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NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

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Mary Ann Strong Connell and Nora A. Devlin

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Frederick M. Lawrence

There are certain special relationships that have historically been central to the administration and governance of institutions of higher education. Some are well known. The relationship between the president or chancellor and the chair of the governing board is one such relationship, and, although the specifics will vary from one campus to another, so is the relationship between the president and the chief academic officer and the chief administrative or operating officer. Until relatively recently, most university leaders would not have included the university's lawyer to be among these partnerships; today nearly all would. One such team, the former president and general counsel of Hobart and William Smith Colleges, Joyce P. Jacobsen and Louis H. Guard, respectively, have shared their own experiences and knowledge of the field to produce a highly readable and useful discussion of how legal issues have become central to the management of the modern university, and how the campus counsel has become a key member of the president's team.

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IS OVERQUALIFICATION A PROXY FOR AGE DISCRIMINATION OR A LEGITIMATE, NONDISCRIMINATORY REASON FOR AN ADVERSE EMPLOYMENT DECISION?

MARY ANN STRONG CONNELL AND NORA A. DEVLIN[*]

Abstract

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INTRODUCTION

Happy Valley University (HVU), a small public university in the Deep South, advertised for a nontenure track instructor to teach two undergraduate classes in business law, a required class for all business and accountancy majors. Larry Law, age seventy, a recently retired dean of the law school at a prestigious private university in the northeast, had recently moved to the town in which HVU was situated to be closer to his children and grandchildren. He wanted to remain involved in both law and education in some capacity but not at the level of a law school professor or dean. Former Dean Larry applied for the business law position, along with twenty-five other applicants, none of whom had qualifications equal to those of Larry. HVU would pay the successful applicant a total of $25,000 a year and have this person report to Brevard Baxter, dean of HVU's business school.

A search committee composed of faculty in the business school reviewed the applications. While impressed with the credentials and background of recently retired Larry, the committee was concerned that Larry would not remain at HVU for long or be happy in the position because he was simply overqualified for the position. Citing the needs of the business school for faculty who would serve the school for a longer term, the search committee removed Larry from the search pool before the interview stage in favor of other candidates who indicated a desire to work at the institution for a term longer than the one-year contract HVU was prepared to offer the successful candidate.

Dean Baxter, age fifty, glanced at all the applications and agreed with the decision of the search committee to remove Larry from the applicant pool. While the search committee and Dean Baxter were impressed with Larry's academic accomplishments, publications, and successful administrative record, they were both concerned that he would not find an undergraduate business law course challenging, would not work in a collegial manner with other faculty teaching lower-level courses, would not refrain from telling them how to teach on a level more consistent with law school pedagogy, and assumed that he would not remain in the position for more than a year. Dean Baxter was also concerned that Larry would eventually demand higher pay commensurate with his credentials, resist following directions given by a dean twenty years younger with less experience, and soon leave the institution for a more attractive position elsewhere. Consequently, Larry was not given an offer or even an interview because, in the opinion of the search committee and Dean Baxter, Larry was "overqualified" for this business law position.

Convinced that he was not offered the position or even given an interview because of his age, Larry filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against HVU, members of the search committee, and Dean Baxter. After receiving his right-to-sue letter, Larry filed a suit in federal court against the same parties, alleging that all defendants had flagrantly violated the provisions of the Age Discrimination in Employment Act (ADEA or the Act).

This article explores the evolution and development of age discrimination law from the Wirtz Report to the Age Discrimination Act of 1967 through cases of the last thirty years in which the circuits have split in their holdings regarding whether overqualification is a legitimate reason for an adverse employment action or a form of age discrimination. The authors have framed their discussion around this hypothetical and ended with offering recommendation for how employers may prevent age discrimination in their employment practices.

I. ORIGIN AND DEVELOPMENT OF THE ADEA

For over fifty-five years, the ADEA[1] has been used to protect older workers from discrimination based on age in the workplace. Enacted in 1967, the ADEA was, in part, an outgrowth of the civil rights movement. However, by this time, concern about age discrimination in employment was not new. Even as early as the 1950s there were legislative and executive efforts to address age discrimination in employment.[2] In 1964, President Johnson issued Executive Order No. 11,141 banning age discrimination in employment by federal contractors and subcontractors.[3] The Order provided no mechanism for enforcement or a private cause of action for its violation. Thus, the Order was largely ineffective.[4]

Efforts to insert a provision prohibiting discrimination based on age in Title VII of the Civil Rights Act of 1964 were rejected in both the House and the Senate. Congress did, however, instruct the Secretary of Labor, W. Willard Wirtz, to make a full study of the subject and propose recommendations for legislation "to prevent arbitrary discrimination in employment because of age."[5]

A. The Wirtz Report

In response to Congress's directive, Secretary Wirtz submitted a two-volume research report, *The Older American Worker: Age Discrimination in Employment*[6] [hereinafter The Wirtz Report v.1 or v.2 or The Report], documenting the state of "arbitrary" discrimination against older workers in the United States as they attempted to gain or retain employment. The Report revealed widespread age discrimination in employment was common practice in nearly ninety percent

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1 Pub. L. 90-202 (codified at 29 U.S.C. §§ 621–623).

2 Tom J. Querry, *A Rose by Any Other Name No Longer Smells as Sweet: Disparate Treatment Discrimination and the Age Proxy Doctrine After* Hazen Paper Co. v. Biggins, 91 Cornell L. Rev. 530, 532 (1996), (citing Age Discrimination in Employment: Hearings Before the Subcomm. on Lab. of the Senate Comm. on Lab. and Pub. Welfare, 90th Cong., 1st Sess. 23 (1967)).

3 Exec. Order No. 11141, 3 C.F.R. 179 (1964).

4 *See id.* at 532 n.16.

5 Civil Rights Act of 1964, Pub. L. 88-352 § 715 (codified at 42 U.S.C. 2000e).

6 2 U.S. Dep't of Lab. & W. Willard Wirtz, The Older American Worker: Age Discrimination in Employment (1965) [hereinafter The Wirtz Report v.2]; 1 U.S. Dep't of Lab. & W. Willard Wirtz, The Older American Worker, Age Discrimination in Employment: Research Materials (1965) [hereinafter The Wirtz Report v.1].

of the surveyed employers but noted that "ageism,"[7] unlike race or gender discrimination, was not due to any dislike or intolerance toward older workers, but was based instead "on inaccurate stereotypes about older workers' declining abilities and productivity."[8] Among the many reasons[9] given by defendants for refusing to hire older applicants or for making other adverse employment decisions affecting this protected group are, for example, incompetence, economic factors, lesser comparative qualifications, inability to get along with (younger) supervisors or fellow employees, insubordination, poor performance, lack of enthusiasm, too long with the company, salary too high, veteran preference, and overqualification.[10] Wirtz's findings echo these reasons; specifically, employers reported not hiring older workers because of their "lack of skills, experience, or educational requirements," "training costs and low productivity," "ability to hire younger workers for less money," and "limited work expectancy."[11]

Wirtz's Report focused heavily on hiring practices and on employers' imposition of specific age limitations. The Report also addressed "arbitrary"[12] discrimination against workers, when exclusion of workers due to a common characteristic (i.e., age) assumes that age affects their ability to do the job, despite that assumption having no basis in fact.[13] Wirtz highlighted the injustice of judging workers based on group characteristics rather than on individual abilities.[14] Importantly, Wirtz

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7 "Ageism" has been defined as the "process of systematic stereotyping of and discrimination against people because they are old." *See* James E. Birren & Wendy L. Loucks, *Age Related Change and the Individual*, 57 Chi.-Kent L. Rev. 833 (1981) (quoting R. Butler, Why Survive Being Old in America 12 (1975) (*cited in* Query, *supra* note 2, at 532 n.17)).

8 Querry, *supra* note 2, at 535 (quoting The Wirtz Report v.2, *supra* note 6, at 2).

9 Some of these reasons are legitimate and nondiscriminatory, while others may violate the ADEA. Literature in the human resources arena abounds in addressing the topic of overqualification and whether it is a code word for "too old." *See*, *e.g.*, Dana Wilkie, *"Overqualified": Is It Code for "Too Old?"* SHRM, Dec. 12, 2013 https://54.83.97.131/workforce/overqualified-is-it-code-for-too-old (noting remarks interviewers make that, unwittingly or not, convey message that an over-fifty-five applicant is "too old" for a job); Tim Sackett, *Overqualified Is Just Another Word for Age Discrimination*, TLNT.com, Sept. 25, 2018 https://www.tlnt.com/articles/overqualified-is-just-another-word-for-age-discrimination (discussing mistake employers make by refusing to hire applicants they consider to be overqualified for a position); *Being Overqualified" May Be a Thin Excuse for Age Discrimination*, Leeds Brown Law Firm Newsletter; Jack Kelly, *Overqualified Job Seekers Are Discriminated Against: Here's How to Combat the Built-In Bias*, Forbes (Aug 21, 2019) (discussing bias many employers have toward hiring overqualified applicants expressed in statements or questions such as, "why this applicant wants this lower-paying job, has this applicant 'flamed out'?, overqualified employee with degree from elite university will be conceited, arrogant, and hard to work with, fear attention will be diverted away from supervisor to older, more experienced person, person with more experience will soon want more money, overqualified employee will look down on less experienced colleague and not fit into the culture of the company").

10 Querry, *supra* note 2, at 539 nn.65–72.

11 The Wirtz Report v.2, *supra* note 6, at 8.

12 *Id.*

13 *See*, Michael Clinton, *The Seismic Shift That's About to Change the American Workplace? Older Employees*, Esquire (Feb. 13, 2024), https://www.esquire.com/news-politics/a46754477/american-workplace-change-older-employees/ (citing studies stating that cognitive impairment is not much more common among older workers than employees aged forty-five to sixty-five).

14 *Id.* at 2, 14.

distinguished between the following two types of age discrimination: policies with specific age limitations—which he found were always arbitrary discrimination—and discrimination based on age when there is a relationship between age and the ability to do the job[15]—which he found could constitute arbitrary discrimination when workers are judged by the average (or perceived average) for their age group rather than their individual abilities.[16] Wirtz recommended legislative action to remedy this "arbitrary" age discrimination.[17] From this recommendation and report, the ADEA was born.

The language of the ADEA's central prohibition was taken word for word from Title VII of the Civil Rights Act of 1964.[18] Thus, the ADEA on its face provides the same basic protections from discrimination based on age that Title VII provides based on race, sex, religion, color, and national origin. The principal differences are in the required number of employees (ADEA—twenty or more, Title VII fifteen or more), the remedial provisions, and some of the defenses.[19] Both acts, however, apply only to employers in industries affecting interstate commerce.

B. The ADEA

The Age Discrimination in Employment Act, 29 U.S.C. section 623 states,

Sec. 4(a) It shall be unlawful for an employer—

1. to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privilege of employment, because of such individual's age;

2. to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

3. to reduce the wage rate of any employee in order to comply with this chapter.[20]

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15 *Id.* at 2.

16 *Id.* at 14–15.

17 *Id.* at 22.

18 *See* Smith v. City of Jackson, Mississippi, 544 U.S. 228, 233–34 (2005) (citing Lurilard v. Puns, 434 U.S. 575, 581 (1978)).

19 *See generally* Judith J. Johnson, *Reasonable Factors Other Than Age: The Emerging Specter of Ageist Stereotypes,* 33 Seatle U. L. Rev. 49, 57–77 (2009) (discussing passage of ADEA, history of RFOA, and defenses to claims of discrimination by employers). Julie A. Lierly, Comment, *A Cross-Circuit Comparison of the Burden-Shifting Analysis in Disparate Treatment Cases Under the Age Discrimination in Employment Act of 1967 as Amended,* 44 Drake L. Rev. 107, 108–10 (1995) (explaining that original intent of drafters of ADEA was to include age within the protected classes under Title VII but eventually determining that age should be a different classification because, unlike race or gender, all workers would eventually be within the protected class) (citing Joseph E. Kalet, Age Discrimination in Employment Law 1 (1986) (citing 113 Cong. Rec. 34743–44 (1967)).

20 Age Discrimination in Employment Act, 29 U.S.C. § 623(4)(a).

When Congress passed the ADEA in 1967,[21] it went further than The Wirtz Report, extending its proscriptions against arbitrary age discrimination in employment not only to hiring practices, but also to promotion, compensation, and termination.[22] The ADEA prohibits local, state, and private employers engaged in interstate commerce who employ at least twenty employees for twenty or more weeks annually from refusing to hire, discharging, or otherwise discriminating against older workers with respect to compensation, terms, and conditions of employment "because of age."[23] As originally enacted, the ADEA only protected individuals working in the private sector between the ages of forty and sixty-five. Congress amended the ADEA in 1978, extending the upper age limit to seventy and eliminating the age ceiling altogether in 1986.[24] Under some state laws, protection may extend to earlier ages.[25] Congress amended the Act in 1972 to cover public employers, but it did not include small employers with less than the previously requisite twenty. In a unanimous decision written by Justice Ginsburg, the Court in 2018 clarified that all public employers, even those with under twenty employees, were covered.[26]

In a significant negative decision for public employees, the U.S. Supreme Court in 2000 held in *Kimel v. Florida Board of Regents*[27] that the Eleventh Amendment prohibits state employees from suing states for monetary damages under the ADEA in federal court. The Eleventh Amendment, however, does not bar suits against municipalities or political subdivisions of a state, thus enabling public employees to sue local public school districts. The EEOC may still enforce the ADEA on behalf of public employees against states, including public universities, and state employees may still sue state officials for declaratory and injunctive relief.

Congress's purpose in enacting the ADEA is set forth in the Act's preamble: "to promote employment of older persons based on their ability rather than age; and to prohibit arbitrary age discrimination in employment."[28] Consistent with recommendations made in The Wirtz Report (and unlike Title VII), the ADEA proscribes only "arbitrary" age discrimination. Although the Act's preamble mentions "arbitrary" three times, the rest of the Act's text failed to define what

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21 For thorough background, legislative history, and purpose of the ADEA, see generally Querry, *supra* note 2, at 531– 36; EEOC, *Age Discrimination: Overview of the Law,* https://www2.ed.gov/policy/rights/guid/ocr/ageoverview.html/?exp=1 (last visited Sept. 21, 2023).

22 *See* 29 U.S.C. § 623(4)(a)(1).

23 *Id*.

24 *Id*.

25 *See*, *e.g.*, Ace Elec. Contractors, Inc., v. Int'l. Brotherhood of Elec. Workers, 414 F.3d 896 (8th Cir. 2005) (interpreting § 363A.03 of the Minn. Human Rights Act); Bergen Com. Bank v. Sisler, 157 N.J. 188, 723 A.2d 944 (1999); *see also* Jacob Dennis, Nat'l Youth Rts. Ass'n "Age Discrimination Under 40," (Apr. 19, 2020), https://www.youthrights.org/age-discrimination-under-40/.

26 *See* Mount Lemmon Fire Dist. v. Guido, 139 S. Ct. 22 (2018) (holding that the ADEA applies to all state and local government employers, regardless of the number of employees).

27 528 U.S. 62 (2000); *see also* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 522 (2000); Flint v. City of Phila., 2000 U.S. Dist. LEXIS 3091, Civil Action No. 98-96 (Mar. 17, 2000).

28 Robert J. Gregory, *There Is Life in That Old (I Mean, More "Senior") Dog Yet: The Age-Proxy Theory After* Hazen Paper Co. v. Biggins, 11 Hofstra Lab. & Emp. L.J. 390, 393 n.14 (1994)

types of discrimination can be "arbitrary."[29] Nevertheless, in The Report, Secretary Wirtz defined "arbitrary discrimination" as the "rejection [of older workers] because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*"[30]

In enacting the ADEA, Congress sought to prohibit the arbitrary use of age as a proxy or indicator for an applicant's or an employee's productivity, ability, or competence.[31] The ADEA, however, contains an "escape clause," the *bona fide occupational qualification* (BFOQ). This statutory defense permits employers under certain circumstances to make age-based employment decisions.[32] For example, employers "may lawfully engage in discriminatory practices that would otherwise be prohibited by the ADEA when 'age is a *bona fide occupational qualification* reasonably necessary to the normal operation of the particular business.'"[33] The BFOQ is statutory, strictly construed, and difficult to prove under both Title VII and the ADEA.[34]

In addition, the ADEA permits employers to differentiate among employees or job applicants "where the differentiation is based on reasonable factors other than age [RFOA]."[35] "Unlike the BFOQ exception, where the employer admits to age-based discrimination and maintains its necessity, an employer who claims an RFOA exception asserts that there has been no age discrimination at all."[36] Reasonable factors other than age may include "'factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence.'"[37]

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29 Querry, *supra* note 2, at 535 n.38; *see,*Age Discrimination in Employment Act, 29 U.S.C. § 621(a)(2) "the setting of arbitrary age limits regardless of potential for job performance has become a common practice;" *Id.* § 621(a)(4) "the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce;" and *Id.* § 621(b) "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

30 The Wirtz Report, *supra* note 6, at 2.

31 Querry, *supra* note 2, at 537 (quoting Duffy v. Wheeling Pittsburg Steel Corp., 738 F.2d 1393, 1399 & n.2 (3d Cir. 1984) (Adams, J., dissenting) ("Apparently cognizant that the aging process can affect capability, Congress drafted the ADEA to distinguish carefully between those employment decisions that are arbitrary and those that are performance-related."), *cert. denied*, 469 U.S. 1087 (1984) (citation omitted).

32 *Id.*

33 29 U.S.C. § 623(f) (emphasis added); *see also* W. Airlines v. Criswell, 472 U.S. 400, 400–02 (1985) (holding that airline's policy of requiring flight engineers to retire at age sixty was a BFOQ reasonably necessary to the safe operation of its business); Usery v. Tamiami Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976) (upholding bus company's policy of refusing to hire persons over forty as intercity bus drivers as a BFOQ reasonably necessary for the safe transportation of passengers from one point to another).

34 *See* Johnson, *supra* note 19, at 71.

35 *Id.*

36 *See* Querry, *supra* note 2, at 576.

37 *See id.* (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979)).

Other legitimate available defenses to an ADEA action are set forth in Morneau's article, *Too Good, Too Bad: "Overqualified" Older Workers,*[38] that is, plaintiff's unsuitability or incompetence, economic factors, lesser comparative qualifications, inability to get along with supervisors or other employees, insubordination, lack of enthusiasm, veteran preference, job elimination, poor performance, and refusal to follow company policies.[39]

C. ADEA Exclusive Remedy

Congress passed the ADEA[40] to promote the employment of older persons and prohibit arbitrary discrimination by employers based on age.[41] When Congress passed the ADEA, it crafted a detailed administrative scheme with complex enforcement mechanisms to accomplish these goals. Until 2012, every circuit to consider the issue viewed the ADEA as the exclusive remedy for claims of age discrimination in employment,[42] even those seeking to vindicate constitutional rights under 42 U.S.C. section 1983.[43]

The leading case holding that the ADEA precludes section 1983 actions in age discrimination in employment is *Zombro v. Baltimore City Police Department*.[44] In *Zombro*, a police officer asserted a section 1983 claim contending the police department discriminated against him because of age when it transferred him to a job of lesser status. The district court granted summary judgment in favor of the department. On appeal, the Fourth Circuit concluded that the ADEA forecloses section 1983 claims and affirmed the district court's grant of summary judgment.[45] The Ninth Circuit followed suit in *Ahlmeyer v. Nevada System of Higher Education*[46] holding, "The ADEA is the exclusive remedy for claims of age discrimination in

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38 Jeff Morneau, *Too Good, Too Bad: "Overqualified" Older Workers,* 22 W. New Eng. L. Rev. 58 nn.62–77 (2000) (opining that rejecting applicants on ground of overqualification may be a legitimate, nondiscriminatory reason but may also be used as a mask for age discrimination).

39 *Id.* at 58–59; *see also* Gregory, *supra* note 28.

40 29 U.S.C. §§ 621–623.

41 *See id.* § 623(b).

42 *See, e.g.*, Migneault v. Peck, 204 F.3d 1003, 1004 n.1 (10th Cir. 2000); Lafleur v. Tex. Dep't of Health, 126 F.3d 758, 760 (5th Cir. 1997); Murray A. Duncan, III, *The Proper Preclusion Standard: Why the ADEA is Not the Exclusive Remedy for Age Discrimination in Employment*, 8 Seventh Circuit Rev. 217 (2012) (discussing *Levin v. Madigan*, the first circuit to hold that the ADEA does not preclude section 1983 equal protection, claims) https://scholarship.kentlaw.itt.edu/seventhcircuitreview/vol8/iss1/9) (last visited Jan. 17, 2024); Erin L. Donnelly, *The Preclusion of § 1983 Claims By the Age Discrimination in Employment Act Following* Hildebrand v. Allegheny County, 757 F. 3d 99 (3d Cir. 2014), St. John's Law Scholarship Repository, 90 St. John's L. Rev. 109 (2016).

43 Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1060–61 (9th Cir. 2009).

44 868 F.2d 1364, 1368–69 (4th Cir. 1989) (holding ADEA's remedies sufficiently comprehensive to demonstrate congressional intent to preclude section 1983 actions in area of age discrimination in employment).

45 *Id.* at 1365, 1369.

46 555 F.3d at 1060.

employment, even those claims with their source in the Constitution."[47]

It is important to distinguish the ADEA from the Age Discrimination Act of 1975,[48] which prohibits discrimination based on age in programs or activities that receive federal financial assistance. For example, the U.S. Department of Education gives financial assistance to schools and colleges. Charges of age discrimination in this area are enforced by the Office for Civil Rights (OCR). Its implementing regulations are found in the Code of Federal Regulations at 34 C.F.R. part 110. The Age Discrimination Act of 1975 does not cover employment discrimination.[49]

D. Litigation under the ADEA

An applicant or employee who has suffered an adverse action based on age by his or her employer may make two claims against the employer: disparate treatment and disparate impact. The former occurs when the employee is intentionally treated differently than other employees because she or he is a member of the age protected class (forty and over). Proof of discriminatory motive is required. Disparate impact, on the other hand, exists where the employer has a rule or policy that is not discriminatory on its face but has a disparate effect on those forty or over.[50] Most ADEA claims, including those arising from failure to hire because of overqualification, are brought under the disparate treatment theory. It was not until 2005 that the Supreme Court, overruling the Court of Appeals for the Fifth Circuit, held in *Smith v. City of Jackson, Mississippi*,[51] that disparate impact claims are actionable under the ADEA.[52]

A plaintiff suing under the ADEA must come forward with either direct evidence of discrimination, which is often difficult to produce, or rely on circumstantial evidence. Cases based on circumstantial evidence utilize the *McDonnell Douglas*/*Burdine* analysis, under which the plaintiff bears the initial burden of establishing the elements of his or her prima facie case of age discrimination. In an ADEA failure to hire case, a plaintiff may establish a prima facie case by showing that (1) the plaintiff was a member of the protected group of persons over forty, (2) the plaintiff was subject to an adverse employment action (not hired), (3) a substantially younger person was hired for the position, and (4) the plaintiff was qualified to do the job for which he/she was rejected.[53]

If a plaintiff establishes a prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for the employer's actions.[54]

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47 *Id.* at 1060–61.

48 Pub. L. 94-135 (codified at 42 U.S.C. § 6101).

49 *See* EEOC, *Age Discrimination: Overview of the Law* 1, https://www2.ed.gov/policy/rights/guid/ocr/ageoverview.html?exp=1 (last visited Sept. 21, 2023).

50 Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

51 544 U.S. 228 (2005).

52 *Id.* at 243.

53 Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998).

54 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973); *see also* Judith J. Johnson, *A*

If the employer offers such a reason, the burden shifts back to the plaintiff to show that the employer's reason was pretext for prohibited discrimination.[55] Prior to the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*,[56] an ADEA plaintiff could establish pretext simply by showing that the employer's proffered evidence was unworthy of credence.[57] The plaintiff could prevail if he or she disproved the defendant's explanation for the alleged discriminatory action.[58] In *Hicks*, however, a 5-4 majority "upped" the evidentiary "ante" for the plaintiff[59] *and* held that to establish pretext, an employee must prove "'*both* that the [employer's] reason was false, and that discrimination was the real reason.'"[60]

Once reluctant to use summary judgment in civil rights cases involving intent, motive, and credibility,[61] courts now frequently decide disparate treatment age discrimination cases at this stage.[62] This movement gained legal support in a trilogy of Supreme Court cases decided by the Court in 1986—*Anderson v. Liberty Lobby*,[63] *Celotex v. Catrett*,[64] and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp*.[65] These cases changed the way courts approach summary judgment, making it much easier for defendants to obtain summary judgment and depriving many deserving ADEA plaintiffs of their rights to a jury trial in civil rights cases, which involve complex issues of intent, motive, and credibility.[66] While courts should be cautious about granting summary judgment in cases where motive, intent, or state

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Cross-Circuit Comparison of the Burden-Shifting Analysis in Disparate Treatment Cases Under the Age Discrimination in Employment Act of 1967 as Amended, 44 Drake L. Rev. 107 (1995) (explaining the shifting burden of proof in discrimination cases and outlining the various approaches taken by the circuits to this burden-shifting analysis for ADEA claims).

55 *McDonnell Douglass*, 411 U.S. at 804.

56 509 U.S. 502 (1993).

57 Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 (1981).

58 *Id.*

59 *See* Querry, *supra* note 2, at 561 (citing 2 Howard C. Eglit, Age Discrimination § 7-05, at 7-36 (2d ed. 1994); *see also* Robert Brookins, *"Hicks, Lies, and Ideology: The Wages of Sin is Now Exculpation,"* 28 Creighton L. Rev. 939, 943 (1995)).

60 *See* Querry, *supra* note 2, at 561 (quoting *Hicks*, 509 U.S. at 516) (quoting *Burdine*, 450 U.S. at 253)).

61 *See generally* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment,* 100 Yale L.J. 73, 74–76 (1990) (discussing history of the summary judgment procedure).

62 *See* Querry, *supra* note 2, at 425.

63 477 U.S. 242 (1986).

64 477 U.S. 317 (1986).

65 475 U.S. 574 (1986).

66 Querry, *supra* note 2 at 562–63 n.195; *see also* Frank J. Cavaliere, *The Recent 'Respectability' of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis Through the Supreme Court's Summary Judgment "Prism,"* 41 Clev. St. L. Rev. 103, 118 (1992) (discussing standards for granting summary judgment in ADEA cases and noting the advantage held by the employer); Ann C, McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 207 (1993) ("In response to the [Supreme Court] trilogy, lower courts have granted summary judgment in cases where there exist questions of fact concerning the employer's motive, thereby denying to employment discrimination plaintiffs their 'day in court' historically promised by the American model of litigation.")

of mind are at issue, "the salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to other areas of litigation."[67] To avoid summary judgment on employment discrimination claims, the plaintiff must introduce significantly probative evidence both that the proffered reason for the adverse employment action is false and that discrimination is the real reason for the action.[68]

E. Age Proxy Theory

Prior to the Supreme Court's decision in *Hazen Paper Co. v. Biggins*,[69] many lower courts held that an employment decision based on a seemingly neutral equivalent of an overt, age-based employment decision could operate as the functional equivalent of an overt age-based decision itself. Applying what has become known as the "age proxy" doctrine or theory, these courts equated employment decisions based on certain age-correlated factors ("age proxies") with unlawful age discrimination under the ADEA.[70]

Professor Howard Eglit in the first edition of his treatise on age discrimination, described the age proxy doctrine as follows:

> Sometimes an employer, rather than using age as the basis of its decisions, will rely on such factors as cost or seniority. As it turns out, however, these factors are so closely correlated with age that most courts have pierced the rhetoric and rejected employers' efforts. In other words, because typically (although not inevitably) seniority—i.e., years on the job—will correlate with age, use of seniority by an employer as a basis for decision making, such as selecting the most senior employees for discharge, will be seen as a disguised reliance on age.[71]

The same theory underlies the concept of overqualification as a proxy for age discrimination as discussed in the hypothetical with which the authors introduced this article.

Overqualification, according to Merriam-Webster, is the state of "having more education, training, or experience than a job calls for."[72] Employers may view overqualified candidates as inappropriate hires for fear that they may become bored, seek a different position that is more at their level, feel underpaid, or be insubordinate if hired into a position for which they are overqualified.

Although the ADEA does not explicitly proscribe the use of age proxies, its

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67 Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985); *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146–47 (2000) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993)).

68 Brooks v. Cnty. Comm'n of Jefferson Cnty., Alabama, 446 F.3d 1160, 1163 (11th Cir. 2006).

69 507 U.S. 604 (1993).

70 *See* Querry, *supra* note 2, at 538.

71 Howard C. Eglit, Age Discrimination, § 16.03a, at 2S97–2S98 (Supp. 1992).

72 Merriam-Webster.com Dictionary: *Overqualified* (Merriam Webster).

creation of the RFOA exception[73] implicitly incorporates what has become known as the "age proxy theory." This theory "refers to a method of proof that permits a finding of age discrimination to be based on an employer's reliance on an age-related factor."[74] The proxy theory simply posits that "the age-related factor is a stand-in for age itself."[75] In other words, whether age itself or the proxy for age, the employer has relied on stereotypes of older workers rather than facts about the individual older worker(s) in question when making a decision that results in an adverse employment action.

F. Objective vs. Subjective Hiring Criteria

Despite more than thirty years of precedent, the federal courts continue to disagree about how to address the proxy theory of age discrimination. Many courts addressing overqualification have consistently held that there must be some objective reason why the excessive qualifications are a negative trait.[76] "Although the ADEA does not prohibit rejection of overqualified job applicants *per se*, courts have expressed concern that such a practice can function as a proxy for age discrimination if 'overqualification' is not defined in terms of objective criteria."[77] Objective criteria mean specific, concrete, identifiable information based on facts such as number of words typed per minute, college, or university degrees. Subjective criteria refer to information based on personal feelings or gut reactions such as the applicant lacks enthusiasm or motivation. Subjective criteria can also be based on personal biases, where objective criteria are based on facts, not feelings. Some courts have held that objective criteria that are uniformly and equally applied regardless of age fail to amount to age discrimination.[78] Some courts have found that "secret, unannounced, subjective criteria cannot satisfy the employer's burden of producing legitimate, nondiscriminatory reasons for an applicant's rejection."[79] Others have held that subjective criteria can also be lawful and legitimate.[80]

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73 29 C.F.R. § 1625.7 (2012). The reasonable factor other than age (RFOA) provision provides that it shall not be unlawful for an employer to take any action otherwise prohibited under [the Act] where the differentiation is based on reasonable factors other than age discrimination. "A reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer exercising reasonable care mindful of its responsibilities under the ADEA under like circumstances." *Id.; see also* Judith J. Johnson, *Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other than Age" Defense and the Disparate Impact Theory,* 55 Hastings L.J. 1399, 1403 (2004) (arguing forcefully for placing emphasis on "reasonable factor other than age" in applying an RFOA defense by an employer).

74 Gregory, *supra* note 28, at 393 n.14.

75 *Id.*

76 Buckner v. Lynchburg Redev. & Hous. Auth., 262 F. Supp. 3d 373, 378 (W.D. Va. 2017) (citing EEOC v. Ins. Co. of N. Am., 49 F.3d 1418, 1420 (9th Cir. 1995)).

77 *EEOC v. Ins. Co. of N. Am.*, 49 F.3d at 1420.

78 *See, e.g.,* Stein v. Nat'l City Bank, 942 F.2d 1062, 1066 (6th Cir. 1991); Phillips v. Mabus, 894 F. Supp. 2d 71 (D. Haw. 2012).

79 *See, e.g.,* Woody v. St. Clair Cnty. Comm'n, 885 F.2d 1557, 1565 (11th Cir. 1989); *Buckner,* 262 F. Supp. 3d at 378.

80 *See, e.g.,* Gray v. N.Y. State Elec. & Gas, No. 02–CV–6214, 2004 WL 15702, at *4 (W.D.N.Y.); Chapman v. Al Transp., 229 F.3d 1012, 1033 (11th Cir. 2000).

Prior to the decision of the Supreme Court in *Hazen Paper*,[81] many lower courts found that an employment decision based on a seemingly age-neutral factor could be the equivalent of an overt, discriminatory, age-based decision in violation of the ADEA.[82] In *Hazen Paper*, the Court addressed the question of whether an employer's interference with the vesting of pension benefits violated the ADEA and concluded that it did not.[83]

II. THE SUPREME COURT'S RULING IN *HAZEN PAPER*

Petitioner, Hazen Paper Company (Hazen Paper/petitioner), manufactured coated, laminated, and printed paper and paperboard. The company was owned and operated by two cousins, Robert and Thomas Hazen. The Hazens hired respondent, Walter Biggins (Biggins/respondent), as their technical director in 1977. They fired him in 1986, when he was sixty-two years old and just a few weeks shy of the date his pension benefits would vest.[84]

Biggins sued the petitioners in the U.S. District Court for the District of Massachusetts, alleging a violation of the ADEA. He claimed that age had been a determinative factor in the petitioners' decision to fire him. Petitioners claimed instead that they fired Biggins for doing business with competitors of Hazen Paper.[85] The case was tried before a jury, which rendered a verdict for Biggins on his ADEA claim, found violations of the Employee Retirement Income Security Act of 1974 (ERISA), and state law. On the ADEA claim, the jury found that the petitioners "willfully" violated the statute that gave rise to liquidated damages.[86] Petitioners moved for judgment notwithstanding the verdict, which the district court granted with respect to the state law claim and the finding of "willfulness" but otherwise denied it.[87]

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81 Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).

82 *See, e.g.,* Tuck v. Henkel Corp., 973 F.2d 371, 376 (4th Cir. 1992), *cert. denied,* 507 U.S. 916 (1993) (holding that employer's reliance on employee's years of service in making hiring decision gave rise to inference of age discrimination); White v. Westinghouse Elec. Co., 862 F.2d 56, 62 n.9 (3d Cir. 1988) (same); Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975) (employee dismissed because he had "too many years on the job"); Castleman v. Acme Boot Co., 959 F.2d 1417 (7th Cir. 1992) (termination of employee only eight months before he reached retirement age evidence of age discrimination); Leftwich v. Harris-Stowe State Coll., 702 F.2d 636, 691 (8th Cir. 1983) (ADEA prohibits business practices that eliminate "older workers who had built up, through years of satisfactory service, higher salaries than their younger counterparts"); Taggart v. Time, Inc., 924 F.2d 43, 44–48 (2d Cir. 1991) (stressing that for those in the protected age group being overqualified may be simply code word for too old); *see also* EEOC v. Gen. Elec. Co., 773 F. Supp. 1470, 1473 (D. Kan. 1991) (holding that employer's statement that younger candidate had more potential to advance in the company sufficient to raise inference of discrimination since "[p]otential often coextensive with age").

83 *Hazen Paper,* 507 U.S. at 604; *see also* Judith Johnson, *Semantic Cover for Age Discrimination: Twilight of the ADEA,* 42 Wayne L. Rev. 1 (1995) (criticizing the Supreme Court's *Hazen Paper* decision for determining that the use of a factor that simply correlated with age was a legitimate, nondiscriminatory reason for an adverse action unless the reason correlated perfectly with age).

84 *Hazen Paper,* 507 U.S. at 606.

85 *Id.*

86 *Id.*

87 *Id.* at 607.

On appeal, the Court of Appeals for the First Circuit affirmed judgment for the respondent on both the ADEA and ERISA counts and reversed judgment notwithstanding the verdict for the petitioners as to "willfulness." In affirming the judgments of liability, the court of appeals relied heavily on evidence that the petitioners had fired Biggins to prevent his pension from vesting at the ten-year mark had Biggins worked "a few more weeks" after being fired.[88]

Writing for a unanimous Supreme Court, Justice O'Connor emphasized that in a disparate treatment case, such as the instant one, liability depends on whether the protected trait (under the ADEA, age) motivated the employer's decision, played a role in that process, and had a determinative influence on the outcome.[89] When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears even if the motivating factor is correlated with age, as pension status typically is.[90] Usually, an older employee has had more years in the workforce than a younger employee and has gained more years of service from a particular employer. "Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age-based.'"[91] The court, holding for petitioners, summarized its decision by saying, "Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service."[92]

The age-proxy theory in its entirety was not before the Court in *Hazen Paper.* The holding there was limited to whether an employer violates the ADEA by interfering with vestment of an employee's pension benefits. The issue was not whether the employer's reliance on pension status could mask an age bias, but whether reliance on such a factor was, *ipso facto*, age discrimination. According to *Hazen Paper*, "there is no intentional discrimination under the ADEA when it is clear that the proxy, rather than age, motivated the employer."[93]

Gregory notes in his article on the importance and effect of *Hazen Paper* that "the proxy at issue in *Hazen Paper* was objective and measurable."[94] He points out that courts have long recognized that subjective employment practices are reviewed carefully because of the danger that such practices are susceptible to being "a 'covert means' to discriminate intentionally."[95] Where an employer bases its employment decision on objective and measurable criteria, as in *Hazen Paper*, there is no direct basis for finding intentional discrimination. On the other hand,

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88 *Id.* at 607.

89 *Id.* at 610.

90 *Id.* at 611.

91 *Id.*

92 *Id.* at 613.

93 Gregory, *supra* note 28, at 408; *see also* Johnson, *supra* note 19, at 23.

94 Gregory, *supra* note 28, at 408.

95 *Id.* (citing Jauregul v. City of Glendale, 852 F.2d 1128, 1136 (9th Cir. 1988)).

"where … the employer bases its decision on subjective, age-related criteria, there is a substantial risk that the employer is using the proxy as a mask for age discrimination."[96]

III. THE COURTS SPEAK AND THE CIRCUITS SPLIT

Cases addressing overqualification as a reason for rejecting a job applicant or taking other adverse employment actions have been found in most of the federal circuits, the district courts within the circuits, and in some state court decisions. Clear splits exist among the courts. Some hold that "overqualification" is a legitimate, nondiscriminatory reason for rejecting a job applicant,[97] while others declare that the use of "overqualification" is a proxy for age discrimination in violation of the ADEA.[98] Still others send mixed signals, holdingthat overqualification, if not clearly defined by objective criteria, can easily be a mask for discrimination while in the same case acknowledging that relying on a factor closely correlated with age, as is overqualification, does not violate the ADEA.[99]

The cases discussed Parts III.A–C have been organized both by circuits and by the positions these courts take regarding overqualification and adverse employment decisions. Part III.A discusses the cases at both the circuit and district court levels in which the courts have ruled overqualification to be a proxy for age discrimination. Part III.B reviews the cases in which overqualification has been found not to be a proxy for age discrimination, but rather to be a legitimate nondiscriminatory reason for an adverse employment action. Part III.C addresses those cases that send mixed signals, recognizing, on the one hand, that overqualification, unless clearly defined by an objective standard, can be a proxy for age discrimination while noting, on the other hand, that while overqualification might be closely correlated with age, the ADEA does not make use of this criterion necessarily a violation of the Act.[100]

A. "Overqualification" as a Proxy for Age Discrimination

Courts in various federal circuits since 1990 (i.e., D.C., Second, and Ninth) have

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96 Gregory, *supra* note 28, at 410. For a more in-depth discussion of subjective versus objective criteria, *see infra* Part IV.A.

97 *See, e.g.,* Timmerman v. IAS Claim Servs., 138 F.3d 952 (5th Cir. 1998) (affirming summary judgment for employer whose stated reason for terminating plaintiff (overqualification) was legitimate, nondiscriminatory reason and noting that the plaintiff cited no cases in opposition to summary judgment that indicate 'overqualification' is a pretext to discrimination).

98 *See, e.g.,* Taggart v. Time, Inc., 924 F.2d 43 (2d Cir. 1991) (reversing summary judgment for employer finding overqualification code word for too old and holding that jury could find overqualification to be mask for age discrimination).

99 *See, e.g.*, Jianqing Wu v. Special Couns., Inc., 54 F. Supp. 3d 48, 55 (D.D.C. 2014) (distinguishing period of service and experience (objective criteria) and age (protected status)), *aff'd* USCA No. 14-7159, 2015 U.S. App. LEXIS 22477 (D.C. Cir., Dec. 22, 2015), *cert denied* 136 S. Ct. 2473, June 2016; Buckner v. Lynchburg Redev. & Hous. Auth., 262 F. Supp. 3d 373, 378 (W.D. Va. 2017) (finding that the defendants' belief that the plaintiff would cost too much to employ due to his experience was an objective criterion).

100 Despite the use of three clearly defined headings in this article, these ADEA cases are fact dependent, and the courts' holdings are a matter of interpretation.

ruled that overqualification is a proxy for age discrimination under the ADEA.[101] As Julia Lamber explains, "[W]hile the issue of overqualification is often raised in employment discrimination cases, Taggart [was] the first court of appeals decision to grapple with the potentially discriminatory nature of excluding applicants because they are 'overqualified' in the age discrimination context."[102] These cases are often fact dependent, however, as evidenced by rulings of most of these same circuits finding overqualification to be a legitimate, nondiscriminatory reason for adverse employment actions in other factually distinct cases (see Part III.B).

1. EEOC v. District of Columbia Department of Human Services[103]

This case concerns Dr. Kielich, a dentist who had spent over thirty years as a board-certified periododontist working with children and the handicapped.[104] After concluding his tenure as a professor of dentistry, dental resident coordinator, and clinic manager at Georgetown University's District of Columbia Children's Hospital, Kielich applied for both permanent and temporary positions as a dental officer for the District of Columbia Department of Human Services. At the time of his initial application, Dr. Kielich was sixty-three years old. He was not hired for any of the positions.

In all these searches, however, the ranking panel had listed Dr. Kielich as "highly qualified."[105] The two permanent positions were filled by dentists aged forty-six and thirty-four, while the temporary positions were filled by dentists aged thirty-one and twenty-eight.[106] After learning that he was not selected for any of the positions, Dr. Kielich filed a timely charge of age discrimination with EEOC. On May 5, 1987, the EEOC filed suit against the defendant on behalf of Dr. Kielich under the ADEA, contending that the defendant violated the Act by refusing to hire Dr. Kielich as a public health dental officer because of his age. At the time of the alleged violation, Dr. Kielich was sixty-four years old.[107]

The defendant put forward a myriad of reasons for not hiring Dr. Kielich, including the defendant's panel members' beliefs that the positions in question were entry level positions for which Dr. Kielich was overqualified and overspecialized.[108] The court was not persuaded by defendant's reasons, found them to be pretextual,

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101 *See, e.g., Taggart,* 924 F.2d 43; Binder v. Long Island Lighting Co., 933 F.2d 187 (2d Cir. 1991); and Warrilow v. Qualcomm, Inc., No. 02cv0360 DMS (JMA) 2004 U.S. Dist. LEXIS 33468 (S.D. Cal. Sept. 16, 2004), *aff'd,* 268 F. App'x 561 (9th Cir. 2008)). The D.C. District Court case in the next section also ruled overqualification was a proxy for age discrimination but the opinion was rendered moot by the settlement of the case, the opinion was therefore vacated, and the case remanded for dismissal.

102 Julia Lamber, *Overqualified, Unqualified or Just Right: Thinking About Age Discrimination and* Taggart v. Time, 58 Brook. L. Rev. 347, 348 (1992).

103 729 F. Supp. 907, 909 (D.D.C. 1990).

104 *Id.*

105 *Id.* at 910.

106 *Id.* at 911.

107 *Id.* at 908.

108 *Id.* at 912.

and concluded instead that Dr. Kielich was "an extraordinary, highly qualified 64 year old dentist."[109]

The court countered the defendant's pretextual reasons by saying, "the testimony … suggested that the reason Dr. Kielich was not selected was because the individual panel members believed that the position for which Dr. Kielich applied was 'entry level' and that Dr. Kielich was simply overqualified."[110] The court concluded, "[T]he Court believes that individual members of the selection panel had preconceived notions about what a successful candidate for an 'entry level' position would look like which did not include a 64 year old [sic] dentist with almost 40 [sic] years of experience."[111] Finding that the EEOC had produced clear evidence to prove that the defendant was motivated by illegitimate reasons to reject Dr. Kielich's application, the court "held that plaintiff had met its burden of proving that Dr. Kielich was discriminated against because of his age in violation of the ADEA."[112]

The parties settled. The circuit court stated that the settlement rendered the lower court's decision moot, vacated its opinion, and remanded the case for dismissal.[113]

2. Taggart v. Time, Inc.[114]

Thomas Taggart was employed as a print production manager by Preview Subscription Television, Inc. (Preview), a subsidiary of Time, Inc. (Time). In May of 1983, Time notified Preview employees that it intended to dissolve Preview and lay off its employees. Shortly thereafter, Time did just that and invited the laid-off employees to apply for job openings at Time. Taggart applied for thirty-two jobs, obtained eight interviews, but was not hired by any division of Time. Seven of the employers concluded that he was unqualified. Home Box Office (HBO), the eighth employer to interview Taggart, declined to hire Taggart for a print purchaser position because he was overqualified. Taggart was sixty years old at that time. Taggart filed a timely charge of age discrimination with the EEOC and subsequently, appearing *pro se*, filed a complaint in the district court for the Southern District of New York. He contended that all the interviews were mere courtesy interviews, a sham, and that his age was the real reason he was denied employment.[115]

The record revealed that the hiring manager at HBO stated that because Taggart was overqualified, she did not think the position for which he was applying would interest or challenge him. She gave no other reason for not hiring Taggart. Time admitted that its sole reason for refusing to hire Taggart for the print purchaser

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109 *Id.* at 915.

110 *Id.*

111 *Id.* at 915.

112 *Id.*

113 EEOC v. D.C. Dep't. of Human Servs., No. 90–7065, 1991 WL 18498 (D.C. Cir. Jan. 31, 1991).

114 924 F.2d 43 (2d Cir. 1991). For further analysis of this case, see generally Lamber, *supra* note 102, at 347.

115 *Taggart*, 924 F.2d at 47.

position was because he was overqualified.[116] The employer believed that the job would not challenge Taggart, and he would likely leave soon to seek other employment.[117] Taggart responded that he was willing to take any job available simply to continue to earn a decent living.[118]

The district court concluded that Taggart failed to show that he was qualified for seven of the positions for which he applied. Neither had he shown that the employer's reasons for not hiring him were mere pretexts but were instead reasonable business judgments to which the court must defer.[119] The district court granted summary judgment for Time and dismissed Taggart's complaint.[120] "The court's grant of summary judgment turned on its finding that, because Time's decision was a reasonable business judgment, a reasonable jury could not find or infer intentional discrimination."[121]

Taggart appealed to the Second Circuit Court of Appeals, which disagreed with the district court, saying, "Denying employment to an older job applicant because he or she has too much experience, training or education is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old."[122] As Lamber explained,

> [The district] court accepted Time's rationale that the job would fail to challenge Taggart and that he would thus continue to seek other employment. In contrast, the Second Circuit accepted Taggart's characterization: it is unlikely that an older employee will continue to seek jobs, in part because there are not many job opportunities for an older employee.[123]

The Second Circuit reversed the summary judgment for Time on the print purchaser position at HBO, where Time had maintained that Taggart was not hired because he was "overqualified," and remanded the case to the district court for a trial on the merits consistent with its opinion.[124]

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116 *Id.*

117 Jeff Morneau, *Too Good, Too Bad: "Overqualified" Older Workers,* 22 W. New Eng. L. Rev. 45, 70 (2000) (containing good discussion of overqualification and the courts, including major cases).

118 *Id.*

119 Taggart v. Time Inc., No. 87 CIV. 3408 (MBM), 1990 WL 16956, at *3–4. (The district court in Taggart concluded that "[i]t is a reasonable business judgment for an employer to decide not to hire a prospective employee because that person would be bored in that job, or would leave upon finding a better job, or both.").

120 *Id.* (quoting Lamber, *supra* note 102 at 352) (The court's grant of summary judgment turned on its finding that, because Time's decision was a reasonable business judgment, a reasonable jury could not find or infer intentional discrimination.).

121 Lamber, *supra* note 102 at 352.

122 *Id.* (quoting EEOC v. Dist. of Columbia, Dept. of Hum. Servs., 729 F. Supp. 915 (D.D.C. 1990) (stating that overqualified and over-specialized are buzzwords for too old)).

123 Lamber, *supra* note 102, at 355.

124 Taggart v. Time, Inc., 924 F.2d 43, 48 (2d Cir. 1991).

3. Binder v. Long Island Lighting Co.[125]

David Binder, a former employee of Long Island Lighting Co. (LILCO), graduated from college in 1955 with a bachelor's degree in mechanical engineering and began working for LILCO. In 1968, shortly after earning a master's degree in nuclear engineering, he began supervising the construction of LILCO'S Shoreham Nuclear Power Station. In 1970, he became the first project engineer for Shoreham, a managerial position with decision-making responsibilities regarding the plant's size, configuration, and equipment. Numerous promotions followed until in 1984 he became Consulting Engineer to the Vice President of Engineering and Administration, Dr. Matthew Cordaro.[126]

The mid-1980s were difficult years for LILCO. By 1984, when William Catacosinos took over as LILCO'S Chair and Chief Executive Officer, the company's financial condition was perilous. Catacosinos tried to make the company's bureaucracy leaner by laying off more than five hundred employees and eliminating the positions of "staff assistant" to senior LILLCO executives. Binder was not one of the employees laid off. However, when Dr. Cordaro was elevated to Senior Vice President of Operations and Engineering, this put Binder in conflict with Catacosinos's policy against staff assistants for senior executives. Cordaro eventually succumbed to Catacosinos's directive and eliminated Binder's position.[127]

During this time, multiple positions in the newly formed project management department opened, but Binder was not considered for these positions despite his obvious qualifications. Robert Kelleher, LILCO'S Vice President of Human Resources, stated in his affidavit that he did not contact Binder about any of these positions because he did not think any of the positions were suitable for someone with Binder's qualifications and experience. Kelleher stated further,

> One of my concerns in placing someone of Mr. Binder's education and experience is that I not "underemploy" the individual. By that I mean that if you place a person in a position which uses little of their knowledge or places them in a subordinate role to that which they had been filling, the individual becomes frustrated and suffers from low morale.[128]

Both Catacosinos and Kelleher acknowledged that there were positions available for which Binder was qualified that were filled by younger persons. However, both stated that none were "suitable" or "appropriate" for Binder because none were at the salary and grade level achieved by him or required the technical skills he possessed. That being the case, both Catacosinos and Kelleher concluded in their affidavits that Binder would have been "underemployed," which would lead to his low morale and frustration.[129]

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125 933 F.2d 187 (2d Cir. 1991, *rev'd in part and remanded*: *Binder I*), 847 F. Supp. 1007 (E.D.N.Y. 1994) (*Binder II*), *rev'd in part and remanded* 57 F.3d 193 (2d Cir. 1995) (*Binder III*).

126 *Binder 1*, 933 F.2d at 187.

127 *Id.* at 189.

128 *Id.* at 190.

129 *Id.* at 192.

The court noted that the only relevant difference in the instant case (Binder) and Taggart was that Taggart said he would take any job available to stay employed, while Binder made no such similar statement. The court further noted, however, that Binder had no opportunity to express his views on lower available positions because none were discussed with him. The suitability of positions for Binder were decisions made by Kelleher and Catacosinos, not Binder. Acknowledging that the jury would be free to conclude that LILCO staff might have been acting out of a genuine desire not to place Binder in a position in which he might be frustrated, exhibit low morale, and perform poorly by not discussing lower paying jobs with him, it would also be free to conclude that this explanation was pretextual. Quoting the Act itself, the court stated,

> The ADEA does not forbid employers from adopting policies against "underemploying" persons in certain positions so long as those policies are adopted in good faith and applied evenhandedly. However, such policies may also serve as a mask for age discrimination, and the issues of good faith and evenhanded application cannot be resolved on a motion for summary judgment.[130]

The Second Circuit vacated the district court's grant of summary judgment in favor of LILCO and remanded for further consideration consistent with this opinion.[131]

In a concurring opinion, Judge Altimari acknowledged that the *Taggart* opinion was binding and, thus, the opinion in *Binder* was correct. He worried, however, that *Taggart* would make summary judgment much harder to come by in ADEA cases. If the term "overqualified" were invariably a buzzword for "too old," an employer might have legitimate reasons for declining to employ overqualified persons. "Certainly," he wrote, "an employer might reasonably determine that placing an 'overqualified" individual in a particular position would . . . demoralize the individual and engender frustration, low morale, and poor job performance."[132] "When such a judgment is made, under circumstances that fail to give rise to an inference of age discrimination, summary judgment should be available. To hold otherwise bestows talismanic significance on the term 'overqualified' and needlessly permits ADEA plaintiffs to evade meritorious motions for summary judgment."[133] "Such a result would be contrary to precedents of this circuit and contrary to the spirit of Fed. R. Civ. P. 56(c)."[134]

The trial was held before a jury, which deliberated less than two hours before returning a verdict in Binder's favor of $828,505 in lost wages and $497,738 for pain and suffering.[135]

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130 *Id.* at 193.

131 *Id.*

132 *Id.* at 194.

133 *Id.*

134 *Id.* (citing Meiri v. Dacon, 759 F.2d 989 (2d Cir. 1985), *cert. denied,* 474 U.S. 829 (1985)).

135 *Binder III*, 57 F.3d at 200.

After the trial judge overturned the jury verdict for Binder, the court of appeals revisited this case for the second time and reversed again, saying, "In short, the district court should not have granted judgment n.o.v. because the jury was entitled to conclude, as it did, that the explanation offered by LILCO (its policy against underemployment) was pretextual and to draw a permissible inference of discrimination."[136]

4. Gray v. New York State Electric & Gas[137]

Timothy Gray, the plaintiff, proceeding *pro se*, brought this action for damages against his former employer, New York State Electric and Gas Corporation (NYSEG/defendant), arising from the defendant's declining to interview or hire him because of his age for any of its openings after a significant layoff. The plaintiff had worked for the defendant for five years before he was laid off due to economic reasons. The plaintiff was forty-two years old when he applied for the first of six open positions.[138] He maintained that there was no reason other than his age to warrant his not having received an offer or at least an interview for any of the six positions to which he applied.[139]

The defendant received nearly two hundred applications for the laborer's position. Gerald Masters, the hiring supervisor, knew Gray from being his supervisor during Gray's previous employment with NYSEG in the early 1990s. He did not select Gray for interview or hiring because he doubted that he would be intellectually challenged as a laborer or interested in staying in this position for any length of time, but rather would leave NTSEG after a few months to return to college.[140] Masters also cited several subjective reasons for not interviewing Gray such as his opinion that Gray was not "proactive or willing to improvise" and was a "loner, standoffish and quiet, almost morose."[141] The court noted that the use of subjective criteria in evaluating job applicants is not unlawful.[142] "Indeed," the court said, "[a] subjective reason can constitute a legally sufficient, legitimate nondiscriminatory reason under the McDonnell Douglas/Burdine analysis."[143]

Gray, relying heavily on *Taggart*, argued that Masters's statement about believing Gray would not be intellectually challenged was an indirect way of denying him consideration because he was judged "overqualified."[144] Gray further argued that, in the context of age discrimination, being told that one is "overqualified" for a position raises an inference upon which a reasonable juror could find support

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136 *Id.* at 193.

137 No. 02–CV–6214, 2004 WL 15702 (W.D.N.Y. 2004).

138 *Id.* at *1.

139 *Id.* at *4.

140 *Id.* at *16.

141 *Id.* at *17–18.

142 *See id.* (quoting Sattar v. Motorola, Inc., 138 F.3d 1164, 1170 (7th Cir. 1998) ("Nothing in Title VII bans outright the use of subjective evaluation criteria.")).

143 *Id.* at *12 (quoting Chapman v. Al Transp., 229 F.3d 1012, 1033 (11th Cir. 2000)).

144 *Id.*

for Gray's arguments regarding "overqualification." However, the court was persuaded by previous rulings of the Second Circuit that "the court must respect the employer's unfettered discretion to choose among qualified candidates"[145] and that its "role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second guesses employers' business judgments."[146] The court went on to emphasize the role of courts in addressing employment discrimination issues under the ADEA, saying, "'Employers are not required to make wise employment decisions, they are merely prohibited from making discriminatory ones.'"[147] "'The ADEA prohibits discrimination, not poor judgment.'"[148]

Nevertheless, in the context of a summary judgment motion, the court found that the conflicting evidence with respect to the laborer position created an issue of fact requiring the court to deny NYSEG judgment on this position but grant summary judgment on the other five positions.[149]

5. Warrillow v. Qualcomm, Inc.[150]

Plaintiff Lisa Warrillow sued her former employer, Qualcomm, Inc., contending that defendant Qualcomm violated the ADEA by terminating her and not selecting her for the open position of marketing coordinator during a reduction in force. At the time of her termination, Warrillow was fifty-seven years old.[151] The defendant stated that it did not select Warrillow for the marketing position because she was overqualified and because of its concern that she would not be interested in performing the lower-end tasks this position required or being paid a modest salary.[152] Qualcomm argued that its rejection of Warrillow "'as overqualified is a legitimate nondiscriminatory reason'"[153] for not selecting her.

Warrilow relied on *EEOC v. Insurance Co. of North America* (ICNA)[154] to support her argument of pretext. In that case, the Ninth Circuit declined to adopt the Second Circuit's suggestion "that rejection of an older worker because he or she is 'overqualified' is *always* tantamount to age discrimination," but instead looked at whether the determination of overqualified was based on at least one defined concern.[155] The court found that the defendant in ICNA met the defined concern standard by explaining its fear that someone with the plaintiff's extensive

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145 *Id.* at *12 (quoting Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 103 (2d Cir. 2001)).

146 *Id.* (quoting Bagdasarian v. O'Neill, No. 00–CV–0258E(SC) 2002 U.S. Dist. LEXIS 13328, at *12 (W.D.N.Y. July 17, 2002)).

147 *Id.*

148 *Id.* (quoting Richane v. Fairport Cent. Sch. Dist., 179 F. Supp. 2d 81, 89 (W.D.N.Y. 2001)).

149 *Id.* at *20. The case was subsequently settled before trial.

150 No. 02cv0360 DMS (JMA) 2004 U.S. Dist. LEXIS 33468 (S.D. Cal. Sept. 16, 2004), *aff'd*, 268 F. App'x 561 (9th Cir. 2008).

151 *Qualcomm*, 2004 U.S. Dist. LEXIS 33468, at *4.

152 *Id.* at *17, 19.

153 *Id.* at *18.

154 49 F.3d 1418 (9th Cir. 1995).

155 *Qualcomm*, 2004 U.S. Dist. LEXIS 33468, at *6 (citing *id.*).

background in loss control would delve too deeply into the accounts he was assigned and impose upon insureds' time to an inappropriate degree."[156]

The district court found Qualcomm's rejection of the plaintiff as overqualified to be a legitimate nondiscriminatory reason, as had the court in *Coleman v. Quaker Oats Co*.[157] But, the analysis did not stop there.[158] Plaintiff Warrilow, unlike Coleman, provided evidence that she would have accepted a thirty to forty percent cut in her pay to stay at Qualcomm. In the eyes of the court, the plaintiff's testimony rendered her case more akin to *Taggart* in that Warrillow, like Taggart, was willing to take any job available simply to continue to earn a (decent) living.[159] Considering those circumstances, the court found that the defendant Qualcomm's reason of overqualification to be pretextual and unworthy of credence. In sum, the district court found that Warrillow raised a genuine issue of material fact as to Qualcomm's proffered overqualification reason for the plaintiff's nonselection for the marketing position and denied the defendant's summary judgment motion on the plaintiff's disparate treatment claims as to her nonselection.[160] Trial by jury was held. The jury decided in favor of the defendant.[161]

The plaintiff moved for judgment as a matter of law and for a new trial. The district court denied both motions. On appeal, the Ninth Circuit ruled that the jury verdict was not plainly erroneous, would not result in a manifest miscarriage of justice, denied the plaintiff's posttrial motions, and affirmed the ruling of the district court granting summary judgment to Qualcomm.[162]

6. Magnello v. TJX Cos.[163]

Peggy Magnello, a fashion buyer with decades of experience, was recommended to TJX by her former employer after it had gone out of business.[164] When she was not hired repeatedly by TJX for positions for which she was qualified, she applied to their educational training program. Magnello was not accepted into the training program either, allegedly because she was "overqualified." The program's marketing targeted mainly recent college graduates, and Peggy already had many years of relevant experience. Nevertheless, the training program personnel recommended her to TJX Human Resources for other possible employment. Magnello was interviewed for relevant positions by two subsidiaries of TJX. She was then told that she lacked experience in their exact subset of retail and that "she had moved around too much."[165]

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156 *Id.* at *18.

157 232 F.3d 1271 (9th Cir. 2000).

158 *Qualcomm,* 2004 U.S. Dist. LEXIS 33468, at *19.

159 *Id.* at *20.

160 *Id.* at *20, 26.

161 *Qualcomm,* 268 F. App'x 561, 563 (9th Cir. 2008).

162 *Id.* at 562–63.

163 556 F. Supp. 2d 114 (D. Conn. 2008).

164 *Id.* at 117.

165 *Id.* at 121–22.

Magnello filed suit under the ADEA alleging disparate impact and disparate treatment theories of age discrimination.[166] The U.S. District Court for Connecticut denied the defendant's motion for summary judgment on the disparate treatment claim stating that Magnello's alleged overqualification for the educational program may have been pretextual and thus was an issue of fact for a jury to decide.[167] The court granted summary judgment to the defendant on the disparate impact claim for failure to accept her into the educational program, because Magnello failed to demonstrate "that defendant's use of college recruitment is unreasonable."[168]

7. Focarazzo v. University of Rochester[169]

Marjorie Focarazzo was an administrative assistant to the associate dean for academic affairs in the University of Rochester School of Nursing.[170] In 2008, seven years into this position, Focarazzo's supervisor began documenting issues with her failure to perform her duties.[171] Focarazzo received multiple written communications explaining her performance issues and noting actions she could take to remedy her supervisor's concerns, but the issues apparently worsened over the course of 2008. In January 2009, Focarazzo was terminated for failure to "meet the requirements of her position."[172]

After receiving her right-to-sue letter from EEOC, Focarazzo commenced the instant action against the university for age discrimination.[173] In her claim of age discrimination, Focarazzo pointed to a particular comment by her supervisor that in earning a master's degree and continuing to take graduate courses, she had become "overqualified" for her position as an administrative assistant.[174] The court acknowledged the precedents from *Taggart* and *Binder* (also in the Second Circuit) that "a conclusory statement that a person is overqualified may easily 'serve as a mask for age discrimination'"[175] but differentiated the circumstances of this case by noting that in those cases "overqualification [was] the sole 'nondiscriminatory reason' offered by the employer for the adverse employment action."[176] The comments made in those earlier cases "were made solely in the context of cases wherein overqualification is the sole 'nondiscriminatory reason' offered by the employer for an adverse employment action, and relate to whether employers might use the facially nondiscriminatory reason of 'overqualification' as a euphemistic pretext

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166 *Id.* at 118–19.

167 *Id.* at 122.

168 *Id.*

169 947 F. Supp. 2d 335 (W.D.N.Y. 2013).

170 *Id.* at 336.

171 *Id.* at 336–37.

172 *Id.* at 337.

173 *Id.*

174 *Id.* at 339.

175 *Id.* at 340 (quoting Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 118 (2d Cir. 1991), and Binder v. Long Island Lighting Co., 933 F.2d 187, 192–94 (2d Cir. 1991).

176 *Id.*.

for refusing to hire older workers.'"[177] In the instant case, the university never claimed to have terminated Focarazzo on the basis of overqualification. The only reason offered by the university for her termination was the plaintiff's failure to perform her duties. Thus, finding that performance issues were legitimate, nondiscriminatory reasons for the plaintiff's termination and comments in *Taggart* and *Binder* were irrelevant here, the court granted the defendant's motion for summary judgment and dismissed the complaint with prejudice.[178]

8. Summary of Part III.A

One common theme throughout the cases discussed above is that the plaintiffs are often not given the opportunity to express their interest in positions that the employer has (preemptively) deemed "beneath" the plaintiff. In *EEOC v. District of Columbia, Department of Human Services*, for instance, the plaintiff was never even interviewed; thus, he was not able to defend his legitimate interest in an allegedly "entry-level" position. Likewise, in *Taggart* and *Binder*, overqualification was the only explanation given for denying their rehiring, despite their testimony explicitly stating that they would prefer any job over no job in order to continue making a living. *Taggart* is important in employment discrimination law because it is the first court of appeals decision to confront the issue of excluding applicants because they are "overqualified." Most striking, according to Lamber, is the "question of paternalism, seen clearly in *Binder* where the employer does not even tell Binder there is no 'suitable' job, let alone talk to him about a lower-paying, lower-status jobs. Also, there is the sense that when employers say a person would not be interested or challenged by a job, the employers are really saying that the person would not be sufficiently enthusiastic or grateful."[179]

In *Gray, Magnello,* and *Warrillow* issues of material fact regarding whether the reasons proffered by the defendants were pretextual precluded summary judgment. Finally, in *Phillips* and *Focarazzo*, the courts granted summary judgment to the defendants while recognizing that—with proper evidence—the Ninth and Second Circuits, respectively, have found overqualification to be pretextual in ADEA cases.

B. "Overqualification" as a Legitimate, Nondiscriminatory Reason for Adverse Action

1. Woody v. St. Claire County Commission[180]

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177 *Id.* ("This holding does not relate, nor has it been applied, to the issue of whether a supervisor's stray remarks referencing an employee's bona fide overqualification for her job comprise evidence of pretext, where overqualification is neither given by the employer as the nondiscriminatory reason for its actions, nor suggested by any evidence as having played any role in them."); *see also* Ulrich v. Moody's Corp., No. 13-CV-8 (VSB) 2017 U.S. Dist. LEXIS 50438 (S.D.N.Y. Mar. 31, 2017), *aff'd,* 721 F. App'x. 17 (2d Cir. 2018) (quoting *Focarazzo* and explaining that where overqualification is the "sole nondiscriminatory reason" for an adverse employment action, an inference of discrimination may arise, but no such inference arises when a "supervisor's stray remarks reference an employee's bona fide overqualification for her job" and overqualification is not given as the reason for an adverse action nor is there evidence suggesting that it played a role in such actions).

178 *Focarzzo*, 947 F. Supp. 2d at 341.

179 Lamber, *supra* note 102, at 366.

180 885 F.2d 1557 (11th Cir. 1989).

This was a Title VII race discrimination case, not one based on the ADEA, but its discussion of overqualification and subjective factors in hiring decisions is informative.[181] Also, it is important to note that the same legal principles in Title VII cases apply in ADEA cases.[182]

Mary Woody, a Black female, applied on three separate occasions for various positions within the St. Clair County Probate Office. Judge Wallace Wyatt, head of the probate office, had authority to hire and fire his own employees. The county commission, however managed the number of employees, insurance, payroll, and retirement records within the probate court, and worked with the Alabama Employment Service (AES) in advertising vacant positions and in conducting initial screenings to determine if applicants met minimum qualifications. Woody first applied for a vacant position with AES. She failed the typing test. AES did not forward her name to Judge Wyatt as a possible candidate. Because she was not hired, she filed a charge of discrimination with EEOC alleging racial discrimination. When she discovered why she had not been hired (failing the typing test), she dismissed the charge.[183]

Shortly thereafter, Woody applied for two other positions in the probate office, along with thirteen other applicants. Judge Wyatt met with the entire group together and then with each applicant individually. He eventually filled all three positions with White females, all of whom had faster typing skills and better secretarial skills than Woody.[184] Later that same year, AES advertised another opening for the position of general office worker. This job primarily required typing automobile registrations. Again, Judge Wyatt interviewed Woody, during which time she emphasized her skills in the clerical field and her experience in law and administration. Judge Wyatt hired a White woman who had previously been employed as a legal secretary and typed seventy-five words per minute. Woody typed fifty-four words per minute. Woody filed a charge of discrimination with EEOC and eventually sued in federal court alleging unlawful hiring practices and race discrimination.[185]

During the trial, Judge Wyatt gave three reasons why he did not hire Woody: (1) she was not the best qualified applicant for the job for which he was hiring; (2) she was overqualified for the position; and (3) because of her qualifications,

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181 Several Title VII cases have been included in this article even though they are not exclusively ADEA cases and do not all deal with age discrimination. They are included because they all address the issue of overqualification as a factor in an adverse employment decision. Some are based on race discrimination alone under Title VII or Title VII and 42 U.S.C. section 1981 (*Woody, Phillips v. TXU Corp., Barnes v. Ergon, Carter v. George Washington University*); others are based on a combination of race and national origin (*Jianquing Wu v. Special Counsel*); others on a combination of race and religion (*Kang v. Omni Tech*); others on both race and retaliation (*Barnes v. Ergon*); others on a complaint of discrimination under both the ADEA and Title VII (*Carter v. George Washinton University)*. It has been noted previously that analysis under Title VII of the Civil Rights Act of 1964 is the same as that under the ADEA (29 U.S.C. § 621).

182 Both cases use the McDonnell Douglas test. *See,* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

183 *Woody*, 885 F.2d at 1558.

184 *Id.*

185 *Id.*

she would leave the job sooner than the person hired for the position.[186] Both the district and the appeals courts found that Judge Wyatt validly rejected Woody because she was overqualified for the position of general office worker; he had a genuine concern that she would become bored with the job and leave sooner than the hired applicants; and he had bad experiences in the past with constant turnover in his office. While some of these reasons were subjective, they were not pretextual or discriminatory.[187] The Eleventh Circuit affirmed the district court's opinion that the defendant articulated legitimate reasons for not hiring Woody—she was overqualified for the position, would be bored, and would leave the job sooner than the other applicants. Woody failed to prove that these reasons were pretextual or a proxy for discrimination.[188] The district court dismissed the case.

2. Barnes v. Ergon Refining, Inc.[189]

While this is a Title VII race discrimination case, the opinion in favor of the employer contains helpful language pertaining to overqualification, which was Ergon's proffered reason for failing to hire Barnes. Alfred Barnes sued Ergon Refining, Inc. (Ergon) for refusing to hire him as a pool operator at Ergon's oil refinery in Vicksburg, Mississippi. Ergon interviewed Barnes but declined to offer him the position, contending that he was overqualified for a pool operator, would not be satisfied with an entry-level position, and would leave. Moreover, Ergon stated that it had difficulty retraining experienced persons to perform their duties according to Ergon's procedures instead of those they had used in prior employment. Ergon believed that Barnes would not be satisfied with an entry-level position and would not stay long term. Based on its previous difficulty retraining experienced persons to perform their duties according to Ergon's procedures, rather than those used in prior positions, Ergon did not hire Barnes. Barnes filed a charge of racial discrimination with the EEOC. When the EEOC declined to pursue his claim, Barnes filed suit against Ergon based on race discrimination under Title VII.[190]

The district court found that Ergon did not intentionally discriminate against Barnes and presented legitimate, nondiscriminatory reasons for refusing to hire him, that is, its unsatisfactory experience with prior "overqualified" applicants[191] who were difficult to retrain in Ergon's ways of performing certain tasks.[192] The appellate court found that Ergon's stated reasons for not hiring Barnes (his overqualification, not being satisfied with an entry-level position, and the company's experience with other "overqualified" applicants) provided objective, legitimate bases for its

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186 *Id.* at 1560.

187 *Id.* at 1561.

188 *Id.* at 1562.

189 No. 93-7375, 1994 WL 574190 (5th Cir. October 4, 1994).

190 *Id.* at *1.

191 *See, e.g., Woody v. St. Clair Cnty. Comm'n,* 885 F.2d at 1561 ("[I]t was not error to find that Wyatt validly rejected Woody because she was over-qualified for the position of general office worker. … [P]eople are often turned away from employment because they are 'overqualified.'").

192 *Barnes,* 1994 WL 574190, at *4.

negative employment decision.[193] The Fifth Circuit affirmed the district court's summary judgment for Ergon.[194]

3. Pagliarini v. General Instrument Corp.[195]

The employer/defendant, General Instrument Corp., hired Pagliarini, the employee/plaintiff, to manage its acoustical engineering department in 1986. Four years later when Pagliarini was fifty-five years old, the employer terminated him as part of an overall reduction in force due to business setbacks. Pagliarini sued his employer under both Title VII and the ADEA, claiming that he was laid off because of his age. Pagliarini conceded that his Title VII claim warranted dismissal, as the exclusive federal remedy for age discrimination is under the ADEA.[196]

The defendant sought summary judgment, contending that it terminated the plaintiff as part of its reduction in work force caused by financial woes and that Pagliarini's expertise did not lend itself to the defendant's short-term objective of financial viability.[197] The plaintiff claimed that this reason was a pretext for age discrimination, as was the defendant's assertion that Pagliarini was "overqualified." He cited in support of this argument *Taggart*.[198] The district court found Pagliarini's argument without merit and his reliance on *Taggart* misplaced because it was distinguishable on the facts.

Pagliarini asserted that the defendant's classifying him as "overqualified" could be construed as evidence of pretextual intent, just as in *Taggart*. The district court disagreed, finding that in *Taggart* the employer's only justification for refusing to hire an older applicant was the assertion that he was overqualified, despite his expressed willingness to take any job available. In contrast, Pagliarini's retention in his existing position was not viable considering the defendant's business necessities.[199] In this context, the defendant's characterizing of the plaintiff as "overqualified" was a simple reflection of the fact that his talents were, in the eyes of his supervisors, "poorly matched to the available work."[200]

Granting summary judgment to the defendant, the court wrote, "No reasonable jury could interpret [the defendant's] assessment of the lack of fit between Pagliarini's skills and its perceived business needs as implied criticism of Pagliarini's age."[201] The First Circuit Court of Appeals summarily affirmed the decision of the district court.[202]

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193 *Id.* at *4–5.

194 *Id.* at *6.

195 855 F. Supp. 459 (D. Mass. 1994).

196 *Id.* at 460 n.1 (citing Williams v. General Motors Corp., 656 F.2d 129, 127 (5th Cir. 1981)).

197 *Id.* at 463.

198 Taggart v. Time, Inc., 924 F.2d 43, 47 (2d Cir. 1991).

199 *Pagliarini*, 855 F. Supp. at 464.

200 *Id.*

201 *Id.*

202 Pagliarini v. Gen. Instr. Corp., 37 F.3d 1484 (1st Cir. 1994) (per curiam).

4. Sperling v. Hoffman-La Roche, Inc.[203]

On February 4, 1984, Roche, employer/defendant, discharged or demoted 1100 employees pursuant to a reduction in force . Based on Roche's conduct during the reduction in force, Richard Sperling, one of the named employees and later plaintiff in this case, filed an age discrimination claim with EEOC on behalf of himself and all employees similarly situated. Thereafter, in May 1985, Sperling, along with other named plaintiffs, filed this action in federal court alleging, among other things, that Roche discriminated against them in violation of the ADEA. Subsequently, 476 of the 1100 employees affected by the reduction in force opted in as members of the putative class.[204]

The magistrate judge directed Roche to serve on plaintiffs a set of contention interrogatories, which would ask plaintiffs to identify the theories on which they based their claims of discrimination. Fourteen interrogatories were served. Each asked plaintiffs whether Roche considered specific factors in making the decision to terminate any employee forty or older.[205]

After several years, plaintiffs' responses were completed. Most of the responses were filed prior to the Supreme Court's decision in *Hazen Paper*. After *Hazen Paper*, some of the plaintiffs' contentions that were previously in violation of the ADEA, such as high salary, ample retirement benefits, and proximity to retirement, could no longer provide the basis for an ADEA claim.206

Overqualification was listed as Factor No. 8 in the contention interrogatories. The district court noted that this factor was arguably correlated with age because people achieving lengthy qualifications achieved this status through years of service, which correlated with age. Relying on *Hazen Paper*, the district court stated that when an employer's decision is wholly motivated by factors other than age, even when those factors are correlated with age, there is no violation of the ADEA. The court further explained that the Supreme Court justified the finding in *Hazen Paper* by emphasizing that "when an employer's decision is entirely motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes is not present."[207] In conclusion, the district court held that "a claim that Roche made an employment decision based solely on the perception that an employee was over-qualified and/or over-experienced does not state a cause of action under the ADEA."[208]

The district court's reading of *Hazen Paper* in this case seems not to allow for a proxy theory of age discrimination. For purposes of this article, *Sperling* aligns with those cases that hold that overqualification does not give rise to a violation of the ADEA.

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203 924 F. Supp. 1396 (D.N.J. 1996).

204 *Id.* at 1398.

205 *Id.* at 1399.

206 *Id.* (citing, *e.g.*, White v. Westinghouse Elec. Co., 862 F.2d 56 (3d Cir. 1988)).

207 *Id.* at 1403.

208 *Id.* at 1409.

5. Senner v. Northcentral Technical College[209]

Senner, an unsuccessful applicant for an instructor position at Northcentral Technical College (NTC), sued the college for age and gender discrimination. The district court for the Western District of Wisconsin entered summary judgment for the college. Senner appealed. The Court of Appeals for the Seventh Circuit held that Senner failed to support his theory that the college discriminated in its candidate screening and hiring process.[210]

The criteria used to evaluate candidates were created by two members of the hiring department (psychology). When evaluating the plaintiff's application materials, the hiring committee members did not give his Ed.D. in counseling and masters in school counseling much weight because they were degrees in education rather than psychology. Defendants argued that a colleague holding a doctorate might have trouble relating to undergraduate students.

Senner argued that the hiring committee applied a numerical rating system to application evaluation post-hoc after having chosen the candidates to be interviewed.[211] The court disagreed. Senner also accused the hiring committee of arbitrarily (if not sinisterly) selecting only three applicants for interviews.[212] Once again, the court was not persuaded. Finally, Senner argued that the rating criteria were subjective and would be better assessed in an in-person interview rather than simply in the application materials submitted.[213] Rejecting Senner's arguments, the appellate court wrote,

> The problem is that [Senner's] arguments, even when construed most favorably toward Senner, only show that NTC did not give his credentials the emphasis they may have deserved. It may be unfair for instructors at a technical college to think that a colleague with a doctorate is over-qualified to teach their students, but it is hardly proof of gender or age discrimination—and holders of academic doctorates are not a protected class under the discrimination laws. Neither are education majors, and it appears from the evaluation sheets that the assessors discounted Senner's educational background because his degrees were in education (B.S., M.S., Ed.D.), instead of arts (B.A., M.A., Ph.D.). Indeed, Senner's claim that he is more qualified than the woman NTC hired goes more to his prima facie case.[214]

The grant of summary judgment to the college was affirmed on appeal. In this early Seventh Circuit case of overqualification as proxy for alleged age discrimination, the circuit court did not address a proxy theory of age discrimination but instead focused on the facts of the case. Thus, as of 1999, the Seventh Circuit had not established an age proxy jurisprudence under the ADEA. For the purposes of this

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209 113 F.3d 750 (7th Cir. 1997).

210 *Id.* at 757.

211 *Id.* at 755.

212 *Id.* at 756.

213 *Id.*

214 *Id.*

article, this opinion states that any factors (whether proxies for age or not has been left undecided) that played a role in the defendant's decision were legitimate and nondiscriminatory.

6. Sembos v. Phillips Components[215]

Phillips Components (Phillips) sold the division of the company in which Sembos worked to Beyersschlag Centralab Components (BCC). The purchasing company offered Sembos a position that he declined because he did not think the pension benefits at BCC were equal to those to which he had been entitled at Phillips.[216] Sembos remained at Phillips and continued to express interest in numerous open positions but never actually applied for the jobs. Sembos claimed that the human resources department had his resume on file and that was a sufficient expression of interest on his part in other positions within Phillips that were filled during the time Sembos was searching for a new position. The court disagreed, saying, "An employer cannot be liable for failing to hire a person who does not apply for a job."[217] Sembos did not find another job with Phillips. Eventually, the company fired him. Sembos was fifty-one at the time.[218]

Sembos filed a charge of age discrimination with EEOC, received his right-to-sue letter, and sued Phillips for age discrimination. Phillips defended by asserting both that Sembos did not apply for several jobs with the company about which he now complains and that he was overqualified for positions for which he did apply. The district court granted summary judgment to Phillips. Sembos appealed to the Seventh Circuit.[219] In affirming summary judgment for Phillips, the Seventh Circuit noted that Sembos failed to present any evidence that the defendant's asserted reasons for not hiring him were pretextual.[220] The appellate court also quoted with approval the Ninth Circuit's opinion in *Coleman v. Quaker Oats Co.*: "employer is entitled to summary judgment on a plaintiff's ADEA claim where the plaintiff was rejected for a position because he was overqualified."[221] This quote seems to indicate that the Seventh Circuit went from *Senner*—not addressing the age proxy theory at all—to an outright finding that overqualification is a legitimate nondiscriminatory reason for an adverse employment action.

7. Summary of Part III.B

In the preceding cases, courts in the First, Third, Fifth, and Seventh Circuits found that worker or applicant overqualification was a legitimate, nondiscriminatory reason for employers' adverse actions. In *Senner* the Seventh Circuit held that the alleged undervaluing of the plaintiffs' credentials or experience did not constitute unlawful discrimination. The Seventh Circuit did not address the issue of an age

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215 Case No. 00C4651 (N.D. Ill., Nov. 4, 2003), *aff'd*, 376 F.3d 696 (7th Cir. 2004)).

216 *Id.* at 699.

217 *Id.* at 701.

218 *Id.* at 699.

219 *Id.* at 702 (quoting Konowitz v. Schnadig Corp., 965 F.2d 230, 234 (7th Cir. 1991)).

220 *Id.* at 701.

221 *Id. at* 701 n.4 (quoting Coleman v. Quaker Oats Co., 232 F.3d 1271, 1290 (9th Cir. 2000)).

proxy theory. In *Sembos,* the Seventh Circuit held simply that overqualification was a lawful nondiscriminatory reason for not hiring an applicant under the ADEA, even though the plaintiff did not appear to have been given an interview or an opportunity to make a case for his interest in the jobs for which he was allegedly overqualified. The Seventh Circuit has perhaps the clearest track record when it comes to the question of overqualification as a proxy for age discrimination, presumably because only one case has addressed it.

In *Pagliarini* (D. Mass.), the court agreed with the defendants that the mismatch of the plaintiffs' skills with the job responsibilities constituted a lawful reason not to hire the plaintiffs under the ADEA. In *Sperling* (D.N.J.), the court held that overqualification is not a proxy for age discrimination because it does not align with the unlawful stereotypes about older workers that the ADEA was passed to address, namely, that older workers are incompetent and/or unable to learn. In direct contrast, the Fifth Circuit held in *Barnes* that the defendant's reason for not hiring the plaintiff—because in the past, the overqualified workers the defendant had hired were resistant to training in the defendant's proprietary procedures—was lawful and nondiscriminatory, even though it was not based on the individual characteristics of the plaintiff.

C. Mixed Signals Regarding Overqualification as a Proxy

Cases of overqualification as an alleged proxy for age discrimination under the ADEA tend to be fact dependent. While the majority of these cases are decided on summary judgment for the defendants, some courts still hedge their language in these opinions to allow for potential future findings of overqualification as a proxy for age discrimination from different facts. How the courts do this, and in which circuits it has been done, is the discussion of this subpart.

1. Jianqing Wu v. Special Counsel, Inc.[222]

Pro se plaintiff Jianqing Wu was a native Mandarin speaker and a well-educated man holding three separate graduate degrees, including a J.D. and a Ph.D., as well as a member of the New York, D.C., and patent bars. He sought positions performing Mandarin document review on a contract basis with defendant law firms, Wilkie Farr & Gallagher LLP and Morrison & Foerster LLP. He applied for these positions through defendant staffing agencies, Special Counsel, Inc. and Hire Counsel Inc. Each required him to sit for a Chinese language exam administered and developed by the fifth defendant, ALTA Language Services. All defendants denied him employment, according to the plaintiff's complaint, based on his age, race, and national origin, in violation of both Title VII and the ADEA.[223]

Unhappy with his inability to gain employment, the plaintiff filed a charge of age discrimination with EEOC, alleging violations of both Title VII and the ADEA. The agency issued a right-to-sue letter, and Jianqing Wu filed suit against all defendants under both disparate treatment and disparate impact theories. He

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222 54 F. Supp. 3d 48 (D.D.C. 2014), *aff'd,* USCA No. 14-7159, 2015 U.S. App. LEXIS 22477 (D.C. Cir. Dec. 22, 2015), *cert denied,* 136 S. Ct. 2473 (2016).

223 *Jianqing Wu,* 54 F. Supp. 3d at 49–50.

argued that the defendants intended to exclude old and experienced candidates through their language testing procedures which did not factor in valuable experience of older candidates.[224] The court found that he failed to allege any facts to support his claim of intentional discrimination by defendants by not giving sufficient credit to his experience. Dismissing his disparate treatment age claim, the court said the ADEA "does not require an employer to accord special treatment to employees over forty years of age, [but rather to treat] an employee's age … in a neutral fashion."[225]

Addressing the plaintiff's claim that defendants' hiring policies have a disparate impact on people with too much experience, rather than on old people, the court said that this argument does not save the plaintiff's claim because "age and experience in the field are not logical equivalents for the purpose of the ADEA."[226] "[T]he statute's operative provisions all turn only on chronological age: the law makes it unlawful to discriminate against people over age 40 [sic],"[227] not people who have more than twenty years' experience in their job. "The statute, therefore, clearly contemplates a distinction between 'period of service' or 'work history' and 'age.'"[228] Courts have confirmed this distinction. "While the rejection of more experienced and overqualified candidates may eventually lead to a finding of age discrimination, the ADEA does not prohibit the practice."[229] For the above reasons, the district court dismissed the plaintiff's federal and state claims without prejudice.[230]

The plaintiff appealed to the D.C. Circuit Court, which affirmed the district court orders of July 16, 2014, and September 12, 2014. The U. S. Supreme Court denied certiorari.[231] Due to the court's recognition that rejection of overqualified candidates may eventually lead to a finding of age discrimination, this case has been included in the "mixed signals" category. The court clearly acknowledged that overqualification could be a proxy for age discrimination even if that were not true in Jianqing Wu's case.

2. Bay v. Times Mirror Magazines, Inc.[232]

Times Mirror Magazines (Times Mirror) acquired *Field & Stream* magazine, the company for which Eugene Bay (Bay) had previously worked. In a series of restructuring moves, Times Mirror reduced Bay's responsibilities and eventually discharged him. At the time of his termination, Bay was fifty-four years old, earning a base salary

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224 *Id.*

225 *Id.* at 53 (quoting Slenzka v. Landstar Ranger, Inc. 122 F. App'x 802, 813 (6th Cir. 2001)) (citing Parcinsski v. Outlet Co., 673 F.2d 34, 37 (2d Cir. 1982)).

226 *Jianquing Wu*, 54 F. Supp. at 55.

227 *Id.*

228 *Id.*

229 *Id.* (quoting EEOC v. Ins. Co. of N. Am., 49 F.3d 1418, 1420 (9th Cir. 1995)).

230 *Jianquing Wu*, 54 F. Supp. at 56.

231 136 S. Ct. 2471 (2016).

232 936 F.2d 112 (2d Cir. 1991).

of $150,000, and eligible for an annual bonus of approximately $45,000.[233] Bay's downgraded position at *Field & Stream* was then filled by a thirty-five-year-old at a much lower salary.[234]

Prior to the acquisition and restructuring, Bay had been responsible for most of *Field & Stream*'s business affairs and operated with virtual autonomy. After the restructuring, he had real authority only over advertising and was required, for the first time, to report to second-level executives. Bay chafed at the diminution of his responsibilities and expressed his dissatisfaction with both the downgrading of his position and the reorganization itself.[235]

Bay then commenced this litigation, claiming that the decisions by Times Mirror violated the ADEA and were part of a deliberate effort to replace older, highly compensated employees with younger, less costly employees. Times Mirror responded that its decisions were based on Bay's resistance to the restructuring program, his stated dissatisfaction with reporting to a second-level supervisor, his high salary, and his overqualification for one of the available open positions for which he applied.[236]

After discovery, Times Mirror moved for summary judgment. Bay argued that recent decisions of the Second Circuit, *Taggart,* and *Binder*, precluded entry of summary judgment against him. The appellate court disagreed, saying, "Neither decision forbids employers from declining to place employees in positions for which they are overqualified on the ground that overqualification may affect performance negatively."[237] This quote adds nuance to the Second Circuit's jurisprudence established in *Taggart* and *Binder* by establishing that overqualification, in certain circumstances, may constitute a legitimate nondiscriminatory reason for rejecting an applicant, if the defendants are concerned overqualification may negatively affect performance.

The Second Circuit affirmed the trial court's decision, noting that Bay had failed to demonstrate that Times Mirror's reasons for discharging him were pretextual.[238] Bay appealed the entry of summary judgment against him, but the appeals court affirmed the trial court's granting of summary judgment in favor of Times Mirror.[239]

D. Buckner v. Lynchburg Redevelopment & Housing Authority[240]

Jeffrey Buckner worked for the Lynchburg Housing Authority (Housing Authority) for several years in a Mechanic II position, tending to the maintenance needs of the

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233 *Id.* at 115.

234 *Id.* at 116.

235 *Id.* at 115.

236 *Id.* at 117–18.

237 *Id.* at 118 (citing Binder v. Long Island Lighting Co., 933 F.2d 187, 192–94 (2d Cir. 1991)).

238 *Id.* at 118–19.

239 *Id.* at 115–116.

240 262 F. Supp. 3d 373 (W.D. Va. 2017).

Housing Authority's properties. He was paid $17.43 per hour. A Mechanic II is a skilled position that requires working independently, while a Mechanic I generally serves more as a manual laborer and often works as a helper for a Mechanic II. In 2013, the Housing Authority terminated Buckner for budgetary reasons. The following year, a Mechanic I employee of the Housing Authority resigned, and the Housing Authority decided to fill that position. Buckner, fifty-two at that time, applied for the Mechanic I position, which paid $12.01 per hour. In his application, Buckner highlighted his twenty years of experience and training, as well as certificates he had received that were relevant to the Mechanic I position. The Housing Authority did not hire Buckner, but instead hired Will Suddith who was thirty-six at the time. Suddith did not have any relevant certification, a high school diploma, or a GED.[241]

Buckner filed a charge of discrimination with EEOC. After receiving his right-to-sue letter, he brought this failure to hire claim under the ADEA against defendant Housing Authority, alleging that the defendant discriminatorily hired a younger mechanic instead of him, even though he (Buckner) had more relevant skills and experience than, Suddith, the younger candidate. The defendant asserted, however, that the plaintiff was overqualified for the Mechanic I position, would not be happy in the lower-level position, and would cost the Housing Authority too much. The defendant sought summary judgment on the ground that the plaintiff's overqualification was a legitimate reason not to hire him.[242]

The district court noted that although the Fourth Circuit had not yet addressed the issue of overqualification as a legitimate reason not to hire an older worker under the ADEA, several circuits had accepted overqualification as a legitimate, nondiscriminatory basis for such a decision.[243] The court further noted that "courts addressing overqualification have consistently held that there must be some objective reason why the excessive qualifications are a negative trait."[244] In the instant case, the court found that the defendant's articulated reasons for not employing the plaintiff (he might cost too much and he would be unhappy in the position) to be reasonable objective concerns that he was not an appropriate hire for the Mechanic I position.[245]

Granting summary judgment for the Housing Authority the court said that the plaintiff had failed to present evidence sufficient to permit a reasonable jury to

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241 *Id.* at 375.

242 *Id.* at 373.

243 *Id.* at 378; *see, e.g.*, EEOC v. Ins. Co. of N. Am., 49 F.3d 1418, 1420 (9th Cir. 1995) ("[I]f ICNA's rejection of Pugh was truly based on its belief that he was overqualified for the position at issue, ICNA did not violate the ADEA."); Stein v. Nat'l City Bank, 942 F.2d 1062, 1066 (6th Cir. 1991) (differentiating the case from that of *Taggart* because the defendants had instituted an objective and measurable criteria for hiring, that is, college degrees); Pagliarini v. Gen. Instr. Corp., 855 F. Supp. 464 (D. Mass. 1994) (rejecting reasoning and ruling in *Taggart* and holding that the statement that Pagliarini was "overqualified" is a simple reflection of the fact that his talents were poorly matched to available work); Sembos v. Phillips Components, 376 F.3d 696, 701 n.4 (7th Cir. 2004) (holding that employer entitled to summary judgment on the plaintiff's ADEA claim where the plaintiff was rejected for the position because he was overqualified).

244 *Buckner,* 262 F. Supp. 3d 378.

245 *Id.*

infer that the defendant's rationale (overqualification) for not hiring him was pretextual, and he failed to provide any probative evidence that his age was the "but-for" reason he was not hired.[246] The district court dismissed plaintiff's case with prejudice.[247]

1. Timmerman v. IAS Claim Services[248]

In September 1993, defendant-appellee IAS Claim Services (IAS) hired plaintiff-appellant, Janet Timmerman, as a temporary employee in its accounting department. In May 1994, Timmerman resigned and accepted a position at another company, but within approximately two weeks she returned to her previous temporary position at IAS. In August 1994, IAS reorganized its accounting department, eliminated some temporary accounting positions, and created new permanent ones. IAS notified Timmerman shortly thereafter that her services would no longer be needed because she was overqualified for the available permanent position and her temporary position was being eliminated. At the time of her termination, Timmerman, who is a White female, was fifty-five years old. IAS hired a Black man who was younger than Timmerman for the permanent position.[249]

Timmerman sued IAS under Title VII for age discrimination, reverse race discrimination, and retaliation in violation of federal and state law.[250] IAS rebutted Timmerman's claim of age discrimination by asserting that it refused to offer Timmerman permanent employment because its restructuring of the accounting department eliminated her temporary position and because she was "overqualified for the newly created permanent position dealing exclusively with the collection of past-due accounts and had expressed dissatisfaction when doing such work in the past."[251] The district court found that Timmerman offered no evidence to create a genuine issue of material fact showing that the IAS's proffered reason (overqualification) was pretextual and, therefore, granted summary judgment to IAS.[252]

On appeal, the Fifth Circuit noted that Timmerman called the court's attention to *Taggart* in which the Second Circuit cautioned that "overqualification is sometimes a pretext for age discrimination," but noted that Timmerman cited no cases from the Fifth Circuit indicating that overqualification is always an illegitimate reason for refusing to hire someone and offered no evidence that overqualification was a pretext for age discrimination in this case.[253] The Fifth Circuit affirmed the district court's granting of summary judgment to the defendants on the age discrimination claim.[254]

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246 *Id.* at 381.

247 *Id.* at 381.

248 138 F.3d 952 (5th Cir. 1998).

249 *Id.* at *2.

250 *Id.*

251 *Id.* at *5.

252 *Id.* at *3.

253 *Id.* at *9 n.5.

254 *Id.* at *13.

2. Stein v. National City Bank[255]

Plaintiff Stein, a fifty-eight-year-old retired employee of the Internal Revenue Service and a college graduate, applied for a customer service position with the defendant employer, National City Bank (employer/defendant). The defendant categorized the position as nonexempt and relied on a general policy of not hiring college graduates for nonexempt positions.[256] The policy was an effort to prevent high turnover in customer service positions based on the assumption that persons with college degrees would leave after a short period of time because the work would not be sufficiently challenging.[257]

Stein was not hired and filed a charge of discrimination with EEOC alleging discrimination based on age and religion. The EEOC determined that the defendant did not discriminate against Stein, who then filed suit in federal district court. Both parties moved for summary judgment. Stein dropped his religion claim. The district court granted the defendant summary judgment on the age claim and held that the plaintiff did not establish a prima facie case of age discrimination.[258]

On appeal, the Sixth Circuit affirmed the district court on the age discrimination claim because the evidence failed to show any disparate treatment or that the defendant's policy was not uniformly applied or unreasonable. The appeals court further found that Stein failed to prove that the hiring policy was a pretext for age discrimination, an essential element of his claim.[259]

The plaintiff relied heavily on *Taggart* in which the district court held that "refusing to hire an individual because he was overqualified constituted circumstances from which a reasonable juror could infer discriminatory animus and thus find that the reason given was pretextual."[260] However, the defendant's "overqualified" criterion in *Taggart* had no objective content. The criterion would allow the employer to shift the standard at will and provide a reviewing court with no way to determine whether the criterion was uniformly applied to all applicants. It was this characteristic that was fatal to the employer's policy in *Taggart*.[261]

The district court noted, however, in the instant case that the defendant City Bank had instituted a policy with an objective and measurable criterion: college degrees. "This objective criterion removes the fear of a shifting standard and, as such, ensures that both the employer and applicant will be bound by the policy. …Unlike the criterion at issue in *Taggart*, defendant's criterion allows a reviewing court to readily determine whether it discriminates against a suspect class on its face or in its application."[262]

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255 942 F.2d 1062 (6th Cir. 1991).

256 *Id.* at 1064.

257 *Id.* (The court noted that no studies were introduced to support the assumptions underlying this policy, and an affidavit of a professor indicated that no such studies existed.).

258 *Id.* at 1063.

259 *Id.* at 1066.

260 Taggart v. Time, Inc., 924 F.2d 43, 48 (2d Cir. 1991).

261 *Stein*, 942 F.2d at 1066.

262 *Id*.

In affirming the district court's grant of summary judgment for the defendant, the appeals court held that the plaintiff failed to prove that the "no college degree" hiring policy in question was a pretext for age discrimination, an essential element of his claim upon which he would bear the burdens of production and persuasion at trial.[263]

3. EEOC v. Insurance Co. of North America[264]

In June 1988, Insurance Company of North America (ICNA) placed an advertisement in a Phoenix newspaper for a "loss control representative." The advertisement stated that the ideal candidate would have a B.S. degree or equivalent work experience, two years of property / casualty loss control, demonstrated verbal and written communication skills, the ability to travel, and be a self-motivated professional.[265]

Richard Pugh, who had over thirty years' experience in loss control and engineering, submitted a resume in response to the advertisement. He was not selected for an interview. Instead, ICNA interviewed four candidates, all of whom were younger than Pugh and had little or no loss control experience. Eventually, ICNA hired a twenty-eight-year-old woman with no loss control experience. Pugh filed a charge with EEOC alleging age discrimination. During the EEOC investigation, ICNA stated that it had not considered Pugh for the position because he was overqualified.[266]

Walter Merkel, one of the ICNA managers who reviewed Pugh's resume stated later in deposition that the reason he decided not to interview Pugh was that Pugh was overqualified and that with his training and experience, he would probably have delved too deeply into accounts, thus consuming too much of the insured's time. Another ICNA manager, who also would have seen Pugh's resume, stated that although he could not remember having seen the resume, he probably rejected Pugh's application because his application was unprofessional in appearance (had handwritten notes on it and did not include a cover letter).

The district court accepted ICNA's assertion that the principal reason it did not interview or hire Pugh was that it considered him overqualified for the position.[267] The court did not find that this reason served as a proxy for age discrimination and granted summary judgment to ICNA.[268]

The Ninth Circuit affirmed the district court relying on language from *Hazen Paper*, that "[t]he fact that overqualification might be strongly correlated with advanced age does not make use of this criterion necessarily a violation of

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263 *Id*.

264 49 F.3d 1418 (9th Cir. 1995).

265 *Id.*

266 *Id.* at 1419.

267 *Id.* at 1420 n.2.

268 *Id.* at 1419.

ADEA."[269] Instead, the appeals court found that ICNA genuinely did not want someone who had thirty years' experience in loss control because he might have become too involved in uncomplicated risks and take up too much of clients' time.

The Ninth Circuit noted that while the ADEA does not prohibit rejection of overqualified job applicants *per se*, several courts have expressed concern that such a practice can function as a proxy for age discrimination if "overqualification" is not defined in terms of objective criteria.[270] Distinguishing *ICNA* from *Taggart, Stein,* and *Bay*, the Ninth Circuit found the employer's reason in ICNA for rejecting Pugh (overqualification) to be "objective and non-age-related."[271]

4. Phillips v. Mabus[272]

Phillips applied for and was interviewed for a GS-9 financial management analyst position with the Department of the Navy. When he was not offered the position because the defendant considered him to be overqualified, he sued Ray Mabus in his capacity as Secretary of the Navy (defendant/Navy). The defendant moved for summary judgment. Phillips argued that the stated reasons for his nonselection were mere pretexts for discriminatory animus based on his race, gender, and age.[273] In addressing his age discrimination claim, he urged the district court to follow *Taggart*,[274] in which the Second Circuit held that denying employment to an older applicant on the ground that he is overqualified "'is simply to employ a euphemism to mask the real reason for refusal, namely, in the eyes of the employer the applicant is too old.'"[275]

The Ninth Circuit declined to do so. Citing *EEOC v. Insurance Co. of North America*, the appeals court stated that in appropriate circumstances, an employer in the Ninth Circuit can reject an applicant who is more than forty years old because he or she is overqualified, if the overqualified label has objective content.[276] In the

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269 *Id.* at 1418 (citing *Hazen Paper* "when an employer makes a decision on the basis of a criterion that is that is correlated with age, as opposed to age itself, the employer does not violate the ADEA.").

270 *See, e.g.*, Taggart v. Time, Inc., 924 F.2d 43, 43 (2d Cir. 1991); Stein v. Nat'l City Bank, 942 F.2d 1062 (6th Cir. 1991); and Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991).

271 *Ins. Co. of N. Am.*, 49 F.3d at 1421; *see also* Morneau, *supra* note 38, arguing that "in contrast to the employer in Stein, ICNA did not maintain an objective hiring policy that could justify its reason for not hiring Pugh." In addition, the employer in Stein failed to offer evidence to support its conclusion that an older worker would "delve too deeply" into accounts or how this could be a problem for ICNA. Morneau further maintains that because ICNA's "conclusions were unsupported by any statistical, empirical or otherwise measurable evidence, the rejection based solely on "overqualification" was likely a mask for age discrimination." The employer's summary judgment in ICNA should have been defeated, in Morneau's opinion, and the case gone to trial. "Unfortunately," he argues, "for the plaintiff and all older applicants, "the Ninth Circuit ruled otherwise."

272 894 F. Supp. 2d 71 (D. Haw. 2012), *aff'd*, 607 F. App'x 762 (9th Cir. 2015).

273 *Phillips*, 607 F. App'x at 763.

274 *Taggart*, 924 F.2d at 43.

275 Phillips v. Mabus, No. 12–00384 LEK–RLP, 2013 WL 4662960, at *17 (D. Haw. Aug. 29, 2013) (quoting *Taggart*, 924 F.2d at 47)).

276 *Id.* (citing *Ins. Co. of N. Am.*, 49 F.3d at 1421).

instant case, the court ruled that "the overqualified label had 'objective content.'"[277] The court explained that the objective content by which Phillips was judged to be overqualified for the position included "Phillips's resolute belief that he was already an expert," which "suggested to the interviewers that he would not be receptive to the training they believed he needed, and his superior management experience suggested that he was not a fit for the lower-level, data-entry position with few opportunities for promotion."[278] Finding no issues of material fact as to any of the plaintiff's claims, the Ninth Circuit affirmed the lower court's granting of summary judgment to the defendant.[279] This precedent leaves open the possibility for a finding that overqualification is a proxy for age discrimination in the Ninth Circuit in the future.

5. Coleman v. Quaker Oats Co.[280]

Jerry Jeney, Joseph Gentile, and Perry Coleman, along with hundreds of other employees nationwide, were laid off by the Quaker Oats Company (Quaker) in Arizona during a series of reductions in force from 1994 to 1995. When the three named former employees were rejected for other available positions within the company, they sued, claiming that they were illegally fired because of their age in violation of the ADEA.[281] After a contentious discovery period, both sides moved for summary judgment. The district court granted summary judgment in favor of Quaker on all claims.[282]

The employees appealed to the Ninth Circuit, contending that Quaker's reasons for terminating them and not rehiring them for any new positions within the company were based on a subjective evaluation system that was a cover for unlawful discrimination.[283] The appeals court disagreed, stating that while a subjective evaluation system can be used as cover for illegal discrimination, subjective evaluations are not unlawful *per se*.[284] Most of the criticism of Quaker's evaluation system centered on the company's not doing a good job of evaluating the employees and that other methods, such as standardized testing, would have done better.[285] This allegation, according to the court "does little to help [the plaintiffs] establish that Quaker used a subjective system in order to discriminate against older employees. That Quaker made unwise business judgments or that it used a faulty evaluation system does not support the inference that Quaker discriminated on the basis of age."[286]

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277 *Phillips*, 607 F. App'x at 763.

278 *Id.*

279 *Id.*

280 232 F.3d 1271 (9th Cir. 2000).

281 *Id.* at 1280.

282 *Id.* at 1281.

283 *Id.* at 1290.

284 *Id.* at 1271

285 *Id.* at 1285.

286 *Id.*; *see* Cotton v. City of Alameda, 812 F.2d 1245, 1249 (9th Cir. 1987) ("The ADEA does not make it unlawful for an employer to do a poor job of selecting employees. It merely makes it unlawful to discriminate on the basis of age.").

Turning to Coleman, the court noted that Quaker rejected Coleman because he was overqualified. The court concluded that Coleman's previous position as an account executive constituted an objective criterion. Placing him in the open customer manager position would have meant a two-step demotion, a sharp cut in salary, and loss of morale. Thus, explained the court, Quaker's rejection of Coleman as overqualified "is a legitimate, nondiscriminatory reason not in violation of the ADEA."[287] As in *Phillips* and *ICNA*, the Ninth Circuit once again applied the "objective criteria" standard to the instant case. In doing so, the court continued to leave open the possibility of a future finding of overqualification as a proxy for age discrimination; however, once again the managers' assumptions about a potential worker's reaction to being overqualified for a position were treated as "objective" by the courts (the opposite of *Taggart*). It is therefore difficult to say whether such a case could exist where the Ninth Circuit could find overqualification as a proxy for age discrimination based on subjective criteria.

6. Summary of Part III.C

The D.C. district court recognized that rejection of overqualified candidates may eventually lead to a finding of age discrimination in *Jianqing Wu*. In *Bay*, the Second Circuit said of *Taggart* and *Binder*, "Neither decision forbids employers from declining to place employees in positions for which they are overqualified on the ground that overqualification may affect performance negatively."[288] This quote adds nuance to the Second Circuit's jurisprudence established in *Taggart* and *Binder* by establishing that overqualification, in certain circumstances, may constitute a legitimate nondiscriminatory reason for rejecting an applicant, if the defendants are concerned overqualification may negatively affect performance.

The Sixth Circuit's only case—*Stein*—established an "objective criteria" standard under which overqualification as determined by objective criteria is a legitimate nondiscriminatory reason for adverse employment actions under the ADEA. *ICNA*, in the Ninth Circuit, also established the objective criteria standard. Nevertheless, the so-called "objective criteria" in *ICNA* was the hiring managers' beliefs that the plaintiff's experience would lead the plaintiff to spend too much client time on unnecessary details. Beliefs that were, notably, not based on interactions with the individual plaintiff.[289]

Finally, in *Phillips* and *Coleman* (Ninth Circuit) and *Buckner* (W.D. Va.), the courts held that in order for overqualification to be a lawful reason for an adverse employment action under the ADEA, the defendant must provide an objective reason for why overqualification is a negative trait in the given context. In *Coleman*,

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287 *Coleman*, 232 F.3d at 1289.

288 Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 118 (2d Cir. 1991) (citing Binder v. Long Island Lighting Co., 933 F.2d 187, 192–94 (2d Cir. 1991).

289 If the purpose of the objective criteria standard is to differentiate the reliance on stereotypes of older workers from general policies based on nonage-related factors to right-size the applicant pool, then one particularly insidious stereotype of older people can be summed up in the adage "you cannot teach an old dog new tricks." If assuming twenty years of experience on the job means one is incapable of learning to do one's job differently for different employers does not reflect precisely such a belief, what does?

the Ninth Circuit held that a sharp salary cut, two-step demotion, and thus loss of morale constituted objective reasons legitimate under the ADEA. In *Buckner*, a district court in West Virginia similarly held that the defendants' beliefs that the plaintiff would be unhappy and would cost more were legitimate objective reasons under the ADEA.

In large part, the mixed signals sent by the cases reviewed in this subpart were due to imprecise language and inconsistent application of precedent. The idea that a hiring manager's contention that older workers will not learn to perform their job duties according to the employer's expectations could be characterized as an objective criterion defies belief. As far as stereotypes of older workers are concerned, this behavior seems to reinforce the most common among them, namely, you cannot teach an old dog new tricks. If there were clear evidence that the individual in question indicated as much (as in *Phillips*) then summary judgment may very well be appropriate, but it is nevertheless a stretch to claim any "objective criteria" was involved. Such decisions should simply hinge on lack of evidence of pretext, rather than legitimate nondiscriminatory use of objective criteria.

IV. DISCUSSION AND RECOMMENDATIONS

Several of the cases reviewed in this article are clear-cut—for instance, *EEOC v. District of Columbia, Department of Human Services* was undoubtedly a case in which the hiring committee members held tightly to their beliefs that the positions in question were to be filled by young or new dentists, not well-established ones like the plaintiff. In this case, the denial of an interview for the position, when he was highly qualified according to all the hiring criteria, was essentially a smoking gun.[290] All of the assumptions the committee may have made based on his application were stained by their age bias. The same can be said of the plaintiff in *Binder* who was also denied an interview. When an older applicant is at least as qualified for the position in question as the younger applicants who interview, but the older applicant is denied an interview, it becomes difficult to deny that age was a factor.

The focus of the ADEA was on eliminating age-based stereotyping and giving older workers the opportunity to demonstrate their individual qualifications, skills, and proficiencies in the workplace and hiring processes. When older workers are denied the opportunity to demonstrate their individual abilities, they are left to wonder if age might have played a role in the decision. Because older applicants and workers are often stereotyped, institutions must ensure they are given proper individual consideration, just as every applicant deserves. Notably many common assumptions about older workers are themselves discriminatory stereotypes, as experts have explained:

> There is no credible public or corporate evidence that overqualified candidates get bored, are less motivated, are absent more, or have any unique team or performance problems. In fact, academic studies from Erdogan & Bauer

290 *But see*, Jimenez v. City of New York, 605 F. Supp. 2d 485, 491 (S.D.N.Y. 2009) (finding that the defendants had not violated the law by denying the plaintiff thirty-one out of thirty-three interviews for the other positions to which he had applied).

> at Portland State University concluded that the overqualified, if hired, get higher performance appraisal ratings and perform better than average hires.[291]

If older applicants will not make it to an interview round, where they can speak for themselves regarding some of the stereotypes about which many people are concerned (e.g., too low a salary, potential boredom/lack of intellectual stimulation, mental sharpness, technological proficiency), then it is common courtesy to inform them why they were not given that opportunity. [292]

As many courts have recognized, there are numerous reasons why an employer may not want to hire an overqualified applicant for a job.[293] Onwuachi-Willig points out in her article in the *Washington University Law Review*, "Complimentary Discrimination and Complementary Discrimination in Faculty Hiring" that these same considerations take place during faculty searches at colleges and universities where departments may not want to offer a position to an "overqualified" candidate if they fear that he or she will leave for a more desirable job shortly thereafter or to avoid expending resources to investigate and recruit a candidate who will not accept.[294] Similarly, academic departments may not want to offer a coveted faculty position to an "overqualified" candidate if they fear that he or she will hold onto the offer until a better one comes along, leaving the department with a vacant position and a failed search.[295] Likewise, departments may be concerned that their preferred candidate may be seeking an offer from them to use in negotiating a better offer from the institution of their first choice.[296]

Running a business requires more than simply hiring employees who can perform their assigned tasks. Employers also must consider workplace morale, collegial relations among employees, retention of employees, and working cooperatively and harmoniously with colleagues and administration. Collegiality has been increasingly recognized by the courts as an important, and even crucial, component of higher education employment decisions and a legitimate reason

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291 John Sullivan, *Refusing to Hire Overqualified Candidates—A Myth That Can Hurt Your Firm*, Recruiting Intelligence, Aug. 25, 2014, at 1 (article by internationally recognized expert on strategic talent management and human resources, focusing on the false assumption that hiring candidates who are "overqualified" will result in frustrated employees who will quickly quit. "There is simply no data to prove any of the negative assumptions that are often made about overqualified prospects or candidates.").

292 "An employer rejecting an applicant on the grounds that his or her skills or experience so far exceed those required for the position that they disqualify the applicant for consideration, should not rely upon generalized claims of 'overqualification,' but should identify and enunciate the specific ways in which the applicant's extensive experience or skills may interfere with proper job performance." Insights, *"Overqualified" Is Not Necessarily a Proxy for Age Discrimination,"* July 1, 1995 at 3, https://www.kmm.com/overqualified-is-not necessarily-a-proxy-for age discrimination.

293 Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 Wash. U. L. Rev. 763 (2010) (quoting *Binder III*, 933 F.2d at 194) ("[I]n reality an employer may have legitimate reasons for declining to employ overqualified individuals.").

294 *Id.* (citing Gumbs v. Hall, 51 F. Supp. 2d 275, 283 (W.D.N.Y. 1999), *aff'd*, 205 F.3d 1323 (2d Cir. 2000) (identifying fear that an employee "will not remain with the company for long" as one reason for not hiring an overqualified applicant)).

295 *Id.* at 784.

296 *Id.*

for declining to hire a person for a faculty position.[297] Nevertheless, as Julia Lamber explains, "employers may exclude 'overqualified' employees [because] other employees may be uncomfortable around them. . . . Part of the tradition of employment discrimination laws is to ignore co-worker or customer preferences in deciding whether it is reasonable to exclude applicants based on race, gender, or age." [298]

Considering the ongoing uncertainty surrounding how to handle overqualified older workers and applicants, what can institutions do?

- **Transparent Policies** regarding hiring criteria will benefit both institutions and applicants. Even if the hiring criteria vary widely from department to department or job to job, transparency regarding policies that may affect the hiring process could prevent future litigation. For instance, if policy dictates that a departmental committee creates the hiring criteria before the job is posted, letting applicants know about this policy could prevent misunderstanding.

- **Uniform Application of Criteria** is especially important when it comes to who is offered interviews. For example, in *Senner*, the hiring committee compiled a list of eight criteria by which all applicants were assessed and given a rating from 1–5.[299] The three applicants with the highest ratings were given interviews.[300] Nevertheless, Senner did sue when he was not interviewed; thus, transparency in this area may also prevent misunderstandings as well as prevent discrimination. Sharing the objective criteria with the applicants at some stage of the hiring process could help to prevent disputes. For instance, if the hiring manager is concerned with how long the employee will stay in the position (because the company has had issues with turnover), then the criterion should be discussed with and applied to all the applicants equally.[301]

- **Educate** employees that "overqualification" should not be the sole reason given for not offering a qualified applicant an interview. Encourage older employees to extend their working careers by providing training to all workers that can extend work lives into later years.

- **Explanations** of why applicants were not chosen to move forward in the process can also prevent misunderstandings and ensure the proper application of policy by those involved in the hiring process.

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297 *See* Mary Ann Connell et al., *Collegiality in Higher Education Employment Decisions: The Evolving Law,* 37 J.C.U.L. 529, 532–33 (2011) (quoting Mabey v. Reagan, 537 F.2d 1036, 1044 (9th Cir. 1976) (holding that an essential although subjective element of professor's performance is "ability and willingness to work effectively with his colleagues.")).

298 Lamber, *supra* note 102, at 361.

299 Senner v. Northcentral Tech. Coll., 113 F.3d 750, 753–54 (7th Cir. 1997).

300 *Id.* at 754.

301 ***See* Woody v. St. Clair Cnty. Comm'n, 885 F.2d 1557, 1562 (stating that the defendant "should have discussed the potential of staying on the job with each applicant if he planned to use this factor in his employment decision").

- **Abandon** twentieth-century ageist biases by eliminating mandatory retirement ages and job requirements that limit applicants to a specific number of years in practice (a common practice among law schools).

Notably, many of these cases were brought by plaintiffs who occupied multiple protected classes (race, religion, gender, etc.). For many people who experience life from within multiple protected classes, discrimination can be the norm rather than an aberration. When viewing a series of rejections from this perspective, it is understandable why someone like Jimenez may have felt litigation was his only recourse. Thus, providing clear paths to advancement, adequate mentoring and feedback, and transparent procedures are important to earn trust and necessary if retention is a priority, especially for employees in multiple protected classes.

V. CONCLUSION

Over the last thirty years, the courts have split when it comes to questions of overqualification as a proxy for age discrimination. While the evidence of age discrimination in some proxy cases has been clear and convincing, it has not been so in many others. In the Second Circuit, the courts have found that employers may discriminate based on age when they choose not to hire an applicant due to their "overqualification."[302] In the Ninth Circuit, the district court in *Qualcomm* found the defendant's "overqualification" defense unworthy of credence considering Warrillow's expressed willingness to take a thirty to forty percent pay cut.[303] Likewise, in *Phillips v. Mabus* the Ninth Circuit stated that because the defendants' label of "overqualification" "had 'objective content'" it was not a euphemism to mask age discrimination.[304] The Ninth Circuit has thus left open the possibility for overqualification as a proxy for age discrimination when it lacks "objective content." In contrast, other circuits have held that overqualification is a legitimate nondiscriminatory reason for not hiring (or even interviewing) an applicant (see Part III.B).

Despite the differences in the circuit courts' current understandings of "overqualification" within the ADEA jurisprudence, institutions hiring or employing older workers across the nation could find themselves in the very same predicament as HVU from our opening hypothetical. To avoid such an expensive and time-consuming conflict, our careful review of the jurisprudence and scholarly literature has resulted in several recommendations (see Part III.A).

When it comes to academia, meritocracy is baked into the milieu, much akin to what we see in other professional careers requiring a great deal of training. Imagine being assigned a physician or airline pilot and then purposely rejecting them solely because they were "overqualified" for your medical situation or flight. That is what happens when hiring managers reject candidates who have "too many" qualifications. Thus, denial of an academic position for which one is overqualified

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302 Taggart v. Time, Inc., 924 F.2d 43 (2d Cir. 1991).

303 Warrilow v. Qualcomm, Inc., No. 02cv0360 DMS (JMA) 2004 U.S. Dist. LEXIS 33468 (S.D. Cal. Sept. 16, 2004), *aff'd,* 268 F. App'x 561 (9th Cir. 2008).

304 Phillips v. Mabus, 607 F. App'x 762, 763 (9th Cir. 2015).

may raise eyebrows, if not suspicions. At the very least, it would behoove institutions to interview "overqualified" applicants to allow each interviewee the opportunity to present their own individual skills, qualifications, and interests relevant to the position. This can prevent unchecked bias by ensuring each applicant is evaluated as an individual rather than according to age-based stereotypes. Likewise, preventive measures, such as developing clear policy, and educating hiring managers and committees on how to develop and apply uniformly objective criteria as well as provide precise feedback as to objective reasons for not hiring older workers, can be implemented to ensure institutions are true to their meritocratic values.

ALEXANDER V. YALE: THE TRANSFORMATIVE POWER OF SOCIAL FORCES TO BEND LEGAL DOCTRINE

*ERIC T. BUTLER**

Abstract

In 1977, five plaintiffs filed a lawsuit against Yale University alleging that the sexual misconduct of the university's employees constituted discrimination on the basis of sex. While the university prevailed on the claims, the court endorsed the plaintiffs' novel application of Title IX of the Education Amendments of 1972 despite a wave of recent rulings in other circuits rejecting the same theory under analogous civil rights laws. This judicial endorsement of the plaintiffs' theory would ultimately reshape the legal landscape of higher education for decades to come. Careful examination of the contemporary events enveloping the case suggests that this inflection point was more likely a product of the social context that compelled the plaintiffs to seek remedy from a unique interpretation of the law than it was from the application of settled legal doctrine by the court. The present article examines this historical context undergirding Alexander v. Yale for the purpose of offering practical insights to education administrators, lawyers, and policy makers.

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INTRODUCTION

The story of Title IX is well recounted in legal scholarship.[2] In 1972, Congress bridged a crucial gap that remained in the wake of the Civil Rights Act of 1964. While the Civil Rights Act prohibited sex discrimination in employment, and prohibited discrimination on the basis of race, color, or national origin in any program receiving federal funding (including most higher education institutions), the legislative developments of the era did nothing to expressly prohibit sex discrimination in education.[3] Title IX of the Education Amendments of 1972—later renamed the Patsy Takemoto Mink Equal Opportunity in Education Act—prohibited educational programs that accept federal funds from discriminating on the basis of sex.[4] The U.S. Department of Health, Education, and Welfare (HEW) then codified Title IX's first regulations in 1975.[5] The regulations required recipients to have a grievance procedure in place for the resolution of discrimination complaints but failed to articulate any other expectations for such a procedure.

But as with many laws, the scope of Title IX's impact has been only minimally defined by the text of the statute or the contemplations of the legislators who wrote it. The new law sparked early battles over whether it should govern intercollegiate athletics or employment in education.[6] It was the legal tool that a rising feminist movement used to combat sexual harassment of female students by faculty members.[7] It later served as the foundation for a new movement calling on schools to both prevent and adjudicate acts of sexual violence between students.[8] And it

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2 *See* Bernice Resnick Sandler, *Title IX: How We Got It and What a Difference It Made*, 55 Cleve. St. L. Rev. 473 (2007); Iram Valentin, *Title IX: A Brief History*, 2 Holy Cross J.L. & Pub. Pol'y 123 (1997); Maggie Jo Poertner Buchanan, *Title IX Turns 40: A Brief History and Look Forward*, 14 Tex. Rev. Ent. & Sports L. 91 (2012); Peter Lake, The Four Corners of Title IX Regulatory Compliance: A Primer for American Colleges and Universities (2017).

3 Lydia Guild Simpson, *Sex Discrimination in Employment Under Title IX*, 48 U. Chi. L. Rev. 462 (1981).

4 Pub. L. No. 92-318, §§ 901-907, 96 Stat. 235, 373 (codified as amended at 20 U.S.C. §§ 1681-1689).

5 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 40 Fed. Reg. 24137 (June 4, 1975) (originally codified at 45 C.F.R. pt. 86 and subsequently codified at 34 C.F.R. pt. 106).

6 Janet Lammersen Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*. 65 Geo. L.J. 49 (1976); Fred C. Davison, *Carrying Title IX Too Far*, N.Y. Times (Dec. 3, 1978), https://timesmachine.nytimes.com/timesmachine/1978/12/03/112818493.html?pageNumber=444; Terrence P. Collingsworth, *Title IX Applies to Employment Discrimination,* 1981 Duke L.J., 588 (1981); Bernard H. Friedman, *Title IX Does Not Apply to Faculty Employment,* 1981 Duke L.J. 566 (1981).

7 Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

8 U.S. Dep't of Educ., *Revised Guidance on Sexual Harassment: Harassment of Students by School Employees, Other Students, or Third Parties* (Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf; U.S. Dep't of Educ., *Sexual Harassment: It's Not Academic* (Sept. 2008), https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.pdf; U.S. Dep't of Educ., *Dear Colleague Letter: Sexual Violence* (Ap. 14, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf, later withdrawn by, U.S. Dep't of Educ., *Dear Colleague Letter* (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

would ultimately play a pivotal role in the federal judiciary's reexamination of constitutional due process in education, which had remained relatively stagnant for decades.[9] All of this unfolded while the hallmark text of the statute and regulations remained unchanged.

Fifty years later, the story of Title IX illustrates the legacy of legal realism in the U.S. justice system. While debates still rage about which descendant school of thought should control judicial interpretation of a statute that defines its mandate in the vaguest of terms, the current scholarly commentary on both purposivism and textualism gives too little attention to an axiomatic concept: judges can only interpret the law for the particular cases that come before the court. Long before the fact pattern reaches the bench, parties and their legal counsel are conducting their own analyses of whether and how the law should apply to their lived experiences. They conduct cost-benefit analyses to determine whether the time, money, and emotional hardship that litigation requires is worthwhile; the most vulnerable often choose not to seek any remedy at all.[10] Those who do seek remedy frame their interpretations of the law in a way that they believe is most likely to achieve their desired outcomes, which might require innovative interpretations of the law. In this respect, the parties themselves arguably play a far more influential role in our modern jurisprudence than the presiding judges.

It naturally follows that the social forces influencing the parties' decisions before and during litigation also make an undeniable contribution to our body of case law. The author therefore argues here that the social context of the parties is inextricable from the interpretations of law that they present to the court. As a result, the broader social context engrained within the plaintiffs' claims before they even make it onto the docket is an inevitable component of any court's ultimate interpretation of the law.

The author uses this article to offer one particularly illuminating case in support of this argument by examining the social context that propelled the plaintiffs' claims in *Alexander v. Yale University*,[11] which was the first case to treat the sexual harassment of students by faculty members as a prohibited form of sex discrimination.[12] While the present argument might pave the way for others who wish to critique judicial philosophies that claim to be strictly doctrinal, the author's present aim is to offer practical insights to educational administrators, lawyers, and policy makers. Those insights include the identification of recurring themes in the social context that might precede plaintiffs' novel and innovative

9 *See* Doe v. Baum, 903 F.3d 575 (6th Cir. 2018).

10 Louise Fitzgerald, *Unseen: The Sexual Harassment of Low-income Women in America*, 39 Equality, Diversity & Inclusion: An Int'l J. 5 (2020).

11 631 F.2d 178 (2d Cir. 1980).

12 The present article is confined to an examination of *Alexander v. Yale* as one example of the way in which social context can drive innovative interpretations of the law. Additional support for the argument is presented in a legal historiography on the burgeoning contours of Title IX, which was originally published in the author's 2022 Ph.D. dissertation. Eric T. Butler, *The Political Implementation of Title IX: How the Social Context Crafted by Title IX is Shaping Due Process in U.S. Higher Education* (2022) (Ph.D. dissertation, Texas Tech University), https://ttu-ir.tdl.org/items/50989519-60d3-41cc-98b8-ca6fa02cb617.

interpretations of law such as those that expanded Title IX's reach over the course of five decades. Early identification of these recurring themes in the social context can allow stakeholders to proactively craft practical solutions that might make novel and unexpected applications of law unnecessary for would-be plaintiffs to achieve their ends.

This article relies on William Clune's political model of policy implementation to examine the outsized role that actors outside of the formal public policy process (e.g., students, schools, and interest groups) play in shaping public policy through their interactions with actors that operate within the formal process (e.g., legislators, administrative enforcement agencies, courts).[13] Guided by that theoretical architecture, the author offers a theory regarding the role that *de jure* and *de facto* voids in available legal remedies can play in shaping interpretations of the law by aggrieved parties. The author uses the analysis of *Alexander* to illustrate the ways in which the absence of a clear legal remedy—whether *de jure* or *de facto*—invites impacted parties to craft solutions that are shaped more by the contemporary social context than by established legal doctrine.

This article adopts a legal realist framework to illustrate this theory, with an article structure that examines both the micro and macro social context and legal landscape enveloping the lawsuit against Yale University. The micro and macro social context is reconstructed predominantly from contemporary press coverage, archive materials, and records of prior interviews or statements offered by the parties to the public.

Adhering to that framework, this article on *Alexander v. Yale* presents the case in four substantive parts. The first part will offer a brief recitation of the facts of the case, legal arguments advanced by the parties, and procedural chronology of the lawsuit. The second part will describe the legal landscape of sexual harassment lawsuits at the time that *Alexander v. Yale* commenced. The third part will present the micro and macro social context that enveloped the lawsuit. The final part will identify features of the social context that might allow future policy makers and education administrators and legal counsel to preemptively address social problems that would otherwise invite new (and creative) applications of law by aggrieved parties. The article will conclude with a summary of the practical lessons to be learned from *Alexander v. Yale*.

I. THE CASE OF *ALEXANDER V. YALE UNIVERSITY*

In 1977, five plaintiffs filed a lawsuit against Yale University in the U.S. District Court for the District of Connecticut. Plaintiffs later amended their complaint to add two additional plaintiffs.[14] The six principal plaintiffs in the final operative

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13 *See* William H. Clune, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 Iowa L. Rev. 47 (1983), https://repository.law.wisc.edu/s/uwlaw/media/23907.

14 One original plaintiff withdrew because she was uncertain that she could contribute effectively during a leave of absence and was concerned about her vulnerable position as an undergraduate student. Yale Undergraduate Women's Caucus, *Alexander v. Yale* [Informational Pamphlet], December 1, 1977, https://clearinghouse.net/doc/80478/.

complaint included three female students, two recent alumna, and one male faculty member.[15] On the whole, the plaintiffs alleged that they were each deprived of access to their respective educational programs as a result of pervasive sexual harassment at Yale and that the university failed to offer a formal grievance procedure for resolving complaints of sex discrimination as required by Title IX's federal regulations.

The factual allegations by the six named plaintiffs varied in their descriptions of the ways in which they were harmed by pervasive sexual harassment. Faculty member John Winkler alleged that his ability to teach effectively was obstructed by a widespread mistrust of male faculty as a result of unchecked harassment by male colleagues.[16] Student Lisa Stone alleged emotional distress resulting from her knowledge of another female student's experiences of sexual harassment by a male university employee without any available recourse.[17] Recent alumna Ann Olivarius alleged that she received complaints of harassment from other women as an officer of the Undergraduate Women's Caucus and that her complaints to the administration on behalf of these women were disregarded.[18] Recent alumna Ronni Alexander alleged that she experienced unwanted sexual advances—including coerced sexual intercourse—during private lessons with her flute instructor, prompting her to withdraw from the program and pursue a different course of study.[19] Student Margery Reifler alleged that she endured sexual harassment by a male coach of an athletic team during her time as the team manager and felt that she was unable to file a complaint due to the absence of clear procedures.[20] Student Pamela Price alleged that a male faculty member offered her an "A" on her term paper, in exchange for compliance with his sexual demands, and undeservingly received a "C" when she rebuffed him. Price submitted complaints to the administration on multiple occasions.[21]

Despite the fact that three of the plaintiffs described specific acts of sexual misconduct by particular individuals, the plaintiffs collectively proceeded against only the university in claims under Title IX rather than naming the individual employees as defendants.[22] Further, the plaintiffs collectively sought only declaratory and injunctive relief to compel the university to institute a grievance process

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15 Alexander v. Yale Univ., Second Amended Complaint, Civ. No. N77-277 (D. Conn. 1977).

16 *Id.* at Count VI.

17 *Id.* at Count IV.

18 *Id.* at Count V.

19 *Id.* at Count I.

20 *Id.* at Count II.

21 *Id.* at Count III.

22 Although the private right of action under Title IX was not yet clearly established at the time—nor the scope of viable defendants—present interpretations of Title IX preclude an action against individuals. Rather, the plaintiff may bring a claim against the institution receiving the federal funding. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 641 (1999). But both then and now, individual employees may be subject to other tort claims. Plaintiffs in *Alexander* chose not to pursue such remedies, opting instead to maintain their focus on the institutional policies.

for allegations of sexual harassment.[23] Only Olivarius requested damages in the amount of $500.00. Price requested injunctive relief that would require Yale to instruct any recipient of her transcripts to disregard her grade in the disputed course.

The lawsuit—crafted by Catharine "Kitty" MacKinnon, Anne Simon, Judith Berkan, Kent Harvey, and Rosemary Johnson of the New Haven Law Collective—was bold in proceeding on three unsettled legal theories.[24] First, Title IX offered no express private right of action. The only available precedent—a recent ruling in the Seventh Circuit Court of Appeals—held that no such right of action was available to aggrieved students.[25] Second, it was unclear whether plaintiffs were first required to seek any administrative resolution through HEW, and none of the plaintiffs had done so.[26] Third, it was not established that sexual acts constituted discrimination on the basis of sex.[27] The plaintiffs also understood that they would be litigating against a defendant institution with untold resources and that it would come at considerable expense to the plaintiffs and their allies.[28] Plaintiffs proceeded nonetheless.

All three of these uncertainties were the focus of Yale University's motion to dismiss. From the outset, the presiding magistrate judge found that four of the named plaintiffs failed to allege a cognizable harm under Title IX.[29] In brief, the magistrate opined that plaintiffs Winkler, Stone, and Olivarius failed to allege that they were personally targeted by any behavior that would have deprived them of access to the educational program or activity.[30] The magistrate further opined that plaintiffs Olivarius and Alexander were not deprived of access to their educational programs because they successfully graduated.[31] The magistrate also dismissed Reifler, who did not bring any formal complaint to the administration.[32] This left only the claim of Pamela Price, who remained a student and reported the behavior to the administration on more than one occasion.[33]

Despite this early blow to plaintiffs' collective case, the adequacy of Price's allegations compelled the magistrate to consider the three threshold questions of

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23 *Alexander*, Second Amended Complaint at Prayer for Relief, Civ. No. N77-277 (D. Conn. 1977).

24 Anne E. Simon, *Alexander v. Yale University: An Informal History*, in Directions in Sexual Harassment Law 51–59 (Catharine A. MacKinnon and Reva B. Siegel eds. 2004).

25 Cannon v. Univ. of Chicago, 559 F.2d 1063, 1082 (7th Cir. 1977). However, the U.S. Supreme Court would ultimately overrule the Seventh Circuit in holding that an implied right of action existed. Cannon v. University of Chicago, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979).

26 Alexander v. Yale Univ., 459 F. Supp. 1, 2 (D. Conn. 1977).

27 *See infra* Part II.

28 Yale Undergraduate Women's Caucus, *Alexander v. Yale* [Informational Pamphlet], December 1, 1977, https://clearinghouse.net/doc/80478/.

29 *Alexander*, 459 F. Supp. at 3–4.

30 *Id*.

31 *Id*.

32 *Id*.

33 *Id*; Pamela Price, *Statement by Pamela Price* [Press Release], December 21, 1977, https://clearinghouse.net/doc/80386/.

law targeted by the university's motion to dismiss. The magistrate ruled in favor of Price on all three questions, allowing her claim to proceed. Although the plaintiffs' claims posed a completely novel question under Title IX, the magistrate opined in a nearly conclusory fashion that acts of sexual harassment toward female students clearly constituted a deprivation of educational access on the basis of sex.[34] Instead of spending any significant time on this particular question of first impression, the magistrate directed considerable attention to the question of whether an implied right of action existed under Title IX. The magistrate acknowledged the adverse precedent in the Seventh Circuit but felt compelled to disagree. In finding that an implied right of action was appropriate, the magistrate took a purposive approach to analyzing congressional intent in accordance with the dictates of *Cort v. Ash*.[35] Faced with an ambiguous legislative history on the question of whether a right of action was intended, the magistrate relied on the legislation that served as a model for Title IX—Title VI of the Civil Rights Act of 1964—in finding that such an implied right of action was appropriate.[36] The magistrate also resolved the question of whether there should be an exhaustion of administrative remedies with an unflattering assessment of whether HEW was likely to provide such an effective remedy. The magistrate opined that the plaintiffs should not be required to wade through such uncertainty.[37] The court ultimately adopted the rationale of the magistrate in a summary order.[38]

As the sole surviving plaintiff in the district court proceedings, Price amended the complaint to request class certification on behalf of

> … those at Yale University who are disadvantaged and obstructed in their educational relations by the policies, practices, acts and omissions of the University with respect to the sexual harassment of women students by men in positions of authority, specifically by having to choose between toleration of, or compliance with, sexual demands and pressures by such men and any educational opportunity, benefit or chance to grow or advance educationally.[39]

The magistrate denied Price's request for class certification in an unpublished opinion.[40] With the focus of the proceedings essentially narrowed to a single tort claim rather than a case about Yale's inadequate response to pervasive harassment, Judge Ellen Burns ruled in a bench trial that the alleged proposition did not occur and found that the grade that Price received was not attributable to anything other than academic merit.[41]

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34 *Alexander*, 459 F. Supp. at 4.

35 422 U.S. 66 (1975).

36 *Alexander*, 459 F. Supp. at 4–5.

37 *Id*. at 6.

38 *Id*. at 2.

39 Alexander v. Yale Univ., Second Amended Complaint at para. 2, Civ. No. N77-277 (D. Conn. 1977).

40 Alexander v. Yale Univ., 631 F.2d 178, 183 (2d Cir. 1980).

41 *Id.*; Price v. Yale Univ., Memorandum of Judgment, Civ. No. N77-277 (D. Conn. 1979). *See also* Simon, *supra* note 23.

The five female plaintiffs appealed the dismissal of their claims, the denial of class certification, and the district court's findings of fact to the U.S. Court of Appeals for the Second Circuit.[42] The court succinctly affirmed the district court's dismissal of the claims brought by all plaintiffs except for Price. The court held that Olivarius's decision to investigate and bring complaints to the administration on behalf of other students did not afford her any claim for which relief could be granted and that the successful graduation of all other female plaintiffs seemingly mooted their claims.[43] In affirming the dismissal of these claims, the court also questioned whether access to extracurricular activities constituted the deprivation of access to "educational" programs contemplated by Title IX.[44] Most notably, the court found that the relief sought was also mooted by Yale's newly created grievance procedures.[45]

Price further contended on appeal that the crux of her complaint was that the university lacked the grievance procedure required by the federal regulations and that the absence of such a procedure was grounds for injunctive relief even if her allegation was ultimately deemed unfounded.[46] Price also appealed the district court's decision not to certify the class, and the court's denial of a posttrial motion by Price to open the record to a new witness who could corroborate her allegations. The Second Circuit rejected all three arguments on the basis that Price simply failed to prove her case when given the opportunity to do so at trial.[47] In turn, the court held that Price was not an appropriate member of the class that she sought to certify and was not harmed by the absence of a grievance process.[48] The court of appeals also summarily ruled that the district court's decision not to open the record to a new witness was not an abuse of discretion.[49]

Though all of the plaintiffs' claims were ultimately disposed of unfavorably by the court, the lawsuit itself is widely credited with turning the tide of sexual harassment adjudication under Title IX.[50] In the midst of the proceedings, Yale adopted the grievance procedures that plaintiffs had been seeking from the outset.[51] By 1981, the newly established U.S. Department of Education was communicating internally to its investigators in the Office for Civil Rights that sexual harassment

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42 The male faculty member did not appeal. *Alexander*, 631 F.2d 178.

43 *Id*. at 183–84.

44 *Id*. at 184–85.

45 *Id*. at 184.

46 *Id*. at 185.

47 *Id*. at 185–86.

48 *Id*.

49 *Id*.

50 Emily Suran, *Title IX and Social Media: Going beyond the Law,* 21 Mich. J. Gender & L. 273 (2014); Michele Landis Dauber & Meghan O Warner, *Legal and Political Responses to Campus Sexual Assault,* 15 Ann. Rev. L. & Soc. Sci. 311 (2019); Elizabeth A. Armstrong et al., *Silence, Power, and Inequality: An Intersectional Approach to Sexual Violence,* 44 Ann. Rev. Soc. 99 (2018).

51 *Alexander*, 631 F.2d at 184.

was to be deemed a form of prohibited sex discrimination.[52] Within five years of the Second Circuit's decision, hundreds of universities across the country had adopted formal procedures for resolving reports of sexual harassment.[53]

II. THE EARLY LEGAL LANDSCAPE OF SEXUAL HARASSMENT

While the Plaintiffs in *Alexander v. Yale* were the first to argue that sexual harassment constituted prohibited sex discrimination under Title IX, their theory was not altogether original. The lawsuit came on the heels of an ongoing effort to interpret Title VII of the Civil Rights Act of 1964 to prohibit sexual harassment in employment. At the time of the *Alexander* lawsuit, the outlook for this theory was less than promising.

Though the term "sexual harassment" had not yet been coined, the first case to consider the question of whether such sexual conduct should be prohibited as sex discrimination under Title VII came in 1974 in *Barnes v. Train*.[54] Barnes was a Black woman working as an administrative assistant for the Environmental Protection Agency (EPA). After rebuffing several sexual advances by her supervisor—a Black man—she was tormented and stripped of responsibility until her job was eventually eliminated. She proceeded pro se in an administrative complaint within the agency. On the advice of EPA personnel, she framed her administrative complaint as one of racial discrimination rather than sex discrimination.[55] The agency's examiner excluded evidence of sex discrimination in concluding that no racial discrimination was present.[56] The agency adopted the findings of the examiner. Barnes retained counsel and appealed to the Civil Service Commission, which upheld the EPA's finding.[57]

Barnes then filed her lawsuit in the U.S. District Court for the District of Columbia asserting that the agency's finding violated her rights under the Fifth Amendment and Title VII, as amended by the Equal Employment Opportunity Act of 1972.[58] On the agency's motion for summary judgment, the court recognized that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" but concluded that "the instant actions which plaintiff complaints of, plainly fall wide of the mark."[59] In granting the agency's motion for summary judgment in 1974, the court reasoned,

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52 U.S. Dep't of Educ., *Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement and Policy Service. OCR, to Regional Civil Rights Directors, Title IX and Sexual Harassment Complaints*. 2 (Aug. 31, 1981). Obtained through a Freedom of Information Act request to the U.S. Department of Education on Sept. 10, 2021, https://drive.google.com/file/d/1FWp9A-Xsk3ySMdeJ2y5vfaGqmpsK-Sdv/view?usp=sharing.

53 Simon, *supra* note 23, at 56.

54 No. 1828-73., 1974 U.S. Dist. LEXIS 7212 (Aug. 9, 1974).

55 *See* Barnes v. Costle, 561 F.2d 983, 985 (D.C. Cir. 1977).

56 Barnes v. Train, No. 1828-73., 1974 U.S. Dist. LEXIS 7212 (1974).

57 *Id*.

58 *Id*.

59 *Id*. at 2–3 (citing Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971)).

> The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex.[60]

The same theory met even greater resistance a year later in the U.S. District of Arizona in *Corne v. Bausch and Lomb*.[61] Two female former employees filed suit against the employer after resigning their positions as a result of persistent and unbearable sexual advances by their male supervisor. On the company's motion to dismiss, the court acknowledged a slew of recent federal court opinions finding that various terms and conditions of employment amounted to illegal sex discrimination under Title VII.[62] But the court distinguished the present theory of sex discrimination by attributing the actions to the individual supervisor, rather than to any policy by the company.[63] The court went further to proclaim that holding the employer liable for such actions by an individual employee would be impractical:

> [A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.[64]

The U.S. District Court for the District of Columbia offered a glimpse of reprieve to sexual harassment plaintiffs the following year by denying a motion to dismiss in *Williams v. Saxbe* in April 1976.[65] Faced with a similar fact pattern in which the female plaintiff at the Department of Justice endured retaliation for rebuffing her supervisor's sexual advances, the department made the same argument as other defendants that any employee, regardless of gender, could be subject to retaliation for rebuffing a supervisor's sexual advances. While the court found this argument persuasive in principle, it held that the plaintiff did in fact allege that such artificial

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60 *Id*. at 3.

61 390 F. Supp. 161 (D. Ariz. 1975).

62 *Id*. at 163 ("it has been held an unlawful employment practice for an employer to discriminate against individuals with respect to job assignment or transfer", Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); hours of employment, Ridinger v. General Motors, Corp., 325 F.Supp. 1089 (D. Ohio 1971); or "fringe benefits" such as retirement, pension, and death benefits, Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971). Employers have been found to have discriminated against female employees because of their sex where they maintained policies which discriminated against females because they were married, Jurinko v. Edwin L. Wiegan Co., 331 F.Supp. 1184 (D.Pa.1971) or pregnant, Schattman v. Texas Employment Co., 330 F.Supp. 328 (D.Tex.1971). In addition, it has been held that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII. Sprogis v. United Airlines, Inc., 444 F. 2d 1194 (7th Cir. 1971).").

63 *Corne*, 390 F. Supp. at 163–64.

64 *Id*.

65 413 F. Supp. 654 (D.D.C. 1976).

barriers to employment and promotion created by that particular supervisor's conduct were only directed at women.[66] The court further rebutted the agency's argument that there could be no cause of action where the conduct complained of constituted the interpersonal actions and choices of an individual employee and not a policy of the employer. The court disagreed, finding that the policies or practices adopted by a supervisor on a subordinate constituted the actions of the agency.[67]

But later that same year, the U.S. Northern District of California targeted this distinction in holding that a former bank teller failed to state a claim in *Miller v. Bank of America*.[68] In one respect, the court bridged the gap between *Corne* and *Williams* in finding that where the company had a clear policy prohibiting such behavior and where the plaintiff failed to bring the matter to the attention of the company's employee relations department, the company could not be liable for sex discrimination based on the actions of an individual supervisor.[69] But the court concluded its analysis by concurring with *Corne* that holding employers liable for the interpersonal interactions between individual employees would subject Title VII to abuse, spawning a lawsuit with nearly every flirtation.[70]

In November of 1976, the U.S. District of New Jersey was called to consider not only the actions of a supervisor, but a company's subsequent retaliation against a female employee in *Tomkins v. Public Service Electric & Gas Co*.[71] Adrienne Tomkins was promoted frequently in her entry-level clerical positions when she was assigned to a new supervisor. The supervisor purportedly took her out to lunch to discuss her prospects of promotion to secretary when he sexually propositioned her. After Tomkins denied him, she filed a complaint with the company. She was reassigned to a less desirable position, her salary was cut, and she was later terminated. After receiving a right to sue letter from the Equal Employment Opportunity Commission, Tomkins brought her civil action in federal court under Title VII against both the company and the individual supervisor. Offering an affirmative nod to the rationale offered by the other district courts in *Corne, Miller, and Barnes*, the district court agreed that the gender of the supervisor and employee was not of consequence.[72] The court expressed that an employee of any gender could be propositioned by a supervisor of any gender, rendering the law against sex discrimination irrelevant.[73] But seemingly contrary to that logic, the court also opined that attraction between men and women is natural, and that companies could certainly not be liable for every such instance of attraction that

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66 *Id*. at 662.

67 *Id*. at 662–63.

68 418 F. Supp. 233 (N.D. Cal. 1976).

69 *Id*. at 236.

70 *Id*.

71 422 F. Supp. 553 (D.N.J. 1976).

72 *Id*. at 556.

73 *Id*.

manifested between male supervisors and female employees.[74] Building on this premise, the court cautioned that allowing a cause of action for the behavior of a supervisor would create an imminent lawsuit every time that a supervisor tried to engage socially with an employee.[75] The court also questioned whether such a cause of action would be a slippery slope to claims based on interactions between employees.[76]

But the court's adherence to the rationale of the other districts played to plaintiff's favor in her retaliation claim against the company. In maintaining the distinction between the actions of an individual and the actions of an employee, the court did find that retaliatory action by a company against an employee who files a complaint of sex discrimination was actionable under Title VII:

> It matters not whether the basis for the discriminatory treatment is a previous sexual assault or a matter related to salary or promotion. When a female employee registers a complaint and the grievance is not only not adequately processed, but the complainant is persecuted for having the temerity to advance it at all, the Act is violated to the extent that such a corporate posture is sex-based. If a company decides that, whatever the merits of the underlying controversy, the female will be terminated because she is female, that is sex discrimination.[77]

As a result, the plaintiff's claims against the company survived the motion to dismiss. However, liability for sexual harassment by a supervisor remained elusive. Liability for sexual harassment by a peer seemingly remained off the table altogether.

Those odds shifted slightly in July 1977, when the Court of Appeals for the D.C. Circuit ruled on the appeal by Barnes (which had then been restyled *Barnes v. Costle* to reflect a change in leadership at the EPA).[78] The opinion by the court of appeals represented the first major victory for plaintiffs in sexual harassment litigation. In reversing and remanding the case, the court rejected the notion that an act of sexual harassment was inextricable from sex:

> But for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel. Put another way, she became the target of her superior's sexual desires because she was a woman, and was asked to bow to his demands as the price for holding her job. The circumstance imparting high visibility to the role of gender in the affair is that no male employee was susceptible to such an approach by appellant's supervisor. Thus gender cannot be eliminated from the formulation which

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74 *Id*. at 556–57.

75 *Id*. at 557.

76 *Id*.

77 *Id*.

78 561 F.2d 983 (D.C. Cir. 1977).

> appellant advocates, and that formulation advances a prima facie case of sex discrimination within the purview of Title VII.[79]

The court went even further in holding that a company was complicit—and therefore liable—in the known harassment by a supervisor unless it took affirmative steps to eliminate the harassment.[80]

The Eastern District of Michigan entertained the final sexual harassment case to precede the inaugural Title IX action. In *Munford v. James*,[81] plaintiff Maxine Munford was employed for mere hours before her male supervisor propositioned her in the office supply room.[82] After rebuffing his advance, she endured repeated harassment, including lewd cartoon sketches left on her desk. Only a couple of weeks later, the supervisor informed her that she would accompany him on a business trip to Grand Rapids, and that they would stay in the same hotel room and have sex on the trip. When she informed him that she would refuse to stay in the same room, she threatened to report his conduct. She was summarily terminated. When she reported his conduct immediately after the termination, the company's leadership declined to investigate and informed her that they would uphold the supervisor's decision to terminate.[83]

After examining the only five sexual harassment cases that preceded it, the court determined that it was charged with deciding two questions: (1) whether acts of sexual harassment were within the purview of Title VII and (2) which acts constituted employment practices for which the employer might be liable.[84] On the first, the court adopted the rationale of *Barnes* and *Williams* in holding that sexual harassment was within the purview of Title VII as sex discrimination.[85] On the second, the court declined to adopt the broad holding by *Barnes v. Costle* that an employer might be vicariously liable for any harassment by a supervisor. Rather, the court found that an employer would be liable where it knew of the harassment and failed to investigate.[86]

Although *Barnes v. Costle* and *Munford* propped open the door of feasibility for the plaintiffs in *Alexander v. Yale*, the legal viability of plaintiffs' theory under Title IX remained dubious when they filed their action in 1977. No similar finding had yet been made regarding a school's responsibility to respond to the harassment of students under Title IX. The heavy emphasis on the distinction between individual and corporate liability under Title VII also did not favor the plaintiffs at the time that they filed their action. Before the court could even answer the second question of whether an implied right of action was appropriate, the plaintiffs needed the

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79 *Id*. at 990.

80 *Id*. at 1000.

81 441 F. Supp. 459 (E.D. Mich. 1977).

82 *Id*. at 460.

83 *Id*.

84 *Id*. at 465.

85 *Id* at 465–66.

86 *Id*. at 466.

court to accept as a threshold issue that sexual harassment by individual faculty members—or the institution's inadequate response to it—constituted a form of sex discrimination prohibited by Title IX. Attorney Anne Simon conceded after the fact that the prospects for their theory under Title IX were bleak at the outset.[87]

Their decision to proceed paid off. Despite the unfavorable legal landscape at the time of filing, their legal theory of sexual harassment as sex discrimination (as it applied to Price) was practically treated as a foregone conclusion by the magistrate who initially ruled on the motion to dismiss. Relying exclusively on the appellate decision in *Costle*, the magistrate held

> it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment, see, e. g., *Barnes v. Costle*, 183 U.S.App.D.C. 90, 561 F.2d 983, 988-992 (1977). When a complaint of such an incident is made, university inaction then does assume significance, for on refusing to investigate, the institution may sensibly be held responsible for condoning or ratifying the employee's invidiously discriminatory conduct.[88]

The court's cursory treatment of this groundbreaking moment raises questions about the forces that were shaping the law of the era. While many likely agree with the court's holding regarding the applicability of Title IX, the court's citation to a single nonbinding appellate decision on Title VII—with no mention of the other district courts whose lengthy legal analyses resulted in other conclusions—suggests that the law in this watershed moment was shaped by more than black letter doctrine.

III. THE SOCIAL CONTEXT

Some view *Alexander v. Yale* as shifting the law on sexual harassment practically overnight.[89] But with the benefit of macrohistorical hindsight, the lawsuit was arguably more so a culmination of social change that had long been building momentum, rather than the unforeseen beginning of a new era. The social context in which the lawsuit was cultivated—both locally at Yale and nationally in the United States—broadcast strong signals that drastic change of some kind was on the horizon. While it was far from certain that *Alexander v. Yale* would yield any particular outcome, observant policy makers and higher education administrators should have been on notice that a shift in the legal obligations of colleges and universities was imminent.

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87 Simon, *supra* note 23.

88 Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977).

89 Simon, *supra* note 23.

A. Micro Social Context: The Squeaky Wheel on Campus

Contemporary archive materials—including those published as essays, press releases, and op-ed columns in the school newspaper—suggest that pervasive sexual misconduct by men in power was not merely a poorly kept secret at Yale. Rather, it was ingrained in the reputation of the institution at the time. They also suggest that factions of the university community were dismissive of the problem.

The undergraduate school, Yale College, opened its doors to women for enrollment in all programs in 1969.[90] The sexual violence and coercion experienced by the women of Yale was a problem known to the university from the beginning of full-time coeducation. In his address to the inaugural coeducational undergraduate class, President Kingman Brewster Jr. stated unequivocally that "[the] two things most obviously on everyone's minds on this opening day are women and campus violence."[91] Three of the women's colleges began installing locks on the bathroom doors because of intrusions by men, including one who was found in the bathroom with a knife.[92] The colleges also discussed strategically dispersing floors for women throughout the campus in order to make them more difficult to find.[93]

A review of contemporary Yale archive materials from 1969 to 1973 by Dr. Anne G. Perkins revealed that the heads of all twelve residential colleges were apprised in a council meeting of at least one instance of rape.[94] There is also evidence that the New Haven Police received at least six reports of rape from Yale women during the second and third academic years of coeducation.[95] The university's own student newspaper, *The Yale Daily News*, reported repeatedly on the sexual assaults of Yale women through the first decade of coeducation.[96] Public debate

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90 Yale Univ. Libr., History of Coeducation in Yale College: Introduction (n.d.), https://guides.library.yale.edu/c.php?g=871411&p=6256097. However, the first female students in the history of the institution were admitted to the Yale School of Fine Arts in 1896 at the insistence of the school's benefactors. Other graduate programs began admitting women in the decades leading up to the coeducational admissions policy of Yale College. *See* Yale Univ., *A Timeline of Women at Yale* (2022), https://celebratewomen.yale.edu/history/timeline-women-yale.

91 Yale Univ., *A Timeline of Women at Yale*, *supra* note 89.

92 *Colleges Put Locks on Girls' Bathrooms*, Yale Daily News (Dec. 9, 1969), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19691209-01.2.3&srpos=1&e=-------en-20--1--txt-txIN-colleges+put+locks+on+girls+bathrooms------.https://ydnhistorical.library.yale.edu/?a=d&d=YDN19691209-01.2.3&srpos=1&e=-en-20--1--txt-txIN-Colleges+Put+Locks+on+Girls%27+Bathrooms.

93 Yale Univ., *supra* note 89.

94 Anne G. Perkins, Unescorted Guests: Yale's First Women Undergraduates and the Quest for Equity, 1969–1973 (2018) (P.h.D. dissertation, University of Massachusetts), https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1388&context=doctoral_dissertations.

95 *Id*.

96 Thomas Kent, *Rape, 2 Attempts Reported; Police Urge New Alertness*, Yale Daily News (Dec. 10, 1970), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19701210-01.2.5&srpos=1&e=-------en-20--1--txt-txIN-rape+2+attempts+reported------ ; Ernest Tucker, *Rapist Attacks: Still at Large*, Yale Daily News (Oct. 13, 1972), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19721013-01.2.4&srpos=1&e=-------en-20--1--txt-txIN-rapist+attacks+still+at+large------ ; Robert Rosenthal, *Female Student Sexually Attacked*, Yale Daily News (Sept. 19, 1972), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19720919-01.2.8&srpos=2&e=-------en-20--1--txt-txIN-female+student+sexually+attacked------ ; J. Harris, *2nd Rape Startles Branford*, Yale Daily News (Dec. 17, 1975), https://ydnhistorical.library.yale.edu/?a=d&d=

raged about whether the responsibility for the safety and security of women at Yale fell on the institution or on the women themselves.[97] The security measures considered by the institution included locking bathrooms, locking exterior gates, hiring guards, instructing students to lock their doors, installing peepholes, and disseminating pamphlets to women with information on how to avoid becoming a "tempting target."[98]

While these sexual assaults were typically attributed to the nefarious locals of New Haven who were otherwise unaffiliated with the institution,[99] students put the institution on notice of the sexual misconduct happening within its own ranks long before the plaintiffs proceeded with their lawsuit in 1977. In 1971, two student organizations—the predecessors to the Women's Caucus and the Women's Forum—produced a report to the university detailing the experiences of sexual harassment endured by women students at the hands of faculty.[100] One woman

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YDN19751217-01.2.4&srpos=1&e=-------en-20--1--txt-txIN-second+rape+startles+branford------ ; Randy Mastro, *Med Student Raped in Year's Fifth Attack*, Yale Daily News (Feb. 11, 1976), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760211-01.2.3&srpos=1&e=-------en-20--1--txt-txIN-med+student+raped+in+year%27s+fifth+attack------ ;

97 Barry Coburn & Jim Graham, *Letters to the Editor*, Yale Daily News (Mar. 25, 1974), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19740325-01.2.10&srpos=1&e=-------en-20--1--txt-txIN-Barry+Coburn+%26+Jim+Graham%2C+Letters+to+the+Editor------; Andy Chapman, *Letters to the Editor*, Yale Daily News (Mar. 25, 1974), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19740325-01.2.10&srpos=1&e=-------en-20--1--txt-txIN-Barry+Coburn+%26+Jim+Graham%2C+Letters+to+the+Editor------ ; Kitty Tyson, *Letter to the Editor: Rape*, Yale Daily News (Oct. 20, 1975), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19751020-01.2.7&srpos=1&e=-------en-20--1--txt-txIN-Kitty+Tyson%2C+Letters+to+the+Editor------ ; Wendy Reuther, *Feeling Helpless*, Yale Daily News (Jan. 24, 1976), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760124-01.2.5&srpos=2&e=-------en-20--1--txt-txIN-Wendy+Feeling+Helpless------ ; Rosemary Bray, *Letter to the Editor: Helplessness*, Yale Daily News (Jan. 27, 1976), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760127-01.2.12&srpos=4&e=-------en-20--1--txt-txIN-Helplessness------ ; Shari Loe, *Letter to the Editor: Helpless*, Yale Daily News (Jan. 28, 1976), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19740116-01.2.9&srpos=1&e=-------en-20--1--txt-txIN-shari+loe+letter+to+the+editor------ ; Anonymous Member of Yale Class of 1979, *Assault and Rape: An Open Letter*, Yale Daily News (Apr. 19, 1978,), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19780419-01.2.5&srpos=4&e=-------en-20--1--txt-txIN-assault+and+rape+an+open+letter------ .

98 Barry Coburn & Jim Graham, *Letters to the Editor*, Yale Daily News (Mar. 25, 1974), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19740325-01.2.10&srpos=1&e=-------en-20--1--txt-txIN-jim+graham+letters+to+the+editor------ ; Mindy Beck, *University Locks Bathrooms, Initiates Old Campus Patrol*, Yale Daily News (Sept. 22, 1975), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19750922-01.2.1&srpos=1&e=-------en-20--1--txt-txIN-mindy+beck+university+locks+bathrooms------ ; Barry Coburn, *Council Discusses Safety Precautions*, Yale Daily News (Sept. 25, 1975), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19750925-01.2.5&srpos=1&e=-------en-20--1--txt-txIN-council+discusses+safety+precautions------ ; John Harris & Randy Mastro, *Chauncey Reveals Tighter Security Plan*, Yale Daily News (Jan. 15, 1976), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760115-01.2.1&srpos=1&e=-------en-20--1--txt-txIN-chauncey+reveals+tighter+security+plan------ ; Jane Fincke, *Panel Advises Common Sense Precaution in Rape Prevention*, Yale Daily News (Feb. 2, 1976), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760202-01.2.2&srpos=1&e=-------en-20--1--txt-txIN-panel+advises+common+sense+precaution------ .

99 With a disproportionate attribution to Black men in the New Haven community. See Perkins, *supra* note 93; Miles Leverett, *Letter to the Editor: Harassment*, Yale Daily News (Jan. 27, 1976), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19760127-01.2.10&srpos=1&e=------197-en-20--1--txt-txIN-miles+leverett----1976-- .

100 Alice Dembner, *A Case of Sex Discrimination*, 7 Yale Graduate-Professional 28 (Mar. 1, 1978),

described a Director of Graduate Studies "who spends more time patting your thighs and pinching your rear than discussing your academic career."[101] Another woman openly described an assault by a professor in her admissions interview:

> When I came to Yale to show my portfolio, a requirement for admission to the department, I did not realize what was going to happen. When I had finished discussing the final picture with one professor, he asked me, "Now, don't you have something else to show me?" and with that he grabbed me by the shoulders, as they say in Victorian novels.[102]

A 1971 *Report to the President from the Committee on the Status of Professional Women at Yale* also documented extensive evidence of the sex discrimination endured by female graduate students and faculty members.[103] The report noted that while women received fourteen percent of the doctorates at Yale, they made up only three percent of the faculty.[104] The report also noted experiences of male faculty members recommending men for jobs, only to acknowledge that there were women students who were more qualified.[105]

The founding of the Undergraduate Women's Caucus in 1974 was also vocal in its intention to address the experiences of women at Yale. One of the organization's primary aims was to change pervasive attitudes at Yale that objectified women. Organizers Katherine Tyson and Ann Olivarius cited an example in which male senior students voted to determine which undergraduate woman was the prettiest and then collected a pot of money as a prize for the first man to have sex with her.[106] The Committee also openly acknowledged the university's reputation as a "male chauvinist" institution.[107]

Despite the work of these university committees, task forces, and student activists, a 1977 *Report to the Yale Corporation from the Yale Undergraduate Women's Caucus* demonstrated that sex discrimination remained pervasive, even if often covert.[108] A Harvard professor at the time recounted that the recommendations that his department received for women from Yale described them as "nice to be around"

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https://clearinghouse.net/doc/80394/.

101 *Id*, 29.

102 *Id*.

103 Burton R. Clark et al., *A Report to the President from the Committee on the Status of Professional Women at Yale* (1971), https://wff.yale.edu/sites/default/files/files/1971_A_Report_to_the_PresidentProf Women.pdf .

104 *Id*. at 23.

105 *Id*. at 13.

106 Marie Lefton, *Women's Caucus Fights Oppression*, Yale Daily News (Nov. 11, 1974), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19741111-01.2.1&srpos=1&e=-------en-20--1--txt-txIN-womens+caucus+fights+------ .

107 Clark, *supra* note 102, at 15.

108 Yale Undergraduate Women's Caucus, *A Report to the Yale Corporation from the Yale Undergraduate Women's Caucus* (Mar. 1977), https://wff.yale.edu/sites/default/files/files/1977_Report_to_the_Yale_Corporation.pdf.

or "a cute addition to your staff."[109] Citing a statement by a male undergraduate student about searching for love at Yale, the drafters of the report expressed that it was still a "common view that a woman's worth seems inextricably bound to her ability to help promote male growth."[110] The 1977 Report also shared an anecdote about a woman who was not hired for a position that she had been performing on an interim basis because she "could not carry heavy boxes"—the same heavy boxes that she had been carrying all summer.[111] The caucus also highlighted the disproportionately low percentage of female employees in management positions, and miniscule enrollment of women students in administrative science, chemistry, economics, engineering and applied science, mathematics, and physics.[112] And while the university had an Affirmative Action plan in place, which was approved by HEW, contributors to the Report noted that the chairs of all of the Affirmative Action committees were White men.[113] Women on faculty expressed frustration at the fact that their "presence serves the purpose of tokenism rather than representing a genuine effort on the part of Yale to incorporate women scholars and researchers into the university."[114] The 1977 Report also contained accounts of rape from two unnamed women who both offered to speak further with the Yale Corporation if promised confidentiality.[115]

Despite these very visible experiences of women at Yale in the first decade of full coeducation, the university still lacked a formal grievance procedure for complaints of sex discrimination called for by the 1975 Title IX regulations when the plaintiffs filed their claims in *Alexander v. Yale* in 1977.[116] Setting aside the substance of the factual allegations, the original prayer for relief and the procedural history of the lawsuit reveal much about the pervasive nature of the problem faced by women at the university.

From the outset, the plaintiffs named only the university as defendant. They declined to pursue any course of action against the individual male faculty members who committed the offenses. The plaintiffs' exclusive focus on the university was reflective of the type of change that they hoped to achieve and that only the university could provide.[117]

That desired change is reiterated several times over in the plaintiffs' prayer for relief. Collectively, the plaintiffs sought only declaratory and injunctive relief. To that end, they sought a declaration that the university's policies (or lack thereof)

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109 *Id*.

110 *Id*. at 5.

111 *Id*. at 6.

112 *Id*.

113 *Id*. at 9–10.

114 *Id*. at 10.

115 Yale Undergraduate Women's Caucus, *A Report to the Yale Corporation from the Yale Undergraduate Women's Caucus* 19–21 (Mar. 1977).

116 Yale Undergraduate Women's Caucus, *Fact Sheet on Alexander v. Yale* (Sept. 1, 1977), https://clearinghouse.net/doc/80476/.

117 *Id*.

violated Title IX, orders enjoining the university and its officials from continuing the practices that allowed harassment to persist in violation of Title IX, and an order that the university implement a grievance procedure for the resolution of sex discrimination complaints.[118] Price also sought to have her grade changed through further investigation, and/or for the university to instruct recipients of the transcript to disregard the disputed grade.[119] Only Olivarius sought damages in the amount of $500, which was meant to reimburse her for time and expenses in pursuing complaints on behalf of others.[120]

The amendments to the complaint also offer insight into the scope of the harassment problem on campus. After the original plaintiffs filed the lawsuit and shared their stories, Reifler and Price asked to join the suit as well. Both brought their own egregious experiences of sexual harassment, and neither sought damages or retribution from the individual employees.[121] The discovery of these additional plaintiffs (at least one of whom formally reported her experience to the administration on multiple occasions) suggests that the experiences of harassment alleged in the original complaint offer just a glimpse at the pervasive problem that existed on campus.

The appellate proceedings also offer insight into the broader social context in which the plaintiffs brought their suit. Intervening as amici in support of the plaintiffs on their appeal to the Second Circuit were notable public interest groups. Among them were the American Civil Liberties Union, the Women's Equity Action League Educational and Legal Defense Fund, Working Women's Institute, the National Conference of Black Lawyers and Black Women Organized for Political Action, Equal Rights Advocates, Inc. and Women Organized Against Sexual Harassment.[122]

On its face, the *Alexander* case seems an unusual candidate to attract the support of so many amici of national prominence. The court had declined to certify the class, and the motion to dismiss had managed to whittle the case down to a single claim by a single plaintiff. The remaining claim was treated as a fact-dependent tort case rather than the type of class action with broad systemic implications that plaintiffs sought from the outset.[123] That single remaining plaintiff lost on the merits at trial. The appeal seemed to be an uphill battle. Despite these circumstances, the plaintiffs found broad support from national interest groups. These organizations' interest in the appeal was representative of a larger context that was driving social and legal change outside of Yale's gates.

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118 Alexander v. Yale University, Second Amended Complaint, Prayer for Relief, Civ. No. N77-277 (D. Conn. 1977).

119 *Id*. at paras. 8–9.

120 *Id*. at para. 11. *See also* Alexander v. Yale Univ., 459 F. Supp. 1, 3 (D. Conn. 1977).

121 Yale Undergraduate Women's Caucus, *Alexander v. Yale* [Informational Pamphlet] (Dec. 1, 1977), https://clearinghouse.net/doc/80478/.

122 Alexander et v. Yale Univ., 631 F.2d 178 (2d Cir. 1980).

123 Simon, *supra* note 23.

B. Macro Social Context: Filling a Legal Void

The plaintiffs' struggle to find an adequate legal mechanism for remedy—internally at Yale or externally in the courts—was a striking reflection of the broader war that women were waging in the workplace. As women began to fight for safety and respect at Yale, the national Second Wave movement for women's rights was gaining momentum through the 1970s.[124] In many ways, this Second Wave picked up where the feminist movement at the turn of the twentieth century left off.[125] While the early feminist movement focused enormously on fundamental civil liberties and acknowledgment of basic personhood for women in the United States, the movement did make early strides in highlighting the use of sexual harassment and abuse as both a means and an end to perpetuating the social and economic inferiority of women.[126] The original feminist movement also addressed the intersectionality of race and sexual abuse for Black women in the United States.[127] This latter cause was a point of emphasis for the sole plaintiff who went to trial, Pamela Price, who argued that her vulnerability to objectification and exploitation as a woman was only exacerbated by her presumed inferiority as a Black person.[128]

The national social context of the Second Wave overlapped significantly with the campus context at Yale because of the pioneering work that MacKinnon was doing in New Haven. However, MacKinnon was not leading the charge alone. Attacking from all angles, legislators, lawyers, and activists worked to ignite a national consciousness-raising regarding the inequities that women endured in the workplace.[129]

In Congress, members called attention to the gaps that the legislative solutions of the 1960s civil rights movement left for women. Representative Martha Griffiths (D. Mich.) successfully passed a constitutional amendment in the House of Representatives that would explicitly prohibit sex discrimination.[130] While Griffiths had been advocating for some version of the amendment for over fifteen years, the renewed push to pass the amendment was reportedly prompted by the

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124 Reva B. Siegel, *A Short History of Sexual Harassment*, in Directions in Sexual Harassment Law (Catharine A. MacKinnon and Reva B. Siegel eds. 2003); Carrie N. Baker, *The Emergence of Organized Feminist Resistance to Sexual Harassment in the United States in the 1970s*, 19 J. Women's Hist. 161 (2007).

125 Siegel, *supra* note 123.

126 *Id*.

127 *Id*. *See also* Carrie N. Baker, *Race, Class, and Sexual Harassment in the 1970s,* 30 Feminist Stud. 7 (2004), http://www.jstor.org/stable/3178552.

128 Pamela Price, *Statement by Pamela Price* [Press Release] (Dec. 21, 1977), https://clearinghouse.net/doc/80386/. However, the Second Wave is criticized for placing disproportionate emphasis on the plight of White, middle-class professional women, relegating the discussions of racial intersectionality to the background until Anita Hill's allegations redirected the national narrative in the 1990s. This is despite the fact that many of the groundbreaking plaintiffs of the Second Wave, like Price, were Black women. See, Baker (2007), *supra* note 123. *See also* Elvia R. Arriola, *'What's the Big Deal?' Women in the New York City Construction Industry and Sexual Harassment Law, 1970–1985*, 22 Colum. Hum. Rts. L. Rev. 21 (1990).

129 Baker, *supra* note 123.

130 H.R.J. Res. 264, 91st Cong. (1970), 116 Cong. Rec. 28004, 28036–37 (1970).

U.S. Supreme Court's reluctance to apply the protections of the Civil Rights Act of 1964 to sex in the same way that it had applied the principles to race.[131]

Contemporaneously, Representative Edith Green (D. Oregon) used her role as the Chair of the Special Committee on Education to pursue legislation that would prohibit sex discrimination in education. Discussions in the committee hearings chaired by Green shed light on the pervasive cultural barriers of the era.[132] Committee members and witnesses debated how to handle income-based repayment plans for funding higher education when women borrowed money to attend school and then chose not to enter the workforce upon marrying—an obvious and inevitable outcome in the minds of some members of the committee.[133] The committee addressed heightened admissions standards for women in higher education as being purportedly justified by initiatives to increase access to "minority" students, which lowered standards for admission—omitting any discussion of the possibility of admitting fewer White men.[134] The Assistant Secretary of Labor questioned whether the programs would be "sensitive to the particular needs of women in the labor market," without discussion of what those "particularized needs" might be.[135] Representative Green addressed other blatant manifestations of sex discrimination in the proceedings, interrogating the Assistant Secretary of Labor about how many women he had in key positions on his staff,[136] addressing jokes made by committee members about the inclusion of women in training for the trades,[137] and calling out the absence of several committee members who chose not to make the hearings a priority.[138] Despite these barriers, a subsequent iteration of Green's bill would later pass in 1972, becoming the law that the Yale plaintiffs would use as the basis of their claims.

These legislative developments seemingly had a reciprocal relationship with the growing sentiments in workplaces across the country, with each lending momentum to the other.[139] Grassroots movements in cities across the country began to leverage local demonstrations and mainstream media to shift public sentiment. One of the most significant consciousness-raising events came on the heels of Representative Griffiths's success in passing the Equal Rights Amendment in the House. On August 26, 1970, a labor demonstration for women's rights organized by Betty Friedan and the National Organization for Women (NOW) drew as many as fifty thousand supporters to the streets of New York City, blocking

131 *New Victory in an Old Crusade*, Time (Aug. 24, 1970), https://time.com/vault/issue/1970-08-24/page/14/.

132 Higher Education Amendments of 1969: Part 1, Hearings before the United States House Committee on Education and Labor, Special Subcommittee on Education, 91st Cong, 1st Sess., and 91st Cong, 2d Sess., Dec. 16–18, 1969, Jan. 29, Feb. 3–6, 17, 25, Mar. 3–6, 9, 11, 12, 1970.

133 *Id*. at 178–81.

134 *Id*. at 463–64.

135 *Id*. at 175.

136 *Id*. at 174–75.

137 *Id*. at 170–72.

138 *Id*. at 315.

139 *See New Victory*, *supra* note 130.

Fifth Avenue during rush hour.[140] The protest was accompanied by several "sister demonstrations" in Detroit, Indianapolis, Boston, Berkeley, New Orleans, and Washington, D.C.[141] The demonstrations—which were intended to highlight the impact that the absence of women would have in the workplace—reportedly exceeded the organizers' own expectations.[142]

The message continued to resonate with working women of the era. Activists Ellen Cassedy, Karen Nussbaum, and Debbie Schneider began rallying fellow secretaries of Harvard and working women across other industries in Boston to demand equality in the workplace.[143] After meeting informally with a group of ten women over the course of a year to discuss their treatment in university offices, shoe factories, hospitals, and insurance companies, the women began to understand that their experiences of mistreatment on the job were practically universal among working women. The group created the labor rights organization "9to5" to pursue policy solutions to workplace inequities.[144] Over 150 women in Boston joined the organization when it began in 1973.[145] The organization targeted policy solutions to core labor issues like equal pay, promotional opportunities, and maternity rights. The 9to5 collective took a multimodal approach: appearing in public meetings before the local chamber of commerce, meeting directly with employers of their members, and "teetering for women's rights" while picketing outside of the state capitol building in their high heels on their lunch breaks.[146] By 1978, the group had expanded beyond Boston into other cities across the country.[147]

In Chicago, a similar organization also emerged in 1973. The new collective, known as "Women Employed," began to lobby the Chicago Association of Commerce for equal pay and professional respect.[148] They made their case to the Association with compelling data. At that time, women made up forty-five percent of the labor force in Chicago but earned only twenty-five percent of the total workforce wages.[149] Nearly half of men also held professional or managerial jobs, while only fourteen percent of women were entrusted with such responsibilities.[150]

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140 Sascha Cohen, *The Day Women Went on Strike*, Time (Aug. 26, 2015), https://time.com/4008060/women-strike-equality-1970/.

141 *Id*. at para. 6.

142 *Id*.

143 Ann Froines, *Transcript of Interview with Ellen Cassedy, Karen Nussbaum, Debbie Schneider*, Washington, D.C. (Nov. 1, 2005), https://reuther.wayne.edu/files/LOH000682.07.00.0.00.00.00.pdf; K. Banks Nutter, *Transcript of Interview with Karen Nussbaum*, Voices of Feminism Oral History Project, Washington, D.C. (Dec. 18–19, 2003), https://www.smith.edu/libraries/libs/ssc/vof/transcripts/Nussbaum.pdf.

144 Froines, *supra* note 142.

145 *Id*. at 1.

146 *Id*. at 5–6.

147 *Id*. at 4.

148 Sheila Wolfe, *Job Equality Plea Made*, Chicago Trib., sec. A1 (Apr. 24, 1973), https://www.newspapers.com/image/377160478/.

149 *Id*.

150 *Id*.

This was despite the fact that the median number of years of schooling for both sexes in Chicago at that time was nearly identical, with 12.5 for women and 12.8 for men.[151]

While 9to5 and Women Employed focused largely on general terms and conditions of women's employment, some activist groups during the Second Wave targeted the explicit sexualization of women. With the benefit of unionizing in the two prior decades, flight attendants were able to move swiftly against the "sexploitation" of women in the profession.[152] Women in the profession created Stewardesses for Women's Rights in 1974 as a direct response to the airline industry's portrayal of flight attendants as sexual objects in its advertising (e.g., female attendants featuring buttons that read "fly me").[153] They also fought back against the airlines' cosmetic regulation of the women's weight, makeup, and hair styles.[154]

But in the earliest years of the Second Wave, the lack of a comprehensive name for the act of sexualizing women in the workplace likely kept some of the dialogue at bay. That changed in Ithaca, New York, in 1975. Local activists began to rally around the case of Carnita Wood, an administrative assistant who endured sexual abuse by a prominent scientist at Cornell University.[155] Members of the women's section of Cornell's Human Affairs Program—including Lin Farley, Susan Meyer, and Karen Sauvigné—began to drum up support for Wood's case.[156] Similar to MacKinnon, Lin Farley was gaining momentum as an activist speaking out against the abuse of women in the workplace and would eventually produce her own seminal work on the topic, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (1978).[157]

The women organized an inaugural "speak out" event in Ithaca, New York, in 1975 in response to Wood's case.[158] In preparation for the event, Farley, Meyer, and Sauvigné brainstormed to come up with a single term that would describe the broad spectrum of mistreatment and abuse that women endured in the workplace as a result of their sex. Farley came up with the term "sexual harassment," and the group agreed to adopt it for the event.[159]

Over 275 women attended the speak-out event, with 20 of them offering recounts of their experiences with sexual harassment on the job.[160] The event was responsible

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151 *Id*.

152 Priscilla Murolo et al., From the folks who brought you the weekend: a short, illustrated history of labor in the United States (2001).

153 Which was met by the attendants' retort on protest signs and buttons that read, "fly yourselves." *Id.*

154 *Id*.

155 Baker, *supra* note 123.

156 *Id*.

157 Lin Farley, Sexual shakedown: the sexual harassment of women on the job (1978).

158 Baker, *supra* note 123.

159 *Id*.; New Mexico in Focus, *Episode 1130 | On Coining the Term "Sexual Harassment" - Raw* [interview broadcast] (Jan. 26, 2018), https://www.youtube.com/watch?v=mymzv2uyf8k&ab_channel=PBSNewsHour.

160 Baker, *supra* note 123.

for formally launching a new organization sponsored by Farley, Meyer, and Sauvigné named "Working Women United" (WWU) with forty inaugural members. The group—along with their cause and their newly coined term—quickly gained national recognition due in large part to coverage of the speak-out by the *New York Times* that was syndicated in major news outlets across the country.[161] The article by Enid Nemy likely resonated with the masses by laying bare the experiences of women in the workplace that were almost universally understood, but never discussed. Nemy's article recounted the experiences of sexual harassment shared by five different women at the speak-out event, transcending industries to include academia, health care, food service, and even part-time babysitting.[162]

These grassroots efforts coalesced into a national movement by women in the workplace. By 1977, 9to5 rallied several local organizations to become a national association of ten thousand members.[163] In addition to pursuing policy solutions at the local and state level, the organizations began to lend support to plaintiffs pursuing private causes of action against employers for sex discrimination under Title VII as the most likely legal remedy for sexual harassment in the workplace.

IV. LESSONS FROM THE SOCIAL CONTEXT

There is no formula for predicting the outcome of any particular case. Nor can we fully anticipate the impact that each case will have on the long-term trajectory of the law. But notwithstanding the uncertainty of these outcomes, change can only occur where plaintiffs feel compelled to bring the case before the court.

Whether driven by the empowerment of a national movement or by desperation from the lack of a readily available remedy—or perhaps both—the benefit of hindsight makes clear that the social context enveloping *Alexander v. Yale* set the stage for the aggrieved to pursue a change in the law. If not achieved by the plaintiffs in *Alexander,* this new path for Title IX very likely may have been charted by different plaintiffs elsewhere. A careful examination of both the micro and macro social context reveals at least two themes that might aid future policy makers, administrators, and lawyers in anticipating the novel application of education law or policy.

The first theme that emerges from both contexts is the prevalence of the problem at issue. The signal of imminent change was not merely that a social problem existed. Rather, there was a well-known, pervasive problem that systematically and consistently impacted one particular faction of the community. On campus at Yale, administrators knew from the outset that both its campus culture and infrastructure were not adequately prepared to host women safely on campus.[164] When they arrived, women predictably endured discrimination and abuse at disproportionate rates, just as women in the workforce did nationally. While many likely tolerated the

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161 *Id*; New Mexico in Focus, *supra* note 158. *See* Enid Nemy, *Women Begin to Speak Out against Sexual Garassment at Work*, N.Y. Times (Aug. 19, 1975), https://www.nytimes.com/1975/08/19/archives/women-begin-to-speak-out-against-sexual-harassment-at-work.html?smid=url-share.

162 *Id*.

163 Murolo et al., *supra* note 151.

164 *See supra* Part III.A.

transgressions quietly, enough of the women made their experiences publicly known through such a variety of fora that leaders—both on the Yale campus and in workplaces nationwide—could not reasonably plead ignorance.

The second theme to emerge is the *de jure* absence of an established legal remedy to address the known problem. The law as written offered no clear remedy for aggrieved persons. For women enduring sexual harassment in the workplace, Title VII's prohibition against discrimination on the basis of sex was not an unequivocal mechanism for addressing these harmful acts. It was not until 1986 that the Supreme Court settled the matter by formally interpreting Title VII to preclude sexual harassment.[165] The women studying at Yale were even further removed from a clear legal remedy. Prior to the enactment of Title IX, there was no clear prohibition against sex discrimination in private education under federal law. After Title IX was enacted, it faced the same question of construction as Title VII. Even if the scope of the prohibition was presumed to reach acts of sexual harassment, Title IX failed to offer the victims any clear recourse. The statute threatened the revocation of federal funds from the offending institution but offered no actual path for making the aggrieved person whole. As a result, there was little incentive for employers or education institutions to adopt grievance procedures that would allow victims of sexual harassment to seek recourse internally.

In the face of this *de jure* absence of legal remedy—in both internal corporate policies and externally in the civil justice system—creative and determined plaintiffs and legal advocates will begin to search for any legal tool that might get the job done. Doing so might require the stakeholders to push for alternative interpretations of the law to find redress for injustice. In the *Alexander* case, it meant clinging to a law that had previously been used to address disproportional opportunities for women in admission, athletics, and employment, and redirecting it to combat individual acts of sexual misconduct.

The plaintiffs in *Alexander v. Yale* had just such a creative and determined advocate in Catharine MacKinnon. Though she was still a law student and Ph.D. candidate at the time that the lawsuit was filed, MacKinnon was emerging as a feminist scholar and activist of national importance. She was already constructing the manuscript of her seminal work, *Sexual Harassment of Working Women*, and had already penned an op-ed in the *Yale Daily News* on sexual harassment in the workplace.[166] She is credited as the architect of the application of Title IX to sexual harassment in *Alexander v. Yale*, and portions of her early manuscripts for *Sexual Harassment of Working Women* were used by counsel of record in their advocacy for the theory throughout the litigation.[167] In assessing the lawsuit's difficult prospects prior to filing, attorney Anne Simon shared of MacKinnon,

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165 Meritor Savs. Bank v. Vinson, 477 U.S. 57 (1986).

166 Catharine A. MacKinnon, Sexual harassment of working women, (1979); Catharine MacKinnon, *Ending a Pernicious Folklore*, Yale Daily News (Feb. 15, 1977), https://ydnhistorical.library.yale.edu/?a=d&d=YDN19770215-01.2.6&srpos=1&e=-------en-20--1--txt-txIN-Ending+a+Pernicious+Folklore------ .

167 Simon *supra* note 23.

> An opposing pitcher once said of Wade Boggs, the third baseman and brilliant hitter for the Boston Red Sox and later the New York Yankees, 'When you have two strikes on him, he's got you exactly where he wants you.' This is also an apt description of the Catharine MacKinnon approach to legal problems. There we were, with no cause of action and no right to sue, and Kitty was convinced we were going to win.[168]

But if the *Alexander* plaintiffs had not been fueled by MacKinnon's willpower and creativity, it is likely that the national movement underway at that time would have surfaced different plaintiffs and advocates to push Title IX—or some other foothold in the law—forward. Sooner or later, institutional leaders would have been required to reconcile the problem that was known to them from the outset. But what is unclear is whether those other advocates would have bent and shaped the law in a way that led to substantially different long-term outcomes. MacKinnon's strategy set a trajectory for Title IX that eventually called on institutions to tackle the monumental task of building robust systems to adjudicate cases of sexual violence between students. This outcome, in turn, ultimately led to the reexamination of due process rights for students accused of misconduct.[169] It is worth wondering if this chain of events might have ever unfolded if the institutional leaders had implemented the simple grievance procedure called for by the *Alexander* plaintiffs prior to resorting to litigation or if some other clear legal remedy had been drafted into the law from the very beginning.

V. CONCLUSION

This examination of the social circumstances undergirding *Alexander v. Yale* offers an opportunity for institutional leaders and educational policy makers to engage in two different policy exercises. First, they can take stock of the current social context surrounding known social problems within their own institutions. They can assess whether the constituents that bear the greatest burden from that problem feel that there is a solution underway. In doing so, they can assess whether there is a clear path for recourse or if the aggrieved will be forced to chart their own course in seeking remedy. Second, institutional leaders and policy makers can measure known problems on campus against the scale to which they exist beyond the campus gates. They might consider whether and how the macro social context for the problem at issue could influence the remedies sought by local constituents.

While these considerations fall far short of comprising a formula for the perfect decision-making process, introducing them into the problem-solving calculus might allow leaders to avoid the need for constituents to bend extant laws and policies in unanticipated ways in order to overcome the absence of a clear remedy.

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168 *Id.* at 53.

169 *See* Doe v. Baum et al., 903 F.3d 575 (6th Cir. 2018); Haidak v. Univ. of Massachusetts-Amherst, 933 F.3d 56 (1st Cir. 2019).

GAME OF LOANS: A COMPARATIVE ANALYSIS OF THE HIGHER EDUCATION ACT OF 1965 AND THE HEROES ACT AS FOUNDATIONS FOR BROAD STUDENT LOAN FORGIVENESS

*RYLIE PENNELL**

Abstract

In Biden v. Nebraska, the United States Supreme Court struck down the first iteration of President Biden's student loan forgiveness initiative, which used the Higher Education Relief Opportunities for Students Act (HEROES Act) as the basis for emergency student-loan debt cancellation. In the wake of this judicial upset, the Biden administration continues to propose new student loan forgiveness initiatives. But the Court's controversial decision has left many observers wondering: Why did Biden's original forgiveness plan fail? And what could the Biden administration have done differently to survive the Court's scrutiny? This Article seeks to answer these weighty questions, outlining the legal arguments around Biden's original forgiveness plan and explaining how the Higher Education Act of 1965 provides a better, constitutionally permissible vehicle for sweeping student loan forgiveness.

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INTRODUCTION

For nearly a century, the United States has helped fund student higher education through federal loans and financing. Since the 1950s, the federal government has funded college and postsecondary education with the alleged intention of making higher education more accessible.[1] However, far from accomplishing this goal, student loan debt in the United States has skyrocketed to a total of $1.757 trillion.[2] Now, over 43 million borrowers agonize over increasing tuition costs, interest rates, and seemingly unsustainable payment plans. According to one 2021 report, the average borrower takes twenty years to pay off their student loan balance.[3]

Of late, the coronavirus pandemic has added to these pressures. Approximately 9.6 million Americans lost their jobs during the pandemic, posing new and unexplored challenges to the national and state economies.[4] These challenges called for government intervention. In March 2020, the pandemic incentivized Congress to pass the Coronavirus Aid Relief and Economic Securities Act, allotting $2.2 trillion to relieve Americans of economic hardships brought on by the pandemic.[5] Federal agencies played an integral role in navigating this national crisis; perhaps most notably, the Department of Education (ED) paused student loan repayments and temporarily zeroed interest rates.[6] Both the Trump and Biden administrations extended this pause past its original expiration date, relying on the Higher Education Relief Opportunities for Students Act (HEROES Act).[7] This 2001 legislation, passed after the events of 9/11, enables the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs … as the Secretary deems necessary in connection with a … national emergency "[8]

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1 Pamela Ebert Flattau et Al., *The National Defense Education Act of 1958: Selected Outcomes*, inst. def. AnALyses sci. & tecH. PoL'y inst. 1, 2 (Mar. 2006), https://www.ida.org/-/media/feature/publications/t/th/the-national-defense-education-act-of-1958-selected-outcomes/d-3306.ashx.

2 *Consumer Credit*, Bd. governors fed. res. sys., https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html (last updated Mar. 7, 2024).

3 Melanie Hanson, *Average Time to Repay Student Loans*, educ. dAtA initiAtive, https://educationdata.org/average-time-to-repay-student-loans (last updated Sept. 25, 2023).

4 Jesse Bennett, *Fewer Jobs Have Been Lost in the EU Than in the U.S. During the COVID-19 Downturn*, Pew rscH. ctr. (Apr. 15, 2021), https://www.pewresearch.org/fact-tank/2021/04/15/fewer-jobs-have-been-lost-in-the-eu-than-in-the-u-s-during-the-covid-19-downturn/.

5 Pub. L. No. 116-136, 134 Stat. 281 (2020).

6 fed. student Aid, u.s. deP't educ., *COVID-19 Loan Payment Pause and 0% Interest*, https://studentaid.gov/announcements-events/covid-19/payment-pause-zero-interest (last visited Mar. 21, 2024).

7 Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (codified at 20 U.S.C. §§ 1098aa–1098ee); Brief for the Petitioners, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535), 2022 WL 11728905 [hereinafter Brief for Petitioners]; Amy Howe, *In a Pair of Challenges to Student-Debt Relief, Big Questions About Agency Authority and the Right to Sue*, scotusblog, (Feb. 13, 2023, 6:50 PM), https://www.scotusblog.com/2023/02/in-a-pair-of-challenges-to-student-debt-relief-big-questions-about-agency-authority-and-the-right-to-sue/.

8 20 U.S.C. § 1098bb(a)(1).

As the country approached the end of the coronavirus state of emergency, President Biden declared that the ED would end the student loan repayment pause and replace it with a nationwide student-debt relief program, granting nearly 40 million qualifying Americans up to $20,000 in student loan forgiveness.[9] Under this framework, the ED would cancel up to $20,000 in loans for Pell Grant recipients who have loans with the ED and "up to $10,000 in debt relief to non-Pell Grant recipients."[10] In order to be eligible for this relief, borrowers needed to have an individual income less than $125,000 (or $150,000 for married couples).[11]

Almost immediately after Biden announced this plan, however, six Republican states—Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina—filed suit, arguing that Biden overstepped his legal authority.[12] Challengers to the program insisted that the Secretary of Education's actions have no legal basis in the HEROES Act, while the Biden administration maintained that its actions fell within the plain reading of the Act, specifically the clause endowing the Secretary of Education with the power to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Higher Education Act or HEA]."[13]

Ultimately, the Supreme Court of the United States reviewed the states' challenge, and on June 30, 2023, ruled in the states' favor in *Biden v. Nebraska*.[14] The Supreme Court held that "the HEROES Act provides no authorization for the Secretary's plan when examined using the ordinary tools of statutory interpretation. …"[15] However, the Supreme Court's decision did not entirely extinguish the Biden administration's efforts.

On the same day that Chief Justice Roberts delivered the Court's seemingly damning decision, President Biden announced a new student loan forgiveness plan.[16] Specifically, Secretary of Education Miguel Cardona "initiated a rulemaking

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9 Statements and Releases, the White House, *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most* (Aug. 24, 2022),

https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

10 *Id.*; fed. Student Aid, u.s. dep't educ., *The Biden-Harris Administration's Student Debt Relief Plan Explained*, https://studentaid.gov/debt-relief-announcement (last visited Mar. 21, 2024).

11 Statements and Releases, the White House, *supra* note 9.

12 Annie Nova, *What to Know About the Two Student Loan Forgiveness Cases the Supreme Court Will Hear Legal Arguments on in February*, cnBc, https://www.cnbc.com/2022/12/23/what-to-know-about-the-legal-challenges-over-student-loan forgiveness.html#:~:text=On%20Sept.,was%20vastly%20overstepping%20his%20authority (last updated Dec. 23, 2022, 1:45 PM).

13 20 U.S.C. § 1098aa(b)(1).

14 143 S. Ct. 2355, 2376 (2023).

15 *Id.* at 2375.

16 Statements and Releases, the White House, *FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers* (June 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/30/fact-sheet-president-biden-announces-new-actions-to-provide-debt-relief-and-support-for-student-loan-borrowers/ [hereinafter *New Debt Relief for Student Loan Borrowers*].

process aimed at opening an alternative path to debt relief … using the Secretary's authority under the Higher Education Act."[17] This article will outline Petitioners' and Respondents' arguments in *Biden v. Nebraska*, analyze the Court's final decision, and ultimately explain how the Higher Education Act of 1965[18] is the better statutory vehicle for broad student loan cancellation.

First, we begin by looking at the legislative history and intent of the HEROES Act.

I ..THE HEROES ACT OF 2003

A. Legislative History and Intent

There are few events that so devastated the American people than the terrorist attacks of September 11, 2001. Domestic soil had not been attacked since the bombing of Pearl Harbor, and the plane crashes of 9/11 left 2977 people dead.[19] As the Bush administration worked on formulating emergency security measures, higher education leaders advocated for financial relief for military personnel affected by 9/11. A few months after 9/11, these advocacy efforts manifested in the Higher Education Relief Opportunities for Students Act (HEROES Act).[20] Congress modeled this legislation after the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, which similarly enabled the Secretary of Education to "waive or modify" student-loan programs to assist "the men and women serving on active duty in connection with Operation Desert Storm. "[21]

When debating the HEROES Act on the House floor in December of 2001, the House of Representatives articulated their basis for supporting the bill, focusing on the terrorist attacks that occurred just three months earlier.[22] One representative, California Republican Howard McKeon, rose in support of the bill, proclaiming that it was crucial "to ensure that the Secretary of Education has the ability to address the needs of students, their families, institutions of higher education, and loan providers as they relate to the events of September 11."[23] Echoing Representative McKeon's sentiments, California Republican George Miller emphasized that "[t] his act [would] give the Secretary of Education the authority to adjust the laws governing student aid programs, if necessary, in response to the September 11 attacks. …"[24] The very next month, President George W. Bush signed the bill into law, with the stated purpose being to "provide the Secretary of Education with

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17 *Id.*

18 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat 1219.

19 *How 9/11 Reshaped Foreign Policy*, Council foreign rels., https://www.cfr.org/timeline/how-911-reshaped-foreign-policy (last visited Mar. 21, 2024).

20 Pub. L. No. 107-122, 115 Stat. 2386 (2002).

21 Pub. L. No. 102-25, 105 Stat. 75; *Biden v. Nebraska*, 143 S. Ct. at 2391 (Kagan, J., dissenting).

22 147 Cong. Rec. H10891 (Dec. 19, 2001).

23 *Id.*

24 *Id.*

specific waiver authority to respond to conditions in the national emergency declared by the President on September 14, 2001."[25] The Act was set to expire a year later, but in 2003, Congress extended the Act for two more years and expanded its applicability to borrowers affected by "war or other military operation or national emergency."[26] In 2007, Congress made the Act permanent.[27]

Ultimately, the 2003 version of the Act built upon its 2001 predecessor, endowing the Secretary of Education with additional authority in cases of national emergency.[28] In fact, one could argue that the 2003 legislation more accurately reflected Congress's original intent, as even the original 2001 legislation was promulgated with the expectation that the Secretary would need to intervene in future events.[29] Just one month after the 9/11 attacks, U.S. House Representative John Boehner stated that, while the HEROES Act of 2001 "addresses the issue arising from [the 9/11 attacks], [it] also allows the Secretary to address needs arising from incidents *that may occur in the future*."[30] Representative Boehner thus foreshadowed the 2003 amendments and later applications of the Act.

B. Text of the HEROES Act

The HEROES Act provides, in relevant part,

> Notwithstanding any other provision of law … the Secretary of Education … may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [HEA] as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2).[31]

Paragraph (2) of this section details the scope of the Secretary's authority under paragraph (1), explaining that the Secretary's waiver/modification powers are limited to situations where invoking such power is "necessary to ensure" one of five public policy objectives.[32] The first of these policy objectives, and the one most relevant to this discussion, is "to ensure that … recipients of student financial assistance under title IV of the [HEA] who are *affected individuals* are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals."[33]

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25 Pub. L. No. 107-122, 115 Stat. 2386, 2386 (2002) (amended 2003).

26 Pub. L. No. 108-76, 117 Stat. 904 (2003).

27 Pub. L. No. 110-93, 121 Stat. 999 (2007) (codified as amended 20 U.S.C. §§ 1098aa–1098ee).

28 147 Cong. Rec. H7133 (Oct. 23, 2001).

29 *Id.*

30 *Id*. (emphasis added).

31 20 U.S.C. § 1098bb(a)(1).

32 *Id.* § 1098bb(a)(2)(A–E)

33 *Id.* § 1098bb(a)(2)(A) (emphasis added).

Importantly, unlike its 2001 predecessor, the 2003 HEROES Act does not limit the definition of "affected individuals" to those affected by the events of 9/11.[34] As defined by the current legislation, "affected individuals" are those who "reside[] or [are] employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a *national emergency*," and/or those who "suffered direct economic hardship as a direct result of a war or other military operation or *national emergency*, as determined by the Secretary."[35] A "national emergency" is a "national emergency declared by President of the United States."[36]

In essence, section 1098bb(a)(1), can be broken down into three clauses: the "notwithstanding" clause, the central operating clause, and the discretionary clause.[37] Looking at each of these clauses independently, the first clause in the provision is the "notwithstanding" clause ("Notwithstanding … section. …"), which exempts the Secretary from other statutory limitations.[38] This clause makes clear that the Secretary's waiver and modification authority is not limited by *any other statutory provision*.[39] As the Supreme Court itself has noted, the "use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."[40] Thus, unless a statutory provision is enacted with specific reference to section 1098bb, the Secretary can exercise their own discretion.[41]

In fact, the third, or "discretionary clause," states that the Secretary may invoke their authority as they "deem[] necessary in connection with a … national emergency."[42] In the instant case, the "national emergency" refers to the COVID-19 pandemic.

But what provisions is the Secretary permitted to waive or modify? The central operating clause provides that the Secretary's waiver and modification authority applies to "statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV [of the HEA]."[43] Title IV of the HEA governs student lending programs, including the Federal Direct Loan Program,[44] Federal

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34 20 U.S.C. § 1098; Memorandum from Christopher H. Schroeder, Assistant Att'y Gen., to the Gen. Couns. Dep't Educ. (Aug. 23, 2022) (on file with U.S. Dep't Just. webpage), https://www.justice.gov/d9/2022-11/2022-08-23-heroes-act.pdf [hereinafter Schroeder Memo].

35 20 U.S.C. §1098ee(2)(c)–(d) (emphasis added).

36 *Id.* §1098ee(4).

37 20 U.S.C. §1098bb(a)(1); Schroeder Memo, *supra* note 34, at 9.

38 20 U.S.C. §1098bb(a)(1); Schroeder Memo, *supra* note 34, at 9.

39 20 U.S.C. § 1098bb(a)(1); Schroeder Memo, *supra* note 34, at 9.

40 Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993); Schroeder Memo *supra* note 34, at 12; Brief for Petitioners, *supra* note 7, at 40.

41 20 U.S.C. § 1098bb(a)(1).

42 *Id.*

43 *Id.*

44 *Id.* §§ 1087a–1087j.

Family Education Loan (FFEL) Program,[45] and the Federal Perkins Loan Program.[46] These provisions dictate the terms and conditions of federal lending programs, the interest rates on loan balances, and the cancellation of loans for teachers and public service employees.[47] Thus, the HEROES Act authorizes the Secretary of Education to "waive or modify" any of these student-lending provisions.[48]

Once the Secretary of Education has invoked this authority under section 1098bb, they must then comply with two procedural requirements.[49] First, they must publish the waiver or modifications in the *Federal Register*, "includ[ing] the terms and conditions to be applied in lieu of such statutory and regulatory provisions";[50] second, they must report the impacts of their action to the House of Representatives' Committee on Education and the Workforce and the Senate's Committee on Health, Education, Labor and Pensions of the Senate.[51] Those are the extent of the Secretary's procedural obligations. The Secretary is not required to comport with ordinary rulemaking procedures, and they need not exercise their waiver/modification authority on a case-by-case basis.[52] In theory, this enables the Secretary to make quick decisions without fear of public disapproval or political chess games.

C. Prior Applications of the HEROES Act

Since the enactment of the HEROES Act in 2003, the Secretary of Education has invoked the Act's waiver and modification authority dozens of times.[53] First, in December of 2003, the Secretary published over a dozen waivers and modifications relating to procedural requirements under the HEA.[54] These waivers and modifications included changes to public service work requirements for loan cancellation, extensions on forbearance periods of Perkins loans, and changes to requirements for loan deferments.[55] In 2012, the Secretary made additional adjustments, leaving most of the 2003 alterations untouched, but waiving "annual

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45 *Id.* §§ 1071–1078-2; Congress discontinued the FFEL program in 2010, but—like the Perkins Loan Program—borrowers must still pay off their outstanding balances. Kat Tretina & Brianna McGurran, *What Are FFLELP Loans?*, Forbes Advisor, https://www.forbes.com/advisor/student-loans/what-are-ffelp-loans/ (last updated June 4, 2021, 12:19 PM).

46 20 U.S.C. §§ 1087aa–1087ii.

47 *Id.* §§ 1098bb(a)(1), 1071–1078-2, 1087a–1087j, 1087aa–1087ii.

48 *Id.* § 1098bb(a)(1).

49 *Id.* §1098bb(b)(1)–(2), (c).

50 *Id.* §1098bb(b)(1)–(2).

51 *Id.* §1098bb(c).

52 *Id.* §1098bb(b)(3).

53 Brief for Petitioners., *supra* note 7, at 7–8.

54 Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Direct Loan Program, Federal Family Education Loan Program, and the Federal Pell Grant Program), 68 Fed. Reg. 69, 312–18 (Dec. 12, 2003) [hereinafter Federal Student Aid Programs]; Brief for Petitioners., *supra* note 7, at 7.

55 Federal Student Aid Programs, *supra* note 54.

reevaluation requirements for borrowers" repaying loans under different repayment plans.[56]

More recently, in 2020, Secretary of Education Betsy DeVos invoked the HEROES Act in response to the coronavirus pandemic.[57] President Donald Trump declared the pandemic a national emergency on March 20, 2020,[58] and one week later, Secretary DeVos announced a student loan relief plan.[59] Under this regime, the U.S. ED zeroed federal student loan interest rates for a minimum of sixty days, enabled borrowers to suspend payments for two months, and authorized automatic suspended payments for certain defaulted borrowers.[60] Seven days later, Congress passed the Coronavirus Aid Relief and Economic Securities Act, which directed the Secretary to extend the suspensions through September 30, 2020.[61] A month before this extension was set to expire, President Trump issued a memorandum directing the Secretary to implement the "waivers and modifications" necessary to continue the student loan repayment pause and zeroed interest rates.[62] This memorandum extended the interest rate and repayment relief through December 13, 2020,[63] and when this relief was set to expire, Secretary DeVos turned again to the HEROES Act.[64] In early December, soon before the pause was set to lapse, Secretary DeVos issued a number of alleged "waivers "and "modifications" under the HEROES Act and extended the student loan repayment pause and interest rate through the end of Trump's presidency.[65] In all these invocations, the "waived" or "modified" provisions were wholly procedural—that is, they dealt with application

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56 Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and the Federal Direct Loan Program), 77 Fed. Reg. 59311, 59317(Sept. 17, 2012); Schroeder Memo, *supra* note 34, at 1.

57 Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, William D. Ford Federal Direct Loan Program, and Federal-Work Study Programs), 85 Fed. Reg. 79856 (Dec. 11, 2020) [hereinafter DeVos HEROES Invocation]; Brief for Petitioners, *supra* note 7, at 8.

58 Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 13, 2020).

59 U.S. Dep't Educ., Breaking News: Testing Waivers and Student Loan Forgiveness (Mar. 20, 2020), https://www2d.gov/news/newsletters/edreview/2020/0320.html (webpage deactivated); Biden v. Nebraska, 143 S. Ct. 2355, 2364 (2023). .

60 DeVos HEROES Invocation, *supra* note 57.

61 Pub. L. No. 116-136, 134 Stat. 281 (2020).

62 Memorandum from Former President of the U.S. Donald J. Trump to the Sec'y Educ., 49585 (Aug. 8, 2020) (on file with the White House Archives) [hereinafter Trump Memo to Sec'y]; *Biden v. Nebraska*, 143 S. Ct. at 2364.

63 Trump Memo to Sec'y, *supra* note 62.

64 DeVos HEROES Invocation, *supra* note 57.

65 Press Office, U.S. Dep't Educ., *Secretary DeVos Extends Student Loan Forbearance Period Through January 31, 2021, in Response to COVID-19 National Emergency* (Dec. 4, 2020), http://web.archive.org/web/20201231233506/https://www.ed.gov/news/press-releases/secretary-devos-extends-student-loan-forbearance-period-through-january-31-2021-response-covid-19-national-emergency; Diccon Hyatt, *Timeline: How Student Loan Forgiveness Reached Its Turning Point*, InvestoPediA, https://www.investopedia.com/student-debt-timeline-7112128#:~:text=Aug.,31%2C%202022 (last updated Feb. 23, 2023) (providing an insightful outline of the student loan relief initiatives from April of 2019 through February of 2023).

processes, fiscal calendars, repayment timelines, and administrative procedures. At most, they extended the eligibility of borrower defenses to repayment, which by extension, affected the borrower's principal loan amount.

Hence, the Biden administration's use of the HEROES Act to achieve mass student loan cancellation was the first attempt of its kind.

D. The HEROES Act in Biden v. Nebraska

The controversy in *Biden v. Nebraska* centered around Secretary Cardona's 2022 publication in the *Federal Register*, in which he claimed to "modify" two statutory provisions and three federal regulations.[66] First, Cardona "modified" 20 U.S.C. section1087(a) and (e), which deal with the "program authority" and "terms and conditions of loans" under the Federal Direct Loan Program.[67] Next, he claimed to "modify" 20 U.S.C. section 1087(dd)(g), which governs the "terms of loans" under the Perkins Loan Program.[68] Looking next to the Code of Federal Regulations, Secretary Cardona "modified" the following regulations: 34 C.F.R. section 682.402, which deals (in part) with disability, unpaid refunds, and bankruptcy payments; 34 C.F.R. section 682.212, which governs the discharge of loan obligations; and 34 C.F.R. part 674, subpart D, which specifically prescribes student loan cancellation procedures.[69]

On appeal, the Supreme Court was asked to consider whether the HEROES Act enables the Secretary of Education to forgive nearly $430 billion of federal student loan balances. President Biden and the Department of Education (Petitioners) argued "yes."

1. Arguments Regarding the Plain Text of the HEROES Act

In their arguments to the Court, President Biden and the ED asserted that Secretary Cardona's actions comported with the plain language of the HEROES Act.[70] Specifically, Petitioners argued that (1) the COVID-19 pandemic was a "national emergency" declared by the President of the United States[71]; (2) most borrowers eligible for student loan relief were "affected individuals"[72] because they "reside[d]" or were "employed"[73] in a declared disaster area; (3) even the few individuals who did not

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66 Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512 (Oct. 12, 2022) ("modifying provisions of: 20 U.S.C. § 1087, which applies to the Direct Loan Program under 20 U.S.C. §§ 1087a & 1087e; 20 U.S.C. § 1087dd(g); and 34 C.F.R. pt. 674, subpart D, and 34 C.F.R. §§ 682.402 & 685.212… .") [hereinafter Cardona HEROES Invocation].

67 *Id.*

68 *Id.*

69 *Id.*

70 Brief for Petitioners, *supra* note 7, at 34–37.

71 Brief for Petitioners, *supra* note 7, at 34 (quoting 20 U.S.C. § 1098bb(a)(1)).

72 Brief for Petitioners, *supra* note 7, at 35 (quoting 20 U.S.C. § 1098ee(2)).

73 Brief for Petitioners, *supra* note 7, at 34 (quoting 20 U.S.C. § 1098ee(2)(C)).

reside in a disaster area were "affected individuals"[74] because they suffered "direct economic hardship"[75] as a result of the pandemic, "a national emergency"[76]; (4) and Secretary Cardona's student loan discharge was a permissible "waiver" or "modification"[77] of provisions under title IV of the HEA.

In their brief to the Court, Respondents did not dispute that the pandemic was a "national emergency" within the purview of 20 U.S.C. section 1098ee(4).[78] In fact, Respondents largely ignored the Act's plain text, instead relying on the major-questions doctrine,[79] a point that Petitioners were quick to expose within their own brief.[80] However, as an alternative argument, Respondents asserted that Secretary Cardona's actions did not constitute a "waiver" or a "modification" within the meaning of the Act.[81] To support this argument, Respondents cited the Court's precedent in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, where Justice Scalia stated that the term "modify" indicates only a slight or incremental change.[82] Respondents insisted that the Secretary's forgiveness initiative "'is effectively the introduction of a whole new regime' of loan cancellation,"[83] which "exceed[ed] what the word 'modify' permits."[84]

Respondents further argued that Secretary Cardona's actions were not a "waiver," declaring that "'waiving' a provision refers to an 'agency's discretionary decision to refrain from enforcing an existing statutory requirement.'"[85] In Respondents' view, Secretary Cardona did not dismiss the existing statutory provision; he invented one.[86]

Heeding Respondents' arguments, the first questions the Court asked of the Petitioners in oral arguments was whether the Secretary's conduct constituted a waiver or modification and what the difference was between those defined terms.[87] On behalf of Petitioners, Solicitor General Elizabeth B. Prelogar argued that Secretary Cardona's actions were both a waiver and a modification, as Secretary Cardona

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74 Brief for Petitioners, *supra* note 7, at 35 (quoting 20 U.S.C. § 1098ee(2)).

75 *Id.* (quoting 20 U.S.C. § 1098ee(2)(D)).

76 Brief for Petitioners, *supra* note 7, at 34 (quoting 20 U.S.C. § 1098ee(4)).

77 Brief for Petitioners, *supra* note 7, at 37–39 (quoting 20 U.S.C. § 1098bb(a)(1)).

78 Brief for State of Nebraska, et. al., *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535) [hereinafter Brief for Respondents].

79 *Id.*at 30–36. See Part III.D.2 for major-questions doctrine analysis.

80 Brief for Petitioners., *supra* note 7, at 38 ("Respondents make little effort to square their contrary position with the Act's text.").

81 Brief for Respondents, *supra* note 78, at 45–46.

82 *Id.* (citing MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994)).

83 *Id.* at 46 (quoting *MCI Telecomm. Corp.*, 512 U.S. at 234).

84 *Id.*

85 *Id.* (*Waiver*, Black's Law dictionary (11th ed. 2019).

86 Brief for Respondents *supra* note 78, at 46.

87 Transcript of Oral Argument at 5–6, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535).

waived the title IV provisions of the HEA governing eligibility requirements for discharge and then *modified* those same provisions to include the new student loan forgiveness parameters.[88] Petitioners maintained that the plain reading of "waive or modify" simply indicates that the Secretary may in some way change the relevant provisions.[89] In Petitioners' view, the Act not only allows, but *requires*, the Secretary to then publish in the *Federal Register* the "the terms and conditions to be applied *in lieu* of such statutory and regulatory provisions."[90] Petitioners argued that the phrase "in lieu of" necessarily grants the Secretary authority to *create* new provisions; otherwise, the phrase "in lieu of" would be rendered superfluous.[91]

In their response to Petitioners' argument, Respondents directed the Court's attention back to Justice Scalia's opinion in *MCI Telecommunications Corp.*, reiterating their position that the Secretary's actions reached beyond the meaning of "modify" and that no "waiver" occurred. [92]

Ultimately, the Court agreed with Respondents. While the Court did not provide a true definition for the term "waiver," it noted that—in prior cases, when a provision has been "waived"—it meant that compliance with that provision was no longer necessary.[93] But the Court's vague definition meant little in the grand scheme of its opinion, as the Court held that Secretary Cardona's actions did not constitute a "waiver" anyway.[94] Specifically, the Court spotted that Secretary Cardona's purported "waiver" "identifie[d] no specific legal provision" as actually having been "waived"; it just vaguely referred to the plan as a "waiver."[95] Thus, the Court honed its analysis on whether the Secretary Cardona's actions could reasonably be said to constitute a "modification." On this point, the Court held no.[96]

The Court noted Respondents' argument that, in *MCI Telecommunications Corp*., the Court interpreted the word "modify" to mean only slight or incremental change.[97] The Court held that this precedent is supported by even the plain meaning of the word, noting that Webster's Dictionary defines "modify" as "'to make more

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88 Transcript of Oral Argument at 5–6, Biden v. Nebraska, 143 S. Ct. 2355, 5 (2023) (Nos. 22-506 & 22-535).

89 Brief for Petitioners, *supra* note 7.

90 20 U.S.C. § 1098bb(b)(2); Transcript of Oral Argument at 65, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535).

91 Transcript of Oral Argument at 65, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (Nos. 22-506 & 22-535) "[T]he states have suggested there was something improper about adding the [student loan forgiveness] requirements in, but the HEROES Act directs [the Secretary] to do this. That subsection [1098bb](b)(2) specifically says he has to publish the terms and conditions for the loan program that are going to apply *in lieu* of the waived and modified provision." *Id.*

92 Transcript of Oral Argument at 5–6, Biden v. Nebraska, 143 S. Ct. 2355, 102 (2023) (Nos. 22-506 & 22-535).

93 *Biden v. Nebraska,* 143 S. Ct. at 2370.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 2368–69 (citing MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 234 (1994)).

temperate and less extreme,' 'to limit or restrict the meaning of,' or 'to make minor changes in the form or structure of [or] alter without transforming.'"[98] Writing for the majority, Justice Roberts stated that "[t]he Secretary's plan has 'modified' the cited provisions only in the same sense that the French Revolution modified the status of the French nobility—it has abolished them and supplanted them with a new regime entirely."[99]

The Court acknowledged the Act's requirement that the Secretary publish a notice in the *Federal Register* "includ[ing] the terms and conditions to be applied in lieu of" the original statutory provisions"; but the Court held that this authority was limited to modifications, and that Secretary Cardona's actions went far beyond what the term "modify" allows.[100] The Court held that—in order to be a modification—"no new term or condition reported pursuant to § 1098bb(b)(2) may distort the fundamental nature of the provision it alters,"[101] because the law enables the Secretary to make modifications, not to "draft new substantive statutory provisions at will."[102] With this in mind, the Court concluded that the "the Secretary ha[d] drafted a new section of the [Higher] Education Act from scratch by 'waiving' provisions root and branch and then filling the empty space with new text."[103] In essence, the Court held that Petitioners' reading of the HEROES Act gave the Secretary unlimited power to dismantle any statutory scheme it desired and replace the provision with one more suitable to the Secretary's preferences.[104]

Ultimately, encapsulating the core of the Court's opinion, Chief Justice Roberts wrote,

> In sum, the Secretary's comprehensive debt cancellation plan is not a waiver because it augments and expands existing provisions dramatically. It is not a modification because it constitutes "effectively the introduction of a whole new regime." And it cannot be some combination of the two, because when the Secretary seeks to *add* to the existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to 'modify.' However broad the meaning of "waive or modify" the language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here.[105]

Nonetheless, the Court's reasoning begs the question, how could the Secretary publish the new modifications and waivers "in lieu of" the old, without creating

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98 *Biden v. Nebraska,* 143 S. Ct. at 2368–69 (quoting WeBster's tHird new internAtionAL dictionAry 1952 (2002)).

99 *Biden v. Nebraska,* 143 S. Ct. at 2369 (quoting *MCI Telecom. Corp.,* 512 U.S. at 228) (quotations omitted).

100 *Id.* at 2371 (citing 20 U.S.C. § 1098bb(b)(2)).

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.* at 2372.

105 *Id.* at 2358 (quoting *MCI Telecom. Corp.,* 521 U.S. at 234).

new provisions? Justice Kagan, joined by Justices Jackson and Sotomayor, answered this question in the dissenting opinion, criticizing the majority for relying so intently on the term "modify."[106] Specifically, Justice Kagan argued that one cannot isolate the terms "modify" and "waive" and still capture the meaning of the statute as a whole.[107] She refers to the terms "waive" and "modify" as "twin verbs," a couplet that cannot be read in isolation.[108]

Accepting the majority's definition of "modify," Kagan offered the only definition of "waive" in the Court's opinion: **"**to abandon, renounce, or surrender."[109] Thus, she argued that—in the context of the HEROES Act—"waiver" means to eliminate a regulatory requirement.[110] Reading those terms together, Kagan explained that the HEROES Act authorizes the Secretary to slightly adjust student loan payment obligations, eliminate those obligations in their entirety, or take any action in between, so long as they deem it necessary in response to the national emergency.[111] Summarized in laymen's terms, Justice Kagan argued: "The phrase 'waive or modify' [] says to the Secretary: 'Feel free to get rid of a requirement or, short of that, to alter it to the extent you think appropriate.'"[112]

Justice Kagan concluded that the majority's interpretation subverts the Act's plain meaning, and posed the following question to highlight the alleged absurdity: "Would Congress have given the Secretary power to wholly eliminate a requirement [waive], as well as to relax it just a little bit [modify], but nothing in between?"[113] To Justice Kagan, "the answer is no, because Congress would not have written so insane a law."[114]

Justice Kagan then retorted the majority's interpretation of procedural requirements under section 1098bb(2).[115] Recognizing that the Secretary's modifications would leave gaps in the statutory provisions, Justice Kagan noted that the Secretary *must* then publish the new terms and conditions of the provisions "'in lieu of' the old."[116] She argued that—contrary to the majority's holding—the Secretary's ability to add these terms is not limited to modifications;[117] rather, the plain text of the HEROES Act *requires* the Secretary to supply new terms and conditions *regardless* of whether

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106 *Id.* at 2394. (Kagan, J., dissenting) ("The majority's cardinal error is reading 'modify' as if it were the only word in the statutory delegation.").

107 *Id.* ("[I]n the HEROES Act, the dominant piece of context is that 'modify' does not stand alone. It is one part of a couplet: 'waive or modify.'").

108 *Id.* at 2392.

109 *Id.* (quoting BLack's LAw dictionAry 1894 (11th ed. 2019)).

110 *Biden v. Nebraska*, 143 S. Ct. at 2392 (Kagan, J., dissenting).

111 *Id.* at 2395.

112 *Id.*

113 *Id.* at 2394.

114 *Id.* at 2394–95.

115 *Id.* at 2392–93 (citing 20 U.S.C. § 1098bb(b)(2)).

116 *Id.* at 2393 (Kagan, J., dissenting) (citing 20 U.S.C. § 1098bb(b)(2)).

117 *Id. at* 2395 (Kagan, J., dissenting).

they are waiving or modifying the provision.[118] Thus, by Justice Kagan's analysis, "the Secretary may amend, all the way up to discarding, those provisions and fill the holes that action creates with new terms designed to counteract an emergency's effects on borrowers."[119] To Justice Kagan, Secretary Cardona did what the Act *required* of him—he modified "pre-existing law and, in so doing, applied new 'terms and conditions' 'in lieu of' the old."[120]

2. Arguments on the Major-Questions Doctrine

While Petitioners' arguments relied heavily on the purpose and plain language of the HEROES Act, Respondents built their case around the major-questions doctrine.

For context, in 2022 the Supreme Court rendered its landmark decision in *West Virginia v. Environmental Protection Agency*. [121] In that case, the Environmental Protection Agency (EPA) had imposed limits on power plants' greenhouse gas emissions, citing the Clean Air Act as the basis for its authority.[122] In this highly controverted opinion, the Court held that the EPA overstepped its authority, and Chief Justice Roberts formulated the "major-questions doctrine" as the basis for that holding.[123] Under this new doctrine, if an administrative agency's decision implicates a topic of great political or economic significance, it must point to something more than a plausible textual basis for the action; it must point to *clear congressional authorization*.[124] In *West Virginia v. EPA*, the Court held that the Clean Air Act provided an insufficient basis for the EPA's actions and that the EPA lacked clear congressional authorization for the emissions cap.[125]

In the wake of this decision, the major-questions doctrine became a formidable obstacle to administrative initiatives. Thus, it is unsurprising that the major-questions doctrine became the foundation of Respondents arguments in *Biden v. Nebraska.* In their brief to the Court, Respondents asserted that Biden's student loan forgiveness initiative was a matter of great "economic and political significance" implicating the major-questions doctrine.[126] Noting that the Secretary's actions would erase up to $430 billion in student loan balances, Respondents argued that "[a] half-trillion dollar agency action is no 'everyday exercise of federal power,'" but rather an economic impact requiring clear congressional authority.[127] Respondents also argued that, even without the economic component, the political significance of Biden's plan necessitated a clear statement of authorization from Congress, stating

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118 *Id*. at 2393 (citing 20 U.S.C. § 1098bb(b)(1)).

119 *Id*. at 2393 (Kagan, J., dissenting).

120 *Id*. at 2394 (quoting 20 U.S.C. § 1098bb(b)(2)).

121 597 U.S. 697 (2022).

122 *Id*. at 707–17.

123 *Id*. at 723.

124 *Id*.

125 *Id*. at 732–35.

126 Brief for Respondents, *supra* note 78, at 31 (quoting *West Virginia*, 597 U.S. at 721).

127 *Id*. (quoting NFIB v. OSHA, 142 S. Ct. 661, 666–67 (2022)).

that "student-loan cancellation is a matter of 'earnest and profound debate.'"[128] In their view, the inherent controversy around student-loan forgiveness demanded the heightened standard of the major-questions doctrine and "clear statement" rule.[129] Respondents maintained that the ED's actions extended beyond the agency's expertise; from their standpoint, the ED "is not equipped to balanc[e] the many vital considerations of national policy implicated' by such a forgiveness program.[130] Rather, Respondents insisted that such "balancing is a task for Congress," and a task that Congress could not have intended to delegate to theED.[131]

In rebuttal, Petitioners argued that the case did not implicate the major-questions doctrine at all.[132] While they conceded that Biden's forgiveness plan would have significant economic and political impacts, they asserted that the major-questions doctrine does not extend to government benefit programs.[133] Citing a litany of Supreme Court decisions, Petitioners noted that "[e]very [prior] case in which th[e] Court has invoked the major questions doctrine to invalidate an agency action involved an agency asserting the power to regulate, and not simply the provision of government benefits."[134] In support, Petitioners explained that the major-questions doctrine protects the principles of separation of powers and seeks to incorporate a "'practical understanding of legislative intent";[135] it thus applies to "'assertions of 'expansive regulatory authority'" over significant political and economic activity.[136] Petitioners asserted that broad grants of government welfare do not raise the same "'reasons to hesitate'" as exercises of "regulatory authority" because there is no encroachment on the lives of private citizens.[137]

Petitioners pointed out several other distinctions between Biden's forgiveness plan and previous cases invoking a major-questions analysis.[138] For example, Petitioners argued that—unlike in *West Virginia v. EPA*—the statutory scheme here is not ""vague,' 'cryptic,' 'ancillary,' or 'modest.'";[139] rather, they asserted that the statutory authority is "direct, concrete, and central to the HEROES Act," and that the Secretary's plan was well within the ED's "particular domain."[140]

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128 *Id*. (quoting Gonzales v. Oregon, 546 U.S. 243, 267 (2006)).

129 *Id.*

130 *Id*. at 35 (quoting *West Virginia*, 597 U.S. at 729).

131 *Id.*

132 Brief for Petitioners, *supra* note 7, at 48.

133 *Id.*

134 *Id.* (citing *West Virginia*, 597 U.S. at 721; NFIB v. OSHA, 142 S. Ct. 661, 666 (2022); Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021); Utility Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014); Gonzales v. Oregon, 546 U.S. 243, 266–68 (2006)); Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 465–68 (2001); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-161 (2000)).

135 Brief for Petitioners, *supra* note 7, at 49 (quoting *West Virginia*, 597 U.S. at 723).

136 *Id.* (quoting United States Telecom Ass'n v. FCC, 855 F.3d 381, 421 (D.C. Cir. 2017)).

137 *Id.* (quoting *West Virginia*, 597 U.S. at 721–23).

138 *Id.* at 50.

139 *Id.* (quoting *West Virginia*, 597 U.S. at 721–26).

140 *Id.* at 51 (quoting *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489).

Petitioners further contended that, as opposed to the carbon emissions cap challenged in *West Virginia*, Secretary Cardona's actions were neither "'sweeping'" nor "'transformative'";[141] rather, Petitioners asserted that the relief was tailored to a limited set of circumstances and a defined class of individuals.[142] Ultimately, Petitioners concluded that their case was "far afield from cases like *West Virginia*, where the Court found that the agency action at issue would have required a complete reorganization of American infrastructure,"[143] and implored the Court to hold that the major-questions doctrine did not apply.[144]

However, in anticipation of the Court's concerns, Petitioners offered an alternative argument: even if the major-questions doctrine *did* apply, the HEROES Act's unambiguous text provides "clear congressional authorization" for Secretary Cardona's plan.[145] Referring the Court back to the Act's plain text, Petitioners argued that "Congress's express grant of authority to the Secretary to waive and modify 'any' such Title IV provision cannot plausibly be read to exclude such obvious candidates for debt relief. …"[146] Rebutting Respondents' claim that Congress could not have intended to delegate the economics of student loan forgiveness to the ED, Petitioners argued that Congress has delegated that responsibility on numerous occasions.[147] As examples, Petitioners noted that Congress has authorized the Secretary to discharge Family Education Loans and Perkins Loans in cases of total disability or death[148] and to establish borrower defenses to repayment.[149] In essence, Petitioners summarized that "'there is nothing surprising'" about the Secretary's actions because discharge of student loans is "a quintessential form of debt relief Congress clearly could have contemplated."[150]

However, once again, the Court disagreed. Rejecting Petitioners' arguments, the majority analogized Secretary Cardona's program to the EPA's emissions cap in *West Virginia v. EPA*, holding that it raised comparable questions of economic and political significance.[151] The Court estimated that Biden's plan would "cost taxpayers" between $469 billion and $519 billion, having "ten times the 'economic impact' that [the Court] found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine."[152] Given this comparison, the Court

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141 *Id.* at 50 (quoting *West Virginia*, 597 U.S. at 721–26).

142 *Id.* (citing 20 U.S.C. §§ 1098bb(a)(1)–(22), 1098ee(2), 1098bb(a)(2)(A)).

143 *Id.* (quoting *West Virginia*, 597 U.S. at 714).

144 *Id.* at 53.

145 *Id.*

146 *Id.* at 54 (quoting 20 U.S.C. § 1098bb(a)(1)).

147 *Id.*

148 *Id.* (citing 20 U.S.C. §§ 1087(a), 1087dd(c)(1)(F)(ii)).

149 *Id.* (citing 20 U.S.C. § 1087e(h)).

150 *Id.* (quoting *West Virginia*, 597 U.S. at 729).

151 Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023).

152 *Id.*

held that there could be no "serious dispute" that Secretary Cardona's actions raise questions of economic significance.[153] The Court also rejected Petitioners' argument that government welfare programs do not implicate the major-questions doctrine.[154] Justice Roberts noted that the Court has never exempted government welfare programs from a major-questions analysis because major questions "have arisen from all corners of the administrative state."[155] The Court explained that one of Congress's "most important authorities is its control of the purse" and that it would be illogical to ignore the separation of powers concerns raised by an agency's actions "simply because the Government is providing monetary benefits rather than imposing obligations."[156]

Holding that the major-questions doctrine did apply, the Court quickly moved into the merits of the major-questions analysis. Looking for a clear statement of congressional authorization for Secretary Cardona's actions, the Court found none.[157] Rather, the Court held that the scale of the Secretary's program was unprecedented because "the plan exceeded the Secretary's statutory authority."[158]

In scathing rebuttal, the dissenting Justices lambasted the majority's major-questions analysis.[159] Justice Kagan criticized the majority for evading the Act's plain text and "resort[ing]" to the "so-called major-questions doctrine."[160] As a threshold argument, Kagan rejected the notion that the major-questions doctrine even applied.[161] She rejected the majority's position that this case shared "indicators from [the Court's] previous major questions cases,"[162] adopting Petitioners' view that the HEROES Act was neither "'ancillary'" to the student loan-forgiveness scheme nor outside the ED's "'particular domain.'"[163] The dissent argued that "this delegation was the entire point of the HEROES Act," that "[s]tudent loans are in the Secretary's wheelhouse" and that Congress thought so too when it adopted the law.[164] Ultimately, Justice Kagan argued that the Court's decision made the already anomalous major-questions doctrine that much more arbitrary, citing two main points.

First, Kagan suggested that the majority's reliance on legislative history was self-serving; she pointed out that the suspension of student loan payments and interest accrual throughout the pandemic had an economic impact of over $100 billion and

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153 *Id.*

154 *Id.* at 2375.

155 *Id.* (quotation omitted) (citation omitted).

156 *Id.*

157 *Id.*

158 *Id.* at 2365.

159 *Id.* at 2391.

160 *Id.* (Kagan, J., dissenting)

161 *Id.* at 2398–99.

162 *Id.* at 2374.

163 *Id.* at 2398–99 (quoting West Virginia v. EPA, 597 U.S. 697, 721–26 (2022); Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021)).

164 *Id.* at 2398 (Kagan, J., dissenting).

affected far more borrowers than Biden's forgiveness plan, yet the majority opinion did not address that comparison.[165] Second, Kagan shared Petitioners' view that the forgiveness plan's unparalleled *scale* was only proportional to the pandemic's "unparalleled *scope*."[166] Mirroring Petitioners' language, Justice Kagan explained that the Secretary's actions provided "unprecedented relief for an unprecedented emergency" but did not extend beyond what Congress authorized in the HEROES Act.[167] She argued that the Court's decision highlights an inherent flaw in the Court's "made-up" major-questions doctrine: it allows the Court to arbitrarily "kill significant regulatory action" when ordinary rules of statutory construction cannot sustain the Court's decision.[168] And—worse—Kagan argues, is that the Court's decision now "moves the goalposts" for when that doctrine applies.[169]

But, assuming for the sake of argument that the major-questions doctrine did apply, Kagan argued that the Secretary's actions were still authorized by a clear statement from Congress and that the HEROES Act is a "delegation both purposive and clear."[170] The dissent repudiated the majority's position that Congress could not have authorized the Secretary to implement such a forgiveness program, retorting that the HEROES Act was designed for precisely such action.[171] Justice Kagan noted that the Act was designed to "deal with national emergencies—typically major in scope, often unpredictable in nature."[172] From the dissent's perspective, Congress intended the Secretary to have broad discretion during national emergencies to relieve hardships on student-loan borrowers, and "drafted a statute saying as much."[173]

E. Analyzing the Court's Decision

1. The Plain Language of the HEROES Act

Based on the rules of statutory interpretation, the Supreme Court's analysis should have centered around the plain text of the HEROES Act. The starting point in any statutory interpretation is to look at the statute's plain language, and as the Court itself has noted, it is "a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute."[174] If a statute's plain text is clear, the reviewing court must take the statutory provision at face value and enforce the statute according to its terms.[175]

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165 *Id.* at 2399.

166 Brief for Petitioners, *supra* note 7, at 52; *Biden v. Nebraska,* 143 S. Ct. at 2399 (Kagan, J., dissenting).

167 *Biden v. Nebraska,* 143 S. Ct. at 2399 (Kagan, J., dissenting).

168 *Id.* at 2400 (Kagan, J., dissenting).

169 *Id.* at 2399.

170 *Id.* at 2398.

171 *Id.*

172 *Id.* at 2396.

173 *Id.*

174 Wisconsin Central Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018).

175 King v. Burwell, 576 U.S. 473. 486 (2015).

Simply put, the HEROES Act authorizes the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs. under title IV [of the HEA]."[176] As Justice Kagan succinctly noted in her dissent, "'[a]ny' of the referenced provisions means, well, any of those provisions."[177] Thus, the plain text of the HEROES Act authorizes the Secretary of Education to waive or modify *any* of the statutory or regulatory provisions governing student financial assistance programs, including provisions dealing with discharge of student loan balances.[178] But what is a waiver or modification?

Both the majority and dissent correctly noted that the ordinary meaning of "modify" is "'to make more temperate and less extreme,' 'to limit or restrict the meaning of,' or 'to make minor changes in the form or structure of [or] alter without transforming.'"[179] Likewise, *Black's Law Dictionary* defines "modify" as "[t]o make somewhat different; to make small changes to," or "[t]o make more moderate or less sweeping."[180] Both the laymen and legal definitions of "modify" are consistent with the Court's precedent in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, where the Court interpreted the word "modify" to mean only slight or incremental change.[181]

By contrast, the ordinary meaning of "waive" is to "refrain from insisting upon, … to forbear to claim or demand."[182] *Black's Law Dictionary* similarly defines "waive" as "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily … [t]o refrain from insisting on (a strict rule, formality, etc.); to forgo."[183]

With these definitions in mind, we must read the words "modify" and "waive" together. As Justice Kagan correctly noted, one cannot read the terms in isolation;[184] "language, plain or not, depends on context."[185]

Reading the terms together and substituting their definitions into the statute's text, the statute reads, "[T]he Secretary may *make minor changes to* or *renounce/forgo* any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [HEA] as the Secretary deems necessary in connection with a … national emergency."[186] Thus, Justice Kagan correctly identified that the

176 20 U.S.C. § 1098bb(a)(1).

177 *Biden v. Nebraska*, 143 S. Ct. at 2392 (Kagan, J., dissenting) (quoting 20 U.S.C. § 1098bb(a)(1).

178 20 U.S.C. §§ 1087, 1087dd(g); 34 C.F.R. pt. 674, subpt. D; 34 C.F.R. §§ 682.402, 685.212.

179 *Biden v. Nebraska*, 143 S. Ct. at 2368–69 (quoting WeBster's tHird new internAtionAL dictionAry 1952 (2002)).

180 *Modify*, BLAck's LAw dictionAry (11th ed. 2019).

181 512 U.S. at 234 (1994)).

182 *Waive*, oxford engLisH dictionAry, https://www. oed.com/view/Entry/225159.

183 *Waive*, BLAck's LAw dictionAry (11th ed. 2019).

184 *Biden v. Nebraska,* 143 S. Ct. at 2394 (Kagan, J., dissenting).

185 King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991).

186 20 U.S.C. § 1098bb(a)(1); *Modify*, BLAck's LAw dictionAry (11th ed. 2019); *Waive*, Black's Law Dictionary (11th ed. 2019).

Secretary may "amend, all the way up to discarding" any of the title IV provisions governing student financial assistance programs.[187] The plain text of the HEROES Act overtly authorizes Secretary Cardona to "renounce" or "forgo" any of the student loan discharge requirements.[188] However, the majority opinion raised a legitimate concern about the procedural aspect of Cardona's actions.

When interpreting section 10988bb(1), the majority agreed with Petitioners that the plain text of the HEROES Act permits the Secretary to "waive" certain student lending provisions under the HEA.[189] But the Court noted that the Secretary's publications in the *Federal Register* never purported to waive any specific provision; they just vaguely referred to the Secretary's actions as a waiver.[190] On this point, the majority was correct. The Secretary *referred* to his actions as both a waiver *and* a modification, but the body of the publication only purports to "modif[y]" the student loan discharge provisions.[191]

And if one reads the statutory provisions Secretary Cardona claims to "modify," it is easy to see why the Court rejected Biden's plain language argument. For instance, consider the second statutory provision Cardona claimed to "modify," 20 U.S.C. section 1087(dd)(g). This provision reads,

> If a student borrower who received a loan made under this part on or after January 1, 1986, *is unable to complete the program* in which such student is enrolled *due to the closure of the institution*, *then* the Secretary shall discharge the borrower's liability on the loan (including the interest and collection fees) and shall subsequently pursue any claim available to such borrower against the institution and the institution's affiliates and principals, or settle the loan obligation pursuant to the financial responsibility standards described in section 498(c).[192]

Secretary Cardona's alleged modification reads,

> [T]he Secretary modifies 20 U.S.C. 1087dd(g); and 34 CFR part 674, subpart D, and 34 CFR 682.402 and 685.212 to provide that … the Department will discharge the balance of a borrower's eligible loans up to a maximum of: (a) $20,000 for borrowers who received a Pell Grant and had an Adjusted Gross Income (AGI) below $125,000 for an individual taxpayer or below $250,000 for borrowers filing jointly or as a Head of Household, or as a qualifying widow(er) in either the 2020 or 2021 Federal tax year; or (b) $10,000 for borrowers who did not receive a Pell Grant and had an AGI on a Federal

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187 *Biden v. Nebraska,* 143 S. Ct. at 2393 (Kagan, J., dissenting); 20 U.S.C. § 1098bb(a)(1).

188 *Waive*, Black's Law dictionAry (11th ed. 2019).

189 *Biden v. Nebraska,* 143 S. Ct. at 2370.

190 *Id.*; Cardona HEROES Invocation, *supra* note 66, at 61514.

191 Cardona HEROES Invocation, *supra* note 66, at 61514. ("Pursuant to the HEROES Act, 20 U.S.C. 1098bb(a)(1), the Secretary *modifies* the provisions of: 20 U.S.C. 1087, which applies to the Direct Loan Program under 20 U.S.C. 1087aand 1087e; 20 U.S.C. 1087dd(g); and 34 CFR part 674, subpart D, and 34 CFR 682.402 and 685.212.") *Id.* (emphasis added)

192 20 U.S.C. § 1087(dd)(g) (emphasis added).

> tax return below $125,000 if filed as an individual or below $250,000 if filed as a joint return or as a Head of Household, or as a qualifying widow(er) in either the 2020 or 2021 Federal tax year.[193]

As shown, 20 U.S.C. section 1087(dd)(g) deals *very specifically* with those who are unable to complete their educational program "due to the closure of the institution."[194] It requires an impressive degree of analytical acrobatics to "modify" that provision to include income-based student loan cancellation. The same logic applies to Cardona's modification of 34 C.F.R. section 682.402; this regulation deals (in part) with disability, loan discharge due to death, unpaid refunds, and bankruptcy payments. One cannot reasonably stretch that regulation's meaning to provide student loan cancellation for able-bodied, living, non-bankrupt borrowers.

A similar issue applies to the first statutory provision Cardona claims to modify, 20 U.S.C. section 1087(a). This provision outlines, very generally, the Secretary's ability to disburse and purchase Federal Direct Loans.[195] Again, applying the plain meaning of the term "modify," there is no way to "limit or moderate" this provision to include income-based student loan cancellation. The problem ultimately boils down to the Secretary's overbroad publication in the *Federal Register*. Rather than systematically listing *each provision* he intended to modify and explaining the logical bridge between the old and new provisions, Cardona wrote a single page on debt discharge in which he claimed to *modify* five separate and entirely different provisions.[196]

As a point of reference for how attenuated Secretary Cardona's forgiveness plan was from the provisions he claimed to modify, compare Secretary Cardona's publications in the *Federal Register* to those published by former Secretary Betsy DeVos.

As mentioned earlier, Secretary DeVos also invoked the HEROES Act during the pandemic, "waiving" and "modifying" the title IV provisions governing loan interest rates. Specifically, Secretary DeVos waived 34 C.F.R. sections 682.202 and 682.209, the regulatory provisions governing interest rates on loans and repayment of loan balances.[197] In her publication in the *Federal Register*, the Secretary stated,

> Section 682.209 provides that interest accrues on an FFEL loan during the interval between scheduled payments. On March 13, 2020, the President announced that the interest on all FFEL loans held by the Department and on all Direct Loans would be waived amid the coronavirus outbreak. … On March 20, 2020, the Secretary announced that interest rates for such loans would be set to zero percent (0%) for a period of at least 60 days, during which time borrowers would have the option to suspend their monthly loan payments. …[T]he Secretary is further extending … the waivers of the regulatory provisions in §§ 682.202 and 682.209 that require that interest be

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193 Cardona HEROES Invocation, *supra* note 66, at 61514.

194 20 U.S.C. § 1087(dd)(g).

195 20 U.S.C. § 1087(a).

196 Cardona HEROES Invocation, *supra* note 66, at 61512–14.

197 DeVos HEROES Invocation, *supra* note 57, at 79862 (extending the waivers of 34 C.F.R. §§ 682.202, 682.209 (2022)).

> charged on FFEL loans held by the Department from March 13, 2020, through March 27, 2020, and from October 1, 2020 through December 31, 2020.[198]

After reading 34 C.F.R. sections 682.202 and 682.209,[199] the average reader can see how Secretary DeVos's waiver is logically related to the cited provisions. Secretary DeVos waived the interest rates and repayment schedules, but she did not fundamentally replace the scheme with an unrelated scheme. This fact highlights the Biden administration's shortcomings; if Secretary Cardona had been more strategic in which statutory or regulatory provision he "waived" or "modified," or at least had been more specific in his modifications, his cancellation initiative may have fallen within the HEROES Act's authority.

For example, take Secretary Cardona's alleged modification of 34 C.F.R. part 674, subpart D, which specifically prescribes student loan cancellation procedures.[200] This regulatory provision details the numerous categories of employees that are eligible for federal student loan cancellation. These categories include teachers, nurses, librarians, firefighters, etc.[201] Hypothetically, Secretary Cardona could have "modified" this regulation to include a more inclusive group of professionals. He could have expanded the definition of "teachers" or waived the requirement that librarians have master's degrees, etc. Or, even better, Secretary Cardona could have modified other provisions under the HEA that govern student loan cancellation. For example, consider HEA sections 428J and 428K.[202]

These sections provide student loan forgiveness for teachers and those in "service in areas of national need."[203] Under section 428K, the Secretary of Education shall forgive "the qualified loan amount … of the student loan obligations of a borrower who (A) is employed full-time in an area of national need … and (B) is not in default on a loan for which the borrower seeks forgiveness."[204] This statute defines borrowers in "areas of national need" as early childhood educators, nurses, foreign language specialists, librarians, highly qualified teachers serving students in low-income/non-English proficient/underrepresented communities, child welfare workers, speech-language pathologists and audiologists, public sector employees, nutrition professionals, medical specialists, mental health professionals, dentists, physical therapists, STEM employees, superintendents and principals, and allied health professionals.[205] Again, under the plain reading of

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198 *Id*.

199 It is highly encouraged to read these provisions before looking at Secretary DeVos's waivers and modifications. Secretary DeVos's waivers and modifications serve as a strong example of the authority provided by the "waive" or "modify" authority under the HEROES Act. If Secretary Cardona had used these provisions as a template for the student loan forgiveness, this would have given the initiative a stronger foothold to use the statute's authority for this purpose.

200 Loan Cancellation. 34 C.F.R. pt. 674 (D) (2023).

201 Loan Cancellation. 34 C.F.R. pt. 674 (D) (2023).

202 20 U.S.C. §§ 1078-10, 1078–11.

203 *Id*.

204 20 U.S.C. § 1078-11(a)(1).

205 *Id*. § 1078-11(b).

section 1098 of the HEROES Act, the Secretary of Education could have expanded or "modified" the definition of "areas of national need" to include lawyers, plumbers, food service employees, or any category of worker he thought would be affected by the coronavirus pandemic. This at least would have formed a more logical bridge between the loan cancellation and the "national emergency." The major-questions doctrine notwithstanding, perhaps then Cardona's *modification* would have survived the Supreme Court's scrutiny.

Instead, Secretary Cardona tied the student loan relief to statutory provisions and regulations that were too distantly related to the alleged modifications. Therefore, his actions did not constitute a "modification" under the HEROES Act, but rather a fundamental and illegal change to the student loan program.

But one of the easier ways for Secretary Cardona to have shielded the forgiveness plan from the Court's axe would have been to *waive* the relevant loan provisions. Though the Court found that the plan was too sweeping to constitute a modification under the Act, it may have constituted a waiver. As mentioned earlier, a waiver is the abandonment of a privilege or right, or the decision to "refrain from insisting upon" some rule or obligation."[206] At the end of the day, Secretary Cardona was trying to renounce the ED's claim to borrowers' student loan balances or abandon the ED's claim to that sum. The goal was waiver or *discharge*, which—as Justice Kagan identified in her dissent—is entirely permissible under the Act.[207] However, Secretary Cardona's publication did not actually waive any specific provision; it only claimed to *modify*. That is why the Court struck down Petitioners' textual argument: because the plan was an improper modification *advertised* as a waiver.

Thus, as is often the case, the problem rested not in the theory of Biden's forgiveness plan, but rather in its execution. Whether the Secretary's limited use of the word "modify" was a deliberate omission or a misnomer, this was a fatal oversight. If Secretary Cardona had instead purported to *waive* the discharge provisions, the plan may have had a firmer ground within the Act's plain text.

2. The Amorphous Major-Questions Doctrine

Looking beyond the statute's plain text, the more contentious debate centers around the Court's major-questions analysis. There is no denying that the Supreme Court's articulation of the major-questions doctrine in *West Virginia v. EPA* inflamed passions across the country. While Justice Kagan criticized the majority in *Biden v Nebraska* for relying on the "made-up" major-questions doctrine,[208] the majority made a point to defend the doctrine, arguing that "while the major questions 'label' may be relatively recent, it refers to an identifiable body of law that has developed over a series of significant cases spanning decades."[209] However, to many scholars, the major-questions doctrine was an overt judicial power grab dealing a devastating blow to the administrative state; or, at the very least, it demonstrated a shift away

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206 *Waive*, BLack's Law dictionAry (11th ed. 2019).

207 *Biden v. Nebraska,* 143 S. Ct. at 2392–93 (Kagan, J., dissenting).

208 *Id.* at 2400.

209 *Id.*at 2374 (quotations omitted) (citation omitted).

from the traditional deference afforded to administrative agencies under *Chevron v. National Resource Defense Council*.[210] While some aspects of the Court's actions may be accredited to ideological differences on the role of administrative agencies, one must wonder, does the major-questions doctrine undermine the predictability of the Court's decisions? In other words, should scholars and lawyers worry about arbitrary judicial opinions influenced by political riptides? The Court's major-questions analysis in *Biden v. Nebraska* explains why the answer to those questions is "yes."

As explained above, a case triggers a major-questions analysis when the administrative action is of vast "economic and political significance."[211] Of cours Biden's student loan forgiveness plan met that low threshold—but what administrative action doesn't? The essence of the administrative state, the very purpose for which agencies exist, is to make economically and politically significant decisions that Congress has neither the resources nor expertise to make on its own. As Justice Kagan noted in her dissent, "Congress delegates to agencies often and broadly … for sound reasons. Because Congress knows that if it had to do everything … *necessary* things wouldn't get done."[212]

For better or worse, the major-questions doctrine is the law, so the majority was justified to hold that the major-questions doctrine applied. Biden's forgiveness plan was concededly a question of economic and political significance, and Petitioners' argument that government benefit programs are exempted from a major-questions analysis was a somewhat of a reach. True, benefits programs are *less* problematic than regulatory programs in terms of separation of powers; the government benefit programs do not raise the same level of concerns about agencies usurping legislative power. However, the Court has never recognized an exception for benefits programs, and Justice Robert correctly noted that one of Congress's most important powers is its spending power. But, putting aside this "regulatory versus government-benefits" argument, even if the major questions doctrine objectively did apply, the Court erred in holding that Cardona's actions lacked clear congressional authority.

To support its position that Congress could not have authorized the ED's student loan forgiveness plan, the Court noted that no prior invocations under the HEROES Act had ever allowed for blanket discharge of loan balances.

To the Court's credit, the numerous invocations of the HEROES Act shed light on the scope of its applicability. And the HEROES Act has never been used for

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210 467 U.S. 837 (1984); *See generally* Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021); *See also* NFIB v. OSHA, 142 S. Ct. 661, 667 (2022) ; Rachel Reed, *What Critics Get Wrong—and Right—About the Supreme Court's New 'Major Questions Doctrine'*, Harv. L. today (Apr. 19, 2023), https://hls.harvard.edu/today/what-critics-get-wrong-and-right-about-the-supreme-courts-new-major-questions-doctrine/; Jeevna Smith & Devon Ombres, Loper Bright *and* Relentless*: Ending Judicial Deference to Cement Judicial Activism in the Courts*, ctr. am. progress (Jan. 10, 2024), https://www.americanprogress.org/article/loper-bright-and-relentless-ending-judicial-deference-to-cement-judicial-activism-in-the-courts/#:~:text=Another%20path%20the%20court%20could,doctrine%20rests%20on%20the%20premise.

211 West Virginia v. EPA, 597 U.S. 697, 721 (2022).

212 *Biden v. Nebraska*, 143 S. Ct. at 2397 (Kagan, J., dissenting) (emphasis added).

blanket student loan cancellation. However, as stated by proponents of Biden's forgiveness plan, "even if the direct cancellation of the principal balances of student loans would be a new application of the statute, novelty alone would not itself be a reason to conclude that an agency's exercise of statutory authority is unlawful."[213] On the surface, this assertion holds merit. The fact that no one has attempted broad loan cancellation through the HEROES Act does not itself make the attempt unlawful. As Justice Kagan noted, the Secretary's program was "unprecedented relief for an unprecedented emergency."[214]

At its core, the HEROES Act was intended to serve a simple purpose: to give the Secretary of Education broad authority in times of national crisis. In fact, anticipating the Court's review of *Biden v. Nebraska*, former Representative George Miller voiced his support in favor of the Biden administration, stating,

> We [the House of Representatives] wanted to make sure that federal student-aid recipients who are affected by national emergencies are not placed in a worse position financially in relation to that financial assistance because of the emergency. And we thought the education secretary would be in the best position to determine how best to effectuate that goal. [215]

However, Respondents correctly noted that the Secretary's relief must be that which he deems necessary to ensure "affected individuals" are not left in a worse position because of a national emergency; they argued that the Secretary's plan did not prevent "affected individuals" from being left in a "worse position" because of the pandemic, but "place[d]them in a far better position by eliminating or reducing their loan principal."[216] As a nod to Respondents' point, the majority noted that Secretary Cardona implemented this plan in 2022, as the pandemic was (arguably) winding down.[217] Respondents argued not only that the program was too extensive but that it was too late. However, whether Secretary Cardona acted swiftly enough under the HEROES Act is a question separate and distinct from whether the Act offers clear congressional authorization for student loan forgiveness. Given the statute's plain text and legislative purpose, there is no question that the Act allows for some form of permanent student loan cancellation; the only question is what form that cancellation may take.

But given all the Court's concerns and the challenges raised by Respondents, it is fair to wonder, why did the Biden administration rely on HEROES at all? Surely the ED anticipated the challengers' arguments? The answer to this question can be summarized by Winston Churchill's adage: "Never let a good crisis go to waste."[218]

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213 Schroeder Memo, *supra* note 34, at 18 (citing Bostock v. v. Clayton Cty., 140 S. Ct. 1731, 1750 (2020)).

214 *Biden v. Nebraska,* 143 S. Ct. at 2399 (Kagan, J., dissenting).

215 George Miller, *Can Biden Legally Cancel Student Debt? There's No Question* (Feb. 22, 2023 at 6:45 AM), https://www.washingtonpost.com/opinions/2023/02/22/student-debt-cancellation-congress-heroes-act/.

216 Brief for Respondents, *supra* note 78, at 30–36.

217 *Biden v. Nebraska,* 143 S. Ct. at 2374.

218 *"NeverWasteaGoodCrisis,"* eLgL(Aug.14,2020),https://elgl.org/never-waste-a-good-crisis-how-human-resources-networking-and-training-are-changing-during-these-turbulent-times/.

When President Trump declared the pandemic a national emergency, the HEROES Act presented as a tool for the Biden administration to make good on its campaign promises to mitigate the student debt crisis. Best of all, the HEROES Act allowed the administration to evade traditional notice-and-comment rulemaking procedures and all the partisan stonewalling that comes with it. With that understanding, one cannot fault the administration for such thinking; as any administrative lawyer would say, notice and comment rulemaking is a tedious and time-consuming process. So, in all probability, the Biden administration likely saw the pandemic as an opportunity to evade other traditional and more laborious lawmaking procedures.

Ultimately, the Biden administration did not err in its decision to use the HEROES Act as a *channel* for student loan forgiveness. It did, however, use the Act improperly, and, in doing so, compromised its first student loan forgiveness initiative. Nonetheless, alternative—and potentially better—routes to mass student loan cancellation are available. More specifically, the Biden administration could rely on the Secretary of Education's compromise and modification authority under the Higher Education Act of 1965.

II. THE HIGHER EDUCATION ACT OF 1965

On the same day that Chief Justice Roberts delivered the Court's opinion in *Biden v. Nebraska*, the Biden administration announced a new student loan forgiveness plan, this time relying on the Secretary of Education's authority under the Higher Education Act of 1965.[219] However, scholars and politicians had advocated for student loan cancellation through the HEA even prior to the Court's decision in *Biden v. Nebraska*.[220] After all, the HEROES Act ties itself to the title of the HEA governing financial assistance to students.[221] So, scholars ask, why not rely on the source legislation? To answer this question, we begin with an overview of the HEA's legislative history and purpose.

A. Legislative History and Intent

The Higher Education Act of 1965 was arguably the most formative piece of legislation in higher education law. Prior to the adoption of the HEA, the only civilian federal student aid program was that proposed in President Eisenhower's National Defense Education Act of 1958 (NDEA).[222] The NDEA established the

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219 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat 1219; *New Debt Relief for Student Loan Borrowers*, *supra* note 16.

220 Luke Herrine, *An Administrative Path to Student Loan Forgiveness*democracy initiative (Dec. 2019), https://rooseveltinstitute.org/wp-content/uploads/2021/08/GDI_Administrative-Path-to-Student-Debt-Cancellation_201912.pdf; Letter from Eileen Connor et al., Legal Dir. at Legal Serv. Ctr. for Harv. Law Sch., to Elizabeth Warren, U.S. Senator (Sept. 14, 2020), https://static.politico.com/4c/c4/dfaddbb94fd684ccfa99e34bc080/student-debt-letter-2.pdf.pdf.

221 20 U.S.C. § 1098bb(a)(1).

222 Pub. L. No. 85-864, 72 Stat. 1580; Matthew B. Fuller, *A History of Financial Aid to Students*, 44 J. Student fin. Aid, 42, 51 (2014), https://ir.library.louisville.edu/cgi/viewcontent.cgi?article=1078&context=jsfa.

National Defense Student Loan System, later named the National Direct Loan System, and today known as the Perkins Loan Program.[223] Under this system, the federal government issued payments to the student's university, who then offered loans to the students with repayments beginning upon graduation.[224] For individuals, loans varied from $1000 to $5000 at a fixed interest rate of three percent with a ten-year payment term.[225]

But President Johnson rejected the ideology behind Eisenhower's NDEA lending program and Eisenhower's view that higher education was merely a means to fortifying a national military defense.[226] President Johnson himself had relied on loans throughout his own education and recognized that, to navigate the world, "higher education [was] no longer a luxury, but a necessity."[227] The Johnson administration believed that "the ability to pay for higher education should not be the controlling factor for educational attainment"[228]: hence came the Higher Education Act of 1965.

Seeking to increase the federal government's role in higher education policy making and make higher education more widely accessible, U.S. House Representatives Wayne Morse and Edith Green sponsored the HEA, with the Act's stated purpose being to "strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary education."[229]

One form of assistance manifested in the form of an intermediary loan program called Guaranteed Student Loans (GSL), renamed the Federal Family Education Loan (FFEL) Program in 1992.[230] Before the HEA, students borrowed funds directly from the U.S. Treasury.[231] However, the Johnson administration wanted to protect students from reliance on private lending.[232] Recognizing that many banks would not be willing to participate in a lending program without some guarantee from the government, under the GSL program, the federal government backed, or

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223 Fuller, *supra* note 223, at 51; National Defense Act of 1958, Pub. L. No.85-864, 72 Stat. 1580.

224 Fuller, *supra* note 223, at 51.

225 *Id.*

226 Gerhard Peters & John T. Woolley, *Statement by the President Upon Signing the National Defense Education Act*, Am. Presidency Project, https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-the-national-defense-education-act (last visited Mar. 21, 2024).

227 Angelica Cervantes et al., Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later, tg rscH. & AnALyticAL Servs. 1, 12 (Nov. 2005), https://files.eric.ed.gov/fulltext/ED542500.pdf.

228 Cervantes et al., *supra* note 228, at 18.

229 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat 1219; *Background Brief: Higher Education Act Reauthorization*, nAt'L Ass'n Student Affs. Adm'rs, https://www.naspa.org/policypapers/background-brief-higher-education-act-reauthorization (last visited Mar. 21, 2024). The original statute authorized federal funding for university libraries, community service involvement, teacher training programs, facilities maintenance, and student financial aid programs. Cervantes et al., *supra* note 228, at 19–27.

230 Fuller, *supra* note 223, at 54.

231 *Id.*

232 Cervantes et al., *supra* note 228, at 24.

"guaranteed," loans between students and private lenders.[233] This program helped low-income and middle-class students obtain funding for higher education.[234]

As another part of Johnson's plan to phase out the NDEA's direct lending model, the HEA constructed the National Defense Student Loan Program, or the now Perkins Loan Program.[235] Proposed alongside the GSL program, the National Defense Student Loan Program included full loan forgiveness for students after they taught i n underserved areas for seven years.[236] This program laid the foundation for changes made during the 1972 reauthorization of the HEA.

The 1972 reauthorization made several changes to federal aid administration, loosening student eligibility requirements and establishing new aid programs.[237] Perhaps most notably, this reauthorization created the Basic Educational Opportunity Grant, ultimately renamed the Pell Grant upon the HEA's reauthorization in 1980.[238] Under this program, the federal government issued need-based financial aid to undergraduate students that—unlike the federal loans—did not require repayment.[239] When Congress reauthorized the HEA in 1992, it expanded these aid programs even further, extending unsubsidized loans to students regardless of their financial need, so long as they were at least enrolled half-time at a qualifying college of university.[240] The 1992 amendment also birthed the Free Application for Federal Student Aid (program as a model for income-based repayment.[241]

In sum, the HEA is the central authority for federal student financial aid programs, including Pell Grants, the Federal Direct Loan Program,[242] the FFEL Program,[243] and the Federal Perkins Loan Program.[244]

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233 Fuller, *supra* note 223, at 54; u.s. dep't of edu., federAL Student LoAn ProgrAms dAtA Book fy 1997–fy 2000, https://www2.ed.gov/finaid/prof/resources/data/fslpdata97-01/edlite-intro.html#:~:text=The%20GSL%20program%2C%20renamed%20the,1992%2C%20has%20experienced%20enormous%20growth (last visited Mar. 21, 2024).

234 Fuller, *supra* note 223, at 54.

235 Cervantes, *supra* note 228, at 27.

236 *Id.*

237 Antoinette Flores, *Fact Sheet: A Legislative History of the Federal Government's Reliance on Accreditation*, ctr. Am. Progress (Nov. 27, 2018),

https://www.americanprogress.org/article/fact-sheet-legislative-history-federal-governments-reliance-accreditation/; Prior to the 1972 reauthorization, only students at accredited universities were eligible for aid; now, if a student's university took reasonable steps toward accreditation or could show that the credits were accepted at three other accredited schools, the student could bypass the accreditation requirement altogether. *Id.*

238 *Id.*

239 cAssAndriA dortcH, cong. rscH. serv., r45418, federAL PeLL grAnt ProgrAm of tHe HigHer educAtion Act: Primer (2023).

240 Heidi Rivera, *The Complete History of Student Loans,* BAnkrAte (July 19, 2023), https://www.bankrate.com/loans/student-loans/history-of-student-loans/#repaye.

241 *Id.*

242 20 U.S.C. §§ 1087a–1087j.

243 *Id.* §§ 1071–1078-2.

244 *Id.* §§ 1087aa–1087ii.

B. The Text of the Higher Education Act

As the central authority for federal student aid, the HEA entails eight separate titles, together spanning nearly 1000 pages. However, the building blocks of a true student loan forgiveness plan presents in title IV, the source of the Secretary of Education's compromise authority.

Section 432 of the HEA provides, in relevant part,

> [T]he Secretary may … subject to the specific limitations in this part, consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any note or other instrument evidencing a loan which has been insured by the Secretary under this part … [and] enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption … [These transactions] … shall be final and conclusive upon all accounting and other officers of the Government. [245]

Put briefly, the HEA authorizes the Secretary of Education to compromise/release loans as well as modify loan balances.[246] However, the text of section 432 provides that the Secretary's powers are "subject to the specific limitations in this part";[247] the only statutory constraint on the Secretary's compromise authority is imposed by 20 U.S.C. section 1082(b), which states,

> The Secretary may not enter into any settlement of any claim under [Title IV] that exceeds $1,000,000 *unless* (1) the Secretary requests a review of the proposed settlement of such claim by the Attorney General and (2) the Attorney General responds to such request, which may include, at the Attorney General's discretion, a written opinion related to such proposed settlement.[248]

The following sections of this article will explain the Secretary's authority under the HEA, the interplay between that authority and any statutory or regulatory constraints, and any foreseeable arguments by potential challengers and supporters of a student loan forgiveness scheme.

C. Prior Applications of the Higher Education Act

The HEA has been used as a vehicle for student loan cancellation for decades. In fact, the HEA endowed the Secretary of Education with their "compromise" authority since its initial enactment in 1965.[249] In the years that followed, the Secretary capitalized on this authority to alleviate loan balances. For example, in

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245 *Id.* § 1082(a)(4), (a)(6), (b).

246 *Id.* § 1082(a)(5), (6).

247 *Id.* § 1082(a)(4).

248 20 U.S.C. § 1082(b); Letter from Eileen Connor et Al., *supra* note 221 (emphasis added).

249 Letter from Eileen Connor et Al., *supra* note 221.

1992, Congress proposed a "pilot version" of Income-Contingent Repayment, under which borrowers' monthly loan payments were adjusted proportionally to the borrowers' incomes.[250] Originally, eligibility for these loans was limited to Federal Direct Loan balances, but Congress later expanded the program's applicability to include some FFEL and Parent Plus borrowers.[251] One of the most noteworthy student loan reforms came in 2007, however, with the passage of the College Cost Reduction and Savings Act (CCRA).[252] Signed into law by President Bush, the CCRA amended sections 1087e and 1088 of the Higher Education Act, establishing the Income-Based Repayment (IBR) and the Public Service Loan Forgiveness programs (PSLF).[253] Under the IBR program, the government capped borrowers' monthly payments at either ten or fifteen percent, with remaining balances being forgiven after twenty or twenty-five years, depending on when the borrowers took out their loans.[254]

The PSLF was equally as transformative. Through the PSLF program, the Secretary of Education cancels a borrower's remaining loan balance once he or she has made 120 monthly payments on an eligible Federal Direct Loan, if the borrower works for an eligible public service employer at the time he or she applies for forgiveness.[255] Both the IBR and PSLF programs are examples of how the Secretary of Education has exercised their compromise or modification authority under the HEA to discharge student loan balances.

The Secretary of Education has also exercised her authority under the HEA to "modify" student loans to a balance of zero.[256] In one case, *Carr et al. v. DeVos*, Plaintiffs sued the Secretary of Education, seeking discharge of student loan balances after being allegedly misled by their universities.[257] Plaintiffs Tina Carr and Yvette Colon were students at the Sandford-Brown Institute (SBI) who took out federal student loans to pay for their education; however, SBI allegedly misrepresented the employment opportunities available to students upon graduation, and when the Plaintiffs completed their respective programs, they were shocked to find that their degrees were effectively worthless.[258] When the Plaintiffs defaulted on their loans, they pursued a "borrower defense."[259] Under this defense, when a student relies

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250 David Wessel & Persis Yu, *Income-Driven Repayment of Student Loans: Problems and Options for Addressing Them*, Hutchins Ctr. fiscal & monetary Pol'y 1, 3 (Mar. 2022), https://www.brookings.edu/wp-content/uploads/2022/03/IDR-student-loan-report.pdf.

251 *Id.*

252 Pub. L. No. 110-84, 121 Stat. 784 (2007).

253 Robert Wu, *America's Unforgiving Forgiveness Program: Problems and Solutions for Public Service Loan Forgiveness*, 72 Hastings L.J. 959, 967–78 (2021); College Cost Reduction and Savings Act, Pub. L. No. 110-84, 121 Stat. 784 (2007) (amending 20 U.S.C. §§ 1087e, 1088).

254 Wessel & Yu, *supra* note 254, at 3.

255 *Id.*

256 Carr et al. v. DeVos, 369 F. Supp. 3d 554 (S.D.N.Y. 2019).

257 *Id.*

258 *Id.*

259 *Id.*

on a misrepresentation from his or her higher education institution regarding the institution's accreditation or postgraduation employment rates, the student may seek to be relieved of his or her obligation to pay their debt.[260] Plaintiffs sought a declaratory judgment relieving them of their obligation to pay on the grounds that "(i) the Secretary of Education is immune from suit; (ii) the specific loans that Plaintiffs received do not trigger a private right of action against the Secretary; and (iii) administrative remedies have not been exhausted."[261] Ultimately, Secretary Cardona exercised his authority under the HEA to "modify" Plaintiff Carr's direct loan balances to zero such that she was relieved of her obligation to pay.[262] Thus, the *Carr* dispute provides yet another example of how the Secretary of Education can use their compromise and modification authority under the HEA to effectively discharge student loan balances.

D. Arguments Under the Higher Education Act of 1965

1. The Secretary's Compromise, Release, and Waiver Authority

As mentioned above, higher education policy makers have advocated for the use of the HEA as a basis for student loan cancellation for years now. These advocates have detailed their own analyses of the Secretary's authority under the HEA, arguing that the plain language of the statute enables a broad student loan forgiveness plan.[263] Proponents' plain text analyses hinge on the definitions of "compromise," "release," "waive," and "modify."

As pointed out by one scholar, *Black's Law Dictionary* defines "compromise" as "an agreement between two or more persons to settle matters in dispute between them."[264] *Black's Law Dictionary* similarly defines "release" as "[l]iberation from an obligation, duty, or demand" or "the act of giving up a right or claim to the person against whom it could have been enforced."[265] Thus, the terms "compromise," "release," and "waive,"[266] while not completely interchangeable, all indicate that the Secretary has the discretion to relinquish legal claims to "any right, title, claim, lien, or demand [under the HEA]."[267]

However, as anyone could have predicted, the Biden administration's new student loan forgiveness plan does not go unchallenged. The New Civil Liberties Alliance, which has previously represented challengers to Biden's student loan

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260 *Id.*

261 *Id.*

262 *Id.*

263 Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat 1219; Letter from Eileen Connor et al., *supra* note 221.

264 *Compromise*, Black's Law dictionary (11th ed. 2019); Herrine, *supra* note 221, at 24.

265 *Release*, Black's Law dictionary (11th ed. 2019); Herrine, *supra* note 221, at 24.

266 *See supra* notes 109, 182–83, 207 and accompanying text.

267 20 U.S.C. § 1082(a)(6); "Whereas 'compromise' indicates situations in which a (potential) litigant settles a potential legal claim subject to an agreement with the person(s) against whom she has a claim, 'waive' and 'release' both indicate a unilateral decision to give up a (potential) legal claim, regardless of the reason why." Herrine, *supra* note 221, at 6.

plans, has openly questioned the legal basis of the ED's latest loan forgiveness plan.[268] Other critics have followed suit. So—as stated by one scholar—"the Department of Education's interpretation of the HEA may face the crucible of judicial review, requiring the Department to defend its view that the HEA permits widespread student loan forgiveness."[269]

Challengers to this plan will likely rely on the one statutory constraint imposed by 20 U.S.C. § 1082(b), which states that the Secretary "may not enter into any settlement of any claim under [title IV] that exceeds $1,000,000 unless (1) the Secretary requests a review of the proposed settlement of such claim by the Attorney General and (2) the Attorney General responds to such request."[270] Challengers may argue that this language indicates the Secretary cannot discharge any sum *totaling* an excess of $1,000,000 without the Attorney General's approval. The foreseeable argument is that the Secretary cannot unilaterally offer student loan forgiveness in excess $1,000,000, thus undermining any sweeping loan forgiveness plan.

However, in anticipation of such arguments, proponents argue that the most "natural reading" of the provision governing the Secretary's compromise/release/waiver authority is that the Secretary must consult the Attorney General if he chooses to compromise/release an *individual* debt greater than $1,000,000.[271] Given that the average student borrower in the United States has federal student loan debt of $37,338, proponents argue that section 1082(b) is no obstacle to mass cancellation.[272] Further, even if there are borrowers who owe greater than the $1,000,000 threshold, their debts can still be compromised; the Secretary need only "provide [the Department of Justice] an opportunity to review and comment on any proposed resolution of a claim arising under any Title IV program that exceeds $1 million."[273]

However, proponents also anticipate arguments from challengers regarding 34 C.F.R. section 30.70, a federal regulation explaining how the Secretary may compromise or terminate collection on a debt. Subsection (a)(1) of this regulation provides that "the Secretary uses the standards in the [Federal Claims Collection Standards], 31 CFR part 902, to determine whether compromise of a debt is

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268 Ali Wong & Zachary Schermele, *Biden's Student Loan Forgiveness Talks Are Nearing an End. Here Are a Few Takeaways.*, usA todAy (Feb. 22, 2024), https://www.usatoday.com/story/news/education/2024/02/22/biden-student-loan-forgiveness-plan-meeting-updates/72633121007/#.

269 Colin Mark, *May the Executive Branch Forgive Student Loan Debt Without Further Congressional Action?* 42 nAt'l Ass'n Admin. L. Judiciary 115 (2022), https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1691&context=naalj.

270 20 U.S.C. § 1082(b).

271 Herrine, *supra* note 221, at 7.

272 Melanie Hanson, *Average Student Loan Debt*, educ. dAtA initiAtive, https://educationdata.org/average-student-loan-debt#:~:text=The%20average%20federal%20student%20loan,them%20have%20federal%20loan%20debt (last updated May 22, 2023). Even accounting for medical students, who maintain the highest average student loan balance, the average debt amounts to $200,000, far less than the HEA's $1,000,000 maximum. *Id.*

273 20 U.S.C. § 1082(b); Letter from Eileen Connor et al., *supra* note 221, at 4.

appropriate *if the debt arises under a program administered by the Department, unless compromise of the debt is subject to paragraph (b) of this section*." The Federal Claims Collection Standards (FCCS) issues additional policies and procedures for government debt collection that—if applicable—would hinder a student loan forgiveness plan.[274]

However, paragraph (b) of that same regulation states that "[f]or purposes of this section … a program authorized under the Higher Education Act of 1965 … is a [not] an applicable Department program."[275] Furthermore, paragraph (e)(1) of the same regulation states that "[t]he Secretary may compromise a debt in any amount, or suspend or terminate collection of a debt in any amount, if the debt arises under the Federal Family Education Loan Program … the William D. Ford Federal Direct Loan … or the Perkins Loan Program … of the HEA."[276] Once again, the only limitation is that if the compromise is of a debt which exceeds $1,000,000, the Secretary of Education must submit a request to the Department of Justice.[277]

Thus, proponents will argue that the plain text of 34 C.F.R. section 30.70(c) exempts programs under the HEA and that the FCCS does not constrain the Secretary of Education's authority to compromise, release, or waive loan balances. Furthermore, even if the Secretary of Education *were* constrained by 34 C.F.R. section 30.70(c), the Secretary could repeal or replace the regulation with one which gives the Secretary broader discretion.[278] However, this is an arduous process and one that is likely unnecessary.

The compromise of loan balances under the HEA aligns with how the Secretary has always used their authority under 20 U.S.C. section 1082(a)(5)—– for example, with loan cancellation through the Public Service Loan Forgiveness program.[279] In fact, the Biden–Harris administration recently identified PSLF and IDR plans as potential avenues for student-loan cancellation. In February of 2024, the administration announced it would use the Secretary of Education's authority under the HEA to expand PSLF and IDR eligibility.[280] A month later, President Biden announced another plan awarding over $5.8 billion in student debt forgiveness for public service workers, reducing the number of payments required before borrowers qualify for forgiveness. These new plans implement precisely the types of policies that this article proposes, and given the plain text of the HEA, there is no reason these efforts should be struck down.

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274 Federal Claims Collection Standards, 65 Fed. Reg. 70389 (Dec. 22, 2020).

275 34 C.F.R. § 30.70(b) (2017).

276 *Id*. § 30.70(e)(2).

277 *Id.*

278 Herrine, *supra* note 221, at 5.

279 Christian Paz, *The Supreme Court Just Struck Down Biden's Student Loan Forgiveness Plan. Here's Plan B.*, vox.com (Jun. 30, 2023, 4:46 pm), https://www.vox.com/23762367/student-loan-forgiveness-supreme-court-biden-cancellation.

280 Press Office, U.S. Dep't Educ., *Biden-Harris Administration Approves Additional $5.8 Billion in Student Debt Relief for 78,000 Public Service Workers* (Feb. 21, 2024), https://www.ed.gov/news/press-releases/biden-harris-administration-approves-12-billion-loan-forgiveness-over-150000-save-plan-borrowers.

2. *The Secretary's Authority to Consent to Modification of Loan Balances*

While the Secretary may choose to exercise their authority to compromise, waive, or release a borrower's obligation to pay, they may also "consent to modification … of interest, time of payment of any installment of principal and interest or any portion" of the HEA governed loans.[281] Proponents argue that "[m]odification of existing loans under Title IV programs is outside of" the FCCS, which "address compromise and settlement, but not modification."[282] Thus, the debate around the Secretary's modification powers would boil down to the plain meaning of "modification." At a glance, this would bring the HEROES Act conversation full circle, with courts once again battling over the plain meaning of "modification."

On this point, we would see similar arguments from both supporters and challengers of the plan, arguing over whether the term "modify" connotes small or incremental changes. However, proponents would add that—in the context of the HEA—"modification" has been known to include total cancellation of loan balances.[283] Pointing to the 2019 development in *Carr*, advocates assert that the Secretary's authority to "modify" includes the authority to reduce loan balances to zero.[284]

In response, one would expect challengers to reraise arguments regarding the limited definition of "modify" and of course, the major-questions doctrine. Given the scale of sweeping student loan forgiveness initiatives, the major-questions doctrine would almost certainly be implicated. However, just as in *Biden v. Nebraska*, advocates would argue that the HEA offers clear congressional authority for loan forgiveness.

As shown, a forgiveness plan rooted in the HEA would face similar obstacles to one based on the HEROES Act, with the major-questions doctrine being the most mercurial obstacle. However, the statement of congressional authorization for student loan cancellation is far clearer in the HEA than the HEROES Act. Thus, if a court applied the major-questions doctrine as it should, recognizing that the HEA contains a clear statement of congressional authorization, there is no legal reason why an HEA-based forgiveness plan should not survive a court's review.

III..CONCLUSION

In summary, the HEA is the best statutory vehicle for a student loan forgiveness initiative. Given that the country is no longer in a state of national emergency due to the pandemic, the HEROES Act is no longer a feasible avenue for student loan relief. The Secretary of Education's compromise authority under the HEA provides a stronger, alternative statutory basis for widespread student loan forgiveness. The Secretary's compromise authority is only limited by two procedural requirements,

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281 20 U.S.C. § 1082(a)(6).

282 Letter from Eileen Connor et al., *supra* note 221, at 6.

283 *Id.*; Carr et al. v. DeVos, 369 F. Supp. 3d 554 (S.D.N.Y. 2019).

284 Letter from Eileen Connor et al., *supra* note 221, at 5 (citing *Carr*, 369 F. Supp. 3d 554).

and these limitations only apply in cases where the Secretary compromises individual claims greater than $1,000,000.[285]

Based on the foregoing analysis, the wiser option for the Biden administration was to continue the student loan repayment pause using the HEROES Act, while simultaneously forming a forgiveness plan using the Secretary's compromise authority under the HEA. In conclusion, now that the pandemic has passed, the executive branch should continue to capitalize on the attention gleaned from its first loan forgiveness initiative and cancel student loans using the Secretary of Education's compromise authority under 20 U.S.C. section 1082 of the HEA.

285 20 U.S.C. § 1082(b).

Higher education and the law(yers)

Review of Louis H. Guard and Joyce P. Jacobsen's

ALL THE CAMPUS LAWYERS: LITIGATION, REGULATION, AND THE NEW ERA OF HIGHER EDUCATION

*FREDERICK M. LAWRENCE**

There are certain special relationships that have historically been central to the administration and governance of institutions of higher education. Some are well known. The relationship between the president or chancellor and the chair of the governing board is one such relationship, and, although the specifics will vary from one campus to another, so is the relationship between the president and the chief academic officer and the chief administrative or operating officer. Until relatively recently, most university leaders would not have included the university's lawyer to be among these partnerships; today nearly all would. One such team, the former president and general counsel of Hobart and William Smith Colleges, Joyce P. Jacobsen and Louis H. Guard, respectively, have shared their own experiences and knowledge of the field to produce a highly readable and useful discussion of how legal issues have become central to the management of the modern university, and how the campus counsel has become a key member of the president's team.[1]

Guard and Jacobsen seek to explain how it is that legal issues moved from the periphery to a central concern of institutions of higher education. They demonstrate the developments of the past half-century and especially the most recent several decades. The book proceeds in two parts—the first reviews how we got here, and the second suggests how we should proceed going forward. Part I consists of a series of chapters, each of which focuses on an area of the law whose impact on higher education has dramatically increased. Some of this will be familiar terrain to those engaged in the study and practice of higher education law or in the administration of colleges and universities. As their goal is to explain the legal developments affecting higher education "in a way that is as accessible to as many

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* Secretary and CEO, The Phi Beta Kappa Society; Distinguished Lecturer, Georgetown University Law Center. The views expressed in this review essay are those of the author and not necessarily those of the intuitions with which I am honored to be affiliated. My appreciation to Kerry Roncallo, Georgetown University Law Center class of 2025, for her research support and editorial assistance.

1 Louis H. Guard & Joyce P. Jacobsen, All the Campus Lawyers: Litigation, Regulation, and the New Era of Higher Education (2024).

people as possible,"[2] the authors assume minimal background knowledge and provide context that will be welcome to the general reader if sometimes somewhat excessive for the specialist.

The constellation of topics covered in the seven chapters of part I is designed to provide a primer of the ways in which statutes and regulations have come to play a significant role in the life of the university. Perhaps nowhere is this seen more clearly than in the development of civil rights legislation that bears on higher education. Guard and Jacobsen focus on Title IX,[3] Title VII,[4] and the Americans with Disabilities Act of 1990 (ADA).[5] No one will dispute the impact that these statutes have had on our campuses. Enacted initially to address gender inequality in college athletics, Title IX has become the primary source for the governmental response to sexual harassment on campus.[6] Unlike Title IX, the ADA is a law of general applicability, not one addressing only colleges and universities. Nonetheless, the impact of the ADA on institutions of higher education has been profound, leading to the creation of administrative infrastructure for governing the assessment of disability claims and the resulting requirements for accommodations.[7] The review of civil rights statutes and their role in university life is a helpful starting point for approaching this dynamic area of the law. Guard and Jacobsen are only too aware that, particularly in the context of Title IX, they are seeking to describe the location of a moving target. To some extent this is simply unavoidable. Whoever has sought to write about the ever-changing landscape of Title IX over the past decade has faced the risk that the scope of the applicable regulations will have shifted between the final manuscript and the book's publication.[8] What might have been a useful topic to consider in this regard is the role of campus counsel in helping student affairs staff deal with this very problem. The shifting regulatory framework of Title IX

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2 *Id.* at 9.

3 Education Amendments of 1972, 20 U.S.C. §§ 1681–1689.

4 Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17.

5 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

6 *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); U.S. Dep't of Educ., Off. for C.R., Dear Colleague Letter on Sexual Violence (Apr. 4, 2011), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201104.pdf.

See also Alvin Powell, *How Title IX Transformed Colleges, Universities over Past 50 Years*, Harv. Gazette (June 22, 2022), https://news.harvard.edu/gazette/story/2022/06/how-title-ix-transformed-colleges-universities-over-past-50-years/#:~:text=A%20half%20century%20after%20its,Watson%20Jr.

7 *See* 42 U.S.C. § 12132 ("No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). *See, e.g.*, Laura Rothstein, *The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education*, 41 JCUL 531 (2015) (highlighting history of application of ADA in higher education and predicting future trends and solutions for accommodating students).

8 *See* U.S. Dep't of Educ., Off. for C.R., , *supra* note 6 (providing guidance during the Obama era); 34 C.F.R. § 106 (2020) (promulgating Trump administration regulations); 34 C.F.R. § 106 (2024) (implementing Biden administration Title IX rules). *See also* Katherine Knott & Johanna Alonso, *A New Title IX Era Brings Confusion and Frustration*, Inside Higher Ed. (Aug. 1, 2024), https://www.insidehighered.com/news/students/safety/2024/08/01/enforcement-bidens-title-ix-rule-complicated-lawsuits (detailing lawsuits and court injunctions blocking implementation of Biden Title IX regulations).

over the three most recent presidential administrations has created challenges not only for attorneys but also for those charged directly with the implementation of the regulations, most of whom lack legal training. This may be the prime example of ways in which the law has failed to provide universities with the clarity of settled direction and instead created the frustration of shifting mandates.

Readers of *All the Campus Lawyers* who have observed the challenges faced by many campuses recently will be particularly interested in the discussion of the legal aspects of free expression and academic freedom. Guard and Jacobsen review the legal principles that emerge from the foundational documents of American academic freedom doctrine,[9] and the Supreme Court jurisprudence developed from such seminal cases as *Sweezy v. New Hampshire*[10] and *Regents of the State of New York v. Keyishian*,[11] incorporated ultimately in Justice Powell's pivotal opinion in *Regents of the University of California v. Bakke*.[12] As the authors survey the range of academic freedom and free expression issues that universities face, they take particular care to highlight the ways in which administrators must balance the competing demands of robust free speech and academic freedom, on the one hand, and protections against harassment, hostile environments, and discrimination, on the other. The framing of these issues is surely correct. In many ways, the hard work of the campus lawyer certainly begins with this framing. It is helpful to remind those in charge of universities that "[w]e must embrace nuance and be comfortable with the fallibility of wading in a gray area, always keeping as our compass the educational best interests of our students."[13] In many ways, however, this is the point where the real challenges begin. How does this compass help answer the kind of questions that have preoccupied campuses over the past few semesters, for example, whether students should be permitted to set up a protest encampment on campus in a way that may make other students uncomfortable but that does not otherwise disrupt the operation of the university. Where should the campus attorney look to provide advice on this question? To be sure, the best interests of students will always be a part of this analysis. Here is where university counsel must draw upon a deep knowledge of the academic mission of the institution and provide the kind of advice that refracts legal questions through the lens of this mission.

The balance of the first part of *All the Campus Lawyers* takes us through the range of issues that fill the docket of the campus counsel and situates these issues helpfully in the development of higher education law over the past decades. University liability today, in what Guard and Jacobsen rightly describe as the "caretaker" era, is best understood in the context of the evolution from the early twentieth century *in loco parentis* era[14] through the "bystander" era of the late third and

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9 *See* American Association of University Professors, 1915 Declaration of Principles on Academic Freedom and Academic Tenure (1915); American Association of University Professors, 1940 Statement of Principles of Academic Freedom and Tenure (1940).

10 354 U.S. 234 (1957).

11 85 U.S. 589 (1967).

12 438 U.S. 265 (1978).

13 Guard & Jacobsen, *supra* note 1, at 59.

14 *See* Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort*

early fourth quarter of the century.[15] A combination of statutory and regulatory provisions, caselaw, and even social custom has created an environment in which the contemporary university has many of the obligations of a caretaker without the immunity provided by the *in loco parentis* doctrine. Dealing with expanding tort liability, whether from Greek life, street crime, or the modern scourge of active shooter cases, now occupies a large share of the university attorney's portfolio. Similarly, admissions decisions now present a context of potential legal liability for the university. In the aftermath of the Supreme Court's rejection of race-conscious admissions policies in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina* [16] universities are subject to potential further litigation, challenging admissions policies that seek diversity in ways that allegedly run afoul of the Court's ruling. The authors do well to situate this analysis in the half-century of affirmative action jurisprudence starting with the judicial acceptance of such policies in *Regents of the University of California v. Bakke*.[17]

Guard and Jacobsen's practical administrative experience is well demonstrated in what might strike some readers as a surprising chapter on the role of university counsel in the face of current challenges to the business model of higher education. The debate over the cost of higher education and the very value of a college degree poses a serious concern to the vast majority of institutions of higher learning whose business model is largely tuition based.[18] Fewer than 150 of the over 4000 higher education institutions in the United States have endowments above $1 billion, and the median college endowment is roughly $209 million.[19] This median endowment would produce a sustainable draw pursuant to most endowment spending policies of about $10.5 million, which is a fraction of the average university budget. One recent study concluded that the median level of endowment dependence to support the operating budget was 16.3%.[20] In a climate where colleges and universities must look to tuition income to support the major portion of their budget, the sustainability of the financial model that has supported American higher education is being deeply stressed.[21] This discussion of the financial strains on the university business model would not be surprising

Doctrines in Higher Education Law, 64 Mo. L. Rev. 1 (1999); Gott v. Berea College, 161 S.W. 204 (Ky. 1913).

15 *See* Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).

16 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181 (2023); Students for Fair Admissions, Inc. v. Univ. of N.C., 600 U.S. 181 (2023).

17 *See* 438 U.S. 265 (1978).

18 *See* Sarah Wood, *What You Need to Know About College Costs*, U.S. News & World Rep. (Sept. 24, 2024), https://www.usnews.com/education/best-colleges/paying-for-college/articles/what-you-need-to-know-about-college-tuition-costs (reporting that "as everything else increases, so does the cost of running a college or a university").

19 Michael T. Nietzel, *College Endowments Saw an Average 7.7% Gain in Fiscal Year 2023*, Forbes (Feb. 15, 2024), https://www.forbes.com/sites/michaeltnietzel/2024/02/15/college-endowments-saw-an-average-77-gain-in-fiscal-year-2023/.

20 Tracy Abedon Filosa & Cambridge Assocs., Endowment Radar Study 2023 3 (2024).

21 *See* Danielle Douglas-Gabriel, *Colleges Enrolled Fewer Freshmen, First Decline Since the Pandemic*, Wash. Post (Oct. 23, 2024), https://www.washingtonpost.com/education/2024/10/23/freshman-college-enrollment-decline/.

in a work on the economics of higher education. However, *All the Campus Lawyers* reveals that legal questions play a significant role in how a university may navigate its financial strains. This is a perceptive and valuable insight of this book. These questions range from admission decisions and their interrelation with development consideration to the ways in which universities might seek mergers and forms of integrated networks with other institutions. Guard and Jacobsen are right to strike a serious but nonextreme tone. As they put it, "the process [of downsizing and integration] may be more graceful than doomsayers have predicated, with potentially few outright closures … . Such actions can be handled gracefully if managed correctly, with the aid of legal counsel."[22]

This brings us to what may be the most important contribution of *All the Campus Lawyers*. In part II of the book, the authors address how the campus counsel can function as an important, if not indispensable, part of the university administrative team. Drawing on the formative work of Ben Heineman on the role of in-house counsel in the corporate context,[23] Guard and Jacobsen explore the ways in which a university counsel must blend legal knowledge with a profound understanding of the goals of the institution. Those of us in the business know that, regarding all of the issues discussed above, the administration will be well served if the campus counsel is at the table and, on many occasions, the last one in the room with the president before a decision is made.

In some ways universities are very much like other complex organizations—various constituencies both internal and external whose interests must be considered, financial stability and sustainability to be managed, potential growth opportunities to be undertaken, and risks to be managed. But in other ways, universities are very much entities unto themselves. Whereas corporations typically have production metrics that allow for a meaningful comparison of costs and revenue to yield a measure of profit, the "product" of higher education, the discovery and creation of knowledge, and the transmission of that knowledge through teaching and scholarship, eludes the best efforts toward quantification. There may be no better example than the university to illustrate the aphorism that "not everything that can be counted counts, and not everything that counts can be counted"[24] In providing legal advice to the university, the campus counsel will often play an essential translational role among the various constituencies of the university. Ideally, the university attorney will be equally comfortable with faculty, staff, administrators, and trustees, understanding the needs of each and their respective roles in the university structure.

All the Campus Lawyers is well organized and accessibly written, in spite of the occasional clichés, such as "long arm of the law,"[25] "downright alarming,"[26]

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22 Guard & Jacobsen, *supra* note 1, at 172.

23 Ben W. Heineman, Jr., The Inside Counsel Revolution (2016).

24 This quote is often misattributed to Albert Einstein but should actually be attributed to William Bruce Cameron, the author of *Informal Sociology*. William Bruce Cameron, Informal Sociology: A Casual Introduction to Sociological Thinking 13 (1963).

25 Guard & Jacobsen, *supra* note 1, at 1.

26 *Id*. at 9.

or "powder keg of liability issues,"[27] which distract from the otherwise clear and concise prose. Washington-based readers may note that "DOE" is the official governmental acronym for the Department of Energy, not the Education Department, which in Washington-speak goes by "ED." But these are small quibbles in an overall important contribution to the public discussion of higher education generally and higher education especially.

Campus counsel must be acutely aware of the complexities and, we might even say, peculiarities of the university to play their role most effectively. Their role goes beyond advising the university president and other members of the administration. As Guard and Jacobsen explore in a thoughtful and insightful discussion of identifying the university counsel's client,[28] campus attorneys will often be working for the president or board chair—but not always. "In our view," they assert, "when properly engaged, resourced and deployed, general counsel are in fact key stewards of the education mission."[29] This may be the essence of the role to which the university counsel should aspire. *All the Campus Lawyers* will help the wide range of constituents who make up the university community better understand the importance of this aspiration and the ways it may best be achieved.

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27 *Id*. at 79.

28 *See* Stephen Dunham, *Who Is the Client?*, *in* Higher Education and the Law 1093–99 (Judith Areen & Peter F. Lake, eds., 2d ed. 2014).

29 Guard & Jacobsen, *supra* note 1, at 212.