, 88 *IOWA L. REV.* 273, 334-35 n.268 (2003) (arguing that "sex" was ultimately included as protected class under Title VII due to lobbying efforts of National Women's Party).

24. See *infra* notes 68-131 and accompanying text for a discussion of the history of discrimination based upon age and disability and how the Supreme Court has recently limited federal protection from discrimination based upon these classifications for one group of employees—those employed by state governments.

25. See *infra* Part III for a discussion of constitutional challenges to federal employment discrimination legislation.

26. See *infra* Part IV for a discussion of the distinction between rights and powers in constitutional analysis.

give way under an Eleventh Amendment states' rights analysis, and that the states should be held to no lesser standard in the employment arena than are private individuals and corporations.²⁷

II. A HISTORY OF DISCRIMINATION AND SLOW GOVERNMENT RESPONSE

Throughout this nation's history, opponents of discrimination have concentrated their efforts in different legal arenas and used different strategies to effectuate change in the law.²⁸ Regardless of the approach taken, slowly, over time, and often after many setbacks, the federal government has become the primary source individuals turn to for protection from discrimination based upon race, ethnicity, gender, religion, and ultimately age and disability.²⁹ The recent Supreme Court rulings in *Kimel v. Florida Board of Regents*³⁰ and *Board of Trustees v. Garrett*³¹ thus represent the first real curtailment of federal protection in four decades.

All laws prohibiting employment discrimination in this country have their genesis in slavery, the consequences of slavery, and its ultimate eradication:

More so than any other group of Americans, African-Americans have shared a history of struggle for freedom and human dignity, partly because, right from the start, white Americans sought to deny them from achieving either. Unlike all other migrants to North America, Africans did not come of their own free will. They were forcibly imported in order to meet the demand for cheap labor. As slaves, African-Americans faced physical cruelty and economic exploitation. They were inhumanly stripped of the profits of their toil and they were consciously dehumanized by their masters and the American system of law that defined them as property.³²

As one author noted, "It took a bloody civil war and a half million dead before the Thirteenth Amendment could be adopted to at least nominally abolish slavery."³³ After the Civil War, the legal and social status of blacks

27. *Id.*

28. Steven S. Lawson, *The View From the Nation*, in *DEBATING THE CIVIL RIGHTS MOVEMENT, 1945-1968*, at 3 (Steven F. Lawson & Charles Payne eds., 1998). For a "Chronology of Events" crucial to the civil rights movement in this country, see PETER B. LEVY, *THE CIVIL RIGHTS MOVEMENT*, at xvii-xxiv (1998).

29. For discussion and timeline of relevant Supreme Court decisions, Presidential actions, and Congressional enactments sometimes contracting and ultimately extending civil rights protection, see *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 1-42* (Robert D. Loevy ed., 1997) [hereinafter Loevy].

30. 528 U.S. 62 (2000).

31. 531 U.S. 356 (2001).

32. *LET FREEDOM RING: A DOCUMENTARY HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT 5-6* (Peter B. Levy ed., 1992). The Constitution declared each slave to count as three-fifths of a person for taxation and representation in Congress. HENRY HAMPTON, ET AL., *VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980s*, at xxiii (1990).

33. Harold Norris, *A Perspective on the History of Civil Rights Laws in Michigan*, 1996 DET. C.L. MICH. ST. U. L. REV. 567, 569 (1996). This author's use of the language "nominally abolish slavery" is

continued to be vastly inferior to whites.³⁴ Blacks were free from the bonds of slavery, but remained unequal by legal mandate in the South; they were also impoverished, and subject to violence—in “the early 1890s a black was lynched in the South an average of every three days.”³⁵ Because southern whites viewed blacks as both a political and economic threat, by the beginning of the twentieth century the South was legally segregated, the federal government consented to these oppressive laws and blacks were without any meaningful recourse in the political arena.³⁶

It was not until 1954, ninety years after the ratification of the Thirteenth Amendment, that the Supreme Court rendered its decision in *Brown v. Board of Education*.³⁷ And “while *Brown* stood as a key moment in the history of the civil

a reference to the Supreme Court’s eradication of the Civil War Reconstruction era statutes and restrictive reading of the Constitution in a series of decisions rendered after the Civil War: *Plessy v. Ferguson*, 163 U.S. 537, 551-52 (1896) (ruling that railroad carrier could mandate separate sleeping cars for blacks and whites so long as separate accommodations were equal); the Civil Rights cases, 109 U.S. 3, 24-25 (1883) (ruling that 1875 Act of Congress prohibiting discrimination in public accommodations, such as inns and theaters, was unconstitutional because Fourteenth Amendment could only be applied to states and not private actors); *United States v. Cruikshank*, 92 U.S. 542, 568-69 (1875) (ruling that section 6 of Enforcement Act of 1870 could not constitutionally be applied to states and voiding convictions of whites for murdering blacks); and the later repeal of many of these Civil War Reconstruction era statutes in 1877, 1894, and 1909. Norris, *supra*, at 571, 573.

34. The period immediately following the Civil War until as late as 1877, is known as the First Reconstruction:

It was a plan designed by the federal government to bring the defeated South back into the Union, and through legislation, manage and regulate race relations in the Old Confederacy. Instead, Reconstruction became the basis of a social upheaval and a national political realignment, aspects of which could still be felt in the social and political fiber of the nation well into the second half of the next century. For the newly freed slaves, supposedly a primary benefactor of federal legislation in this period, post-Civil War Reconstruction was a dismal failure.

GARY A. DONALDSON, *THE SECOND RECONSTRUCTION: A HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT*, at v (2000).

35. Loevy, *supra* note 29, at 8. See also DONALDSON, *supra* note 34, at v (describing federal government’s reconstruction plan). Statistics from just before the beginning of World War II establish the median annual family income for a black family to be \$489 and the median white family income to be \$1,325, almost three times greater than a black family. See LEVY, *supra* note 28, at 4 (reprinting Statistical Abstract of the United States (1950)). Approximately 80% of black households lacked “some or all plumbing” in comparison to a rate of 47% for white households. *Id.*

36. *Id.* “In 1941, less than 5 percent of adult Blacks in the South had managed to register to vote.” Lawson, *supra* note 28, at 6. In 1944, in *Smith v. Allwright*, the Supreme Court held that the Texas Democratic Party’s rule excluding blacks from participating in primary elections violated the Constitution. 321 U.S. 649, 661-66 (1944). Even after this important Supreme Court ruling, by 1952, only 20% of adult blacks were registered to vote in the South. Lawson, *supra* note 28, at 6. Literacy tests continued to be used in the South to exclude blacks from the electoral process. *Id.*

37. 347 U.S. 483 (1954). The law of segregation began to give way prior to the decision in *Brown* in a series of Supreme Court decisions focused on segregation in higher education. In 1938, for example, in *Gaines v. Missouri*, the Court ruled that Missouri must admit a black applicant to its state law school where there was no other educational institution in the state offering a legal education for blacks. 305 U.S. 337, 352 (1938). In 1948, in *Sipuel v. Regents of the Univ. of Okla.*, the Court ruled that a black must be granted admission to the state university because the black institution did not offer opportunities comparable to those provided at the state university. 332 U.S. 631, 632-33 (1948).

rights movement, putting the law of the land on the side of those who sought to eradicate racial inequality, the decision signaled only the beginning of the modern civil rights movement, not its culmination.³⁸ It signaled a beginning because atrocities against blacks continued, most notably in the South. In Mississippi, for example, from 1882 through 1955, more than 500 blacks had been lynched, including Emmett Till, a fourteen year-old from Chicago, who in the summer of 1955 was viciously murdered for “talking fresh” to a white woman in a store.³⁹

A. *The Beginning—State Law*

Following on the heels of the Supreme Court decision in *Brown*, Title VII marks the true beginning of the modern civil rights era, an era in which federal legislation was finally enacted to provide meaningful protection against discrimination and federal legislation continued to expand uninterrupted for forty years.⁴⁰ Title VII is arguably “the most important legislation enacted by the United States Congress in the twentieth century.”⁴¹ Yet, state legislation prohibiting employment discrimination actually preceded federal law by

In *Sweatt v. Painter*, the Court ruled that a black law school at Texas State University, which had been expressly and quickly created for blacks, was not equal to the law school at the University of Texas. 339 U.S. 629, 635-36 (1950). In another decision, *McLaurin v. Regents of the Univ. of Okla.*, the Court ruled that a black student was not provided an equal law school education when he was admitted to the University of Oklahoma Law School but was segregated from his white classmates. 339 U.S. 637, 641-42 (1950).

38. LEVY, *supra* note 28, at 8.

39. *Id.* at 60. Till had accompanied his cousins and their friends to the local drugstore and, as they were leaving the store, Till “allegedly whistled and said ‘bye baby’ to the female shopkeeper.” *Id.* at 59. That same evening the woman’s husband and half-brother abducted Till; they beat Till, shot him, and threw him into the Tallahatchie River with a cotton gin fan attached to his body. *Id.* at 60. For a detailed account of the story, including the national attention it garnered, see HAMPTON, *supra* note 32, at 1-15.

40. See Loevy, *supra* note 29, at 348-50 (describing individual anti-discrimination legislation enacted after Civil Rights Act of 1964 expanding civil rights protection to age, gender, and disability related discrimination).

41. David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 645 (1995). In the 1960s, Congress enacted numerous anti-discrimination laws:

There were five core policies of nondiscrimination, all of them new in the 1960s. Three were contained in the Civil Rights Act of 1964, one in the Voting Rights Act of 1965, and one in the Open Housing Act of 1968. First, Title II of the Civil Rights Act banned discrimination by race in hotels, stores, restaurants, and similar places of public accommodation. Second, Title IV of the same law aligned the elected branches of the national government behind the Supreme Court’s ruling against school segregation. Third, Titles VI and VII banned job discrimination by public and private employers (schools and local governments were exempted in 1964 for political reasons, but were included in 1972). Fourth, the Voting Rights Act, primarily through its Section 4, banned racial discrimination in registering and casting ballots. Finally, the Open Housing Act of 1968 added a fifth core requirement, nondiscrimination in the sale and rental of private housing.

Hugh Davis Graham, *Race, History, and Policy: African Americans and Civil Rights Since 1964*, in *THE CIVIL RIGHTS MOVEMENT* 283 (Jack E. Davis ed., 2001).

approximately two decades,⁴² and by the time the Civil Rights Act of 1964 made its way through both houses of Congress, twenty-two states had enacted statutes commonly referred to as “fair employment practices legislation.”⁴³ These early statutes were primarily aimed at race discrimination in employment, but a few states provided protection against discrimination based upon religion, national origin, and ancestry.⁴⁴ Some state statutes were nothing more than broad statements of policies against discrimination without either enforcement procedures or remedies, and other statutes, such as the New York legislation, created commissions for enforcement, included specific definitions of discrimination, and provided remedies for violations.⁴⁵

Just as the political and social upheavals in the early 1960s provided the impetus for the federal Civil Rights Act of 1964, social activists began their campaign for state anti-discrimination legislation in the North in the 1940s.⁴⁶ These activists hoped that with protective legislation in place, minorities would be hired in greater numbers in a post-war era of full employment and a strong growing economy.⁴⁷ The goal was to move newly hired minorities into skilled positions so that they would be less susceptible to unemployment in a future economic downturn.⁴⁸

Although the activists achieved success with their state legislatures, twenty years after their enactment critics deemed state fair employment practice laws a failure, and in fact, the economic position of minorities was getting worse, not better.⁴⁹ Critics did call for some amendments to state law, but primarily focused

42. Arthur E. Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 NW. U. L. REV. 907, 907 (1967).

43. See DUANE LOCKARD, *TOWARD EQUAL OPPORTUNITY: A STUDY OF STATE AND LOCAL ANTI-DISCRIMINATION LAWS 23-24* (1968) (discussing table showing states' passage of anti-discrimination laws between 1945 and 1966).

44. As early as 1930, New Jersey enacted legislation prohibiting age discrimination against people age forty or older. See KERRY SEGRAVE, *AGE DISCRIMINATION BY EMPLOYERS* 76 (2001). Frequently this legislation did not include penalties for violations and included provisions mandating that “any person 40 or over accepting any employment with the state or any county or city would not be eligible to join any pension plan.” *Id.* See *infra* notes 68-101 and accompanying text for discussion of federal law dealing with age discrimination.

45. See, e.g., Joseph A. Ranney, *Looking Further Than Skin: A History of Wisconsin Civil Rights Law*, 68 WIS. L. REV. 20, 21 (July, 1995) (stating that Wisconsin legislature enacted fair employment practices legislation in 1945, but did not give commission enforcement powers); see also Note, *Fair Employment Practices—A Comparison of State Legislation and Proposed Bills*, 24 N.Y.U. L. REV. 398, 399 (1949) (discussing various policy justifications provided for anti-discrimination in employment bills). In 1945, New York was the first state to enact fair employment practices legislation. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972*, at 19 (1990). The model for these state fair employment practices commissions was the administrative agency model of the National Labor Relations Board. *Id.* at 19-20.

46. Herbert Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFF. L. REV. 22, 22 (1964).

47. *Id.*

48. *Id.*

49. *Id.* at 23.

their efforts on reform in the application of existing laws.⁵⁰ In order to achieve greater success in eliminating discrimination against minorities, the critics urged commissions to enforce the existing fair employment practice laws on a larger scale by targeting the discriminatory practices in specific industries and, in particular, the exclusionary practices of labor unions.⁵¹ They also urged commissions to expedite review and conciliation of individual claims.⁵² They urged public disclosure by state agencies or commissions of the basis for settlements and easier access for individuals to invoke agency complaint procedures.⁵³

As one disillusioned commentator noted in 1964: "with some very few exceptions, most state FEP commissions have been administered by timid political appointees, many with little or no professional competence and with an appalling lack of sensitivity to the realities of . . . life in the racial ghettos of the urban north."⁵⁴ These deficiencies resulted in commissions in virtually every state dismissing on average 50% of all individual claims of discrimination; the most active commissions found probable cause of discrimination in only 20% of the claims.⁵⁵ The concern was not with these numbers in isolation, but rather in combination with a low rate of access and other enforcement problems.⁵⁶ In the southern states, individuals were without even this protection.⁵⁷

50. *Id.*

51. Hill, *supra* note 46, at 23-25.

52. *Id.* at 24. See also Carl A. Auerbach, *The 1967 Amendments to the Minnesota State Act Against Discrimination and the Uniform Law Commissioners' Model Anti-Discrimination Act: A Comparative Analysis and Evaluation*, 52 MINN. L. REV. 231, 232 (1967) (discussing 1967 positive improvements in Minnesota antidiscrimination laws but recognizing deficiencies, including sometimes inability to adjudicate discrimination matter in question and inability to obtain judicial review of negative outcome for complainant in discrimination case, and inadequate relief).

53. Hill, *supra* note 46, at 25.

54. *Id.* at 25.

55. *Id.* at 24. See also GRAHAM, *supra* note 45, at 22 (noting that during its first twenty years, New York Human Relations Commission found probable cause in 20% of all discrimination charges). In New York, although the state fair employment practices legislation had been enacted in 1945, the first public hearing was held in 1949 and, from 1945 to 1965, the commission conducted only thirty-four hearings. *Id.* at 21-22. Although the most recent statistical information reveals that, in 2002, the EEOC found no reasonable cause to believe that discrimination had occurred in 59.3% of all charges filed (including Title VII, ADA, ADEA, and Equal Pay Act (EPA) charges), this number is not very meaningful. All Statutes FY 1992—FY 2002, at <http://www.eeoc.gov/stats/all.html> (last visited Feb. 24, 2004). Although federal regulations require that when appropriate the EEOC issue a letter indicating a finding of no "reasonable cause to believe that an unlawful employment practice has occurred," the EEOC receives so many charges that it is unable to investigate each of them. 29 C.F.R. § 1601.19(a) (2001). The EEOC therefore recently eliminated this no cause determination and simply dismisses many charges without making findings. Michael D. Moberly, *The Admissibility of EEOC and Arizona Civil Rights Division Determinations in State Court Employment Discrimination Litigation*, 33 ARIZ. ST. L.J. 265, 293 & n.180 (2001).

56. See Hill, *supra* note 46, at 24-25 (describing state FEP commissions as being "timid" in their efforts to curb discrimination practices by large businesses and noting difficulty of learning where and how to file FEP complaint).

57. See GRAHAM, *supra* note 45, at 34 (noting "in the southern states, aggrieved blacks could turn only to federal judges, whose local roots combined with weak and cumbersome statutes to offer

B. The Shift to Federal Law

The ineffectiveness of state employment discrimination laws led to a shift to federal law to rectify problems of racial discrimination in the workplace. Over time federal laws were also enacted to address problems of age discrimination and disability discrimination in the employment arena.

1. Race Discrimination

The failure of these state employment discrimination laws in combination with the 1954 Supreme Court decision in *Brown*, which destabilized entrenched practices of segregation, caused activists to refocus their attention on the national government.⁵⁸ The momentum for this movement toward national reform of race discrimination had been building during the twentieth century as blacks migrated out of the South in progressively greater numbers.⁵⁹ After World War II, blacks continued to move out of the South and into the northern states, where they enjoyed a higher standard of living; by the middle of the twentieth century, blacks, who could vote in the North, were by sheer numbers able to exert meaningful influence in the political arena.⁶⁰ Other external events converged to exert pressure on the federal government to change the status of blacks in this country.⁶¹ During the Cold War, “the newly independent African states threatened to slip into the Soviet sphere of influence in response to American racism. Also the atrocities committed by Nazi Germany made Americans acutely aware of the consequences of racism.”⁶²

Political pressure mounted as the nonviolent protests and marches, which were typically met with official violence, were broadcast for the first time in history on national television.⁶³ One of the most appalling responses was

little hope for substantial change”).

58. Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 487-88 (2000).

59. At the turn of the twentieth century, 90% of blacks lived in poverty in the South. See DONALDSON, *supra* note 34, at 3. During the 1920s, 750,000 blacks left the South for the urban areas of the North. *Id.* During the post-war era of the 1940s, one million blacks left the South. *Id.* at 4.

60. With the increase in gross national product, black income earners also gained economically: Median black income rose from \$1,614 in 1947 to \$2,338 in just five years; and as a percentage of white income, black earnings increased from 41 percent before the war to 57 percent in 1952. When the war ended one million more African Americans had civilian jobs than before Pearl Harbor, and those working in government service jobs had jumped from 60,000 to 300,000.

Id. at 11.

61. *Id.* at v.

62. DONALDSON, *supra* note 34, at v.

63. See Oppenheimer, *supra* note 41, at 667-68 (describing national political mood swing following broadcast of 1963 Birmingham, Alabama protest). Nonviolent racial protests garnered national media attention as early as December 21, 1956, when Martin Luther King, Jr., and a group of protesters were allowed to sit in any seat on a bus in Montgomery, Alabama. See Loevy, *supra* note 29, at 24 (stating that national and international news recorded “every word and move” of Martin Luther King, Jr. on December 21, 1956). The Montgomery Bus Boycott, as it came to be known, began on December 1, 1955, when Rosa Parks refused to give her seat to a white man, and lasted for

directed at children and occurred on May 2, 1963, in Birmingham, Alabama: "As the nation watched on television, black children kneeling in prayer or singing spirituals as they walked down sidewalks were attacked by vicious police dogs and rolled down the streets by fire department water cannons."⁶⁴

This brutal repression occurred in a place where local ordinance mandated segregation in both private and public facilities, including restrooms, restaurants, hospitals, and hotels.⁶⁵ The result was often worse than separate, inferior facilities for blacks, and instead resulted in the complete exclusion of blacks from downtown restaurants, and denial of access to such fundamental services and resources as ambulances and taxicabs, with criminal penalties for violations.⁶⁶ All of these events provided the backdrop to and the impetus for the Civil Rights Act of 1964, an Act which has no parallel in United States history, because "short of a declaration of war, no other act of Congress had a more violent background—a background of confrontation, official violence, injury and murder" ⁶⁷

2. Age Discrimination

During the debates over Title VII, advocates made attempts to include age as a protected class, but all such attempts were deflected.⁶⁸ When Congress passed Title VII, however, it contained an express mandate for the Secretary of Labor to study the problem of age discrimination in employment.⁶⁹ The resulting report provided the impetus for enactment of the ADEA.⁷⁰ Title VII thus bears a direct connection to the ADEA even though these two statutes contain significant differences in terms of operative provisions.

Discrimination based upon age has not historically received the level of attention, study, and documentation as have race and sex discrimination in our society.⁷¹ Certainly older individuals in our society have not been subject to a history of purposeful subjugation, violence, and abuse comparable to that of

more than one year, as the forty thousand blacks in Montgomery refused to ride public buses until segregation ended. *Id.* at 22-24. December 1, 1955, is commonly referred to as the beginning of the modern civil rights movement in this country. *Id.* at 22. After Montgomery, civil rights and nonviolent protests became "big news items." *Id.* at 24. Not all of the protesters believed in nonviolent, passive resistance. By late 1961, a growing schism was emerging in the black community "between the forces of moderation and the forces of a growing radicalism." DONALDSON, *supra* note 34, at 33.

64. Oppenheimer, *supra* note 41, at 646.

65. *Id.* at 658.

66. *Id.*

67. Loevy, *supra* note 29, at 40.

68. Nathan E. Holmes, Comment, *The Age Discrimination in Employment Act of 1967: Are Disparate Impact Claims Available?*, 69 U. CIN. L. REV. 299, 305 (2000).

69. *Id.* See also U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965).

70. See Holmes, *supra* note 68, at 305 (describing Department of Labor's report as "the foundation upon which the ADEA was constructed").

71. JUDITH C. HUSHBECK, *OLD AND OBSOLETE: AGE DISCRIMINATION AND THE AMERICAN WORKER, 1860-1920*, at 1 (1989).

blacks.⁷² Nor have the elderly been denied the basic legal rights women were historically denied.⁷³ Age is also different as a protected class because it is a class that is “ever-changing” and, as a result, most people will enjoy its protections.⁷⁴

At the time Congress issued its directive to the Secretary of Labor in 1964, members of Congress had become genuinely interested in protecting older workers from job discrimination for a variety of reasons.⁷⁵ The Secretary’s report issued in June of 1965 found, not surprisingly, that older workers were disadvantaged relative to younger workers in their ability to retain employment, to reenter the labor market after an absence or loss of job, their rates of unemployment were rising, and they were often subject to arbitrary age limitations.⁷⁶ The ADEA was thus passed in 1967 “in order to eliminate arbitrary age discrimination in employment, promote the employment of older persons based on their ability rather than age, and to help employers and workers to meet problems arising from the impact of age on employment.”⁷⁷

One explanation for Congressional focus on age discrimination at this time in history is straightforward:

72. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a ‘history of purposeful unequal treatment’ or been subject to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Id.

73. Women were denied the right to vote by the United States Supreme Court. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874) (ruling that women did not possess constitutional right to vote as privilege and immunity of citizenship because they had always been citizens within meaning of Constitution and had always been denied suffrage). Even after the Nineteenth Amendment was ratified, in 1920, courts sometimes refused to allow women to sit on juries by refusing to extend the definition of “person” by implication of the Nineteenth Amendment. *Commonwealth v. Welosky*, 177 N.E. 656, 661 (Mass. 1931). See also U.S. CONST. amend. XIX (stating that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex”). In *Welosky*, the court found the situation of women different from “previous ones where the right to vote had been extended to members of an existing classification theretofore disqualified, as women were a whole new class.” Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 ALA. L. REV. 1281, 1284 n.16 (2003). Before the twentieth century, women lost almost all rights to hold property upon marriage, they were not permitted to enter contracts without their husbands’ consent, and they were not permitted to enter certain occupations, such as the practice of law. See Julie M. Spanbauer, *Scarlett O’Hara as Feminist: The Contradictory, Normalizing Force of Law and Culture*, 5:2 LAW/TEXT/CULTURE 45, 56-57 (2001) (explaining legal and cultural constraints placed on 19th century women).

74. Marlinee C. Clark, Note, *Discrimination Claims and “Same-Actor” Facts: Inference or Evidence?*, 28 U. MEM. L. REV. 183, 203 (1997).

75. See U.S. Department of Labor, Interim Report to Congress on Age Discrimination in Employment Act Studies 50 (1981) [hereinafter Interim Report] (stating that Congress was interested in eliminating arbitrary age discrimination in employment and promoting employment of older persons based on ability).

76. *Id.*

77. *Id.*

The proportion of people over age 65 in America remained quite small until the twentieth century; in 1900 only 4% of the population was 65 or older. These people continued to participate in the work life of the community. In 1890, 68.2% of men 65 and older were active members of the work force. Three decades later, a majority of all men 65 and over remained in the work force.⁷⁸

By 1976, twenty million people were age sixty-five and older, due in large part to advances in medicine and nutrition.⁷⁹ And yet only 25% of men aged sixty-five and older were working and a mere three and two-fifths percent of all people aged sixty-five and older were active in the labor market.⁸⁰

Declining fertility and longer, healthier lifespans, both by-products of economic development in this country during the twentieth century, combined to shift the population demographics.⁸¹ These changes, however, do not account for discriminatory attitudes and the lower rates of participation by older workers in the workforce. Researchers have documented discrimination against older employees occurring as early as the end of the nineteenth century when employers would invoke age limitations at the hiring stage and would screen out many applicants through the use of "restrictive physical examinations."⁸² Indeed, "[t]here is some evidence to indicate that even at this time, negative attitudes about the capacities and productivity of the aged were already common in the nation and that these ideas continued to gain in strength . . ."⁸³ It appears that "age discrimination was widely entrenched and pervasive by 1900."⁸⁴

These discriminatory attitudes toward older workers could not be transformed into acts of employment discrimination until these workers were somehow divested of their control over major industries.⁸⁵ Another change during the twentieth century allowed just such a transformation to take place: the economy's shift from a more rural, agrarian system to one of rapid technological advancement and industrialization.⁸⁶ Older workers were made

78. Brief of Amici Curiae Legal Services for the Elderly Poor, et al., at 20, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (No. 74-1044).

79. *Id.*

80. *Id.* at 20-21.

81. See HUSHBECK, *supra* note 71, at 10 (noting that falling birth rates and increasing longevity have caused increase in elderly population).

82. Interim Report, *supra* note 75, at 55. Linguistic evidence of abuse and discriminatory attitudes toward older people has been found to exist in the 1820s:

A large vocabulary of abuse had been invented for them as early as the 1820s when they remained firmly in control of economic relations and political power. Ironically, by the turn of the century, when old people were disproportionately in economic distress, the disparaging epithets seem largely to have disappeared.

HUSHBECK, *supra* note 71, at 24 n.33.

83. Interim Report, *supra* note 75, at 55.

84. SEGRAVE, *supra* note 44, at 8. The author notes, however, that "there is little agreement on the question of when age discrimination began and when it flourished" in this country. *Id.* at 5.

85. HUSHBECK, *supra* note 71, at 6.

86. *Id.* at 45-54. From 1810 though 1850, the percentage of workers engaged in farming fell from 80% to 55%. *Id.* at 45-46. "By 1890, 9.5 million persons (43 percent of the labor force) worked in

less powerful as their “unique skills, special know-how, and long experience” became irrelevant due to technological advances, which changed the industrial structure to consolidate resources and capital in fewer hands.⁸⁷ As specialization increased, the skills of the individual worker became less important, and labor-saving technology together with greater use of immigrant workers pushed older American workers out of the job market.⁸⁸ Although a growing bias toward younger workers may well have resulted from the ever-increasing pace of work life in this period of specialization and industrialization, the development of other governmental programs and laws also meant that older workers simply cost the employer more money.⁸⁹

In the mid-1930s, the Social Security system was introduced in this country to provide the financial resources to encourage workers to retire.⁹⁰ The Social Security system was also instrumental in creating and fostering an expectation of retirement as not only an appropriate but also a routine and expected occurrence in employment.⁹¹ This “development of retirement as a social pattern in industry may have served to enhance and legitimize employment discrimination practices.”⁹² On the heels of the Social Security laws, during the 1940s, this nation saw a substantial increase in formal private pension offerings by employers, which were initially instituted as an incentive to encourage executive retirement at an earlier age.⁹³ Pension coverage was also expanded during this time to cover a greater segment of the workforce, in part due to unions and collective bargaining agreements and also due to the development of Internal Revenue regulations promoting employer pension plans.⁹⁴

agriculture.” *Id.* at 46. During this same timeframe, farming became more mechanized and farming methods were improved, leading to greatly increased production. *Id.* at 51. These advances meant that significantly fewer people were necessary to produce an even greater output. HUSHBECK, *supra* note 71, at 51.

87. *Id.* at 4, 6.

88. *Id.* at 7.

89. *Id.*

90. See EDWIN E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 3-110 (1962) (chronicling history of Social Security Act). “The Social Security Act of 1935 established a three-member agency known as the Social Security Board to administer the old age and survivors insurance, unemployment compensation, and public assistance programs.” Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1212 (2000). See also Interim Report, *supra* note 75, at 14 (noting that policies encouraging workers to retire arose in wake of development of social security).

91. Interim Report, *supra* 75, at 14 (describing Social Security as creating expectation of retirement for older workers).

92. *Id.* at 56.

93. *Id.* at 14.

94. *Id.* Until the middle of the 1930s, a pension plan was treated by many states as a “gratuity”—no promise was involved. It was merely a ‘thank-you’ from the employer, upon retirement, if the employer wanted to give it then.” Frank Cummings, *ERISA Litigation: An Overview of Major Claims and Defenses*, SH082 A.L.I.-A.B.A. 1, 96 (2003). Before World War II, pensions were unregulated and thus frequently unenforceable. *Id.* Continuing after World War II and until 1974, pension rights began to improve, but were subject to state and not federal law. *Id.* After 1974, federal law preempted state law, setting national standards. *Id.*

The standard reasons employers provided during the 1930s and 1940s for refusing to hire older workers were ostensibly rational and cost-based.⁹⁵ Two reasons frequently advanced—the higher costs of group insurance for older workers and workers' compensation costs associated with an older workforce—resulted in employers adopting mandatory retirement policies on a large-scale during the 1940s and 1950s and setting their age limits for initial hiring as low as age thirty-five.⁹⁶ Finally, employers justified their age discrimination by the lower salary expectations of younger, entry-level employees in comparison to older, more experienced workers.⁹⁷ In the late 1950s and continuing into the 1960s, the period immediately preceding enactment of the ADEA, the majority of reasons given by employers for reticence to hire older workers were not appreciably different, were based upon negative stereotypes about older workers, and were unsubstantiated.⁹⁸

The treatment of disabled individuals throughout history in this country has been different from age discrimination in that society has by and large excluded or separated disabled individuals.⁹⁹ And while the disability rights movement in this country shares some common features with the civil rights movement of the 1950s and 1960s, the disabled community is unique as a protected class for the simple reason that “[i]mpairments are variable, and they are not dichotomous conditions.”¹⁰⁰ Physical and mental impairments can be of varying degree in

95. SEGRAVE, *supra* note 44, at 63.

96. Interim Report, *supra* note 75, at 56. Many employers believed that older workers were “more accident-prone” and that “their reflexes” had “slowed down.” SEGRAVE, *supra* note 44, at 130. Yet studies revealed that by employing older workers an employer did not experience increased workers' compensation costs. *Id.* at 63. As to private pension plans, some studies concluded that age limitations were necessary because without them an employer's “very existence” was “threatened.” *Id.* at 64. Common age limitations for hiring were age forty to forty-five. *Id.* at 69.

97. See Gary Minda, *Aging Workers in the Postindustrial Era*, 26 STETSON L. REV. 561, 581 (1996) (noting that currently under ADEA, “[a]n employer's decision to cut costs by focusing on salary level or years of service of employees may not be circumstantial evidence of age discrimination”).

98. The reasons given by employers included the following survey answers, which were refuted by New York State Labor Department data:

- (1) older workers were less productive (surveys were cited to show such allegations were untrue);
- (2) they were frequently absent (a 1956 survey by the United States Labor Department showed older workers had a 20 percent better attendance record than younger ones);
- (3) they were involved in more accidents (the same survey found that workers 45 and over had 2.5 percent fewer disabling injuries and 25 percent fewer nondisabling injuries than those under 45);
- (4) they did not stay on the payroll long enough to justify the hiring expense (separation rates for older employees were much lower than for the younger ones);
- (5) it was too costly to provide them with adequate pensions (it often depended on the type of plan);
- (6) they caused major increases in employee group insurance plans (it depended on the nature of the plan);
- (7) they did not have the needed job skills (evidence was to the contrary);
- (8) they were inflexible and unimaginative and had trouble getting along with younger workers (a sweeping generalization with no supporting evidence).

SEGRAVE, *supra* note 44, at 114-15.

99. JACQUELINE VAUGHN SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY* 31-32 (2003).

100. SHARON BARNATT & RICHARD SCOTCH, *DISABILITY PROTESTS: CONTENTIOUS POLITICS*,

terms of “visibility; stability; the degree of interference with physical, mental, or cognitive functioning; the degree to which the disabilities threaten life; the degree of pain involved; and the degree to which the disabilities pose ongoing medical problems.”¹⁰¹

3. Disability Discrimination

Disability discrimination can be separated into roughly four periods in U.S. history; this breakdown, of course, somewhat oversimplifies the history, but is useful as a general guide to the status of disabled individuals over time.¹⁰² First, from 1700 until approximately 1920, “extended families provided care for disabled persons; when societal indifference produced abuse, state-funded institutions were created to house indigent disabled citizens.”¹⁰³ The second period extended from approximately 1920 until 1960 and “was characterized by segregation, the growth of rehabilitative medicine, and the establishment of

1970-1999, at xv (2001). In part, because civil rights groups recognized that disability and remedies for combating discrimination based upon disability were different than race, gender and other forms of discrimination, disability was not included in the early civil rights legislation:

The first attempt to create a disability rights law was undertaken by Senator Hubert Humphrey and Representative Charles Vanik; their approach was a simple one, namely to add handicapped persons to the classes of persons protected by the Civil Rights Acts of 1964 and 1968. This move, had it been successful, would have forged a close relationship between civil rights and disability rights groups. Instead, disability rights laws emerged separately from other civil rights laws, partially because of a lack of enthusiasm by traditional civil rights groups to accept disabled citizens into the civil rights movement.

STEPHEN L. PERCY, *DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY* 248 (1989).

101. BARNATT & SCOTCH, *supra* note 100, at xv-xvi. And indeed great differences exist between physical and mental disabilities in terms of treatment, employment considerations, and prejudice. See Rachel Rubey, Note, *There's No Place Like Home: Housing for the Most Vulnerable Individuals With Severe Mental Disabilities*, 63 OHIO ST. L.J. 1729, 1731 (2002) (asserting that individuals with mental disabilities are more susceptible to discrimination than physically disabled individuals). The inclusion of mentally disabled individuals in disability laws has been historically resisted. *Id.* & n.10. In fact, Senator Armstrong argued against inclusion of mental disabilities within the coverage of the Americans with Disabilities Act (ADA). Leonard S. Rubenstein, *Mental Disorder and the ADA*, in GOSTIN & BEYER *infra* note 115, at 209. “[P]rejudice against people with mental disorders runs very deep” in our society. *Id.*

102. See *infra* note 103-106 and accompanying text for discussion of four historical periods of disability discrimination.

103. *Id.* During this time, disabled individuals were subject to horrific treatment. Stephanie A. Fishman, Note, *Individuals with Disabilities but Without Mitigating Measures*, 46 WAYNE L. REV. 2013, 2016 (2000).

In 1883, a movement was started with the intention of improving society by eliminating the reproductive capability of mentally deficient children and institutionalizing society's “feeble-minded.” The “Eugenics” movement [as it came to be known] died out in the United States during the 1930's, when it was scientifically proven that people without disabilities were having just as many children with disabilities, if not more, than parents who were disabled.

Id. “Eugenics” means “well born” and was developed by those who believed that the majority of social problems were caused by the disabled. *Id.* & n.14. State laws requiring sterilization of individuals suffering from hereditary mental illness were found constitutional in the early twentieth century. *Buck v. Bell*, 274 U.S. 200, 207-08 (1927).

special organizations that attempted to educate the public on the needs of disabled persons.”¹⁰⁴ During the third period, from 1960 to 1975, the disability rights movement took shape and Congress enacted legislation.¹⁰⁵ During present times, the fourth period, organizations designed to advance the interests of disabled individuals have expanded.¹⁰⁶

The exclusion of disabled individuals from society generally and from employment opportunities more specifically has occurred:

in part from limitations in mobility, dexterity, and communication imposed by disabling conditions. But even greater barriers to the opportunities of modern society have been imposed by non-handicapped persons, who have feared disabled people and have been preoccupied with that group’s *inabilities* and problems rather than their *capabilities*.¹⁰⁷

Society has historically stigmatized disabled individuals—such individuals have been feared, pitied, viewed as helpless, not worthy of trust, and invariably viewed with discomfort by other members of society.¹⁰⁸ In particular, the failure to understand the needs and capabilities of mentally and physically disabled individuals throughout history has consistently been translated into “unrealistic, negative, and paternalistic” attitudes toward the disabled community.¹⁰⁹

“Compared to other public policies for disabled persons, those dealing with employment have the longest history.”¹¹⁰ In response to the large number of disabled veterans returning home after World War I, the federal government began enacting legislation addressing employment discrimination based upon disability.¹¹¹ After World War II and the Korean War, during the 1950s and 1960s, the federal government and health care professionals once again faced the problem of disability discrimination in employment.¹¹² The disability rights movement had also become more organized and more cohesive and sought

104. SWITZER, *supra* note 99, at 31.

105. *Id.*

106. *Id.* This fourth period has also been politically conservative and has produced “what is regarded as a generally restrictive interpretation of disability rights law.” *Id.*

107. PERCY, *supra* note 100, at 1.

108. *Id.* at 4.

109. *Id.*

110. *Id.* at 193.

111. *Id.*

112. Laura C. Scotellaro, Note, *The Mandated Move From Institutions to Community Care: Olmstead v. L.C.*, 31 LOY. U. CHI. L.J. 737, 741 (2000). See also BARNATT & SCOTCH, *supra* note 100, at 14 (discussing increased prevalence of impairments because of war and medical advancement lengthening life span of disabled). Polio epidemics in this country in 1946, 1952, and 1953 also resulted in many physical impairments. *Id.* In 1974, after the Vietnam War, Congress enacted the Vietnam Era Veterans’ Readjustment Assistance Act. See PERCY, *supra* note 100, at 196 (discussing employment protection for disabled population and describing VEVRAA’s educational assistance objective). The legislation was more expansive than previous legislation aimed at returning veterans. *Id.* Its provisions include increased educational benefits; it requires affirmative action in hiring for certain federal contracts, subcontracts, and federal agencies. *Id.* This law was enacted over President Ford’s veto. *Id.*

expansion of social security and rehabilitation for the disabled community.¹¹³ In 1954, Congress responded with the Vocational Rehabilitation Amendments to the Vocational Act of 1918.¹¹⁴ In 1968, Congress passed the Architectural Barriers Act (ABA), requiring all buildings constructed or altered by the federal government be accessible by persons with disabilities.¹¹⁵

These laws, rather than excluding, emphasized integration and bringing disabled individuals into the community.¹¹⁶ The problem with the early legislation, however, is that it was evaluated and justified “largely from the vantage [point] of society, not the disabled person.”¹¹⁷ The reasons given to justify the Vocational Rehabilitation Act and the programs created pursuant to it were cost-based: that the cost of rehabilitation was less, that the tax revenue generated by disabled individuals who were able to work was more, and more working disabled meant that fewer disabled individuals would be participating in social welfare programs.¹¹⁸

By the 1970s, lawmakers realized that vocational rehabilitation alone would not resolve the problem of underemployment and exclusion of disabled individuals from the workforce.¹¹⁹ Other barriers to employment existed and needed to be addressed.¹²⁰ Society began to view the employment of disabled individuals as more than a desirable goal for government and society, but as a right possessed by the disabled individual.¹²¹ Congress soon enacted the Rehabilitation Act of 1973 to prohibit discrimination in any federal program against otherwise qualified individuals with disabilities and to require affirmative action.¹²² As a result, the Rehabilitation Act of 1973 became “the most

113. See Scotellaro, *supra* note 112, at 741 (stating how advocates attempted to meet needs of growing disabled population through rehabilitation and social services).

114. *Id.* The 1918 Act, the earliest broad federal program to aid disabled individuals, “provided federal funds, at a fifty-percent matching rate, to state rehabilitation agencies for counseling, vocational training, and job placement services for physically handicapped persons.” PERCY, *supra* note 100, at 44.

115. See LAWRENCE O. GOSTIN & HENRY A. BEYER, IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 11 (1993) (explaining Architectural Barriers Act as “legislative building block” to ADA).

116. See Scotellaro, *supra* note 112, at 741 (discussing how maintaining and rehabilitation practices adopted through legislation sought to incorporate disabled populations into community).

117. PERCY, *supra* note 100, at 193.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. GOSTIN & BEYER, *supra* note 115, at 11. The Rehabilitation Act also applied to executive agencies and the United States Postal Service. *Id.* The Act’s affirmative action requirements extended only to federal government hiring decisions and to entities that are contractors with the federal government. *Id.* Other federal legislation enacted at this time for the benefit of disabled individuals includes: The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1400 (2001); The Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. § 1973ee (2001); The Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. § 1997 (2001); The Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 (2001); The Developmental Disabilities Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 (2001); and The Air Carriers Access Act of

significant building block for the ADA," which incorporates many core requirements, such as the reasonable accommodation requirement.¹²³

Congress enacted the ADA in 1990 after three years of congressional debate and study; the ADA is also accompanied by an extensive legislative history documenting the continued exclusion, underemployment, and poverty disabled individuals experience in our society.¹²⁴ It represents the most expansive and far-reaching legislation ever enacted by the United States Congress to eradicate discrimination.¹²⁵ More than eighty years have elapsed since the first federal disability legislation, and yet the misconceptions and discriminatory attitudes against disabled individuals persist.¹²⁶

Employers, and for that matter, co-workers, continue to underestimate the productive capacity of disabled individuals and also to prefer a certain social distance from them:

The reluctance of employers to hire persons with disabilities is rooted in common myths and misunderstandings, which include the ideas that the employment of disabled persons will increase insurance and worker[s'] compensation costs, cause higher absenteeism among employees, reduce productivity, harm the morale and productivity of nonhandicapped workers, and require costly accommodation measures.¹²⁷

The ADA is the youngest of the federal employment discrimination legislation, enjoying full operative effect for just over a decade.¹²⁸ And unfortunately, the physically and mentally disabled have made slow progress, with only small gains in rates of employment.¹²⁹ For example, from 1986 to 2001, the rate of employment of disabled individuals had increased by ten percent, but this increase results in the employment of just over half of all disabled workers

1986, 49 U.S.C. § 1374(c) (2001). *Id.* at 12-13. For a listing and description of federal legislation, see DUANE F. STROMAN, *THE DISABILITY RIGHTS MOVEMENT: FROM DEINSTITUTIONALIZATION TO SELF-DETERMINATION* 77-81 (2003).

123. GOSTIN & BEYER, *supra* note 115, at 11.

124. See Tim Edwards, *Constitutional Limits on an Employee's Right to Dictate the Terms of an Addict's Recovery Under the ADA: Some Sobering Concerns*, 44 WAYNE L. REV. 1679, 1696 & n.81 (1999) (noting Congressional opinion of Americans with Disabilities); Scotellaro, *supra* note 112, at 745, 764 (discussing congressional findings describing unequal treatment of disabled population).

125. Scotellaro, *supra* note 112, at 745. See also Heather R. McDonald, *Garrett Under Title II of the Americans With Disabilities Act: Its Broad Implications to Civil Rights Laws*, 52 DEPAUL L. REV. 993, 993-97 (2003) (discussing legislative sweep of ADA). The ADA consists of five different titles, with Title I addressing employment discrimination. *Id.* at 997. Title II addresses discrimination in "public services, public employment, public communications, and public transportation." *Id.* & n.28. Title III prohibits discrimination in public accommodations, Title IV prohibits discrimination with telecommunications, and Title V includes miscellaneous provisions. *Id.*

126. See PERCY, *supra* note 100, at 194 (detailing misconceptions of disabled in employment).

127. *Id.*

128. The ADA became effective as to employers with fifteen or more employees as of July 26, 1992. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 108, 104 STAT. 327, 337 (1990) (codified as 42 U.S.C. § 12111(5) (2001)).

129. See PERCY, *supra* note 100, at 194 (describing employment opportunities as growing at "snail's pace").

who are willing to work.¹³⁰ This low rate of employment and the resulting poverty exist despite the fact that government-sponsored surveys report high levels of employer satisfaction with disabled workers.¹³¹ Although progress has been slow, the ADA has been instrumental in assisting disabled members of society achieve access to employment.

C. *The Development and Prominence of Federal Law*

When Congress originally enacted Title VII in 1964, it was as revolutionary in transforming rights and duties in the employment setting as was the ADA in 1990.¹³² As a result, many initially viewed Title VII with fear, hostility, and skepticism.¹³³ Over time, expectations of protection from discrimination in the workplace grew, and Title VII, along with the other antidiscrimination laws that followed, simply became a part of the legal and social landscape in this country.¹³⁴ As the federal employment discrimination laws became a part of the settled expectations of workers and employers in this country, Congress extended the scope of these laws.

130. STROMAN, *supra* note 122, at 99. The number increased from 46% to 56%. *Id.*

131. *Id.* at 97-99. The Harris poll conducted by the National Organization on Disability in 2000, concluded that 81% of nondisabled people aged eighteen to sixty-four are working full or part time compared with 56% of disabled people aged eighteen to sixty-four working full or part time (this number is based upon people who said they were able to work). *Id.* at 98-99. The percentage of nondisabled people aged eighteen to sixty-four who live in poverty is 10% in comparison to 19% of disabled individuals aged eighteen to sixty-four living in poverty. *Id.* A 1987 study sponsored by the International Center for the Disabled, the National Council on the Handicapped, and the President's Committee on Employment of the Handicapped also reported "that the costs of making accommodations were generally not very expensive and should not be considered a significant barrier to employing disabled workers." PERCY, *supra* note 100, at 216, 219.

132. See McDonald, *supra* note 125, at 996 (describing consensus that ADA was modern generation's Civil Rights statute). See also Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 413-14 (1991) (quoting American politicians' descriptions of ADA as significant Civil Rights legislation for disabled population); Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 55 (2001) (comparing purposes of ADA and Civil Rights legislation).

133. Those who opposed the Civil Rights Act of 1964 "described it as a 'blackjack,' and a 'political foray' directed solely at the South. Opponents in both houses felt the bill was 'so drafted as to concentrate the major impact of its atrocious provisions on the southern states . . .'" Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1, 51-52 (1998) (footnotes omitted).

134. Jack M. Balkin, *History Lesson*, LEGAL AFF., Jul.-Aug. 2002, at 48. In fact, forty years ago, the Supreme Court was willing to defer to Congress in this matter:

Equally important, by letting Congress take the lead in identifying which civil rights protections were necessary, the Warren Court could learn from social movements and take into account evolving popular understandings of equality. The Civil Rights Act of 1964 addressed women's rights, for example, well before the court did in the 1970s. The Rehnquist Court also rejects this approach, saying in effect that it's irrelevant that a popular consensus has grown in favor of civil rights for the elderly or the disabled, or that a democratically elected body like Congress has responded to a changing social climate.

Id.

As originally enacted, Title VII of the Civil Rights Act prohibited employment discrimination by private employers and labor unions based upon race, color, national origin, religion, and sex.¹³⁵ Title VII also established the EEOC and vested the five members of the EEOC with the authority to investigate charges of discrimination and to establish procedures for mediation of these charges.¹³⁶ Although Congress did not originally give the EEOC enforcement power, the Attorney General was statutorily empowered to intervene when charges of discrimination were filed and to file lawsuits when it believed a pattern or practice of discrimination existed.¹³⁷ Congress amended Title VII to apply to governmental employers in 1972.¹³⁸ Congress similarly extended the ADEA two years later.¹³⁹ When Congress enacted the ADA in 1990, it applied to state governmental employers and expressly incorporated the remedies provided under Title VII.¹⁴⁰

Other important amendments and enactments over the years clarified or added substantive protections. For example, Title VII was amended by the Pregnancy Discrimination Act (PDA) of 1978 to explicitly recognize that discrimination based upon pregnancy is discrimination “because of sex” within the meaning of Title VII.¹⁴¹ The Family and Medical Leave Act of 1993 was enacted to combat discriminatory leave policies for dependent care and care of other family members.¹⁴² Another important amendment to Title VII was the Civil Rights Act of 1991.¹⁴³ As originally enacted in 1964, Title VII provided successful litigants with only equitable relief (and thus no right to a jury trial) in the form of hiring or reinstatement, back pay, and other appropriate equitable

135. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 241 (1985). To supporters of the 1964 Civil Rights Act, “the most important abridgements of civil rights involved private acts of discrimination—by employers who refused to hire blacks or restaurant owners who refused to serve them at lunch counters.” Balkin, *supra* note 134, at 46.

136. See WHALEN & WHALEN, *supra* note 135, at 241 (outlining major provisions of Title VII).

137. *Id.* See also 42 U.S.C. § 2000e-6(b)-(e) (2001) (describing attorney general’s authority and role in bringing civil rights actions).

138. WHALEN & WHALEN, *supra* note 135, at 241. See also 42 U.S.C. § 2000e(a), (b), (h), (i) (2001) (including government in definition of person, employer, industry, and state); Ann Carey Juliano, *The More You Spend, The More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111, 1132 n.175 (2001) (noting Title VII’s amendment changing definition of employer to include governments).

139. See 29 U.S.C. § 630(b)(2) (2001) (including government as employer covered under act); Landau, *supra* note 11, at 176 (discussing certain exemptions applying to government employees despite AEDA’s extended coverage).

140. Landau, *supra* note 11, at 176-77. See also 42 U.S.C. §§ 12111(5), 12117(a) (2001) (excluding only federal or U.S. government from definition of employer and expressly incorporating Title VII remedies).

141. 42 U.S.C. § 2000e(k) (2001). See also *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-99 (1991) (holding PDA prohibited employment criteria blanketly precluding women from work that could potentially harm fetus, regardless of fertility).

142. 29 U.S.C. § 2601 (2001).

143. For a discussion of all of the changes created by the Civil Rights Act of 1991, see Glen D. Nager & Julia M. Broas, *Enforcement Issues: A Practical Overview, in The Civil Rights Act of 1991: A Symposium*, 54 LA. L. REV. 1473, 1474-81 (1994).

relief, including front pay.¹⁴⁴ The 1991 amendments were significant because they expressly allowed: jury trials in cases of intentional discrimination, an award of compensatory damages, and in appropriate cases, punitive damages.¹⁴⁵ These damages are dependent upon the size of the employer and range from \$50,000 to \$300,000 for the total damage award, including both compensatory and punitive damages.¹⁴⁶ Punitive damages are not available, however, against a governmental employer.¹⁴⁷

Since the ADA incorporates Title VII remedies, this relief is similarly available for disability claimants.¹⁴⁸ The ADEA was not amended by this provision of the Civil Rights Act of 1991. Instead, from its original enactment, it incorporated selected Fair Labor Standards Act provisions allowing for relief in the form of unpaid wages, and in the case of a willful violation of the Act, liquidated damages in an additional amount equal to double the unpaid wages award.¹⁴⁹ The various amendments to these civil rights statutes over time demonstrate just how far federal employment discrimination law has come in occupying the field of employment discrimination law and in protecting workers in this country.

The level of general acceptance federal employment discrimination laws enjoy today did not exist, however, in 1964. Opponents to Title VII were numerous and vocal in their arguments against its constitutional validity.¹⁵⁰ Their legal arguments, which were unsuccessful, were based on the First Amendment right of association.¹⁵¹ Simply stated, the opponents to Title VII firmly believed that private employers had a constitutional right not to associate in the workplace with members of other races and other protected classes and thus were not required to hire these individuals.¹⁵² The workplace was seen as analogous to a private club, a club in which individual job applicants had no rights to nondiscriminatory treatment during the hiring process and a

144. Michael D. Moberly, *Evolution in the Civil Rights Revolution: The Survival of Employment Discrimination Claims for Pain and Suffering*, 17 HOFSTRA LAB. & EMP. L.J. 1, 3-4 (1999). See also 42 U.S.C. § 2000e-5(g)(1) (2001) (providing availability of injunctive or equitable relief). Courts routinely award front pay to compensate for the time from the date of judgment to the point of reinstatement or hiring. *King v. Staley*, 849 F.2d 1143, 1144 (8th Cir. 1988). If the court finds that reinstatement is not feasible because, for instance, the working relationship between the parties has deteriorated to such an extent that they are unable to work together, the court will generally order a lump sum payment as front pay. See *Farber v. Massillon Bd. of Ed.*, 917 F.2d 1391, 1396-97 (6th Cir. 1990) (describing awarding this remedy).

145. 42 U.S.C. § 1981a(a)-(c) (2001).

146. 42 U.S.C. § 1981a(b)(3)(A)-(D).

147. 42 U.S.C. § 1981a(b)(1).

148. See Moberly, *supra* note 144, at 6 & n.28 (noting that ADA contains no remedial provisions, but rather inculcates Title VII remedies).

149. *Id.* at 9-10. See also 29 U.S.C. § 626(b) (2001) (detailing specific enforcement procedures for ADeA).

150. Post & Siegel, *supra* note 58, at 489-93.

151. *Id.* at 489.

152. *Id.* at 489-91.

discrimination-free work environment.¹⁵³

Pointing to the demonstrations and violent clashes between law enforcement and protesters over civil rights, southern governors and senators argued that if the Civil Rights Act of 1964 became law, it would encourage "government by intimidation," "mob violence," and even "anarchy."¹⁵⁴ Senator Strom Thurmond referred to the Civil Rights Act as "socialism" because he believed it would result in "government control of the means of production."¹⁵⁵ He incited fear by asking, "Whose jobs are these Negroes and minorities going to take, other Negroes or white peoples' jobs?"¹⁵⁶ The clear implication was that whites would lose jobs, and he even predicted that the new law would destroy seniority rights in unions.¹⁵⁷ At this time, legal rights vested in the employer, not the employee. The settled expectations of employers were heavily influenced by the employment-at-will doctrine, a concept that permeates employment law in this country.¹⁵⁸ Title VII thus represented a major incursion into that doctrine.¹⁵⁹

Advocates rarely make these kinds of arguments today, and when they are made, they are not taken very seriously because the employment setting is not viewed as simply a private club or private association.¹⁶⁰ It has become accepted in this country that individuals, whether employees or applicants for employment, have rights; they are entitled to equal treatment, and under some of these federal laws, equal opportunity to participate in the workforce and to compete for jobs.¹⁶¹ In fact, from the beginning, the Civil Rights Act of 1964 is

153. *See id.* at 489-93 (discussing distinctions made between civil and social rights).

154. BIRTH STRUGGLE OF THE 1964 CIVIL RIGHTS ACT (Films for the Humanities and Sciences 2002). The videotape documents important speeches and debates regarding the Civil Rights Act of 1964. One of those debates is a debate broadcast live on CBS between Senator Hubert H. Humphrey of Minnesota, the sponsor of the bill, and Senator Strom Thurmond of South Carolina. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. The employment-at-will doctrine allows an employer or employee to end the employment relationship at any time (if there is no term of duration) for any reason. Gary Minda, *Aging Workers in the Postindustrial Era*, 26 STETSON L. REV. 561, 561-62 (1996). "Federal and state anti-discrimination legislation which forbids the employer to terminate the relationship also governs the at-will relationship, especially legislation with any intent to discriminate on the grounds of race, gender, ethnicity, age, disability, or pension status of the employee." *Id.*

159. *Id.*

160. Although these arguments were freely and fiercely advanced by public figures, they have recently been described as sounding like "voices from another world." Post & Siegel, *supra* note 58, at 493. For a contemporary argument against the need for anti-discrimination law in this country, see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST DISCRIMINATION LAWS 59-78 (1992) (making economic arguments against such legislation).

161. The disparate treatment prohibitions in Title VII represent typical equal treatment requirements. John V. Jacobi, *Federal Power, Segregation, and Mental Disability*, 39 HOUS. L. REV. 1231, 1237 (2003). The reasonable accommodation requirements under the ADA also represent equal opportunity legislation. *Id.* In fact, very early in the history of Title VII, the Supreme Court found that Title VII went beyond mandating equal treatment: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment

credited with creating an expectation of uniform, federal protection for employees.¹⁶² For example, only after 1964 was nearly a century of doubt resolved when in 1975, the Supreme Court ruled that the Civil War Reconstruction Era statutes applied in private employment settings and to private actors.¹⁶³ These statutes proved important vehicles for litigants because they allowed for damages at a time when Title VII was limited to equitable relief.¹⁶⁴ The enactment of Title VII and the expectations that grew out of it thus breathed new life into these statutes.¹⁶⁵

From the beginning, the federal employment discrimination laws were designed by Congress to coexist with the already existing state laws and to encourage state resolution of employment discrimination claims.¹⁶⁶ Various administrative devices and procedures were established so as not to displace state law in this area.¹⁶⁷ And from almost the beginning, federal laws became the primary avenue by which individuals sought protection from discrimination in the workplace.¹⁶⁸ For example, in 1992, individuals filed 72,302 charges of discrimination with the EEOC; in 2002, individuals filed 84,442 such charges.¹⁶⁹ The reasons for having co-existing laws are in large part reflected in the legislative differences—many state laws do not provide a similar level of substantive protection from discrimination, the remedies available to successful

opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (ruling in favor of disparate impact as theory of liability under Title VII).

162. See Post & Siegel, *supra* note 58, at 502 (stating, “The Civil Rights Act of 1964 provoked sustained public deliberation about the role of the federal government that fundamentally transformed American traditions of federalism. Americans now believe that a core function of the federal government is to prohibit discrimination in the public and private sectors.”).

163. *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975) (ruling that 42 U.S.C. § 1981, which, among other things, prohibits discrimination in contracts, was applicable to private actors). For a discussion of the Supreme Court rulings regarding private actors and the applicability of other Reconstruction Era statutes, see Jack M. Beerman, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 992-1002 (2002).

164. See *supra* note 145 and accompanying text for discussion of 1991 Amendments to Title VII.

165. See Beerman, *supra* note 163, at 1021 (noting that there was ubiquitous civil rights legislation after three-quarters of century of no significant civil rights legislation between 1875 and 1957).

166. See, e.g., 42 U.S.C. § 2000e-4(g)(1) (2001) (stipulating that EEOC shall cooperate with state and local agencies). See also *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987) (holding that federal Pregnancy Discrimination Act did not preempt more generous state laws requiring reinstatement after pregnancy leave and finding specifically that PDA is “a ‘floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise’”) (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

167. *Id.* The EEOC is required to defer to state agencies to allow state processing of employment discrimination charges before federal processing. Moberly, *supra* note 55, at 266-67 & n.12. The EEOC also has “worksharing” agreements with state agencies. *Id.* at 269.

168. See Beerman, *supra* note 163, at 988 (noting flood of civil rights litigation and legislation since 1950s has repeatedly justified imposing limitations on reach of civil rights statutes by referring to explosion of civil rights litigation).

169. See EEOC Charge Statistics, *supra* note 22 (listing total number of individual charges for discrimination).

litigants are frequently more limited, and some states do not provide for an award of attorneys fees to a successful litigant.¹⁷⁰

The face of an employment discrimination charge has also changed over time. Initially, employment discrimination claims filed with both the state commissions and with the EEOC were primarily based upon a failure to hire.¹⁷¹ Over time, the definition of discrimination and the corresponding expectations of employees have expanded to encompass claims based upon discriminatory termination, failure to promote and various aspects of the employment environment, such as harassment.¹⁷²

III. FEDERAL EMPLOYMENT DISCRIMINATION LAW AND CONSTITUTIONAL CHALLENGES

Opponents to federal employment discrimination laws challenged their constitutionality. Several lines of Supreme Court cases have addressed these challenges. Part III.A discusses cases analyzing congressional power to legislate under the Commerce Clause.¹⁷³ Part III.B discusses cases analyzing congressional power under the Commerce Clause to abrogate states' Eleventh Amendment immunity to private damage claims in federal court.¹⁷⁴ Part III.C discusses cases analyzing congressional power to abrogate state immunity under Section 5 of the Fourteenth Amendment.¹⁷⁵

A. Power to Legislate Under the Commerce Clause

Unlike the recent decisions in *Kimel v. Florida Board of Regents*¹⁷⁶ and

170. See Jaclyn A. Okin, *Has the Supreme Court Gone Too Far?: An Analysis of University of Alabama v. Garrett and its Impact on People with Disabilities*, 9 AM. U. J. GENDER SOC. POL'Y & L. 663, 688-89 (2001) (discussing state laws protecting people with disabilities); Landau, *supra* note 11, at 189-94 (discussing state employment discrimination laws). See also McCafferty, *supra* note 11, at 1072-73 (discussing primarily Alabama's employment discrimination statutes). For a table including all fifty states and their employment discrimination laws, see Shelton *supra* note 18, at 858.

171. See Balkin, *supra* note 134, at 46 (discussing evolving nature of employment discrimination law).

172. Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After Bourne: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 817 (2003) ("The parameters of the [Voting Rights] Act, like those of the Civil Rights Act of 1964, have been determined through a dialogue between Congress and the Court, which continually reified and expanded the statute's provisions."). See also Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 480 (2003) (discussing expansion by both Congress and judiciary of protection under Title VII pursuant to disparate impact theory of liability).

173. See *infra* notes 176-95 and accompanying text for discussion of federal power to legislate under Commerce Clause.

174. See *infra* notes 196-200 and accompanying text for discussion of Congressional power to abrogate states' Eleventh Amendment Immunity.

175. See *infra* notes 201-25 and accompanying text for discussion of Congressional power to legislate under Section 5 of Fourteenth Amendment.

176. 528 U.S. 62 (2000).

Board of Trustees v. Garrett,¹⁷⁷ the question of the constitutional validity of the Civil Rights Act of 1964 immediately made its way to the United States Supreme Court in *Heart of Atlanta Motel, Inc. v. United States*¹⁷⁸ in 1964 and the judgment was unanimous.¹⁷⁹ In this case, a motel operator for whom 75% of its clientele were “transient interstate travelers” refused to open its doors to black travelers and filed a declaratory action to challenge the constitutional validity of Title II, the public accommodations provision of the Act, pursuant to the Interstate Commerce Clause, the Fifth Amendment due process clause and the Thirteenth Amendment prohibition against “involuntary servitude.”¹⁸⁰ Although Congress had invoked its power to legislate under both the Commerce Clause and the Fourteenth Amendment,¹⁸¹ the Supreme Court rested its decision solely upon the broad powers vested in Congress under the Interstate Commerce Clause:

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by the Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not the courts. How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress.¹⁸²

The Court avoided meeting head-on its earlier decision in the Civil Rights Cases.¹⁸³ In a concurring opinion, Justice Douglas joined the opinion of the

177. 531 U.S. 356 (2001).

178. 379 U.S. 241 (1964).

179. *Heart of Atlanta*, 379 U.S. at 241 (1964). See also *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (ruling that Congress validly legislated under Commerce Clause to prohibit racial discrimination in restaurants). The Court had addressed a constitutional challenge to the 1974 extension of the ADEA to governmental employers under the Tenth Amendment. See *EEOC v. Wyoming*, 460 U.S. 226, 229 (1983) (upholding application of ADEA to state employers by balancing state and federal interests). However, in 1985, just two years later, the Court overruled a prior decision in which it held that the Tenth Amendment limited congressional power under the Commerce Clause. *Garcia v. San Antonio Metro Trans. Auth.*, 469 U.S. 528, 531 (1985), *overruling* *Natl. League of Cities v. Usery*, 426 U.S. 833 (1976).

180. *Heart of Atlanta*, 379 U.S. at 243-44.

181. The Senate Report accompanying the Civil Rights Act of 1964 directly addressed the Civil Rights Cases of 1883 in which the Court struck down a substantially similar federal statute that was based upon Section 5 power. Post & Siegel, *supra* note 58, at 447 n. 22. The Senate Report explained:

There is a large body of legal thought that believes the Court would either reverse the earlier decision if the question were again presented or that changed circumstances in the intervening 80 years would make it possible for the earlier decision to be distinguished. That question, however, was not before the committee, for the instant measure is based on the commerce clause . . . of the Constitution.

Id. (quoting S. REP. NO. 88-872, at 12 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2356).

182. *Heart of Atlanta*, 379 U.S. at 261-62.

183. *Id.* at 250-51. The legislation under consideration in the *Civil Rights Cases* involved an 1875 Act of Congress prohibiting discrimination in public accommodations, such as inns and theaters. *Civil Rights Cases*, 109 U.S. 3, 4 (1883). The Court found the act unconstitutional under the Fourteenth

Court reluctantly, arguing instead that the result the Court reached was “much more obvious as a protective measure under the Fourteenth Amendment than under the Commerce Clause” and that

[i]t is rather my belief that the right of the people to be free of state action that discriminates against them because of race, like the “right of persons to move freely from State to State, occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel, and coal across state lines.”¹⁸⁴

The Supreme Court decision in *Heart of Atlanta Motel* “fixed a fateful pattern.”¹⁸⁵ As Congress continued to legislate in this area, the Court focused upon the decision in *Heart of Atlanta Motel* to uphold congressional enactments under the Commerce Clause.¹⁸⁶ Three strands of recent Supreme Court authority, however, have combined to call into question the seemingly broad congressional power to legislate under the Commerce Clause and, as a result, the validity of several federal employment discrimination laws.¹⁸⁷ First, in *United States v. Lopez*¹⁸⁸ in 1995 and more recently in *United States v. Morrison*,¹⁸⁹ the Court struck down legislation under the Commerce Clause.¹⁹⁰ In each case, the Court found the regulated activity to not be “commercial” or “economic” and therefore not a matter of national concern.¹⁹¹

In *Lopez*, the Court concluded that Congress did not possess the authority to enact the Gun-Free School Zones Act, legislation prohibiting the knowing possession of a firearm in a location the individual knows or reasonably believes to be a school zone.¹⁹² The Court found that such possession of a gun in a local school zone by a local individual was not an economic activity substantially affecting interstate commerce.¹⁹³ In *Morrison*, the Court analyzed federal civil

Amendment specifically ruling that the Constitution could not be applied to private actors. *Id.* at 26. See *supra* note 33 for discussion of other cases during this era. The Court in *Heart of Atlanta*, distinguished the 1875 legislation and decision in the *Civil Rights Cases*: “Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in ‘inns, public conveyances on land or water, theaters, and other places of public amusement,’ without limiting the categories of affected businesses to those impinging upon interstate commerce.” 379 U.S. at 250.

184. *Id.* at 279 (citations omitted).

185. Post & Siegel, *supra* note 58, at 448.

186. *Id.* at 448, 503-04 n.280 and cases cited therein. The authors argue that:

[T]he Court’s deference to Congress helped to consolidate a new consensus about the federal government’s role in enforcing civil rights. By the end of the decade, [by the end of the 1960s] Congress, the Court, and the American people all expected the federal government to lead the fight against discrimination in the public and private sectors.

Id. at 501.

187. *Id.* at 449.

188. 514 U.S. 549 (1995).

189. 529 U.S. 598 (2000).

190. *Morrison*, 529 U.S. at 618; *Lopez*, 514 U.S. at 567.

191. *Morrison*, 529 U.S. at 598-619; *Lopez*, 514 U.S. at 567.

192. *Lopez*, 514 U.S. at 567.

193. *Id.*

rights legislation concerning gender-motivated violence.¹⁹⁴ It specifically “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”¹⁹⁵

B. Power to Abrogate States’ Eleventh Amendment Immunity

In a second line of cases beginning in 1996, with *Seminole Tribe v. Florida*,¹⁹⁶ the Supreme Court held that legislation enacted pursuant to Article I, as is Commerce Clause legislation, does not abrogate states’ Eleventh Amendment immunity to private damage claims in federal court.¹⁹⁷ In 1999, in *Alden v. Maine*,¹⁹⁸ the Court ruled that the Eleventh Amendment also prohibited Congressional action subjecting unconsenting states to private damage claims in state court. In *Alden*, the Court noted that Eleventh Amendment immunity could be validly abrogated by Congress through legislation enacted pursuant to its Section 5, Fourteenth Amendment Enforcement Clause power.¹⁹⁹ Thus, Congress’ power pursuant to section 5 will now often determine which federal laws can validly be applied to the states.²⁰⁰

C. Power to Legislate Under Section 5 of the Fourteenth Amendment

The third line of recent Supreme Court cases, not surprisingly, involve decisions assessing congressional power to legislate under Section 5 of the Fourteenth Amendment.²⁰¹ Beginning in 1997, in *City of Boerne v. Flores*,²⁰² the

194. *Morrison*, 529 U.S. at 598-619.

195. *Id.* at 617. The Court found the congressional record insufficient in its findings of the impact violent gender-based crimes had on interstate commerce: “by ‘detering potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.’” *Id.* at 615 (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994), reprinted in 1994 U.S.C.C.A.N. 1803, 1853). The Court ruled that these findings were representative of the findings it feared Congress would use to “obliterate the Constitution’s distinction between national and local authority,” especially given the fact that the prevention of violence has “always been the prime object of the States’ police power.” *Morrison*, 529 U.S. at 615.

196. 517 U.S. 44 (1996) (deciding action by Indian tribe against state to compel negotiation under the Indian Gaming Regulatory Act).

197. *Seminole Tribe*, 517 U.S. at 47. This decision overruled the Court’s 1989 decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

198. 527 U.S. 706 (1999) (considering action by probation officers against state for allegedly violating overtime provisions of Fair Labor Standards Act). In both *Seminole Tribe* and *Alden* the Court was closely divided and rendered a 5-4 decision with vigorous dissenting opinions. *Alden*, 527 U.S. at 760-814, *Seminole Tribe*, 517 U.S. at 100-185. In *Seminole Tribe*, Justice Souter argued, “[T]he Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a state to the jurisdiction of a federal court at the behest of an individual asserting a federal right.” 517 U.S. at 100 (Souter, J., dissenting).

199. *Alden*, 527 U.S. at 756.

200. Post & Siegel, *supra* note 58, at 451.

201. *Id.*

Court ruled that Congress acted unconstitutionally when it enacted the Religious Freedom Restoration Act of 1993 (RFRA).²⁰³ This was the first Supreme Court decision to squarely address Congress' Section 5 power in two decades.²⁰⁴ "Congress enacted RFRA in direct response to *Employment Division, Department of Human Resources of Oregon v. Smith*,²⁰⁵ in which the Court upheld against a free exercise challenge a state law of general applicability criminalizing peyote use."²⁰⁶ The RFRA legislation attempted to prohibit both federal and state government from "substantially burdening" the First Amendment Free Exercise of religion "even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest.'"²⁰⁷

The Court ruled that Congress exceeded its power under Section 5 of the Fourteenth Amendment to enact RFRA because although the delegation of power to Congress to enforce Section 5 is broad, Congress lacks "the power to determine what constitutes a constitutional violation."²⁰⁸ The Court found that because Congress enacted RFRA with an express purpose: "to restore the compelling interest test as set forth in *Sherbert v. Verner*, . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened," the legislation crossed the line from enforcing the Constitution through appropriate remedial legislation to determining its substantive content or meaning.²⁰⁹ The Court thus reasserted "the basic precept of *Marbury [v. Madison]*: In the last instance, it is for 'the Judicial Branch . . . to say what the law is.'"²¹⁰

In determining that RFRA was not appropriate remedial legislation, the Court applied a test of "congruence and proportionality between the injury to be

202. 521 U.S. 507 (1997).

203. *Boerne*, 521 U.S. at 535-36.

204. Post & Siegel, *supra* note 58, at 452. See generally, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding Eleventh Amendment is limited by enforcement provisions of section 5 of Fourteenth Amendment).

205. 494 U.S. 872 (1990)

206. *Boerne*, 521 U.S. at 512 (citation omitted).

207. *Id.* at 515-16 (quoting 42 U.S.C. § 2000bb-1 (2001)).

208. *Id.* at 519.

209. Post & Siegel, *supra* note 58, at 453 (quoting 42 U.S.C. § 2000bb(b)(1) (2001) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963))). In *Boerne*, the Court expressly approved several of its prior decisions. 521 U.S. at 518 (approving *City of Rome v. United States*, 446 U.S. 156 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966)). The Court, however, expressly reaffirmed its decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), in which it had rejected its earlier decision in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Boerne*, 521 U.S. at 512. In *Sherbert*, the Court applied a balancing test and held that South Carolina could not constitutionally apply its unemployment compensation statute to deny benefits to a claimant who had declined employment based upon her religious beliefs. 374 U.S. at 398.

210. Post & Siegel, *supra* note 58, at 454 (quoting *Boerne*, 521 U.S. 507 (1997) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

prevented or remedied and the means adopted to that end.”²¹¹ The Court concluded that the legislation was not “designed to prevent . . . unconstitutional behavior,” but was rather an attempt by Congress to create “a substantive change in constitutional protections.”²¹² This analysis set the stage for the Court’s decisions in *Kimel* and *Garrett*.²¹³ First, in *Kimel*, in 2000, the Court applied the analytical framework utilized in *Boerne* to the ADEA.²¹⁴ The Court began its analysis by noting that age-based classifications are not entitled to heightened scrutiny under the Fourteenth Amendment; thus, so long as states have a rational basis for making distinctions based upon age, such distinctions will be upheld.²¹⁵

The Court found that this test “permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it ‘is probably not true’ that those reasons are valid in the majority of cases.”²¹⁶ The Court then framed the issue presented in terms of the *Boerne* distinction between remedial (permissible) legislation and substantive (impermissible) legislation and concluded:

Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.²¹⁷

Although it clearly found disproportionality, the Court next examined the legislative history to determine whether Congress was in fact warranted in enacting such broad and far-reaching legislation.²¹⁸ The Court found the legislative record deficient, falling “well short of the mark” in identifying “any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.”²¹⁹

A year later in *Garrett*, once again, a closely divided Court, ruled that Title I of the ADA failed to pass the *Boerne* test of proportionality and congruence.²²⁰ First, the Court looked to its earlier Equal Protection Clause jurisprudence to support its conclusion that rational basis analysis applies to classifications based

211. *Boerne*, 521 U.S. at 520.

212. *Id.* at 532.

213. *Garrett*, 531 U.S. at 356; *Kimel*, 528 U.S. at 62.

214. *Kimel*, 528 U.S. at 82-83.

215. *Id.* at 83-84.

216. *Id.* at 86 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (upholding, under Equal Protection Clause rational basis test, Missouri constitutional requirement that judges retire at age seventy)).

217. *Id.* (quoting *Boerne*, 521 U.S. at 532).

218. *Id.* at 88-89.

219. *Kimel*, 528 U.S. at 89.

220. *Garrett*, 531 U.S. at 372.

upon disability: “States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled.”²²¹

The Court next analyzed the very extensive legislative record underlying the ADA for evidence of “a history and pattern of unconstitutional employment discrimination by the States against the disabled.”²²² Although the Court found evidence of such discrimination in the legislative record, it concluded that the evidence was insufficient to support the broad scope of the ADA:

Several of these incidents undoubtedly evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA. Whether they were irrational under our decision in *Cleburne* is more debatable, particularly when the incident is described out of context. But even if it were to be determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.²²³

The Court also noted other evidence in the congressional record that was in tension with a finding of a history of purposeful discrimination on the part of the states—by the time the ADA became law, every state had laws prohibiting discrimination based upon disability.²²⁴ The Court reasoned further that even if Congress had identified a pattern of State discrimination sufficient to support remedial legislation, “the rights and remedies created by the ADA” far exceed appropriate remedial legislation.²²⁵

IV. CONSTITUTIONAL RIGHTS, POWERS, AND SETTLED EXPECTATIONS

A great deal of critical scholarship has been generated in the wake of *Kimel v. Florida Board of Regents*,²²⁶ *Board of Trustees v. Garrett*,²²⁷ and the other

221. *Id.* at 367-68.

222. *Id.* at 368.

223. *Id.* at 370.

224. *Id.* at 368 & n.5. See *supra* note 170 and accompanying text for a discussion that while the Court did not explicitly recognize this fact as undercutting congressional findings, it is worth noting that the state measures are frequently less extensive in terms of the types of disabilities protected, the duties imposed upon employers in accommodating disabled employees and applicants for employment, and the available remedies. In fact, some states exempt state employers from coverage. See Landau, *supra* note 11, at 190 (noting that “[s]ome state laws are ambiguous as to whether the state is a covered employer at all”).

225. *Garrett*, 531 U.S. at 372. The Court focused on the statutory requirement that employers make facilities “readily accessible to and usable by individuals with disabilities;” the reasonable accommodation requirement and undue hardship test; and the disparate impact theory of liability. *Id.* at 372-73 (quoting 42 U.S.C. §§ 12112(5)(B), 12111(9) (1994)).

226. 528 U.S. 62 (2000).

227. 531 U.S. 356 (2001).

recent Supreme Court pronouncements²²⁸ concerning congressional power under both the Eleventh²²⁹ and Fourteenth Amendments²³⁰ to the Constitution. The purpose of the remainder of this article is not to join that debate directly, but instead to assess federal employment discrimination law as applied to state employers from a different constitutional perspective—a perspective focused upon (1) the historical rights/powers distinction under the Constitution, (2) the private function a state performs as an employer, (3) the increased importance of work in the lives of individuals within our society, and (4) the settled expectations of individuals who have been until recently protected by longstanding federal laws and, as a result, have ordered their lives around the protections provided by these laws. As Justice Stevens noted in his dissenting opinion in *Kimel*, when commenting upon the questionable *stare decisis* effect of the Court's 1996 decision in *Seminole Tribe v. Florida*,²³¹ overruling seven-year-old precedent: "That principle is perverted when invoked to rely on sovereign immunity as a defense to deliberate violations of settled federal law."²³²

This argument has particular force given the fact that the recent decisions of the Supreme Court have been bitterly contested within the Court and have all been rendered with five Justices in the majority and four voting in dissent.²³³

228. See, e.g., *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48 (1999) (applying *Boerne* congruence and proportionality test to invalidate federal legislation abrogating state sovereign immunity from patent claims). For a discussion of the waiver issue, see *supra* note 18.

229. In addition to the scholarship previously cited in this article, for a small sampling of additional research, see generally, Roderick M. Hills, Jr., *Symposium, The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225 (2001); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027 (2002); Ronald D. Rotunda, *The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183 (2002); Christopher E. Sherer, *The Resurgence of Federalism: State Employees and the Eleventh Amendment*, 23 HAMLINE J. PUB. L. & POL'Y 1 (2001); Mark Strasser, *Hans, Ayers, and Eleventh Amendment Jurisprudence: On Justification, Rationalization, and Sovereign Immunity*, 10 GEO. MASON L. REV. 251 (2001).

230. For a sampling of Fourteenth Amendment scholarship, see generally, Stephen E. Gottlieb, *Symposium, Rolling John Bingham in his Grave: The Rehnquist Court Makes Sport With the 14th Amendment*, 36 AKRON L. REV. 411 (2003); Adam J. Rosen, *Slaughtering Sovereignty: How Congress Can Abrogate State Sovereign Immunity to Enforce the Privileges or Immunities Clause of the Fourteenth Amendment*, 11 TEMP. POL. & CIV. RTS. L. REV. 111 (2001); Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Bourne v. Flores*, 32 IND. L. REV. 163 (1998); Brent E. Simmons, *The Invincibility of Constitutional Error: The Rehnquist Court's States' Rights Assault on Fourteenth Amendment Protections of Individual Rights*, 11 SETON HALL CONST. L.J. 259 (2001).

231. 517 U.S. 44 (1996).

232. *Kimel*, 528 U.S. at 98 (Stevens, J., dissenting). See also *Seminole Tribe*, 517 U.S. at 44 (1996) (holding that Eleventh Amendment prevents Congress from authorizing suits by Native American tribes against states to enforce legislation enacted pursuant to Indian Commerce Clause), overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). For a discussion of the analysis in these cases, see *supra* notes 196-200 and accompanying text.

233. See Shelton, *supra* note 18, at 838-39 (noting several close decisions over the issue of sovereign immunity). The bitter division in the Court is evident from the tenor of the opinions. Justice Steven's anger regarding the decision in *Seminole Tribe* is readily apparent: "First and

When members of the Court hold radically different interpretations of the meaning of the Eleventh Amendment's guarantee of state sovereignty, and when those interpretations are not textually grounded in the language of the Eleventh Amendment, a particularly compelling argument in favor of deference to Congress can and should be made.²³⁴ This is especially true when Congress has acted pursuant to its Section 5 power to enforce the Fourteenth Amendment, which confers no rights on states, but instead vests power in Congress to enact legislation against the states.²³⁵ A final consideration present in both *Kimel* and *Garrett* involves the nature of the legislation itself—in both cases, the legislation “does not discriminate against anyone, nor does it pose any threat to basic liberty.”²³⁶ Why then would a majority of the Court rule that state sovereignty trumps the rights of individuals protected by the ADEA, for example, “a statute . . . whose substantive mandates extend to ‘elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State’s governmental hierarchy?’”²³⁷

A very basic consideration and beginning point of constitutional analysis is its recognition of individual rights, rendering the individual sovereign over certain spheres of life, while simultaneously granting powers to the states.²³⁸

foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers’ conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court.” *Kimel*, 528 U.S. at 97-98 (Stevens, J., dissenting).

234. The Eleventh Amendment provides that: “The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. The language of the Amendment does not explicitly grant immunity from suit to the states. Todd B. Tatelman, Comment, Nevada Department of Human Resources v. Hibbs: *The Eleventh Amendment in a States’ Rights Era: Sword or Shield?*, 52 CATH. U.L. REV. 683, 683 & n.5 (2003). Its immediate purpose was to overrule *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). See U.S. CONST. amend. XI (invalidating the ruling in *Chisolm v. Georgia* that declared that United States citizens could sue their state governments); *Chisolm*, 2 U.S. at 428 (holding that United States citizen may bring action against state government). It was not until almost a century after its ratification, that the Supreme Court gave the Eleventh Amendment this interpretation. See *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (holding that Amendment was designed to incorporate concept of sovereign immunity by which state may not be sued in federal court without its consent). Analysts argue over three different theories of interpreting the Eleventh Amendment: (1) restricts subject matter jurisdiction of federal courts (current majority); (2) restricts subject matter jurisdiction only in matters of diversity jurisdiction (current dissent); (3) reinstates common law immunity of states prior to *Chisolm*. Tatelman, *supra*, at 683 & n.5.

235. As Justice Breyer argued in his dissenting opinion in *Garrett*: “Rules for interpreting § 5 that would provide States with special protection, however, run counter to the very object of the Fourteenth Amendment. By its terms, that Amendment prohibits States from denying their citizens equal protection of the laws.” 531 U.S. at 388 (Breyer, J., dissenting).

236. *Id.* at 387.

237. *Kimel*, 528 U.S. at 99 (Thomas, J., concurring in part and dissenting in part) (quoting *Employees of Dep’t of Pub. Health and Welfare v. Dep’t of Pub. Health and Welfare*, 411 U.S. 279, 285 (1973)).

238. See Akhil Reed Amar, 2000 *Daniel J. Meador Lecture: Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1225 (2002) (noting in Reconstruction context and passage of Fourteenth Amendment, that individual rights are “fundamental privilege” of all American citizens); Reich, *supra*

Very simply stated, the Constitution confers rights on individuals and powers on states:

The original Constitution relied on the concept of boundaries and limits to preserve individual sovereignty as well as on specific guarantees of liberty such as those found in the Bill of Rights. The principle that the national government was limited to enumerated powers, and the principle of federalism, which left large areas of power to the states, are both protections of liberty. Indeed, because these protections are structural and territorial, they afford a potentially broader area for the individual than specific rights.²³⁹

The next consideration is the interpretation employed by the Court today in weighing the rights of individuals against the power of states. The Court vests the term “power” with positive force, with authority to act; in contrast, individual rights are often analyzed from a negative perspective—the right not to act, but to be left alone.²⁴⁰ This interpretation is not constitutionally mandated. It is Court imposed and highly value-laden.²⁴¹ The balance is thus often struck in favor of the state before the interests are ever weighed, and individual rights are thereby subordinated.²⁴²

note 1, at 1410 (arguing that Framers might have included separate article for individual rights in Constitution if they could have foreseen “dominance of the modern corporate state”).

239. Reich, *supra* note 1, at 1414. Some argue that states’ rights must be equal to individual rights to preserve federalism. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 912 (1994). Others believe differences mandate different treatment of states and individuals. *Id.* For example, Jesse Choper argues that only individual rights should be judicially enforced and that states are protected through the political process. *Id.* For an assessment of judicial review from the perspective of whether it protects the rights of individuals, see Ralph Ruebner, *Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel—A Comparative Perspective*, 31 GA. J. INT’L & COMP. L. 493, 493 (2003).

240. Reich, *supra* note 1, at 1416 (arguing for parity in assessment—individual rights should be thought of no differently than individual power). The idea of “positive” and “negative” freedom is deeply rooted in our history and philosophical beliefs. John Lawrence Hill, *A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought*, 29 HASTINGS CONST. L.Q. 115, 116-17 (2002). In the nineteenth century, the notion of negative liberty dominated constitutional belief: “liberty itself was conceived of as the absence of constraint and, more particularly, the absence of government regulation.” *Id.* at 122. Professor Hill asserts that by the late nineteenth century, this concept began to change from simply the right of the individual to be left alone to the belief that at times individual liberty or rights required more, that government intervention was sometimes necessary to protect these rights. *Id.* at 124. Hill argues that:

[T]he Founding Fathers and, in particular, James Madison and Thomas Jefferson, drew together the diverse strands of a number of distinct, if often overlapping traditions, in creating a theory of liberty which ties the values associated with individual self-determination to a conception of liberty as social balance. More specifically, liberty requires the counter-balancing of all forms of social power, yet this attempt to create an equilibrium of social power does not simply check power, as in negative theories of liberty, but serves to create a social foundation for the affirmative expression and influence of groups, and through them, persons.

Id. at 119.

241. Reich, *supra* note 1, at 1412 (arguing that “[i]ndividual rights have been demoted from a ‘preferred’ position to a ‘subordinate’ position, a drastic reversal of our constitutional jurisprudence”).

242. See *id.* at 1411 (arguing that Court has not adhered to any notion of original meaning to

In fact, Justice Breyer made an argument that the evidentiary balance was struck in favor of the states and against protecting individuals in his dissenting opinion in *Garrett*: “The Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies improperly invades a power that the Constitution assigns to Congress.”²⁴³ Justice Breyer took great issue with the majority’s conclusion that characterized the evidence of state discrimination as “minimal.”²⁴⁴ Breyer found the congressional record extensive: Congress held hearings in every state over a three-year period, “attended by more than 30,000 people,”²⁴⁵ and found “hundreds of instances”²⁴⁶ of state discrimination against the disabled:

instances in which a person with a disability found it impossible to obtain a state job, to retain state employment, to use the public transportation that was readily available to others in order to get to work, or to obtain a public education, which is often a prerequisite to obtaining employment. State-imposed barriers also frequently made it difficult or impossible for people to vote, to enter a public building, to access important government services, such as calling for emergency assistance, and to find a place to live.²⁴⁷

The majority in *Garrett* also took issue, however, with the weight of the evidence presented to Congress because it found this evidence insufficient to prove discrimination in court.²⁴⁸ Not only does this analysis fail to recognize Congress’ constitutional competency, it places a nearly impossible burden on Congress pursuant to its Section 5 authority to enact legislation protecting individuals from discrimination—the burden of gathering evidence sufficient to support a finding of disparate treatment in a court of law.²⁴⁹ The high failure rate of employment discrimination claims in the court system is evidence of the difficulty this burden of proof places upon an individual litigant; when this same burden is placed upon Congress’ shoulders to justify national legislation that is not subject to heightened scrutiny, it becomes almost insurmountable.²⁵⁰

In order to meaningfully assess the rights of individuals in the workplace and the corresponding power of states as employers, the realities of the modern day work setting should also be recognized.²⁵¹ The distinction between the

interpret governmental power, but has adhered closely to traditional meanings of individual rights, thereby creating “Unbalanced Constitution”).

243. *Garrett*, 531 U.S. at 388 (Breyer, J., dissenting).

244. *Id.* at 377.

245. *Id.* at 377.

246. *Id.* at 379.

247. *Id.*

248. *Garrett*, 531 U.S. at 379.

249. *Id.* at 380.

250. See Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 249-50 (giving statistics about relative frequency of reversal on appeal of employment discrimination cases in contrast to other types of civil cases because of high legal standard for proving liability).

251. See Reich, *supra* note 1, at 1423-34. Reich argues that:

private and public sector in employment has become blurred and meaningless—large corporations have become highly organized and operate like governmental organizations, often wielding power indistinguishable from that traditionally vested in government.²⁵² The growth of the administrative state, as it is often termed, frequently results in policymaking “between unelected administrators, a few interested politicians, and representatives of the affected industries.”²⁵³ Governments, in turn, particularly when acting as employers, are indistinguishable from large corporate entities.²⁵⁴ In this setting, one in which the government is performing a private function, and wielding enormous power over the lives of individual employees, the state action doctrine loses its meaning.²⁵⁵

Yet from a constitutional perspective, this public-private distinction undermines the individual employee because state employers are permitted to “claim a special public interest in their employment practices so as to deny public employees rights they would have as private employees.”²⁵⁶ And now, with the rulings in *Kimel* and *Garrett*, state employers are not subject to the same legal standards and sanctions in their treatment of disabled and older workers and applicants for employment as are private employers.

Another reality of the modern day work setting is its social, emotional, and economic importance to individuals.²⁵⁷ Indeed, “[f]or most of us, attachment to the work force is both a financial necessity and a sign of one’s worth socially and politically. Employment lies . . . at the very core of modern democratic citizenship. The person who does not work and is expected to work is socially and politically stigmatized.”²⁵⁸

Exclusion or the potential for exclusion from an entire class of job

Today, in contrast, America is territorially divided into an “inside” and an “outside.” Most people spend a major portion of their lives within a system or organization, public or private. This inside territory is governed by different rules and principles than those prevailing on the traditional outside. A corporation or government agency is not a democracy. It is governed from the top. Workers are not full citizens. They do not vote; instead, they take orders. On the inside, there are no courts, no Bill of Rights, no legislature, no system of law, no principle of equality.

Id. at 1423-24.

252. *Id.* at 1424.

253. Hill, *supra* note 240, at 134. Hill explains:

[W]hile the growth of the administrative state is typically viewed as a tradeoff of indirect political control by the citizenry in return for expertise, efficiency and coverage . . . there can be no doubt that the administrative state represents virtually the opposite end of the philosophical spectrum from that of the polis, from the standpoint of a commitment to positive liberty.

Id.

254. Reich, *supra* note 1, at 1429.

255. *Id.*

256. *Id.*

257. Mark Neal Aaronson, *Ideas Matter: A Review of John Denvir's Democracy's Constitution*, 36 U.S.F. L. REV. 937, 949 (2002).

258. *Id.*

opportunities—those with a state as employer—is especially troubling. It must be remembered that the Supreme Court did not base its decisions in *Kimel* and *Garrett* on the idea that the states might be held to a higher standard than private employers. By its decisions, the Court declared that states will be held to a lesser standard in the employment arena than are private employers.²⁵⁹ The Court's decision has grave ramifications. In some sense, the Court has decreed that a state system of excluding individuals who have historically been denied productive, fulfilling work lives, is now constitutionally permissible.²⁶⁰ This is not to say that states will engage in discrimination with impunity, but the message the decisions themselves send should not be underestimated.²⁶¹

When these recent Supreme Court decisions are placed side-by-side with the Court's prior jurisprudence in this area, an odd tapestry emerges. In other aspects of federal regulation of the states as employers, the Court has recognized that "Congress' power to regulate the American economy includes the power to regulate both the public and the private sectors of the labor market."²⁶² For instance, Congress is permitted to regulate the states by establishing uniform minimum wage laws, federal employee benefit and pension laws, tax laws, and fair labor standards rate-setting laws.²⁶³ Yet, it is not permitted to impose important aspects of employment discrimination laws upon the states when the protected class involves age, or physical or mental disability.²⁶⁴ The Supreme Court's conclusion that state sovereignty trumps individual rights to be fully compensated for arbitrary and discriminatory treatment in the employment setting makes no sense when the state is engaging in a private function.²⁶⁵

This result is especially problematic given the fact that federal employment

259. *Garrett*, 531 U.S. at 387-88 (Breyer, J., dissenting).

260. *Id.* at 388.

261. See Reich, *supra* note 1, at 1438-39 (noting that our economy consists of centralized "inside" where small few make majority of decisions, and "outside" where those excluded cannot affect their own fate or achieve their desire to be on "inside" without help of "inside" decisionmakers). Reich characterizes the working sector as the "inside" and those who are excluded from it as being on the "outside."

The phenomenon of exclusion has escaped adequate analysis and understanding because we comfort ourselves with the belief that it is a voluntary deprivation; that anyone who wants to contribute work may find a place on the inside through her own efforts and that those who are on the outside are responsible for their own condition. This belief represents a lag in our consciousness, the clinging to a mythology we desperately want to believe. Layoffs, plant closings, the existence of a permanently excluded socioeconomic class, the fate of neglected children, and the uncared-for aged tell a different story.

Id. at 1439.

262. *Kimel*, 528 U.S. at 92-93 (Stevens, J., dissenting).

263. See *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 554 (1985) (upholding application of Fair Labor Standards Act overtime and minimum wage requirements to public mass transit employer), *overruling* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

264. *Garrett*, 531 U.S. at 360; *Kimel*, 528 U.S. at 91-92.

265. *Garcia*, 469 U.S. at 543-44. See also Wally Mueller, *Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response*, 38 DEPAUL L. REV. 1051, 1110-11 (1989) (arguing that nonprofit access management corporations that exercise control over public airwaves are state actors).

discrimination laws protect most within society in one form or another for their entire career; these laws have become socially accepted and expected.²⁶⁶ In other areas of constitutional analysis, members of the Court have recognized that when longstanding laws exist, which confer individual rights, people order their lives around the expectation that the rights will not be taken from them.²⁶⁷ The expectation of uniform, national protection of civil rights in the employment setting should not be cast aside by such narrow margins:

One cannot reason about the scope of the national government's authority to enforce civil rights without addressing the history of the second Reconstruction, which profoundly altered the federal government's role in combating discrimination. That history is now institutionalized in judicial precedents, congressional enactments, and executive agencies. It has been incorporated into the common sense and experience of the country.²⁶⁸

V. CONCLUSION

Federal employment discrimination law has become the primary vehicle by which individuals pursue relief from discrimination in employment. For four decades federal legislation has provided a uniform system of rights and remedies, one that the Supreme Court has very recently fundamentally altered. Individuals have come to expect national protection from discrimination in employment based upon race, color, national origin, religion, sex, age, and disability, and there exists no good reason, constitutional or otherwise, for undermining this settled expectation for two sources of protection—disability and age. Certainly, a justification grounded in state sovereignty should not disturb these settled expectations around which people have ordered their lives. The need to exercise judicial restraint is especially critical when the Court is so bitterly yet so closely divided upon the issue of state sovereignty and when the legislation it thwarts prohibits the states in their capacity as employers from

266. See Post & Siegel, *supra* note 58, at 485-86 (noting that employment relationship today “now appears . . . a sphere of ‘national’ regulatory concern”).

267. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 853 (1992), Justices O'Connor and Kennedy concluded that the doctrine of stare decisis should be observed and that the decision in *Roe v. Wade*, 410 U.S. 113 (1973), recognizing abortion rights should not be overturned: “arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of stare decisis.” See also *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (stating “[s]tare decisis has special force when legislators or citizens ‘have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response’” (quoting *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991))). The Court, however, in *Hubbard* found the reliance interest on precedent “notably modest.” *Id.* at 714. In a series of other due process decisions, the Court has similarly declared that Congress does not possess “unlimited power to ‘readjust rights and burdens . . . and upset otherwise settled expectations.’” *United States v. Carlton*, 512 U.S. 26, 37 (1994) (O'Connor, J., concurring) (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 229 (1986) (O'Connor, J., concurring)).

268. Post & Siegel, *supra* note 58, at 486.

practicing invidious discrimination against individuals based upon traits or characteristics essentially unrelated to the ability to perform a job.