

The Similarity of Congressional and Judicial Lawmaking Under Title VII of the Civil Rights Act of 1964

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*"[T]he process of research . . . which is imposed upon the judge in finding the law seems to us very analogous to that incumbent on the legislator himself [T]he considerations which ought to guide it are . . . exactly of the same nature as those which ought to dominate legislative action itself, since it is a question in each case, of satisfying, as best may be, justice and social utility by an appropriate rule."*¹

INTRODUCTION

Title VII of the Civil Rights Act of 1964² is one of the most important pieces of labor legislation of the century. The Bill that became Title VII was vigorously debated in Congress. Important interests were at stake: on the one hand were minorities and women, who sought economic justice; on the other hand were employers and incumbent employees, who feared (among other things) quotas and loss of seniority status. These interests were strong, and the fair employment practices (FEP) title of the civil rights bill was amended many times before it was enacted. In the end, Congress struck a balance of interests and passed a law.

After Title VII took effect, the courts were called upon to interpret and apply the statute. Legal doctrine required them to honor congressional intent. Yet, on four important issues, the courts initially reached

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¹ F. GENY, *METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF* 77 (1919), *quoted in* B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 119-20 (1921).

² 42 U.S.C. §§ 2000e to 2000e-17 (1982).

decisions that were inconsistent with the legislative history. Courts rendered judgments that significantly altered the balance of interests originally fashioned in Congress in the areas of seniority systems, the time limits within which charges of discrimination had to be filed, bona fide occupational qualifications, and ability testing. In more recent years, however, the doctrines announced in the early cases on these four issues have been renounced or modified substantially. Today the law on these four issues stands at, or approaches, the positions Congress intended in 1964. Interestingly, Congress had previously vacillated on these same issues.

Following a brief statement of the legislative history of Title VII, this Article describes how, and then explains why, the four issues were treated as they were by Congress and the courts. The evidence reveals that both institutions of government were influenced by the competing interests, and the conclusion is drawn that the process of lawmaking is similar in this important way in both the courts and the legislature.

I. A BRIEF LEGISLATIVE HISTORY OF TITLE VII

Many civil rights bills were introduced into the Eighty-eighth Congress.³ The most important of those dealing with equal employment opportunity was H.R. 405, sponsored by Representative James Roosevelt of California. This Bill, which applied to employment discrimination on the grounds of race, color, religion, and national origin (but not sex) was referred to the House Committee on Education and Labor. The Committee held hearings, amended the Bill in several ways, and recommended passage,⁴ but the Bill never came to a vote in the House. While H.R. 405 was still in committee, Representative Emmanuel Celler of New York introduced the Kennedy Administration's omnibus civil rights bill, H.R. 7152, which eventually became the Civil Rights Act of 1964.⁵ Although this Bill contained titles on voting, public accommodations, and public schools, the Bill lacked provisions concerning fair employment practices in the private sector of the economy. H.R. 7152 was referred to the House Committee on the Judi-

³ Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COMM. L. REV. 431, 433 (1966). Vaas noted the variation in scope between the different proposed bills: "Some included comprehensive provisions relating to all areas of civic and economic life where discrimination existed, including private employment; others dealt primarily with equal employment opportunity in both private and public employment." *Id.*

⁴ H.R. REP. NO. 570, 88th Cong., 1st Sess. (1963).

⁵ Vaas, *supra* note 3, at 434.

ciary,⁶ which (at the urging of Representative Roosevelt and others)⁷ amended the Bill to include an FEP title. Although it differed in some ways from Representative Roosevelt's Bill, the new FEP title was patterned after H.R. 405 as reported by the Committee on Education and Labor. The Judiciary Committee reported favorably on H.R. 7152⁸ and the House of Representatives, after adding sex as a protected class,⁹ passed the Bill on February 10, 1964.¹⁰

In the Senate, Hubert Humphrey of Minnesota, the majority whip, and Thomas Kuchel of California, the minority whip, served as floor managers for H.R. 7152.¹¹ Bipartisan cocaptains were also designated for each major title of the Bill. Joseph Clark of Pennsylvania and Clifford Case of New Jersey were the cocaptains for the FEP title (Title VII).¹² Because the Senate took the unusual step of placing H.R. 7152 directly on the calendar,¹³ there is neither committee report nor hearing in the Senate on the Bill. Nevertheless, cocaptains Clark and Case provided their colleagues with a document entitled "Interpretative Memorandum of Title VII of H.R. 7152."¹⁴ This memorandum, which is a detailed discussion of the FEP title of the Civil Rights Bill, is tantamount to a committee report and is the single most authoritative piece of legislative history on Title VII.

Although advocates of the Civil Rights Bill at first hoped the Senate would adopt H.R. 7152 without amendment, the need for substantial revision soon became evident, and a bipartisan group began to meet privately. The group included Mike Mansfield of Montana, majority

⁶ 109 CONG. REC. 11,252 (1963).

⁷ Vaas, *supra* note 3, at 433-35.

⁸ H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963).

⁹ 110 CONG. REC. 2584, 2804 (1963).

¹⁰ *Id.* at 2804-05.

¹¹ *Id.* at 6812 (1964) (Sen. Mansfield refers to Sen. Humphrey as the floor manager of the bill); *id.* at 9244 (Sen. Len B. Jordan refers to Senators Humphrey and Kuchel as comanagers of the bill). As the bipartisan leaders, Senators Humphrey and Kuchel spoke generally in support of H.R. 7152 and explained the provisions thereof. Vaas, *supra* note 3, at 444.

¹² Vaas, *supra* note 3, at 445.

¹³ 110 CONG. REC. 3693-96, 3719 (1963). The comanagers relied on rule XIV, subsection 4, of the rules of the Senate, which requires a bill that has been read the second time and has not been referred to a committee to be placed on the calendar. Sen. Russell sought to send the bill to a committee; he argued that subsection 4 of rule XIV had been superceded by the provision of the Legislative Reorganization Act of 1946, which provides for mandatory references of bills to committees. The acting president pro tempore overruled Sen. Russell's objection. *Id.* at 3696. On appeal, a Senate vote of 54 to 37 upheld the direct placement of the bill on the calendar. *Id.* at 3719.

¹⁴ *Id.* at 7212.

leader of the Senate; Everett Dirksen of Illinois, minority leader of the Senate; Senators Humphrey and Kuchel; William McCulloch of Ohio, ranking minority member of the House Judiciary Committee; and Attorney General Robert Kennedy.¹⁵ The meetings of this group bore fruit on May 26, 1964, when Senator Dirksen introduced Amendment No. 656.¹⁶ Commonly referred to as the Mansfield-Dirksen substitute, it was an amendment in the nature of a substitute for the entire Bill.¹⁷

On June 9, 1964, the Senate passed H.R. 7152, as amended by the Mansfield-Dirksen substitute, and returned the Bill to the House of Representatives.¹⁸ The House concurred in the Senate's amendments on July 2, 1964,¹⁹ and President Lyndon Johnson signed the Bill into law on the same day.

The following section outlines four major points of disagreement concerning H.R. 7152 and the ultimate compromises struck on these points.

II. THE FOUR ISSUES

A. Seniority

Job security was a focal point of important, but conflicting interests in the Eighty-eighth Congress. The interest of minorities and women lay in immediate access to the jobs from which they had been unjustly excluded for generations. Competing with this interest was that of incumbent employees (particularly those in labor unions), who wanted protection for seniority rights that had accumulated over the years.

As reported to the House of Representatives, neither H.R. 405 nor H.R. 7152 expressly protected seniority, and critics of the Civil Rights Bill warned that the omission would destroy existing seniority rights. In the House, critics argued the Bill would force employers to replace whites with blacks in order to achieve racial quotas, and would force unions to give blacks preference over more senior whites in hiring

¹⁵ Vaas, *supra* note 3, at 445. The purpose of these meetings was to reach agreement on amendments to H.R. 7152 that would ensure passage. According to Vaas, this involved meetings with leading Senators "who were basically civil rights proponents but who were sincerely concerned about various provisions of the bill." *Id.*

¹⁶ 110 CONG. REC. 11,926-35 (1964).

¹⁷ On June 10, 1964, Sen. Dirksen offered Amendment No. 1052, 110 CONG. REC. 13,370 (1964). It was a substitute for Amendment No. 656 but did not differ in any way relevant to this Article.

¹⁸ 110 CONG. REC. 14,511 (1964).

¹⁹ *Id.* at 15,897.

halls.²⁰ Leading advocates of the Bill — for example, Representative Celler, chairman of the Judiciary Committee — responded that Title VII would not affect bona fide seniority systems.²¹ Representative John Dowdy of Texas offered an amendment that would have expressly protected employment practices pursuant to a seniority system, but the amendment was defeated.²²

The concern about seniority followed H.R. 7152 into the Senate, where the initial strategy of the leadership followed the course set in the House: reassurances that Title VII would not affect seniority rights were repeatedly given. A supporting memorandum from the Justice Department was also produced. The memorandum stated, "Title VII would have no effect on seniority rights existing at the time it takes effect . . . even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes."²³ The Interpretative Memorandum stated, "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective."²⁴ Senators Humphrey and Kuchel made similar statements.²⁵ Influential Senators were dissatisfied, however; they feared the Bill would impair seniority rights. For example, Senator Dirksen asked, "What of the dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?"²⁶ Other Senators were equally concerned.²⁷ As a result, the leadership changed its strategy. Explicit lan-

²⁰ See, e.g., H.R. REP. NO. 914, 88th Cong., 1st Sess., 65-66, 71 (1963) (minority report); 110 CONG. REC. 2571 (1964) (Rep. Gathings voiced concern that racial and religious quotas would become the rule in each workplace); *id.* at 2576 (Rep. Poff echoed Rep. Gathings concerns); *id.* at 2726 (Rep. Dowdy repeated the same concerns).

²¹ 110 CONG. REC. 1518 (1964).

It has been asserted also that the bill would destroy worker seniority systems and employee rights vis-a-vis the union and the employer. This again is wrong. The bill would do no more than prevent a union, as it would prevent employers, from discriminating against or in favor of workers because of their race, religion, or national origin.

Id.

²² *Id.* at 2727-28. The amendment offered by Rep. Dowdy was identical to provisions adopted by Congress in the Equal Pay Act of 1963. *Id.* at 2728.

²³ *Id.* at 7207. The memorandum was a direct response to assertions of Sen. Hill of Alabama.

²⁴ *Id.* at 7213.

²⁵ *Id.* at 6549 (Sen. Humphrey); *id.* at 6564 (Sen. Kuchel).

²⁶ *Id.* at 7217.

²⁷ *Id.* at 486-88 (Sen. Hill viewed Title VII as weakening the power of labor unions); *id.* at 7091 (Sen. Stennis remained convinced that Title VII meant "[p]referential

guage protecting seniority rights was incorporated into the Mansfield-Dirksen substitute. This language appears in section 703(h), which provides in relevant part: “[I]t shall not be an unlawful employment practice for an employer to apply different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system.”²⁸

Thus, during the early debate of Title VII, seniority rights stood in jeopardy in Congress. Both critics and advocates of the Bill surely realized that, notwithstanding any assurances, the absence of express language on seniority left the door open to the courts to decide that relief for victims of past discrimination was more important than protection of seniority. The defeat of Representative Dowdy’s amendment in the House could have supported such a reading of the statute. However, the Bill was ultimately amended to guarantee that seniority would be protected. Thus, incumbent employees prevailed over minorities and women in the competition between increased access to jobs and protection of seniority rights.

A similar process of accommodation occurred in the courts. At first, seniority rights gave way to relief for discrimination as courts invalidated seniority systems that perpetuated the effects of past discrimination. Later, seniority came to prevail in the courts as well.

As the early Title VII cases came to court, judges realized that simply stopping overt discrimination would leave a generation of black workers frozen into inferior jobs. Before passage of Title VII, blacks had been restricted to the least desirable, lowest paying positions. Commonly, there were a black department and a white department, and never the twain did meet. Title VII was undoubtedly intended to end such job segregation. But even if they were freed of segregation, blacks hired before Title VII took effect in 1965 would never reach parity with their white counterparts. One black might have been inhibited by his²⁹ employer’s rule prohibiting interdepartmental transfers.³⁰ Other blacks may have been allowed to transfer between departments, but could not catch up with their white counterparts because a seniority system required transferees to go to the bottom of the seniority roster in the new department. One such black might feel constrained to stay in

advance of minorities so as to destroy seniority in employment, civil service and apprenticeship programs.”).

²⁸ 42 U.S.C. § 2000e-2(h) (1982).

²⁹ Since most of the plaintiffs in these cases were black men, this Article will use the masculine gender when referring to them.

³⁰ Such a rule was not discriminatory on its face because it had the same effect on a white who desired to transfer to the black department.

the black department, where he enjoyed greater protection against lay-off and, perhaps, earned more money than the entry-level job in the white department provided. Another black might transfer, but he would be forever junior to his white counterpart, who had been assigned to the white department years before. Thus, judges perceived that, unless the law intervened, none of these blacks would attain his rightful place alongside of his white counterpart, and all of these blacks would suffer the present effects of past discrimination for the rest of their lives.

The courts intervened to correct this inequity. Holding that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act,"³¹ the lower courts entertained attacks on seniority systems throughout the South.³² When employers and unions argued that their seniority systems were protected by section 703(h), the courts held that a system is not bona fide if it preserves the effects of past discrimination. A common remedy was to allow blacks to transfer into the formerly white department and carry their accumulated seniority with them.³³ This remedy seriously impaired seniority rights of white employees.

The early cases on seniority all but read section 703(h) out of Title VII. In *International Brotherhood of Teamsters v. United States*,³⁴ however, the Supreme Court revitalized this section that was so important in Congress. The Court held that a seniority system is not unlawful merely because it perpetuates past discrimination. Quoting the Interpretative Memorandum and the Justice Department memorandum, the Court recognized that section 703(h) was meant to immunize differences in treatment of employees resulting from a seniority system so long as the system did not result from an intent to discriminate.³⁵ More recently, the Court has held that section 703(h) also protects bona fide seniority systems created after Title VII took effect.³⁶ Thus, seniority has been vindicated in the courts, as it was in Congress.

³¹ Quarles v. Philip Morris, 279 F. Supp. 505, 516 (E.D. Va. 1968).

³² See, e.g., *United States v. Chesapeake & Ohio R.R.*, 471 F.2d 582 (4th Cir. 1972); *Local 189, United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969); *United States v. Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969).

³³ See, e.g., *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976).

³⁴ 431 U.S. 324 (1977).

³⁵ *Id.* at 352-54.

³⁶ *Pullman Standard v. Swint*, 456 U.S. 273 (1982).

B. *The Time for Filing a Charge of Discrimination*

Interests were also at odds concerning the time within which a victim of discrimination must bring a claim against an employer or union. While primary responsibility for administering the National Labor Relations Act lies with an administrative agency, enforcement authority under Title VII is vested in the courts.³⁷ But before a lawsuit may be prosecuted, a charge of discrimination must be filed with the Equal Employment Opportunity Commission (EEOC).³⁸ The period of time for filing a charge with the EEOC acts as a statute of limitations on claims of discrimination.

The interest of victims of discrimination would have been best served by a lengthy period of time to make a claim. However, the interest of employers and unions, as articulated in the Interpretative Memorandum,³⁹ lay in protection against stale claims. Title VII claims are especially subject to growing stale because motive is the central issue in many discrimination cases. Motive is difficult to prove. Direct evidence of motive — the testimony of the employer or his agent — is likely to be discounted as self-serving. Circumstantial evidence of motive is easily lost unless the need to preserve the evidence (such as indicated by a charge of discrimination) is apparent. Thus, the longer the gap between the alleged acts of discrimination and the filing of a claim, the less likely that the most reliable evidence will be available.

The history behind passage of Title VII's limitations periods reflects the tension between the competing interests. H.R. 405 originally provided a relatively generous period for filing a charge: section 9(c) allowed a person one year within which to act.⁴⁰ One year is twice the time allowed for filing a charge of unfair labor practices with the Na-

³⁷ Enforcement provisions are found in 42 U.S.C. § 2000e-(5) (1982). Final relief may be obtained through the courts in the form of injunctions, affirmative action, equitable relief, accrual of back pay, or reduction of back pay. *Id.* § 2000e-5(g). However, before a case reaches the courts it must pass through several intermediate levels of review under the auspices of the Equal Employment Opportunity Commission. *Id.* §§ 2000-5(a) to 2000-5(f). A case that reaches the courts will ultimately be filed by either the EEOC or the aggrieved party. *Id.*

³⁸ Title VII creates the EEOC, a five member commission appointed by the President by and with the advice and consent of the Senate. *Id.* § 2000e-4(a). Title VII also creates the office of the General Counsel, also appointed by the President by and with the advice of the Senate. *Id.* § 2000e-4(b)(1). The General Counsel has responsibility for the conduct of litigation filed by the EEOC for the enforcement of Title VII's provisions. *Id.*

³⁹ *See supra* note 24 and accompanying text.

⁴⁰ Section 9(c), H.R. 405 (reprinted in H.R. REP. 570, 88th Cong., 1st Sess.).

tional Labor Relations Board.⁴¹ But the House Committee on Education and Labor shortened the period of limitations in H.R. 405 to six months,⁴² and the House Judiciary Committee incorporated this period into H.R. 7152.⁴³ In the Senate, the once-shortened limitations period was further reduced. As amended by the Senate and agreed to by the House of Representatives, Title VII allowed only 90 days for the filing of a charge with the EEOC in states lacking FEP agencies.⁴⁴

Like Congress, the courts, via the highly creative doctrine known as "continuing violations," initially provided victims of discrimination a generous period of time to file charges with EEOC, but ended by substantially reducing the limitations period. One court ruled that a charge was timely, though filed 161 days after an allegedly discriminatory layoff, because a layoff, as opposed to a discharge, suggests the continuing possibility of reemployment.⁴⁵ In another case, a woman claimed that she and her female coworkers were discriminatorily assigned to segregated jobs with limited promotional opportunities. Although the assignments had occurred more than 90 days before a charge was filed, the court held the charge was timely because limited promotional opportunities constituted a continuing violation.⁴⁶ The most important application of the doctrine was to seniority systems. On the theory that a seniority system that preserves the effects of past discrimination is a present and continuing violation of Title VII, the courts widely held that a charge could be filed against such a system as long as it continued to disadvantage blacks.⁴⁷

Ultimately, three decisions of the United States Supreme Court sharply curtailed the doctrine of continuing violations and reduced the

⁴¹ Section 10(b), National Labor Relations Act, as amended, 29 U.S.C. § 160(b) (1982).

⁴² See § 10(c) in H.R. REP. 570, 88th Cong., 1st Sess. (1963).

⁴³ Section 707(d), H.R. REP. 914, 88th Cong., 1st Sess. 12 (1963).

⁴⁴ Section 706(d). In states with FEP agencies the charging party had 210 days in which to file with the local agency. The text focuses on the shorter period because Congress believed that Title VII would have little or no effect in states that already had FEP legislation. See, e.g., 110 CONG. REC. 1521 (1964) (Rep. Celler); *id.* at 9244 (letter from Ass't Att'y Gen. Burke Marshall to Sen. Jordan of Idaho). The time limits were increased in 1972 to 180 and 300 days. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 706, 86 Stat. 103, 105.

⁴⁵ *Cox v. U.S. Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969). The charging party referred to in the text is Adeline Cox. The dates on which she was laid off and filed a charge are in *Cox v. U.S. Gypsum Co.*, 284 F. Supp. 74, 77 (N.D. Ind. 1968).

⁴⁶ *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 972 (1975).

⁴⁷ See, e.g., *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976).

limitations period substantially. In *International Brotherhood of Teamsters v. United States*⁴⁸ the Court held that a seniority system that perpetuates past discrimination can still be bona fide and does not constitute a present or continuing violation of the Act. Even more damaging to the doctrine of continuing violations was *United Air Lines v. Evans*.⁴⁹ United forbade female flight attendants to marry. When the plaintiff married, she was forced to resign. Some years after her resignation, in a law suit to which the plaintiff was not a party, the Seventh Circuit held the no-marriage rule discriminatory because it was not applied to male flight attendants.⁵⁰ Thereafter, the plaintiff reapplied to United and was hired as a flight attendant. When United refused her any seniority credit based on her prior service, she sued, arguing the denial of seniority was a present and continuing violation of Title VII. The Supreme Court rejected this argument. The plaintiff had 90 days to file a charge after her termination. When she did not, her termination became the legal equivalent of a discriminatory act that occurred before Title VII was passed. By virtue of the *Teamsters* case, the present effect of such an act (her current lack of seniority) was immune from attack.

The third case shortening the limitations period is *Delaware State College v. Ricks*.⁵¹ A Liberian was denied tenure by a college, and was given the usual one-year terminal contract. He filed a charge of national origin discrimination after this contract expired. The charge was timely if the limitations period began to run on his last day of work, but untimely if the period began when he was denied tenure. The Supreme Court held the charge was untimely. Any violation of law occurred when the tenure decision was made and communicated to the plaintiff; his subsequent loss of employment was merely an effect of the earlier decision.

The Supreme Court has vitiated much of the doctrine of continuing violations, and the lower court decisions discussed above have been effectively overruled. Thus, in much the same way as the House of Representatives shortened the limitations period in H.R. 405 and the Senate shortened the period further, the courts initially afforded victims of discrimination an extended period of time to file a charge, but subse-

⁴⁸ 431 U.S. 324 (1977); *see supra* text accompanying notes 33-34.

⁴⁹ 431 U.S. 553 (1977).

⁵⁰ *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

⁵¹ 449 U.S. 250 (1980).

quently reduced the period substantially.⁵²

C. *The Bona Fide Occupational Qualification*

Should membership in a protected class have been recognized as a bona fide occupational qualification (BFOQ) for a job? For example, could a lumbering company have limited the search for lumberjacks to the class of men? The interest of employers in 1964 dictated an affirmative answer. Why should they have incurred the expense of determining whether a given person was qualified for a job if most members of the class were less qualified than most members of another class? Of course, the interest of women and minorities required a negative response. They would have benefited most from a law requiring evaluation of each person on the basis of individual ability to perform, regardless of the average ability of the person's class. A third interest belonged to consumers, who held preferences concerning the kinds of persons who would serve or entertain them.

As introduced, H.R. 405 strongly favored ethnic minorities because its BFOQ clause applied only to advertisements mentioning the genuine need for a person of a particular religion.⁵³ Presumably, nothing

⁵² The doctrine of continuing violations retains some vitality, though the scope of the doctrine is uncertain. See, e.g., *Berry v. Board of Supervisors of La. State Univ.*, 715 F.2d 971 (5th Cir. 1983), in which the plaintiff alleged inter alia that, because of her sex, the university required her to teach more classes on campus than men were required to teach; as a result, men had time to earn extra money by teaching off campus, but she did not. Some of the plaintiff's extra on campus teaching occurred without Title VII's limitations period and some, within. Treating these allegations as a claim of unequal pay for equal work under the Equal Pay Act, 29 U.S.C. § 206(d) (1982), whose limitations period is longer than Title VII's, the court suggested, but did not rule explicitly, that the plaintiff had suffered a continuing violation. Treating the allegations as a claim of discriminatory work load, which is not actionable under the Equal Pay Act, the court discussed several cases of continuing violations and distilled three factors for the district court to take into account on remand:

The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

715 F.2d at 981 (footnote omitted).

⁵³ Section 7(b). This section also applied to age as a basis of discrimination, but this

but inability to perform the job would have served to disqualify a minority candidate under Representative Roosevelt's Bill. One of the changes made in the Bill by the House Committee on Education and Labor, however, was the addition of the following language:

Notwithstanding any other provision of this Act, it shall not be an unlawful employment practice for an employer to hire and employ employees of a particular religion or national origin in those certain instances where religion or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.⁵⁴

This language was carried forward by the Judiciary Committee into H.R. 7152.⁵⁵ After the House of Representatives added sex as a protected class to the Bill, the BFOQ clause was amended to include sex as well as religion and national origin.⁵⁶ So amended, the House passed the Bill and sent it to the Senate. In the upper house, the BFOQ clause was not altered, but it was clarified by the Interpretative Memorandum, which provided three examples of BFOQ's: a French chef for a French restaurant, a male as a player for a professional baseball team, and a person of a particular religion as a salesman for a business seeking the patronage of members of that religion.⁵⁷

The BFOQ clause reduced the protection, generally guaranteed in Title VII, against discrimination based on religion, sex, and national origin. In two senses, the clause was a victory for the interests of employers and consumers. First, the very addition of the clause to the law was significant because, arguably, the clause was unnecessary. If Ghanaian ancestry is truly necessary for the performance of a certain job, an employer who refuses to hire a Finn can hardly be charged with discrimination. The BFOQ clause, therefore, is analogous to the seniority clause of Section 703(h).⁵⁸ Either provision could have been omitted, but the legislators were evidently persuaded by the employers' interests to attempt to ensure against judicial misinterpretation of congressional intent.

Second, the BFOQ clause was meant to be broad, as evident in its language and in the examples in the Interpretative Memorandum. The language of the clause demonstrates Congress's intent that sex, for ex-

basis was deleted from the Bill by the Committee on Education and Labor. *See* H.R. REP. 570, 88th Cong., 1st Sess. (1963).

⁵⁴ Section 5(c), H.R. REP. 570, 88th Cong., 1st Sess. 8 (1963).

⁵⁵ Section 704(e), H.R. REP. 914, 88th Cong., 1st Sess. 10 (1963).

⁵⁶ 110 CONG. REC. 2721 (1964).

⁵⁷ *Id.* at 7213.

⁵⁸ *See supra* note 28.

ample, need only be reasonably (as opposed to absolutely) necessary to job performance. The term "normal operation" suggests Congress did not intend that employers would have to make significant changes in the operation of their businesses in order to accommodate more women. The words "that particular business or enterprise" imply that Congress had a case-by-case approach in mind; sex might be a BFOQ for one business but not for another.

The examples in the Interpretative Memorandum also reveal a congressional purpose that the BFOQ clause be read broadly. In each example, persons who may well have been qualified to do the work were excluded without regard to individual ability. Americans born of French immigrants might cook French food and speak the French language. Baptists might know how to sell Bibles to Methodists. Women might be able to compete successfully against men for a position on a baseball team. In the first two examples, Congress plainly decided that the interest of consumers outweighed the interest of some qualified potential employees. Diners are allowed an authentic French chef, and Methodists are permitted a salesperson of their own denomination. The paramount interest in the third example is uncertain. Perhaps Congress thought so few women could ever qualify as baseball players that an employer need not bother giving a woman a try-out, or perhaps Congress chose to indulge the public's preference for sex-segregated professional competition. Whichever interest Congress had in mind, it is undeniable that this interest overcame the interest of women in being considered on their own merits.

As Congress initially provided broad protection against discrimination based on religion, sex, and national origin, and then narrowed the protection by adopting and illustrating the BFOQ clause, the courts also first extended broad protection and have more recently begun to narrow it. One court held that a BFOQ exists only if a person's sexual characteristics, as distinguished from characteristics that merely correlate with sex, disable the person from performing a job.⁵⁹ Thus, said the court, the female sex would be a BFOQ for the job of wet nurse, but the male sex was not a BFOQ for a job that required frequent lifting of heavy weights.⁶⁰ This holding virtually made the BFOQ clause superfluous, for an employer cannot be said to have discriminated against a candidate who is disabled by sexual characteristics from performing a job. Other courts gave the clause a slightly broader reading, holding a BFOQ exists only if all or substantially all members of

⁵⁹ *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971).

⁶⁰ *Id.* at 1224-25.

the excluded class are unable to perform a task that is essential to the business.⁶¹ Against this standard, the female sex was held not to be a BFOQ for ticket agents and flight attendants on the "love airline," whose advertising projected "an image of feminine spirit, fun and sex appeal." The court reasoned that men were able to perform the essential tasks of selling tickets and serving cocktails.⁶² This interpretation effectively limited the scope of the clause to cases in which an employer is unable to make individual determinations of the capabilities of job candidates.

While precedent in specific situations continues to have force, the courts have begun to retreat from early doctrine. In *Dothard v. Rawlinson*,⁶³ the Supreme Court said the BFOQ clause was meant to be "an extremely narrow exception," but nevertheless held that the male sex was a BFOQ for prison guards in Alabama. The risk, the Court held, was that "[a] woman's relative ability to maintain order . . . could be directly reduced by her womanhood."⁶⁴ Yet there was no evidence that the plaintiff's ability to perform would have been impaired in this way, and surely some women could be more effective guards (despite their womanhood) than many men. Another court found the female sex to be a BFOQ for a nurse's aid in a home for elderly women,⁶⁵ though clearly a male nurse would be qualified to perform all the tasks of the job. In age discrimination cases, which are governed by a BFOQ clause that is almost identical to Title VII's and which often cite Title VII cases as precedent,⁶⁶ the courts have found age to be a BFOQ for bus drivers, despite the absence of evidence that the individual plaintiff was disabled by age from performing satisfactorily.⁶⁷ Thus, like Congress, the courts began by protecting broadly against discrimination based on religion, sex, and national origin, but have more recently narrowed the protection.

⁶¹ See, e.g., *Diaz v. Pan American Airways*, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

⁶² *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

⁶³ 433 U.S. 321 (1977).

⁶⁴ *Id.* at 335.

⁶⁵ *Fesel v. Masonic Home*, 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

⁶⁶ See, e.g., *Usery v. Tamiami Trail Tours*, 531 F.2d 224 (5th Cir. 1976).

⁶⁷ *Id.*

D. Ability Tests

As the pendulum had swung on the issues of seniority, the limitations period for filing charges, and the BFOQ clause, so the pendulum swung in the courts as it had previously swung in Congress on the issue of ability tests. Tests were a twofold problem for minorities and women in 1964. First, some employers allowed only white men to take tests. Second, even if tests were administered fairly to all comers, blacks tended to achieve lower scores than whites. No one doubted that Title VII was designed to solve the first aspect of the problem. The second aspect, however, was a major issue in the Senate.

Shortly after the upper house began consideration of the civil rights bill, a hearing examiner in Chicago held that a preemployment test administered by the Motorola Company was illegal under the Illinois FEP law because the test had been standardized on advantaged groups and failed to compensate for differences in applicants' backgrounds.⁶⁸ Congress reacted strongly. Opponents of the civil rights bill cried that Title VII would outlaw ability tests if blacks did not pass in proportion to whites. For example, Senator Smathers read aloud an article that argued "merit and ability and Motorola's standards of performance [would be] cast aside"⁶⁹ by Title VII. Later, the Senator from Florida said Title VII "would take away from the employer his right to require an examination, give it to everyone, and say, 'I will take the man who makes the highest and best grade, because that is the man who can do the best for my company.'"⁷⁰ Other Senators also supported ability tests and feared that Title VII would prohibit them.⁷¹

Although advocates of Title VII believed the critics' arguments were groundless, the arguments could not be ignored. At first, advocates of the Bill were content to deny that it would outlaw ability tests. For

⁶⁸ 110 CONG. REC. 9030 (1964).

⁶⁹ *Id.* at 6000.

⁷⁰ *Id.*

⁷¹ *See, e.g., id.* at 9599-600 (Senators Fulbright and Ellender). Sen. Fulbright expressed the views of many when he stated: "I cannot imagine anything more idiotic than to say that an aptitude test is not a legitimate way for a company to determine those who are fitted for employment in that company." *Id.* This position was used by the same Senators to cast doubt on the advisability of passage of Title VII:

The *Motorola* case shows, too, to any reasonable person what a disastrous thing it would be if companies were prohibited from applying aptitude tests or any other kind of tests of that nature which are intended to test the capacity or ability of an applicant for a particular job. It is a very clear warning of what we could expect if this section of the bill were adopted.

Id.

example, the Interpretative Memorandum said, "There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups."⁷² Senator Clark wrote in the *Wall Street Journal* that Title VII "would not make unlawful the use of tests such as those used in the Motorola case, unless it could be demonstrated that such tests were used for the purpose of discriminating against an individual because of his race."⁷³ Senator Clark's statement is particularly important because, in the same article, he stated that he personally preferred another bill that would have outlawed the Motorola test.⁷⁴ But many employers were firmly committed to objective ability tests, and the critics persisted. Their chief spokesman on this point was Senator John Tower, who introduced an amendment (Tower-I) that would have sanctioned "any professionally developed ability test [that is] designed to determine or predict when [an applicant] is suitable or trainable with respect to his employment in the particular business."⁷⁵ The Senator from Texas assured his colleagues that this amendment was "not an effort to weaken the Bill . . . [but was] an effort to protect the system whereby employers give general ability and intelligence tests to determine the trainability of prospective employees."⁷⁶ He continued:

I point out that college entrance examinations discriminate against culturally deprived and disadvantaged persons. Civil service examinations discriminate. Various examinations given by the Federal Government for civil service positions requiring special ability could be ruled to be discriminatory. Bar examinations could be ruled to be discriminatory to the culturally deprived and disadvantaged. A State medical examination could be held to be discriminatory.⁷⁷

In spite of these arguments, Tower-I was defeated.⁷⁸ The leadership in the Senate firmly believed that the amendment was unnecessary because ability tests were already lawful.⁷⁹ Also, the leadership feared the

⁷² *Id.* at 7213.

⁷³ The letter was reprinted in the *Congressional Record*. 110 CONG. REC. 9107 (1964).

⁷⁴ *Id.* Sen. Clark concluded, however, that "whatever my preferences, and those of my colleagues may be, the fact remains that the issues raised by the Motorola case have nothing to do with [T]itle VII of the pending civil rights bill, and are plainly beyond its scope." *Id.*

⁷⁵ 110 CONG. REC. 13,492 (1964).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 13,505. The result was yeas 38, nays 49, with 13 members not voting.

⁷⁹ *Id.* at 13,503-04 (Senators Case and Humphrey).

amendment, as written, would protect tests that were used purposefully to discriminate.⁸⁰

But ability testing, like seniority, was too important to leave to legislative history. Senator Tower rewrote his amendment to protect "any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate." The revision (Tower-II) satisfied the objection that a professionally developed test would have been protected even if it were purposefully used to discriminate. The revision did not satisfy the objection that the amendment was unnecessary. Nevertheless, the leadership approved Tower-II, and it passed, becoming part of section 703(h).⁸¹

There was a further difference between the two versions of the Tower amendment: the requirement that a test be protected only if it was "designed to determine or predict when [an applicant] is suitable or trainable with respect to his employment" was omitted from Tower-II. If this language had been intended to restrict the amendment's protection to job-related or valid tests — tests that predict success on the specific job in question — the obvious explanation for the omission would be that Congress intended to protect all fairly administered professional ability tests, regardless of whether they were job related. More likely, however, the quoted language was not intended to restrict the amendment's protection to job-related tests. There is no evidence in the congressional debates or hearings on Title VII that Congress understood the concept of job relatedness or appreciated that a professionally developed test might fail to predict success on a specific job. Indeed, the Motorola Company's test, of which all but one senator approved,⁸² was simply an intelligence test. It follows that Congress understood both versions of the Tower amendment to protect professional (as opposed to home-grown) tests, not merely job-related tests. The language deleted from Tower-I was probably considered superfluous. Either way — whether Congress deliberately deleted the requirement of job relatedness or never thought the requirement was there in the first place — the Tower amendment was meant to protect all fairly administered professional ability tests.

In Congress it was perceived that Title VII might invalidate ability tests, and the Tower amendment was adopted to guard against this risk. In the courts, this risk materialized at first, but more recently it

⁸⁰ *Id.* (Senators Case and Humphrey).

⁸¹ 110 CONG. REC. 13,724 (1964).

⁸² *See supra* note 74.

has abated. In this way, ability tests are like the other issues we have examined. Unlike the other issues considered, however, all the important judicial action on tests has occurred in the Supreme Court.

In *Griggs v. Duke Power Company*,⁸³ an employer required applicants for certain jobs to hold a high school diploma or achieve a passing score on standardized ability tests. These criteria had an adverse impact on blacks because proportionately fewer blacks than whites held diplomas and passed the tests. When the employer failed to offer any proof that the criteria were job related, the Court found a violation of Title VII, even though the criteria had been applied even handedly. In the process, the Court said the EEOC's interpretation of the law was entitled to great deference. On the issue of ability tests, the EEOC's "Guidelines on Employee Selection Procedures" required that tests with an adverse impact be validated against rigorous scientific standards.⁸⁴

The Supreme Court affirmed the importance of scientific validation in *Albermarle Paper Company v. Moody*,⁸⁵ in which the Court stated explicitly that the Guidelines were entitled to great deference. In that case, candidates for promotion had to pass two widely used ability tests. The employer commissioned a study of these tests. The study departed from the Guidelines in several ways, however: a detailed job analysis had not been performed; ratings of job performance were based on the subjective, unstructured opinions of supervisors; to the extent it was established, validity was proven for some jobs near the top of lines of progression, while the tests were used to select among applicants for entry level jobs; and the validation study dealt only with experienced white workers, whereas the tests were administered to inexperienced, largely nonwhite applicants. Because the study failed to meet the requirements of the Guidelines, the employer lost the case.

In *Griggs* and *Albermarle* the Supreme Court did not keep faith with the Tower amendment. Professionally developed, fairly administered tests were invalidated. But the most recent decisions of the Court on ability tests are a retrenchment from the earlier decisions. In *Washington v. Davis*,⁸⁶ a police department required applicants for admission to the police academy to achieve a minimum score on a written test. The test excluded proportionately more blacks than whites, so the employer was called upon to validate it. The employer demonstrated a

⁸³ 401 U.S. 424 (1971).

⁸⁴ 29 C.F.R. §§ 1607-1607.17 (1984).

⁸⁵ 422 U.S. 405 (1975).

⁸⁶ 426 U.S. 229 (1976).

correlation between scores on the pre-training test and scores on another written test given at the close of the training program. The plaintiffs urged the Supreme Court to reject this validation strategy because there was no proof that the training program correlated with success on the job. The plaintiffs also argued that validating a written test against another written test proves only that good test takers remain good test takers, but shows nothing about job performance. The Court rejected these arguments. It held that a pre-training test may be validated against a post-training test, regardless of any relationship to job performance. As for whether the test measured only ability to take tests, the Court was satisfied with the common sense proposition that minimum verbal skill was important to the job of police officer. The Court did not insist on a scientific demonstration that the kind and level of skill measured by the test were the same as needed on the job. Validation of this sort does not seem to satisfy the standards adopted in the EEOC Guidelines,⁸⁷ but of course is much easier for employers to establish.

The Supreme Court's commitment to the EEOC Guidelines weakened even further in *New York City Transit Authority v. Beazer*.⁸⁸ The Transit Authority (TA) refused to hire anyone being treated for heroin addiction with the drug methadone. The district court held that the methadone rule had an adverse impact on minorities and enjoined the TA from denying employment (except in jobs in which safety was important) to persons who had used methadone successfully for one year. The portion of the Court's opinion dealing with Title VII was concerned primarily with whether the plaintiffs had established a prima facie case. Nevertheless, after noting the weakness of the plaintiff's evidence, the Court added, "if it is capable of establishing a prima facie case of discrimination, it is assuredly rebutted by TA's demonstration that its narcotics rule (and the rule's application to methadone users) is 'job related.'"⁸⁹ In a footnote, the Court added:

Respondents recognize, and the findings of the District Court establish, that TA's legitimate employment goals of safety and efficiency require the exclusion of all users of illegal narcotics, barbituates, and amphetamines, and a majority of all methadone users. The District Court also held that those goals require the exclusion of all methadone users from the 25% of

⁸⁷ The case did not arise under Title VII; nevertheless, the defendants conceded they were governed by "standards similar to those obtaining under Title VII," 426 U.S. at 249, and argued the tests satisfied the job-relatedness requirements of *Griggs, id.* at 249 n.15.

⁸⁸ 440 U.S. 568 (1979).

⁸⁹ *Id.* at 587 (footnote omitted).

its positions that are "safety sensitive." Finally, the District Court noted that those goals are significantly served by — even if they do not require — TA's rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions. The record thus demonstrates that TA's rule bears a "manifest relationship to the employment in question."⁹⁰

Thus, the Court approved the use of a selection criterion that was relevant to selection decisions for only one-fourth of the jobs in an employer's business. Although not a "test," the methadone rule is treated like a test under section 2B of the Guidelines, which reads: "These guidelines apply to tests and *other selection procedures* which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring"⁹¹

After *Davis* and *Beazer*, the risk that a court will invalidate an employer's selection criterion has diminished. The courts have moved in a direction consistent with the intent of Congress that professionally developed, fairly administered ability tests be lawful regardless of any relationship to job performance.

III. AN EXPLANATION: THE COMPETITION OF INTERESTS AND THE EDUCATION OF JUDGES

This Article has chronicled the courts' change in position on four important issues, and has noted the similarity of these changes to the course followed by the Civil Rights Bill in Congress in 1964. A number of questions surface as a result of this discussion. What accounts for the changes in Congress? What explains the courts' early divergence from the intent of Congress? Why did the courts retreat from their initial positions? And, most interesting of all, why have the courts arrived at approximately the same points on which Congress settled on the four issues under study? Answers to some of these questions may be advanced with confidence; answers to others may be suggested in the spirit of *heurism*.

A ready explanation of the course of Title VII through Congress is politics. Experienced legislators are well aware of the tendency of bills to be modified as they move from introduction to enactment. Knowing that compromise with competing interests is all but inevitable, a sponsor of a bill may be inclined to write it as favorably as possible for the group whose interest the bill is designed to serve. For example, it is

⁹⁰ *Id.* at 587 n.31.

⁹¹ 43 Fed. Reg. 38,290, 38,296 (1978) (to be codified at 20 C.F.R. § 1607.2B) (emphasis added).

reasonable to suppose that Representative Roosevelt, chair of the General Subcommittee on Labor of the House Committee on Education and Labor, knew that the limitations period for filing charges under the National Labor Relations Act is six months. Quite possibly, when Representative Roosevelt wrote a one-year limitations period into H.R. 405, he was prepared to compromise on this point. As we have noted,⁹² it was Representative Roosevelt's own committee that reduced the limitations period to six months, and the Senate reduced it further to 90 days.

Not all compromises are foreseen. Although the proponents of Title VII never intended the Bill to endanger seniority systems or ability tests, the sponsors initially resisted attempts to add specific protection for these practices to the Bill. Nevertheless, the strength of the interest of employers in testing and the interest of unions in seniority compelled acceptance of the relevant provisions of section 703(h).

The same process of competition among interests explains the courts' divergence from and return to the intent of Congress on the four issues examined in this Article. The parties to the cases discussed above embodied the interests that had competed in Congress: the plaintiffs were the victims of discrimination, and the defendants were employers and unions. In the legislature these groups were represented by lobbyists, who certainly pointed out to Representatives and Senators the practical effects the Bill would have. In the courts, these groups were represented by lawyers. If the lawyers merely argued about legal doctrine, one could not maintain that the outcomes of cases were affected by the competition of interests unless there was evidence that the judges were influenced by the sources of the arguments instead of the arguments themselves. In fact, the parties to the lawsuits examined above (with help from amicus curiae briefs filed by groups like the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Educational Testing Service)⁹³ did not limit themselves to disputes over doctrine. Rather, they frequently pointed out the practical implications of the cases at bar. And the judges listened. Instead of searching for congressional intent, they often justified the rules of law they announced by references to how the decisions would affect the interests of the parties. There is evidence that the judges were influenced by the briefs that identified such effects.⁹⁴ Thus, the judges were subject to some of the same influences, and took into account some of the same

⁹² See *supra* text accompanying notes 42-43.

⁹³ See *infra* text accompanying notes 103-06, 111-13, & 116.

⁹⁴ See *infra* text accompanying notes 95-117.

considerations, as the legislators who wrote the statute.

A convincing demonstration that the judges in the cases reviewed were influenced by interest-based arguments would be grounded on evidence drawn from many sources. Interviews with judges and the attorneys would be enlightening. Also, a large number of documents would be studied, including motions, briefs, transcripts of testimony and of oral argument, orders, judgments, and drafts of opinions in the trial and appellate courts. Only published opinions and the briefs filed in the Supreme Court are readily available. Although more extensive research is needed to reach a firm conclusion, currently available sources provide some evidence of the process.

Strong evidence that the competition of interests affected the judicial decisions studied above is found in opinions that openly balanced competing interests. For example, in *Ricks v. Delaware State College*⁹⁵, the court of appeals ruled that the limitations period began to run on the final date of employment for three policy reasons that relied explicitly on the effect of the decision on the parties' interests: the initial decision to terminate might be reversed (for instance, if the employee pursued internal appeals); filing a charge of discrimination while an employee is still on the job might damage her productivity and working relationship with others; and designating the last day of employment as the beginning of the limitations period would provide an easily recognized date for employees, employers, and courts.⁹⁶

In reversing the court of appeals and holding that the limitations period began to run on the date of decision to discharge,⁹⁷ the Supreme Court appeared to rely chiefly on traditional doctrinal analysis. Nevertheless, the Court identified policy reasons not unlike those articulated by the lower court:

The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past It should not be forgotten that time-limitations provisions themselves promote important interests; "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."⁹⁸

Although these reasons were advanced in explanation of why Congress intended the limitations period to begin to run on the date of the deci-

⁹⁵ 605 F.2d 710 (3d Cir. 1979), *rev'd*, 449 U.S. 250 (1980).

⁹⁶ *Id.* at 712-13.

⁹⁷ *Delaware State College v. Ricks*, 449 U.S. 250, 256 (1980).

⁹⁸ *Id.* at 256-60 (citations omitted).

sion to discharge, the Court cited no legislative history to support the choice of this date. In fact, no such legislative history exists. As had the court of appeals, the Supreme Court itself made the "value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."⁹⁹

The briefs filed in the Supreme Court in the cases we have discussed contain further evidence that the competition of interests followed Title VII from Congress into the courts and affected the decisions. One example is *Washington v. Davis*,¹⁰⁰ in which the plaintiffs vigorously attacked the employer's strategy of validating scores on the test for admission to the police academy against scores on the test given at the end of training. The plaintiffs argued that this strategy failed to establish a connection between success on the admissions test and success on the job. In reply, the defendants pointed out that the plaintiffs' argument imperiled a long-standing, well accepted institution, namely, the entrance examination to professional school:

To use as an entrance examination to police training a device that predicts how well candidates perform in that training is a perfectly reasonable and justifiable procedure with many precedents. Practically all professional training (Law, Medicine, Architecture, Psychology, Business, Science, etc.) follow just such a procedure.¹⁰¹

Note that this argument did not claim that examinations like the Law School Admission Test are valid or legitimate, but only that they are widespread. In other words, the defendants argued that a ruling against their test would affect significant interests. There is no evidence in the Supreme Court's opinion that this interest-based argument affected the outcome of the case; nevertheless, it is significant that a party believed the argument was worth making to the court. Of course, this is exactly the same argument that Senator Tower made to the Senate in support of his amendment.¹⁰²

Another argument, offered by a company with a big stake in the outcome of the case, clearly hit the mark. The amicus curiae brief of the Educational Testing Service drew a distinction between predicting success and predicting nonsuccess on the job.¹⁰³ Predicting success is

⁹⁹ *Id.* at 259-60 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)).

¹⁰⁰ 426 U.S. 229 (1976).

¹⁰¹ Brief of Petitioners at 6, *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁰² See *supra* text accompanying note 77.

¹⁰³ Brief Amicus Curiae of the Educational Testing Service, at 11, *Washington v. Davis*, 426 U.S. 229 (1976). "In many employment situations, attempting to maximize

difficult because the definition of success is elusive and because strength in one area can overcome weakness in another area. On the other hand, predicting nonsuccess is often easy. A skill may be vital to a job and, if an applicant lacks that skill, nonsuccess is certain. The brief argued that a test that predicts nonsuccess should be lawful. Eventually tests may be developed that provide a comprehensive measure of individual ability, but until that day, employers must be permitted to use tests that accurately measure a proficiency or aptitude without which an applicant cannot succeed on the job.¹⁰⁴ Applying this reasoning to the facts of the case, the brief argued that a police officer would fail on the job without knowledge of the law and the procedures of law enforcement.¹⁰⁵ A training program designed to impart such knowledge is legal, as should be a test that predicts success in such a training program.¹⁰⁶

Notice that the Educational Testing Service did not argue that when Congress protected job-related tests, it intended to include tests that predict success in training. Rather, the Service argued, in essence, "Leave us professionals alone; we're doing the best we can." The effect of this argument on the Supreme Court appears in the following passage from the opinion in *Davis*:

Based on the evidence before him, the District Judge concluded that [the admissions test] was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer Nor is the conclusion foreclosed by either *Griggs* or *Albemarle* . . . and it seems to us the much more sensible construction of the job-relatedness requirement.¹⁰⁷

Another example of the movement of the competition of interests to the courts is found in the continuing violation cases. The briefs in the Supreme Court in *United Airlines v. Evans*¹⁰⁸ hammered home the practical consequences of the Court's endorsing the doctrine of continuing violations. One such consequence would be the virtual repeal of the limitations period in Title VII because, as the employer pointed out:

Any present employee who was discriminated against in the past could

the chances of selecting successful employees involves a different, and more difficult, assessment than minimizing the rules of selecting those who are likely to be unsuccessful." *Id.*

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *Id.* at 39-43.

¹⁰⁶ *Id.* at 12-16, 42-43.

¹⁰⁷ 426 U.S. at 251.

¹⁰⁸ 431 U.S. 324 (1977).

wait indefinitely and file a charge any time in the future — whether five, ten, or fifteen or more years later, for he would meet the criteri[on] . . . of being an employee who could be in the position of always suffering the effects of a past act of discrimination.¹⁰⁹

Accordingly, “the only requirement for a timely claim [would be] that there presently is an employment relationship and that there are some ‘collateral effects’ from a prior act of discrimination.”¹¹⁰

Unhappy results could flow from such a rule. One, according to the employer and the brief amicus curiae filed by the Equal Employment Advisory Council and others, would be that employers would protect themselves by refusing to rehire former employees who might have been victims of discrimination.¹¹¹ Another, claimed the briefs amici curiae of the AFL-CIO and the Equal Employment Advisory Council, would be serious disruption of seniority systems.

[T]he cost to the employees who lose comparative seniority should not be understated . . . There is a time at which the ‘economic security of the individual employee’ hired subsequent to an employer’s discrimination against others should no longer be subject to question. That point is fixed by the statute of limitations whose chief purpose is repose.¹¹²

A third unfortunate result of the doctrine of continuing violations, argued the AFL-CIO, would be “that a labor organization that entered into collective agreement with an employer that contained a seniority system lawful in itself [would be] held to violate Title VII by reason of the employer’s unilateral discrimination in hire, assignment, or discharge.”¹¹³

Similar points were urged in *Delaware State College v. Ricks*.¹¹⁴ The employer argued that if the limitations period began to run on an employee’s last day of work, instead of the day on which the discriminatory act occurred, an employee could file a charge upon termination concerning anything that transpired during his employment.¹¹⁵ The

¹⁰⁹ Petition for Writ of Certiorari, at 17, *United Air Lines v. Evans*, 431 U.S. 553 (1977).

¹¹⁰ *Id.* at 7.

¹¹¹ Petition for Writ of Certiorari, at 19; Brief for Petitioners, at 20; and Brief Amicus Curiae of the Equal Employment Advisory Council, at 19, *United Airlines v. Evans*, 431 U.S. 553 (1972).

¹¹² Briefs Amicus Curiae of the AFL-CIO, at ii-iii and of the Equal Employment Advisory Council, at 19, in *United Air Lines v. Evans*, 431 U.S. 553 (1972).

¹¹³ Brief Amicus Curiae of the AFL-CIO at iii, *United Air Lines v. Evans*, 431 U.S. 553 (1977).

¹¹⁴ 449 U.S. 250 (1980).

¹¹⁵ Petitioner’s Brief, at 16, *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

Equal Employment Advisory Council emphasized that such a rule would lead to stale claims and added that employers would be motivated to discharge an employee as soon as a dispute arose in order to commence the limitations period.¹¹⁶

Only one of the foregoing arguments appears in the Supreme Court's opinions in *Evans* and *Ricks*. The contention that the lower court in *Evans* had virtually repealed the limitations period is reflected in the sentence, "A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations."¹¹⁷ Whether the other arguments influenced the justices is unclear. Yet we do have further evidence that the competition of interests was carried in the courts and that judges were affected by it.

Knowing that judges are influenced by the competition of interests facilitates an understanding of why the courts initially took different positions from Congress on the four issues examined, but in time came to roughly the same positions as Congress. The interests apparently educated the judiciary as they had the legislature. Educating the judiciary simply took longer.

Congress has many means of learning about the probable effects of pending legislation. One is the committee hearing, in which legislators receive testimony that has been solicited and that is volunteered. Another is the lobby system, which springs into action when a bill with a chance of success is introduced. Legislators also learn from material prepared by their research staffs. And legislators learn from discussions with colleagues, who typically represent a spectrum of opinion. Thus, the effects a bill might have on various groups are quickly impressed on Representatives and Senators.¹¹⁸

The education of judges takes more time. A judge rarely calls witnesses to provide relevant information; rather, she relies on witnesses supplied by the parties to the litigation, on argument offered by their counsel, and on what she herself knows and believes. As the quality of legal representation varies, so does judges' knowledge of the effects of a decision on the affected interests. Interest groups have access to judges via *amicus curiae* briefs, but there are many courts and they are scattered throughout the country. A single lobbyist can influence many leg-

¹¹⁶ Brief *Amicus Curiae* of the Equal Employment Advisory Council, at 3, 13, 14, *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

¹¹⁷ 431 U.S. at 560.

¹¹⁸ Legislators are influenced by factors other than education. Votes are traded back and forth, letters from constituents are received, and money is contributed to campaigns, to name but a few such factors. Yet education remains important.

islators in a short space of time, but an interest group may not know of a lawsuit until the decision is announced, or may know in time to participate but not appreciate the importance of the issue, or may grasp the issue but lack the resources to join the fray at once. A judge may have a law clerk (usually a recent graduate of law school), but never a professional research staff. And, as compared to legislators, a judge has many fewer colleagues (probably representing a narrower range of persuasions) with whom to consult before deciding a case. The result is a risk that early judicial decisions under a new statute may be based on incorrect information and assumptions about the effects of the decisions on the affected interests. But as more cases on an issue are litigated and decided, more opinions are issued. Judges read and learn from one another's opinions. Also, the interest groups learn where to focus their attention. By the time an important issue reaches the Supreme Court, the likelihood is high that the affected interests will apprise the Court as fully as Congress was apprised of the possible effects of a decision.¹¹⁹

The education of the courts had just begun in the early cases we have examined. The interests on both sides of each issue were strong enough to have caused Congress to vacillate, and the interest of minorities and women was strong enough to win some judges to its side.¹²⁰ Thus, it is no surprise that these judges took positions at odds with congressional intent.

Why did the courts eventually return to the accommodations of inter-

¹¹⁹ Another, more conventional explanation of why courts eventually reached the outcomes Congress intended is that, in the early cases, the judges misconstrued congressional intent, and they were corrected in the later cases by judges who were, perhaps, better informed of the legislative history. One problem with this explanation is that the pertinent legislative history was before the judges in the early cases and often appeared in the courts' opinions. For example, the Interpretative Memorandum was widely cited, as were the debates on the *Motorola* case and the Tower amendment.

It might be argued that the deviations from congressional intent on the issues of seniority, limitations periods, and BFOQ's occurred in the lower courts, which were reversed by a better briefed, perhaps more able Supreme Court. But this argument would not account for the Supreme Court's own deviation and (partial) self-correction on the issue of ability testing. Whereas the briefs in *Griggs* and *Albermarle* were devoid of informed opinion on testing, the briefs in *Davis* were full of professional comments from which the Supreme Court seems to have learned a great deal.

¹²⁰ It may not have been coincidental that many of the early decisions discussed in this Article were rendered by the Court of Appeals for the Fifth Circuit. Its jurisdiction included most of the Deep South — the coastal states from Georgia to Texas. The Fifth Circuit was generous to Title VII plaintiffs, perhaps because the problem of discrimination was greatest there, perhaps because the most sympathetic cases arose there, or perhaps because the Southern judges were determined to put an end to a phenomenon that disgraced their region in the eyes of the nation.

est originally fashioned by Congress? In time, the judges learned as much about the effect of the statute as Congress had known. It is possible, of course, that the judges could have disagreed with Congress, and perhaps this disagreement led to the contrary decisions. Yet across the span of issues, the judiciary will generally concur with the legislature, for there is a locus of consensus on most issues in the stratum of society that makes important political decisions. Many Representatives and Senators share a common educational background with federal judges: professional legal training. Learning law, like learning any other discipline, affects how one thinks. There is a way "to think like a lawyer" about issues, and judges and most legislators have this way of thinking in common. In addition, most judges and legislators are reasonably prosperous and thus hold a significant stake in the economic and social system. All, of course, are part of, and most are deeply committed to, the political system. One may expect that two large groups (such as legislators and judges) that are composed of persons who think in similar constructs, share similar economic interests, and adhere to similar political philosophies, will arrive at similar solutions to social problems — when, of course, these persons have the same facts in mind.

CONCLUSION

If the foregoing observations are accurate of Title VII and typical of other statutes, courts make law in much the same way as do legislatures. Both institutions are strongly influenced by interests. Courts are most likely to abide by legislative intent if the judges are as informed as was the legislature on the effects of a possible decision. Of course, even a well-informed judge may disagree with the legislature and ignore its intent, but she will probably be reversed, and certainly will not be followed outside her jurisdiction, by other judges who participate in the consensus reflected in the statute.

Eventually, the judges will take possession of a statute and, for practical purposes, convert it to a common law doctrine that courts are free to modify. For as time passes, the judges will deal with more aspects of a social issue than the legislature could have foreseen. Also, circumstances will change. The legislature may not react, but cases will be brought to court, and decisions will have to be rendered. By reading one another's opinions, the judges will come to know more about a problem than the legislators did, and increasingly they will find authority in other judicial opinions rather than in legislative history. After all, how often do cases decided today under the National Labor Relations Act refer to what Senator Wagner said in 1935 or Senator Taft in 1947?