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It is Political: Using the Models of Judicial Decision Making to Explain the Ideological History of Title VII

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IT IS POLITICAL: USING THE MODELS OF JUDICIAL DECISION MAKING TO EXPLAIN THE IDEOLOGICAL HISTORY OF TITLE VII

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Scholars and observers often explain or interpret United States Supreme Court decisions based on the ideology of the sitting Justices.[1] Many offer a similarly political account of the Court's decisions in actions brought under Title VII of the Civil Rights Act of 1964[2] ("Title VII"). Certain events in the history of

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[1] *E.g.*, Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH L. REV. 13, 15 (2010) (describing the United States Supreme Court's cases during the October 2009 term as "divided along ideological lines—with Roberts, Scalia, Thomas, and Alito on one side and Stevens, Ginsburg, Breyer, and Sotomayor on the other"); Barbara A. Perry, *The "Bush Twins?" Roberts, Alito, and the Conservative Agenda*, 92 JUDICATURE 302, 302 (2009) ("[Justices Alito and Roberts'] initial Supreme Court opinions reflect a conservative agenda that reaches back to the conservatism of Ronald Reagan."); Adam Liptak, *Three Justices Bound by Beliefs, Not Just Gender*, N.Y. TIMES, July 2, 2013, at A11 (describing the decisions of Justices Ginsburg, Sotomayor, and Kagan as the result of their liberal ideology). Indeed, confirmation hearings for Supreme Court nominees reflect the assumption that the appointee's ideology will lead to certain votes. *See, e.g.*, Michael J. Songer, Note, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 247–48 (2005).

[2] *See, e.g.*, Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 463 (2005) ("As the membership of the Supreme Court began to change, so too did the jurisprudence on Title VII."); David A. Green, *Why the African-American Community Should Be Concerned About Supreme Court Nominee, Samuel A. Alito: His Potential Impact on Title VII Cases*, 33 S.U. L. REV. 425, 427, 436 (2006) (concluding that Justice Alito's conservative views would lead to restrictive decisions on Title VII issues); Cedric Merlin Powell, *Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality*, 31 ST. LOUIS U. PUB. L. REV. 255, 261–63 (2012) (describing the effect of conservative Justices on Title VII

Title VII suggest ideological decision making by the Supreme Court. Dozens of the Court's Title VII opinions are split between the conservative and liberal Justices.[3] On three separate occasions, including, most recently, the Lilly Ledbetter Fair Pay Act of 2009,[4] a more liberal Congress amended Title VII to override the Supreme Court's conservative interpretation of the statute.[5] Yet, subsequent to each of these amendments, the conservative Justices continued to vote to restrict Title VII, apparently following their political preference over Congressional intent.[6]

The full history of Title VII, however, does not conclusively establish that the Supreme Court decides cases according to ideological viewpoint. Although numerous split decisions fall along ideological lines,[7] other cases, including a number of unanimous decisions,[8] reflect votes contrary to political viewpoint and potentially indicate a different dynamic. The fifty years of

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jurisprudence); Songer, *supra* note 1, at 249 ("[T]he increasingly conservative composition of the federal judiciary may explain a significant part of the decline in successful Title VII challenges to facially-neutral employment practices."). Songer further explains, "Numerous commentators have posited that federal judges appointed by Republican presidents are more skeptical of civil rights claims than Democratic appointees." *Id.* at 249 n.11 (citing Timothy B. Tomasi & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 776–77 (1987)).

[3] *E.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; Connecticut v. Teal, 457 U.S. 440 (1982); *see also infra* note 162 (listing cases).

[4] Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 and 42 U.S.C.).

[5] See *infra* Part I.C. for a discussion of the three amendments.

[6] *See, e.g.*, JEB BARNES, OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 13–15 (2004) (noting that following the Civil Rights Act of 1991, the Supreme Court still felt free to create its own employer-friendly standard for punitive damages, contrary to the language of the statute); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1456–58 (2001) (describing the Supreme Court's response to the Civil Rights Act of 1991 amending Title VII and finding that the conservative Court ignored Congress's clear message that it intended a broader interpretation of the statute).

[7] *See infra* note 162.

[8] *See, e.g.*, Thompson v. N. Am. Stainless, LP., 562 U.S. 170 (2011); Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006); *see also* Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 294–96 (2011) (describing a series of unanimous Supreme Court decisions on Title VII).

Title VII jurisprudence, therefore, present the opportunity to assess whether Justices' votes on issues of employment discrimination are determined by their respective ideologies.

To answer this question, this Article turns to the work of political science scholars, specifically, the models of judicial decision making developed by political theorists over the past two decades.[9] These models use sophisticated empirical techniques to test whether the Justices of the Supreme Court vote according to their ideologies and to explain the circumstances when Justices vote contrary to their political viewpoints.[10] Their work can be divided into three predominant models—attitudinal, strategic and integrated—all of which agree that that ideology influences Supreme Court decisions[11] but offer different explanations for the exceptions when the Court's ideological pursuit is apparently constrained.[12] The political science models therefore offer the potential to explain Title VII's varied jurisprudence.

This potential, however, is not fully realized. The strategic and integrated models fail to effectively explain a significant portion of the Supreme Court's Title VII decisions because these models have generally failed to study the effect of statutory overrides on the Court's decision making. This Article therefore draws on the few studies of overrides that are available, and some of the more context-specific analyses, to draw a more

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[9] *E.g.*, RICHARD L. PACELLE, JR. ET AL., DECISION MAKING BY THE MODERN SUPREME COURT 28–49 (2011). *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

[10] *E.g.*, SEGAL & SPAETH, *supra* note 9, at 312–26; Mario Bergara et al., *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247, 260–67 (2003). *See generally* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE (2011); PACELLE ET AL., *supra* note 9.

[11] PACELLE ET AL., *supra* note 9, at 53 (concluding that Court decisions reflect "ideological predilections," among other factors); SEGAL & SPAETH, *supra* note 9, at 312–27 (describing the attitudinal model conclusion that ideology affects Supreme Court decisions); Bergara et al., *supra* note 10, at 267 (explaining the strategic model study conclusion that, in addition to strategic concerns, ideology influences the Court).

[12] *See, e.g.*, BAILEY & MALTZMAN, *supra* note 10, at 15–16 (explaining that the Supreme Court Justices are "policy-motivated," but also constrained by the law, as well as by the elected branches); EPSTEIN & KNIGHT, *supra* note 9, at 10–13 (noting that Justices are constrained in their ideological decision making by the potential response of the elected branches). *But see* SEGAL & SPAETH, *supra* note 9, at 323–51 (finding empirical evidence of ideology in Supreme Court decision making but finding no evidence that the preferences of the elected branches constrained it).

nuanced model for Title VII and to account for the apparent exceptions to ideological decision making. Ultimately, this Article asserts that the history of Title VII is not only political, but also that the Supreme Court exhibits strong resistance to any restraint on ideological voting in the area of employment discrimination.

In Part I, this Article details the key features of Title VII's history, explaining the statute, the significant role the Supreme Court has played in its interpretation, and the history of congressional intervention to override Supreme Court decisions on key issues. Part II reviews the existing evidence for and against an ideological interpretation of Title VII's case law. Part III introduces the political science models of judicial decision making and applies the models to Title VII. Part III also details the models' evidence of ideological voting by the Supreme Court and matches this evidence with voting patterns in Title VII cases. Part III further examines the challenge of the exceptions, that is, the cases where the Justices did not vote according to their ascribed ideology in interpreting Title VII. Part III also explores whether the political science models can explain these exceptions while still maintaining the basic premise of ideological voting. Concluding in Part IV, this Article asserts that the Supreme Court is particularly ideological in its decision making on issues of minority rights and, as a result, many of the typical constraints on the Court have not affected, and will not affect, its ideological interpretation of Title VII.

I. THE HISTORY OF TITLE VII

Title VII's jurisprudence spans the terms of three Chief Justices—Chief Justice Burger, Chief Justice Rehnquist, and Chief Justice Roberts[13]—and twenty-three Justices have interpreted the statute over its history.[14] During this time,

[13] *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (Roberts Court); Lorance v. AT&T Techs., Inc. 490 U.S. 900 (1989) (Rehnquist Court); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (Burger Court).

[14] The earliest Title VII case that the Supreme Court decided was in 1971, in *Phillips v. Martin Marietta Corp.*, at which time the Supreme Court was comprised of Chief Justice Burger, Justices Stewart, Marshall, Black, Douglas, Harlan, Brennan, White, and Blackmun. 400 U.S. 542 (1971); *Members of the Supreme Court*, SUP. CT. U.S., http://www.supremecourt.gov/about/members_text.aspx (last visited Apr. 10, 2015). Since that time, the following other Justices have had the opportunity to consider Title VII cases: Justices Powell, Stevens, O'Connor,

Congress has weighed in with four major amendments, three of which were passed in order to overturn Supreme Court decisions concerning the statute's meaning.[15] The development of Title VII's case law and its history of amendments are the starting points for analyzing the role that ideology may have played in the Justices' decisions. In conducting this review, it is generally understood that decisions or amendments expanding Title VII's reach or easing the plaintiff-employee's burden in litigation are considered liberal, and decisions or amendments that favor defendant-employers are considered conservative.[16]

Rehnquist, Souter, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Roberts, Alito, Sotomayor, and Kagan. The Court most recently considered Title VII in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

[15] The first amendment to Title VII came in the Equal Employment Opportunity Act of 1972. Pub. L. No. 92-261, 86 Stat. 103. Among other changes, this Act extended Title VII to reach employers with as few as fifteen employees, as well as state and local governments; it also lengthened the statute of limitations. Elinor P. Schroeder, *Title VII at 40: A Look Back*, J. KAN. B. ASS'N, Nov.–Dec. 2004, at 18, 22–23. Substantively, it defined Title VII's prohibition of discrimination based on religion to include " 'all aspects of religious observance and practice, as well as belief' and to add a requirement of reasonable accommodation." *Id*. at 22 (quoting Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 2, § 701(j), 86 Stat. 103). The subsequent three amendments were passed for the specific purpose of overturning Supreme Court decisions and are discussed in detail later in Part I. *See infra* Part I.C. This Article describes the amendments as Congress's response to the Court's interpretation of Title VII. Each amendment, however, was signed by the President at the time and, thus, could also be viewed as the response of both elected branches. *See* Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2012)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 and 42 U.S.C.).

[16] *See, e.g.*, Christopher Smith, *Polarized Circuits: Party Affiliation of Appointing Presidents, Ideology, and Circuit Court Voting in Race and Gender Civil Rights Cases*, 22 HASTINGS WOMEN'S L.J. 157, 160, 165 (2011) (asserting that a vote in favor of a race or gender civil rights claim is a vote in a liberal direction) (citing CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 19 (2006) (arguing that voting in favor of a discrimination plaintiff is liberal)); William A. Wines, *Title VII Interpretation and Enforcement in the Reagan Years (1980-89): The Winding Road to the Civil Rights Act of 1991*, 77 MARQ. L. REV. 645, 685 (1994) (describing votes restricting Title VII as conservative); *see also* Harold J. Spaeth et al., *Online Code Book: Decision Direction*, SUP. CT. DATABASE, http://scdb.wustl.edu/documentation.php?var=decisionDirection (last visited Apr. 10, 2015) (describing how this database of Supreme Court decisions coded "pro-civil liberties or civil rights claimant[s]" and "anti-employer" outcomes as liberal and the reverse outcomes as conservative).

A. The Title VII Statute

Title VII is just one provision of the Civil Rights Act of 1964,[17] a broad statute passed in response to the civil rights movement and designed to address inequality in many areas of society.[18] Title VII's main antidiscrimination provision states:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[19]

This prohibition bars intentional acts of disparate treatment based on race, gender, and the other protected categories.[20] Title VII also forbids neutral employment policies that have a demonstrable disparate impact on a protected class.[21] Title VII further prohibits harassment that is based on its covered statutes even if no tangible job action has occurred.[22] Finally, in a separate statutory provision, Title VII bans retaliation against those who report or oppose violations of the statute.[23]

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[17] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

[18] Belton, *supra* note 2, at 432. *See generally* Schroeder, *supra* note 15, at 19–22 (describing the history of the Civil Rights Act).

[19] 42 U.S.C.A. § 2000e-2(a)(1)–(2) (West 2014).

[20] *E.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985–86 (1988); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 429 (1995).

[21] 42 U.S.C.A. § 2000e-2(k); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[22] *E.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64–65 (1986); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2015).

[23] 42 U.S.C.A. § 2000e-3(a).

B. *The Supreme Court's Role in Interpreting Title VII*

Since the statute's passage, the Supreme Court has played a fundamental role in developing the law of Title VII.[24] The Court has not only interpreted the meaning of Title VII's language,[25] but has also created substantive doctrines[26] and important evidentiary mechanisms for proving violations of the statute.[27] In the course of this lengthy case history, the Supreme Court has, in some cases, issued liberal decisions, which expanded or defined Title VII in a manner favorable to employees. In other cases, the Supreme Court issued conservative decisions, which narrowed or defined the statute in a way that favors employers.

For example, in *Griggs v. Duke Power Co.*,[28] the Supreme Court created the doctrine of disparate impact liability under Title VII,[29] which was later codified by Congress.[30] Disparate impact prohibits neutral acts with discriminatory effects.[31] The creation of this doctrine significantly expanded Title VII, which had originally only prohibited intentional discrimination.[32]

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[24] *See, e.g.*, Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 4 (1990) (describing the significant impact of the Court's 1989 term on the reach of Title VII); Emmanuel O. Iheukwumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 22–28 (2001) (describing the Supreme Court's role in defining Title VII's rules for affirmative action in the workplace).

[25] *E.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–99 (2003) (interpreting the Title VII subsection on the motivating factor standard of causation); *Meritor Sav. Bank*, 477 U.S. at 64–65 (interpreting Title VII's language barring discrimination with respect to "terms, conditions or privileges of employment" to prohibit sexual harassment (internal quotation marks omitted)).

[26] *E.g.*, *Griggs*, 401 U.S at 429–30 (creating the doctrine of disparate impact).

[27] *E.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973) (establishing a three-part test for proving discriminatory intent).

[28] 401 U.S. 424.

[29] *Id.* at 429–30 ("The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

[30] 42 U.S.C. § 2000e-2(k) (2012).

[31] *Griggs*, 401 U.S. at 429–30.

[32] Belton, *supra* note 2, at 434 ("The disparate impact theory . . . combats not intentional, obviously discriminatory policies, but a type of discrimination in which facially neutral practices are employed to unnecessarily and disparately exclude protected groups from employment opportunities. The *Griggs* disparate impact theory, as later codified by Congress in the Civil Rights Act of 1991, put to rest the

Later, the Supreme Court, in *McDonnell Douglas Corp. v. Green*,[33] developed a three-part test that allows plaintiffs to prove discriminatory intent through circumstantial evidence, a pro-employee construction that provides a crucial mechanism for proving the invisible state of mind of the employer.[34] In *Meritor Savings Bank v. Vinson*,[35] the Supreme Court held that sexual harassment was a form of sex discrimination under Title VII,[36] an interpretation that again substantively expanded the scope of Title VII and the conduct that the statute prohibits.

The Court's substantial role in the development of Title VII is not limited to expanding the reach of the statute. In a number of opinions, the Court issued conservative decisions that significantly restricted the statute's scope or made it more difficult for employee-plaintiffs to prove violations.[37] For example, in *General Electric Co. v. Gilbert*,[38] the Court limited Title VII's reach by holding that pregnancy-based discrimination was not sex discrimination under the statute.[39] Recently, the Supreme Court has issued decisions that made it difficult for employees to prove harassment[40] or retaliation[41] claims under Title VII.

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view that evidence supporting a finding of intentional discrimination is the only way to establish a violation under civil rights statutes." (footnotes omitted)).

[33] 411 U.S. 792.

[34] *Id.* at 802–04; *see also* Green, *supra* note 2, at 428 ("In the early 1970s, the Supreme Court, liberally interpreting Title VII, established a procedure redressing invidious discrimination where there was no direct evidence and the plaintiff only had circumstantial evidence.").

[35] 477 U.S. 57 (1986).

[36] *Id.* at 64–65; *see also* Ronald Turner, *Making Title VII Law and Policy: The Supreme Court's Sexual Harassment Jurisprudence*, 22 HOFSTRA LAB. & EMP. L.J. 575, 578 (2005) ("Title VII sexual harassment law 'has been judge-made law' and 'is a judicial rather than a legislative creation.' " (footnote omitted)).

[37] Selmi, *supra* note 8, at 283 ("During the 1980s, the Supreme Court took a deeply conservative turn on issues of civil rights, particularly with respect to employment discrimination. The Court repeatedly reached adverse results for plaintiffs, and even in cases in which the plaintiffs prevailed, the Court would often impose significant limitations on the employment discrimination doctrine."); *see also* Nancy Gertner, *Losers' Rules*, 122 YALE L.J. FORUM 109, 109 (2012) ("Changes in substantive discrimination law since the passage of the Civil Rights Act of 1964 were tantamount to a virtual repeal. This was so not because of *Congress*; it was because of *judges*." (footnote omitted)).

[38] 429 U.S. 125 (1976), *superseded by statute*, 42 U.S.C. § 2000e(k) (2012).

[39] *Id.* at 145–46.

[40] Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013) (limiting employer liability for sexual harassment by narrowly defining the category of employees who are considered supervisors).

C. *Legislative Overrides of Supreme Court Title VII Decisions*

The Supreme Court's role is one significant aspect of Title VII's history; the second is the elected branches' role in reversing the Court. A number of the Supreme Court's conservative Title VII decisions were so restrictive that the more liberal Congress amended Title VII for the specific purpose of overturning the Court.[42] The earliest example of this type of congressional override occurred in 1978 when Congress passed the Pregnancy Discrimination Act[43] ("PDA") in response to the Supreme Court's 1976 decision in *Gilbert*.[44] As noted above, in the *Gilbert* case, the Court held that the employer's policy that discriminated against pregnancy and related conditions did not discriminate on the basis of sex.[45] The PDA was drafted in direct response to this decision[46] and overturned *Gilbert* by amending Title VII to state that "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions."[47]

Similarly, in the most extensive amendment of Title VII, the Civil Rights Act of 1991[48] ("CRA"), Congress overturned twelve Supreme Court decisions that had restricted Title VII and other federal antidiscrimination laws.[49] For example, the CRA superseded the Supreme Court's holding in *Wards Cove Packing*

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[41] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2528 (2013) (stating that plaintiffs bringing retaliation claims under Title VII are required to prove that the retaliatory motive was a "but-for" cause of the employment action, not the more lenient standard of motivating factor causation).

[42] *See e.g.*, Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 516, 537–56 (2009).

[43] Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)).

[44] 429 U.S. at 145–46.

[45] *Id.*

[46] Widiss, *supra* note 42, at 552–53.

[47] 42 U.S.C. § 2000e(k) (internal quotation marks omitted).

[48] Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.); Maurice Wexler et al., *The Law of Employment Discrimination from 1985 to 2010*, 25 A.B.A. J. LAB. & EMP. L. 349, 351 (2010) ("Collectively, the substantive provisions of the 1991 CRA made it easier to assert race discrimination claims; added the right to jury trials in Title VII cases; established entitlement to limited compensatory and punitive damages for intentional discrimination; limited the use of mixed-motive defenses; allowed timely challenges to seniority systems and consent decrees; codified the *Griggs v. Duke Power* disparate-impact model; addressed the extraterritorial reach of Title VII; and permitted recovery of expert witness fees." (footnotes omitted)).

[49] Widiss, *supra* note 42, at 516.

Co. v. Atonio,[50] which had significantly expanded employers' defenses to disparate impact claims.[51] In one of the most significant examples, the CRA overturned the Supreme Court's decision in *Price Waterhouse v. Hopkins*.[52] According to *Price Waterhouse*, employees with direct evidence of discrimination could succeed under Title VII by showing that discriminatory animus was a "substantial factor" in an employment decision,[53] and employers could escape liability if they could affirmatively prove the same decision would have occurred even in the absence of the animus.[54] The CRA superseded this holding and lowered the causation standard to allow an employee to establish a Title VII claim if the discriminatory animus was a mere "motivating factor" in the decision.[55] The CRA also restricted the *Price Waterhouse* "same decision" affirmative defense, by removing the employer's ability to use it as a defense to liability and limiting that defense to the question of damages.[56]

In the third and most recent example of congressional override, the Lilly Ledbetter Fair Pay Act of 2009[57] ("Ledbetter Act"), Congress overrode the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*[58] In *Ledbetter*, the Court held that the Title VII statute of limitations for unequal pay claims began running on the date the discriminatory pay is established, even if the plaintiff was unaware of it.[59] In *Ledbetter*, the plaintiff had been receiving lower compensation than similarly situated male employees, but only discovered it and asserted a claim of discrimination long after the initial compensation decisions that established the disparity were made.[60] The Court rejected the argument that each paycheck could be a new violation that restarted the limitations period and

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[50] 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

[51] Wexler et al., *supra* note 48, at 354 (citing Civil Rights Act of 1991, sec. 105, § 703, 105 Stat. 1071, 1074–75).

[52] 490 U.S. 228 (1989).

[53] *Id*. at 265 (emphasis omitted).

[54] *Id.* at 266.

[55] 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2012).

[56] § 2000e-5(g)(2)(B).

[57] Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 and 42 U.S.C.).

[58] 550 U.S. 618 (2007).

[59] *Id.* at 621, 628–29.

[60] *Id.* at 644–45 (Ginsburg, J., dissenting).

found that the plaintiff's claims were untimely filed.[61] As Justice Ginsburg explained in her dissent, the decision ignored the characteristics of pay disparities, which are often hidden, and significantly limited the plaintiff's ability to bring discriminatory compensation claims.[62] Justice Ginsburg specifically called on the legislature to act, and Congress did so with the Ledbetter Act, which superseded the Supreme Court's decision by amending Title VII to specify that a discriminatory pay event occurs each time a paycheck is issued.[63] Thus, the Ledbetter Act expands the time period for alleging claims of unequal pay and broadens plaintiffs' ability to challenge this type of discrimination.[64]

This overview of Title VII's history already suggests ideological decision making by the Supreme Court. Over the past fifty years, the Court has issued both liberal and conservative decisions interpreting Title VII, which could reflect the Court's changing ideological composition. Moreover, on three separate occasions a Democrat-controlled Congress overturned conservative Supreme Court decisions, suggesting a Court motivated by political belief more than concern for congressional intent or rebuke.[65] These suggestions, however, are insufficient in themselves to establish ideological voting in Title VII cases, and, as explained below, scholarly analysis and voting patterns show conflicting views on this issue.

II. CONFLICTING EVIDENCE OF IDEOLOGY-BASED VOTING IN THE SUPREME COURT'S TITLE VII JURISPRUDENCE

A. Disagreement Among Scholars

It is common practice to explain or predict Supreme Court rulings based on the ideology of the Justices.[66] A number of scholars of Title VII embrace this premise, believing that the outcomes of Supreme Court cases are influenced by the Justices'

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[61] *Id.* at 637 (majority opinion).

[62] *Id.* at 645, 660 (Ginsburg, J., dissenting).

[63] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, sec. 3, § 706(e) 123 Stat. 5, 5–6 (codified as amended at 42 U.S.C. § 2000e-5(e) (2012)).

[64] *See id.*

[65] *See, e.g.*, Widiss, *supra* note 42.

[66] *E.g.*, Chemerinksy, *supra* note 1; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 2006 Term*, 36 HASTINGS CONST. L.Q. 51, 57 (2008).

respective viewpoints.[67] For example, Emmanuel Iheukwumere and Philip Aka analyzed a series of Supreme Court decisions on affirmative action, including analysis under Title VII.[68] They concluded that the appointment of conservative Supreme Court Justices led to the adoption of a "color-blind jurisprudence" that is hostile to affirmative action and ultimately undermines racial equality.[69] Theodore Blumoff and Harold Lewis, Jr. similarly concluded that the "Reagan Court" had certain policy "baselines" that private parties should be able to form contracts as they wish and that the "economy functions best with minimal government interference."[70] They concluded that Title VII jurisprudence ran "headlong into" these policy axioms, which limited the statute's reach.[71]

Conversely, some scholars offer explanations of Title VII's development based on factors other than the Justices' ideologies. For example, former United States District Court Judge Nancy Gertner explains that, although ideology may have played a part in Title VII jurisprudence, a powerful alternative theory, "[a]symmetric decisionmaking,"[72] can, in many ways, better explain the development of this area of law.[73] In another example, Anne McGinely explains at least part of the Supreme Court's Title VII decision in *Ricci v. DeStefano*,[74] based on the studies of "cognitive illiberalism," which show "people of different

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[67] *E.g.*, Green, *supra* note 2, at 427, 435.

[68] Iheukwumere & Aka, *supra* note 24, at 29–43.

[69] *Id*. at 54 ("As applied by the federal judiciary, particularly the Supreme Court under Rehnquist, color-blind jurisprudence is merely a subterfuge employed by the Court to cover the fact that it is deliberately ignoring its own precedents on affirmative action prior to the ascendancy of Rehnquist to the helm of the Court.").

[70] Blumoff & Lewis, *supra* note 24, at 5.

[71] *Id*. at 5; *see also* Powell, *supra* note 2, at 257–58, 262 ("[I]t now seems likely that the fate of disparate impact claims under Title VII will replicate the fate of affirmative action under the Court's conservative bloc jurisprudence." (quoting Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1148 (2010)); Green, *supra* note 2, at 440 ("With the appointment of Chief Justice Roberts to replace Chief Justice Rehnquist and the appointment of Justice Alito to replace Justice O'Connor, to go along with Justices Scalia, Thomas, and Kennedy, there is a solid conservative block on the Supreme Court that will establish jurisprudence in Title VII cases." (footnote omitted)).

[72] Gertner, *supra* note 37, at 110. Asymmetric decision making results from repeat players, such as employers, settling strong cases and litigating weak cases. The result over time is judicial interpretations that favor the repeat players' interests. *Id*. at 110, 113–14.

[73] *Id*. at 110.

[74] 557 U.S. 557 (2009).

cultural viewpoints and identities interpret[] the facts differently."[75] William Corbett interprets the development of Title VII jurisprudence as a process of "tortification," that is, the incorporation of tort principles to interpret the statute's meaning.[76] Other analyses interpret the development of Title VII as a progression of the Justices' choices on how to conduct statutory interpretation, with changes reflecting different emphasis or interpretation on textual language, statutory purpose, or legislative intent.[77]

Thus, there is no firm consensus that Title VII case law is the result of the Supreme Court's ideology. A number of different potential explanations are available—some political, some not. This conflict among theorists is mirrored by a mixed body of law.

B. Ideological and Nonideological Cases

A number of Supreme Court decisions support an ideology-based interpretation of Title VII's history. In these cases, the Court's votes are split according to the ascribed political views of the Justices.[78] For example, in the most recent term, the Court issued two major Title VII decisions with a five-to-four ideological

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[75] Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of* Ricci v. Destefano, 57 N.Y.L. SCH. L. REV. 865, 869 (2012–13). McGinley concludes that this "cultural cognition" influenced the Supreme Court's interpretation of the *Ricci* facts and, therefore, its grant of summary judgment to defendant was improper. *Id.* at 868–70 (attributing "the poor showing of employment discrimination plaintiffs to fundamental American beliefs concerning meritocracy and discrimination" to "psychological research [that] demonstrates that most people in most situations are 'unwilling to make robust attributions of discrimination' " (quoting Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1278 (2012)).

[76] William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal To Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 456–67 (2013).

[77] Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 GEO. MASON L. REV. 545, 554 (2013) ("While many of [the Title VII] frameworks grow out of the statutory language of the federal statutes, they also derive from those statutes' unique histories, as well as the choices the Supreme Court has made regarding how to piece together the purpose of the statutes and their legislative and textual history." (citing Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 446 n.194, 479 (2000))).

[78] For purposes of this Section, this Article ascribes a political preference to the Justices based on the perception indicated by the press and by scholars. *Cf.* SEGAL & SPAETH, *supra* note 9, at 204, 321–22 (using statements in newspaper editorials at the time of a Justice's nomination to measure that Justice's ideology).

divide. In *University of Texas Southwestern Medical Center v. Nassar*,[79] the Court restricted Title VII's protections against retaliation by holding that plaintiffs must establish that the retaliatory motive was the "but-for" cause of the employment action, rather than meet the more lenient "motivating-factor" standard.[80] In this conservative decision,[81] Justice Kennedy, the swing vote,[82] wrote the opinion for the majority, joined by the perceived conservatives, Justices Scalia, Roberts, Alito, and Thomas.[83] The four dissenting Justices, Ginsburg, Breyer, Sotomayor, and Kagan, are all members of the liberal bloc.[84] The Justices' votes in *Vance v. Ball State University*[85] show an identical ideological divide. In *Vance*, the Supreme Court again restricted Title VII's scope by broadening one of the employers' defenses to liability for harassment.[86] Justice Alito, joined by Justices Scalia, Roberts, and Kennedy, wrote the majority opinion, and Justice Thomas filed a concurrence.[87] The four liberal Justices again dissented.[88]

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[79] 133 S. Ct. 2517 (2013).

[80] *Id.* at 2534.

[81] The description of a case outcome as conservative or liberal is based on the case direction designation in Harold Spaeth's U.S. Supreme Court Database. *See* Spaeth et al., *supra* note 16; *see also* Lee Epstein & William M. Landes, *Was There Ever Such a Thing as Judicial Self-Restraint?*, 100 CALIF. L. REV. 557, 565 (2012) (using this database to determine the ideological direction of the Court's decisions).

[82] *See* Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1995 Term*, 24 HASTINGS CONST. L.Q. 1, 31–32 (1996) (identifying Justice Kennedy as a swing vote between liberal and conservative blocks); Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, at A18, *available at* http://www.nytimes.com/2007/05/31/opinion/31thu1.html?_r=0 (describing Justice Kennedy as a swing vote).

[83] *Nassar*, 133 S. Ct. at 2522; *see* Chemerinsky, *supra* note 1 (identifying the conservative bloc of Justices Roberts, Scalia, Thomas, and Alito); Perry, *supra* note 1 (describing Justices Roberts and Alito as conservative); Wilkins et al., *supra* note 66 (identifying conservative voting patterns of Justices Scalia, Thomas, Roberts, and Alito).

[84] *Nassar*, 133 S. Ct. at 2522; *see* Chemerinsky, *supra* note 1 (identifying Justices Ginsburg and Breyer as part of the liberal bloc); Charles D. Kelso & R. Randall Kelso, *The Constitutional Jurisprudence of Justice Kennedy on Speech*, 49 SAN DIEGO L. REV. 693, 694 (2012) (identifying the current liberal bloc as Justices Ginsburg, Breyer, Sotomayor, and Kagan); Liptak, *supra* note 1 (describing Justices Ginsburg, Sotomayor, and Kagan as liberal).

[85] 133 S. Ct. 2434 (2013).

[86] *Id.* at 2446–47.

[87] *Id.* at 2438, 2454.

[88] *Id.* at 2454.

The *Nassar* and *Vance* cases are just two of many examples where the Supreme Court's decisions either limited or broadened the reach of Title VII, depending on whether the conservative or liberal Justices were able to garner a majority. For example, in *Connecticut v. Teal*,[89] the Court issued an employee-friendly decision with a split in Justices according to their ascribed political views.[90] In this case, the employer claimed that a screening test for promotion, which disproportionately excluded blacks, could be excused because the ultimate percentage of blacks promoted reflected an appropriate racial balance.[91] Justice Brennan, a member of the liberal bloc,[92] crafted the majority opinion rejecting this "bottom-line defense" to Title VII disparate impact liability,[93] and fellow liberals, Justices Blackmun, Stevens, and Marshall,[94] joined.[95] Justice White, a moderate Republican appointee,[96] joined the majority.[97] Justice Powell[98] filed a dissenting opinion,[99] joined by conservatives Justice Burger and Justice Rehnquist,[100] along with swing vote Justice O'Connor.[101]

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[89] 457 U.S. 440 (1982).

[90] *Id.*

[91] *Id.* at 444, 452.

[92] Lino A. Graglia, *The Legacy of Justice Brennan: Constitutionalization of the Left-Liberal Political Agenda*, 77 WASH. U. L.Q. 183, 189 (1999) (identifying Justice Brennan as liberal).

[93] *Teal*, 457 U.S. at 442, 452.

[94] Jeff Bleich & Kelly Klaus, *The Liberal Legacy: The Imprint of the Warren Era Remains and Continues To Influence the Court*, OR. ST. B. BULL., Aug.–Sept. 1999, at 13 ("Justice Blackmun and the two [J]ustices with whom he was most frequently aligned, William J. Brennan, Jr. and Thurgood Marshall, were the last holdouts of the 'liberal' wing."); James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect,* 29 BERKELEY J. EMP. & LAB. L. 117, 120 (2008) (describing Justices Stevens, Blackmun, Brennan, and Marshall as liberal Justices).

[95] *Teal*, 457 U.S. at 442.

[96] Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 935 n.238 (2008) (describing Justice White as sometimes moderate and sometimes conservative); Robert H. Smith, *Uncoupling the "Centrist Bloc"—An Empirical Analysis of the Thesis of a Dominant, Moderate Bloc on the United States Supreme Court*, 62 TENN. L. REV. 1, 3 (1994) (describing Justice White as a "centrist" and noting that many commentators identified him as a moderate).

[97] 457 U.S. at 442.

[98] Stearns, *supra* note 96, at 896–97 (describing Justice Powell as a moderate conservative).

[99] *Teal*, 457 U.S. at 456.

[100] *Id.* Michael C. Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices "Evolve" and Others Don't?*, 1 HARV. L. &

Wards Cove Packing Co. v. Atonia,[102] is another example of ideological voting, wherein the Supreme Court issued a conservative decision restricting the reach of Title VII.[103] *Wards Cove* made it easier for employers to defend against a disparate impact suit under Title VII.[104] In that case, the three Republican appointed swing votes, Justices White, Kennedy, and O'Connor, joined conservatives Justices Rehnquist and Scalia for the majority.[105] The liberal group of Justices, Stevens, Brennan, Marshall, and Blackmun, dissented.[106]

Although many Supreme Court decisions interpreting Title VII fit the narrative of ideological voting, a significant number do not. For example, since 1971, the Supreme Court issued at least thirty-five unanimous decisions in Title VII cases[107] on such

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POL'Y REV. 457, 462 (2007) (describing conventional wisdom, confirmed by analysis of voting patterns, that Justice Burger was a conservative and Justice Rehnquist even more so); Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 48 (2007) (describing Rehnquist's conservative voting patterns).

[101] 457 U.S. at 456; *see* Smith, *supra* note 96 (noting the common description of Justice O'Connor as a centrist); Eric J. Segall, *Justice O'Connor and the Rule of Law*, 17 U. FLA. J.L. & PUB. POL'Y 107, 134 (2006) ("For most of her time on the bench, Justice O'Connor served as the crucial swing vote.").

[102] 490 U.S. 642 (1989).

[103] *Id.*

[104] *Id.* at 657–59.

[105] *Id.* at 644.

[106] *Id.*

[107] The following cases were unanimous as to reasoning and result. Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002); Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001); Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202 (1997); Robinson v. Shell Oil Co., 519 U.S. 337 (1997); Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990); Bazemore v. Friday, 478 U.S. 385 (1986); W.R. Grace and Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum and Plastic Workers of Am., 461 U.S. 757 (1983); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982); N.W. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77 (1981); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); E. Tex. Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395 (1977); Chandler v. Roudebush, 425 U.S. 840 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Love v. Pullman Co., 404 U.S. 522 (1972); Griggs v. Duke Power Co., 401 U.S. 424 (1971). The following cases were unanimous as to result. Thompson v. N. Am. Stainless, LP, 562 U.S. 170 (2011); Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 555 U.S. 271 (2009); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); Edelman v. Lynchburg Coll., 535 U.S. 106 (2002); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991); Watson v. Ft. Worth

issues as same-sex harassment,[108] the standard for retaliation claims,[109] and the scope of disparate impact.[110] This unanimity among the liberal, moderate, and conservative camps[111] undermines the claim that political preference guides Title VII votes.[112] Indeed, in some of these cases, the Justices voted contrary to the expectations of their ascribed political views. For example, in *Meritor Savings Bank v. Vinson*,[113] conservative Justice Rehnquist penned the opinion that expanded Title VII to include sexual harassment as a form of sex discrimination.[114] In *Watson v. Fort Worth Bank & Trust*,[115] Justices Rehnquist and Scalia agreed with the unanimous Court that disparate impact analysis could be extended to apply to subjective or discretionary promotion systems, as well as to objective tests.[116] In a recent example, *Thompson v. North American Stainless, LP*,[117] Justice Scalia wrote the opinion of the Court which expanded Title VII to prohibit employers from retaliating against third parties in order to punish employees who complain of discrimination.[118]

Thus, an overview of Title VII—the history of amendment, the varied Supreme Court decisions, and the diverse scholarly analysis—does not conclusively establish an ideologically driven

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Bank & Trust, 487 U.S. 977 (1988); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Hishon v. King & Spalding, 467 U.S. 69 (1984); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983); Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982); Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Int'l Union of Elec., Radio & Mach. Workers, Local 790 v. Robbins & Myers, Inc., 429 U.S. 229 (1976); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); *see also* Selmi, *supra* note 8, at 293–94 (identifying eighteen unanimous Supreme Court employment discrimination decisions from 1993 to 2010 and suggesting that the unanimity reflected the Court's strategic response to the Civil Rights Act of 1991).

[108] *Oncale*, 523 U.S. at 79.

[109] *White*, 548 U.S. at 60.

[110] *Watson*, 487 U.S. at 987.

[111] For example, in the unanimous decision in *Desert Palace, Inc. v. Costa*, Justice Ginsburg joined Justice Thomas's opinion for the Court. 539 U.S. 90.

[112] Selmi, *supra* note 8, at 298 (noting unanimous cases indicated a shift in the Supreme Court toward a more pro-plaintiff position).

[113] 477 U.S. 57 (1986).

[114] *Id.* at 73.

[115] 487 U.S. 977 (1988).

[116] *Id.* at 991.

[117] 562 U.S. 170 (2011).

[118] *Id.* Justices Roberts, Kennedy, Sotomayor, Thomas, and Alito all joined in the majority, with Justice Kagan recusing herself and Justice Ginsburg filing a concurrence joined by Justice Breyer. *Id*. at 178–79.

jurisprudence. Those adopting the political interpretation can identify supporting examples, but exceptions and theories challenge this view. An interdisciplinary approach can aid in this effort to determine whether the Supreme Court's jurisprudence on Title VII is ideological. Political science scholarship on judicial decision making offers particularly relevant empirical evidence and theories to enhance this incomplete picture.

III. USING POLITICAL SCIENCE MODELS TO ANALYZE TITLE VII JURISPRUDENCE

Political science scholars have long studied the Supreme Court's decision making,[119] including empirically measuring whether the decisions are based on ideology, the law, or other factors.[120] Their works study Supreme Court decisions in broader areas of law but can provide a useful basis for assessing whether Title VII jurisprudence is the result of an ideological Court.[121] The consensus among the predominant political science studies is that political preference does indeed drive Supreme Court decisions.[122] Their conclusion is based on empirical measurements that accurately capture the political ideology of the Court and find statistically valid means of measuring its impact.[123] Further, a subset of this scholarship also offers theoretical and empirical explanations for the exceptions when Justices appear to vote contrary to their political viewpoints,[124] potentially explaining the varied history of Title VII. Ultimately, applying the models to Title VII reveals that the Supreme

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[119] Kate Webber, *Correcting the Supreme Court—Will It Listen? Using the Models of Judicial Decision-Making To Predict the Future of the ADA Amendments Act*, 23 S. CAL. INTERDISC. L. J. 305, 305 (2014) (citing PACELLE ET AL., *supra* note 9, at 28–49).

[120] *E.g.*, PACELLE ET AL., *supra* note 9, at 44, 71; SEGAL & SPAETH, *supra* note 9, at 312–26.

[121] *Cf.* Webber, *supra* note 119, at 332–52 (using the models of judicial decision making to predict how the Supreme Court will respond to the Americans with Disabilities Act Amendments Act ("ADAAA")).

[122] *E.g.*, BAILEY & MALTZMAN, *supra* note 10, at 1 ("Much of the [political science] discipline has long embraced the notion that judicial outcomes primarily reflect judicial policy preferences . . . ."); EPSTEIN & KNIGHT, *supra* note 9, at 23 ("It is generally conceded, at least among social scientists, that members of the Court are by and large policy seekers.").

[123] *E.g.*, PACELLE ET AL., *supra* note 9, at 44, 71; SEGAL & SPAETH, *supra* note 9, at 312–26.

[124] *See supra* Part II.A.

Court's interpretation of this statute is particularly ideological. The political science models that posit constraints on ideological voting do not match well with the history of Title VII. At best, in Title VII, the only apparently effective exception to ideology-based voting is when the Court is faced with direct statutory language or long-standing precedent, a narrower category of constraint than in other areas of law.

A. Summary of the Models

Within political science, three theories, or models, of judicial decision making are particularly influential and supported by robust empirical and theoretical analysis. First, the attitudinal model of judicial decision making posits that Supreme Court Justices[125] decide cases based on their individual political preferences and are not constrained in that ideological pursuit by congressional or presidential intent, nor even by the dictates of the law.[126] Second, the strategic model of judicial decision making asserts that Justices decide cases based on their ideologies, but under certain circumstances, are constrained by their coequal branches of government.[127] Specifically, according to this model, Justices will pursue their political preference so long as it will not trigger a congressional response to override their decision.[128] If Justices' true preferences are outside the realm of political acceptability, such that an override or other congressional response is likely, Justices will modify their positions to fall within the realm of positions acceptable to the elected branches.[129] Finally, recent works have espoused a third, integrated model that claims Justices decide cases based largely on ideology but are tempered in this political motive by strategic influences and by the constraining force of the law itself.[130]

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[125] *See* Webber, *supra* note 119, at 309 ("Although some models have included an analysis of judicial decision-making in lower federal courts, the models have generally focused on explaining and predicting Supreme Court decisions." (footnote omitted)).

[126] LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES 69 (2013); PACELLE ET AL., *supra* note 9, at 34–36; SEGAL & SPAETH, *supra* note 9, at 86.

[127] EPSTEIN & KNIGHT, *supra* note 9, at 10.

[128] BAILEY & MALTZMAN, *supra* note 10, at 97–101 (describing the strategic model); PACELLE ET AL., *supra* note 9, at 39–45 (explaining the strategic model).

[129] BAILEY & MALTZMAN, *supra* note 10, at 98–101.

[130] *See generally id.* at 101–19; PACELLE ET AL., *supra* note 9, at 51–52.

The various models of judicial decision making base their claims on empirical studies that test for a statistical correlation between the Justices' political views and their votes in particular cases.[131] This first model requires a valid measurement of the Justices' individual ideologies.[132] Political science scholars have developed an extensive body of work on this issue alone and offer empirical, standardized methods of identifying Justices' respective political viewpoints.[133] A complete explanation of the various methods used by political scientists to estimate Justices' ideologies is beyond the scope of this Article. As an extremely simplified description, however, the predominant methods for determining judicial ideology assess the Justices' voting patterns and use other data and statistical methods to control for potential motivations other than political preference.[134] For the purposes of this Article, it is enough to understand that Justices' political preferences can be quantified through valid, testable methods.[135]

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[131] *E.g.*, SEGAL & SPAETH, *supra* note 9, at 323; Bergara et al., *supra* note 10, at 260.

[132] *See* SEGAL & SPAETH, *supra* note 9, at 320–24 (giving an example of measuring the Justices' ideologies); Bergara et al., *supra* note 10, at 260–61.

[133] PACELLE ET AL., *supra* note 9, at 215–16; *see, e.g.*, Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306–08 (2007); Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261, 263–65 (1996); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 136–40 (2002).

[134] *E.g.*, BAILEY & MALTZMAN, *supra* note 10, at 27–43; PACELLE ET AL., *supra* note 9, at 215–16; Bergara et al., *supra* note 10, at 251–56; Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 601–03 (2001); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 35–36 (1997); *see also* SEGAL & SPAETH, *supra* note 9, 204, 320–22 ("To determine perceptions of nominees' qualifications and judicial philosophy, we use a content analysis from statements in newspaper editorials from the time of the nomination until the Senate voted. The analysis used four of the nation's leading papers, two with a liberal stance, the *New York Times* and the *Washington Post*, and two with a more conservative outlook, the *Chicago Tribune* and the *Los Angeles Times*. . . . Ideology ranges from 0 (extremely conservative) to 1 (extremely liberal)." (footnote omitted)).

[135] Indeed, the various assessments lead to sensible results. For example, Justices Scalia and Rehnquist score the most conservative, Justice O'Connor as a moderate, and Justices such as Marshall and Brennan receive liberal scores. *E.g.*, SEGAL & SPAETH, *supra* note 9, at 321–22 ("We believe that the scores accurately measure the perceptions of the [J]ustices' values at the time of their nomination. While not everyone would agree that every score precisely measures the perceived ideology of each nominee, Fortas, Marshall, and Brennan are expectedly the most

With the Justices' political preferences established, the various political science models use statistical techniques to measure whether a meaningful correlation exists between the Justices' ideology and case votes.[136] The studies also test whether other factors, such as legal precedent or concern for congressional override, influence votes.[137] Political science scholars have used these techniques in numerous studies conducted over the last decade, creating a substantial body of empirical work on the role of ideology in Supreme Court decisions.[138] Thus, the political science models of judicial decision making offer an interdisciplinary, empirical basis for assessing whether the Supreme Court's Title VII's jurisprudence is the result of the Justices' ideologies.

B. Title VII and the Attitudinal Model

According to the attitudinal model, Supreme Court Justices decide cases based on their political viewpoints.[139] Applied to Title VII, the attitudinal model explains the case law according to the political makeup of the Court, with defendant-employer friendly decisions as the result of a coalition of conservative Justices and pro-plaintiff employee decisions as the result of a liberal Justices wielding the necessary five votes. In fact, a few legal scholars have found evidence connecting Title VII case outcomes to the ideology of the deciding Justices. For example, in 2010, Margaret Lemos published an empirical study of every case decided by the Supreme Court "that involved a question of interpretation or application of Title VII."[140] She identified a "strong correlation" between the Justices' votes on Title VII issues and their presumed political preferences[141] based on her

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liberal, while Scalia and Rehnquist are the most conservative. . . . O'Connor comes out as a moderate, given her previous support for women's rights and abortion.").

[136] Again, the statistical techniques behind these studies are beyond the scope of this Article but are detailed at length in the predominant studies cited. *See, e.g.*, PACELLE ET AL., *supra* note 9, at 54–60; SEGAL & SPAETH, *supra* note 9, at 312–26; Bergara et al., *supra* note 10, at 251–60.

[137] *E.g.*, BAILEY & MALTZMAN, *supra* note 10, at 68–72, 103–19.

[138] *See generally* PACELLE ET AL., *supra* note 9, at 28–50 (describing the development of and the body of work on the models of judicial decision making).

[139] PACELLE ET AL., *supra* note 9, at 34–36; SEGAL & SPAETH, *supra* note 9, at 86.

[140] Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 388 (2010).

[141] *Id.* at 407–08.

finding that "Justices who are generally viewed as 'liberal' have cast a high proportion of 'liberal' votes in the Title VII context, while the opposite is true for Justices typically deemed 'conservative.' "[142] For example, Lemos found that Justice Ginsburg's and Justice Breyer's votes on Title VII cases were liberal eighty-four percent and eighty-eight percent of the time while Justices Scalia and Thomas were liberal only forty-three percent and fifty-two percent of the time.[143]

In 1994, William Wines examined every Supreme Court Title VII decision during the Reagan era, 1980 to 1988.[144] Wines found a distinct pattern of decisions, with Justices identified as liberal consistently voting to expand the reach of Title VII, Justices identified as conservative consistently voting to restrict the statute's reach, and Justices identified as moderate providing the swing vote in the Court split.[145] For example, for the period of 1980 to 1985, Wines identified six expansive Supreme Court decisions on Title VII and five restrictive decisions.[146] He then tallied the votes and found that Justices Rehnquist, Powell, Burger, and O'Connor had the most conservative record of votes and Justices Brennan, Marshall, Stevens, and Blackmun had the most liberal.[147]

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[142] *Id.* Lemos also found this correlation between the appointing President and the Justices' Title VII vote. *Id.* at 408 ("Justices appointed by Democratic presidents tend to render significantly more liberal decisions than Justices appointed by Republican presidents."). However, she acknowledged the significant exceptions to this trend and cautioned that "[s]ome of the most liberal Justices to cast votes during the Title VII era were appointed by Republican Presidents" and "Reagan's three appointees—O'Connor (1982), Scalia (1984), and Kennedy (1988)—all proved to be farther to the left on Title VII issues than the Justices they replaced." *Id.*

[143] *Id.* at 409.

[144] Wines, *supra* note 16, at 662.

[145] *Id.* at 687, 690.

[146] *Id.* at 685–87.

[147] *Id.* For the period of 1985 to 1989, Wines identified twenty Title VII decisions—six expanding the statute, seven restricting it, and seven maintaining the status quo. *Id.* at 688. Again, Wines identified patterns of voting that match the ascribed political views of the Justices. *Id.* Justices Rehnquist and Scalia consistently voted to restrict Title VII, while Justices Marshall, Brennan, Blackmun, and Stevens consistently voted to expand Title VII. *Id.* "Justices O'Connor, White and Powell provided the swing votes that influenced results in either direction depending on the issues at hand." *Id.* at 688–89. Wines found that in the five Title VII cases at issue from the time Justice Kennedy joined the Court in February 1988 until the end of the period studied, April 1990, Justice Kennedy consistently voted with the conservatives, Justices Rehnquist and Scalia. *Id.* at 690. Justice Kennedy would later be viewed as a swing vote, *see* Wilkins et al., *supra* note 82, at 32, but

Although these studies identify ideological voting trends, the attitudinal explanation of Title VII's jurisprudence appears incomplete. For example, in addition to the ideologically split decisions, Wines also identified a number of unanimous decisions,[148] a finding which undermines any claim of purely ideological decision making by the Justices. In fact, Wines's ultimate conclusions undermine the association between ideology and Supreme Court votes.[149] Similarly, although Lemos finds the expected association of liberal votes with liberal Justices, her results also continue to document the fact that ideology-based voting is not one hundred percent; indeed, according to her study, even Justice Thomas issues liberal votes on Title VII about half of the time.[150]

On the surface level, these exceptions undermine the claim that the Supreme Court decides cases based on ideology. The exceptions seem to pose the most significant challenge to the attitudinal model given its premise that "[J]ustices care only about policy"[151] and this "single variable" explains their

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according to Wines, in this abbreviated period, he was conservative. *See* Wines, *supra* note 16, at 690.

[148] Wines, *supra* note 16, at 685 (noting that three of the six cases from 1980 to 1985 that expanded Title VII were unanimous); *id.* at 690 (identifying two unanimous cases in the 1986 to 1989 period that expanded Title VII).

[149] Ultimately, although acknowledging the small sample size, Wines also found that "no statistically significant relationship, using a chi-square test, between voting pattern and Presidential appointment." *Id.* at 716. He further concluded:

> [C]areful ideological screening of federal judicial candidates did not assure President Reagan the "correct" votes on Title VII cases in the short run as measured by conservative ideology . . . as late as 1989, Supreme Court decisions did not reflect President Reagan's agenda for Title VII [in part] because, despite excellent conservative credentials, Justice O'Connor had voted with the liberal wing on employment discrimination issues.

Id. at 717.

[150] Lemos, *supra* note 140, at 409.

[151] BAILEY & MALTZMAN, *supra* note 10, at 5 (citing SEGAL & SPAETH, *supra* note 9, at 111); *see also* PACELLE ET AL., *supra* note 9, at 35–36 (explaining the attitudinal model and its belief that "[J]ustices are totally unencumbered in deciding cases" according to their values and attitudes and are "single-minded political actors"); Epstein et al., *supra* note 134, at 588 ("Based on the attitudinal model, no factors other than ideology come into play [in Supreme Court decisions]."). The critiques of the attitudinal model often highlight the problem of its failure to accommodate exceptions to attitudinal voting. PACELLE ET AL., *supra* note 9, at 37–39.

individual decisions.[152] In fact, critics challenge the attitudinal model as "too simplistic and too exclusive of other possible contributing factors" to the Supreme Court's decision making.[153]

The proponents of the attitudinal model explain, however, that the purpose of the model is to establish a meaningful measure of the Court overall, as opposed to explaining every individual case.[154] Regardless of individual exceptions, if the attitudinal model establishes a strong correlation between ideology and judicial votes overall, this informs important questions,[155] such as whether the Democrats made the right decision in limiting the ability to filibuster judicial appointments.[156] Thus, the proponents of the attitudinal model offer it as the best—the most empirically validated—explanation of the Supreme Court's decisions among all the theories on what drives the Court's behavior.[157]

Moreover, some of the exceptions to ideology-based voting can be explained by the importance of the issue to the Justices, or salience.[158] Recent explorations of attitudinal theory have found that ideology has a stronger influence on Supreme Court votes in salient cases than in cases that are less salient to the Court.[159] Salience becomes a useful explanatory factor, particularly in light of the evidence that the issue of minority rights is particularly salient to the Supreme Court.[160] In fact, a number of Supreme Court Title VII decisions where one or more Justices

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[152] PACELLE ET AL., *supra* note 9, at 36.

[153] *Id.* at 37.

[154] *See* SEGAL & SPAETH, *supra* note 9, at 45–46 (explaining that the criteria for evaluating a model is whether it provides a better explanation of reality than alternatives); Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 LAW & POL'Y 295, 296 (2006) ("What is intriguing about the [attitudinal] model is its deceptively simple but powerful logic: [J]ustices come to the Supreme Court with their ideological preferences fully formed and, in light of contextual case facts these preferences cast overwhelming influence on their decision making. Thus the attitudinal model is a complete and adequate model of Supreme Court behavior, though not a complete explanation for [J]ustices' votes." (citation omitted)).

[155] *See* SEGAL & SPAETH, *supra* note 9, at 45–46.

[156] S. Res. 15 & 16, 113th Cong. (2013) (enacted).

[157] SEGAL & SPAETH, *supra* note 9, at 351.

[158] PACELLE ET AL., *supra* note 9, at 202.

[159] *E.g.*, *id.*; Unah & Hancock, *supra* note 154, at 296, 307.

[160] BARNES, *supra* note 6, at 171 (describing empirical evidence that the Supreme Court is particularly resistant to congressional influence in votes on minority rights, noting the importance of the issue to the Court given its "special role in scrutinizing statutes that affect 'suspect' classes").

voted contrary to ideology involved less salient procedural questions that did not implicate the scope of protections for minority employees.[161] Thus, a Title VII decision where Justices voted contrary to political preference may simply reflect a case of less importance, rather than an exception that challenges the attitudinal model. Overall, the attitudinal model provides a compelling explanation for a significant number of Title VII cases[162] and supports the thesis that the Supreme Court's jurisprudence in this area is driven by ideology.

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[161] Michael Selmi found this trend in an analysis of the Court's Title VII decisions after the Civil Rights Act of 1991. *See* Selmi, *supra* note 8, at 291–92. Selmi drew a different conclusion about the significance of this trend, which is addressed in Part III.C. Less salient Title VII cases from other time periods also reflect this trend. *See, e.g.*, Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) (concerning the effect of class action on Title VII statute of limitations and resulting in a unanimous liberal outcome in case); E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395 (1977) (concerning proper class representatives in Title VII class action and resulting in a unanimous conservative decision); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (concerning the effect of union arbitration proceeding on the right to bring claims under Title VII and resulting in a unanimous liberal decision); Love v. Pullman Co., 404 U.S. 522 (1972) (concerning administrative filing requirements and resulting in a unanimous liberal decision among conservative, moderate and liberal Justices).

[162] *See generally* Vance v. Ball State Univ., 113 S. Ct. 2434 (2013) (conservative decision with Justices Scalia, Kennedy, Roberts, and Alito for the majority, Justice Thomas concurring, and Justices Ginsburg, Breyer, Sotomayor, and Kagan dissenting); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (conservative decision with Justices Scalia, Kennedy, Thomas, Roberts, and Alito in the majority and Justices Steven, Souter, Ginsburg, and Breyer in the dissent); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (conservative decision with Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas for the majority and Justices White, Blackmun, Stevens, and Souter dissenting); Wards Cove Packing, Co. v. Atonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (conservative decision with Justices White, Rehnquist, O'Connor, Scalia, and Kennedy for the majority and Justices Brennan, Marshall, Blackmun, and Stevens dissenting); Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) (liberal decision with Justices Brennan, Marshall, Blackmun, and Stevens for the majority, Justice Powell concurring, and Justices White, Burger, Rehnquist, and O'Connor dissenting); Connecticut v. Teal, 457 U.S. 440 (1982) (liberal decision with Justices Brennan, White, Marshall, Blackmun, and Stevens for the majority and Justices Burger, Powell, Rehnquist, and O'Connor dissenting); United Steelworkers v. Weber, 443 U.S. 193 (1979) (liberal decision with Justices Brennan, Stewart, White, Marshall, and Blackmun for the majority and Burger and Rehnquist dissenting). As noted previously, for this analysis, the case direction of liberal or conservative is taken from Harold Spaeth's United States Supreme Court Database. Spaeth et al., *supra* note 16; *see* Epstein & Landes, *supra* note 81, at 565 (adopting U.S. Supreme Court Database assessments of liberal and conservative decisions). For assessments of the political ideologies of the Justices, see *supra* notes in Part II.B. There are other Supreme Court Title VII decisions generally reflecting

C. Title VII and the Strategic Model

Proponents of the strategic model challenge the attitudinal model's premise that ideology is the only reliably predictive influence on the Supreme Court.[163] According to the strategic model, although ideology has a strong influence on the Court's decisions, the Supreme Court is constrained in its ideological voting by concern for "the potential reactions of their policy competitors" including Congress and the President.[164] Specifically, many proponents of the strategic model posit that Justices will modify their preferred position and moderate their vote in order to avoid an override by Congress,[165] and offer their own empirical studies in support.[166] On its surface, the strategic model could provide a comprehensive explanation of Title VII's varied history that acknowledges the strong, but not sole, role of ideology, and explains the circumstances under which ideological

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ideological voting. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013); Ricci v. DeStefano, 557 U.S. 557 (2009); West v. Gibson, 527 U.S. 212 (1999); Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987); Johnson v. Trans. Agency, 480 U.S. 616 (1987); Int'l Ass'n of Firefighters Local 93 v. Cleveland, 478 U.S. 501 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Ariz. Governing Comm. v. Norris, 463 U.S. 1073 (1983); Am. Tobacco Co. v. Patterson, 456 U.S. 63 (1982); Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); Cnty. of Washington v. Gunther, 452 U.S. 161 (1981); Cal. Brewers Ass'n v. Bryant, 444 U.S. 598 (1980); Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24 (1978); L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Johnson v. Ry. Express Agency, 421 U.S. 454 (1975).

[163] *E.g.*, EPSTEIN & KNIGHT, *supra* note 9, at 9–10.

[164] Bergara et al., *supra* note 10, at 248.

[165] *E.g.*, EPSTEIN & KNIGHT, *supra* note 9, at 13–17, 140–41, 154–57; *see also* PACELLE ET AL., *supra* note 9, at 44–45 (describing the strategic premise that risk of override constrains the Court); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1451 (2001) (identifying the risk of override as an element of strategic theory); Epstein et al., *supra* note 135, at 595 (noting that, according to strategic theory, the Supreme Court "will not, in the main, issue decisions that are unacceptable to the ruling regime"). Some strategic scholars, however, do not rely on the risk of override theory and data and theorize that risk of override does not need to be effective for Congress or the President to constrain the Court. *See* Webber, *supra* note 119, at 335. What this branch of the strategic model generally fails to identify, however, is how and when these power-based constraints are operative. *Id.* at 336.

[166] *E.g.*, BAILEY & MALTZMAN, *supra* note 10, at 15–16; EPSTEIN & KNIGHT, *supra* note 9, at 9–13.

voting is constrained. Ultimately, however, the strategic model fails as an explanatory paradigm because it does not fully account for the effect of enacted overrides.

1. A Strategic Explanation of Title VII's History

Michael Selmi uses the strategic model of decision making to explain the pattern of Title VII cases following the Civil Rights Act of 1991[167] ("CRA"). As explained in Part II.C. above, the CRA amended Title VII to overturn a series of Supreme Court decisions on Title VII and other discrimination laws.[168] Selmi finds that the CRA had "a meaningful restraining effect on the Supreme Court's jurisprudence," and that since its passage, the Court has generally been "more supportive of plaintiffs' Title VII claims than it had been in the years immediately preceding the CRA."[169] According to Selmi, after the congressional overrides signaled the elected branches' willingness to act, the Court strategically issued decisions more in line with those branches' preferences.[170] In this manner, Selmi connects Title VII jurisprudence with the strategic model's premise that the Court's ideological decision making is tempered by its concern for the views and potential response of Congress.[171]

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[167] Selmi, *supra* note 8, at 282.

[168] *Infra* Part III.C.3.

[169] Selmi, *supra* note 8, at 282. For example, Selmi found that the Court issued a higher number of unanimous decisions subsequent to the Civil Rights Act ("CRA"), the majority of which favored plaintiffs. *Id.* at 293. These included decisions prohibiting same-sex harassment, reversing some lower court decisions that had heightened the plaintiff's burden and "craft[ing] quite liberal principles of law relating to retaliation claims." *Id.* at 297.

[170] *Id*. at 289–90. One of Selmi's examples, the post-CRA case *Desert Palace v. Costa*, seems particularly illustrative of the strategic move that Selmi identifies. *Id.* at 295 (citing Desert Palace v. Costa, 539 U.S. 90 (2003)). In this decision—which, significantly, is authored by conservative Justice Thomas—the Court interpreted one of the CRA amendments in a manner that expanded plaintiffs' ability to use a lower causation standard to prove a case of intentional discrimination. *Desert Palace*, 539 U.S. at 101. Throughout the decision, the Court appears significantly constrained by the amendment. For example, Justice Thomas's decision relied on his view of the unambiguous words of the amendment, which "[o]n its face . . . does not mention, much less require, that a plaintiff make a heightened showing." *Id.* at 98–99.

[171] EPSTEIN & KNIGHT, *supra* note 9, at 10, 13 (strategic premise); Bergara et al., *supra* note 10, at 248 (strategic premise).

Selmi's findings are also consistent with at least one other Supreme Court decision prior to the CRA. In 1976, the Supreme Court held in *General Electric Co. v. Gilbert*[172] that pregnancy-based discrimination was not sex discrimination prohibited by Title VII.[173] The 1978 Pregnancy Discrimination Act ("PDA") amended Title VII in direct response to this decision and defined sex to include "pregnancy, childbirth or related medical conditions."[174] Six years later, in *Newport News Shipbuilding & Dry Dock v. EEOC*,[175] the Court embraced the amendment and issued a decision based on the PDA's instruction to treat pregnancy discrimination as a form of sex discrimination.[176] In their seminal work describing the strategic model, Lee Epstein and Jack Knight cite *Newport News* as a strong example of sophisticated, strategic Court behavior where the Justices vote contrary to their true preferences to avoid congressional rebuke.[177]

2. Limits to the Strategic Model: Lack of Evidence on Enacted Overrides

Many proponents of the strategic model posit that Justices will modify their preferred positions and moderate their votes to avoid an override by Congress.[178] As set forth in the author's prior work, the strategic model generally has limited relevance for employment discrimination statutes because the model relies too heavily on this risk of reversal theory and empirical evidence.[179] The strategic model's limited focus of its empirical

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[172] 429 U.S. 125 (1976).

[173] *Id.* at 138–40.

[174] Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)).

[175] 462 U.S. 669 (1983).

[176] *Id.* at 684.

[177] EPSTEIN & KNIGHT, *supra* note 9, at 15–17.

[178] *E.g.*, EPSTEIN & KNIGHT, *supra* note 9, at 13–17, 140–41, 154–57; *see also* PACELLE ET AL., *supra* note 9, at 44–45 (describing the strategic premise that risk of override constrains the Court); Cross & Nelson, *supra* note 6, at 1451 (same); Epstein et al., *supra* note 134, at 595 ("[According to strategic theory,] the Court will not, in the main, issue decisions that are unacceptable to the ruling regime."). Some strategic scholars, however, do not rely on the risk of override theory and data and theorize that the risk of override does not need to be effective for Congress or the President to constrain the Court. *See* Webber, *supra* note 119, at 335–36. What this branch of the strategic model generally fails to identify, however, is how and when these power-based constraints are operative. *Id.*

[179] Webber, *supra* note 119, at 328–36.

evidence, which mainly consists of studies showing that a risk of override constrains the Supreme Court, fails to prove strategic action in circumstances, such as Title VII, where the law is shaped by enacted overrides.[180]

To begin with the mere existence of enacted overrides presents a challenge to strategic theory. If, as the strategic and integrated models claim, the Court will strategically move its preferred position in light of the congressional risk of override, then, conversely, when the override does occur, it is because the Justices were unconcerned with congressional response. This is consistent with the attitudinal, not the strategic, model.[181] To claim, as strategists do, that the risk of overrides constrains the Court, the strategic model must explain why overrides occur, otherwise it appears the Court simply engaged in attitudinal, that is ideological, voting and Congress responded.[182]

The strategists do offer explanations—for example, overrides may occur because the Court erred in assessing the risk or did not sufficiently moderate its position to fall within Congress's acceptable range of outcomes, or because the makeup of Congress changed between the time of the Court's vote and the time of the overriding legislation.[183] These explanations, however, are not fully supported by empirical evidence.[184] If overrides occur because of errors in calculating the risk of override or the makeup of Congress changes, then, according to the logic of the strategic model, once the override has passed this clear rebuke by the current elected branches, it should move the Court into conformity.[185] A strategic postoverride Court would move its preferred ideological position on cases in response to the overriding act; otherwise, the Court votes that are later overridden are just as equally well explained by ideological voting, unconcerned with other branches, as by strategic error.[186]

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[180] *Id.*

[181] *Id.* at 330–32.

[182] *See* Cross & Nelson, *supra* note 6, at 1457–58 ("[Examples of overrides] actually indicate that the Court does not feel constrained by the risk of reversal. . . . The mere existence of reversals does not disprove the [strategic] theory . . . but the existence is better evidence against the constraint theory than for it.").

[183] Webber, *supra* note 119, at 330, 332–34.

[184] *Id.* at 333–35.

[185] *Id.* at 333.

[186] *Id.* at 333–35.

The strategic modelists, however, have generally failed to study whether an override by Congress subsequently reins in the Court's ideology-based voting.[187]

In fact, the few studies of enacted overrides are either inconclusive or show just the opposite, that the Court does not move its position in response to enacted overrides, at least in certain types cases.[188] Specifically, in the most relevant example of override study, Jeb Barnes found that, although overrides have an effect on judicial decisions in general; that effect was absent in the context most relevant to Title VII.[189] According to Barnes, where the issues involve protection of minority rights, legislative overrides do not restrain courts from pursing their political preferences.[190] Thus, the existing evidence more strongly supports the attitudinal model claim that Justices act according to ideology without regard for the potential response of the elected branches. In the absence of empirically based explanations for why and when overrides occur, the strategic model does not silence the alternative, ideological explanation.

3. The Supreme Court's Resistance to Title VII Overrides

This gap or inconsistency in the models' empirical evidence is particularly significant to the analysis of Title VII's jurisprudence in this Article. Congress has repeatedly amended Title VII to overturn conservative Supreme Court interpretations of its provisions.[191] If, as strategic modelists claim[192]—and integrated modelists claim in part[193]—the Supreme Court is constrained by its coequal branches, surely it would alter its Title VII jurisprudence in the face of such a clear effort by those branches to assert their position. This expected change of judicial course, however, has not occurred. As with the strategic and integrated models' empirical studies, the history of Title VII, is more consistent with attitudinal, that is ideological, voting, with the Supreme Court resisting congressional and executive efforts to constrain them.

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[187] *Id.* at 332–35.
[188] *Id.* at 339–43.
[189] BARNES, *supra* note 6, at 136–37, 171.
[190] *Id.* at 171.
[191] *See supra* Part I.C.
[192] *E.g.*, EPSTEIN & KNIGHT, *supra* note 9, at 154–57.
[193] *E.g.*, BAILEY & MALTZMAN, *supra* note 10, at 15–16.

As explained above, Selmi makes the opposite claim, asserting that after the Civil Rights Act of 1991 ("CRA"), which amended Title VII in order to overturn a number of conservative Supreme Court cases, the Court shifted its position and issued more liberal decisions.[194] At the same time, Selmi also found a significant number of post-CRA cases where the Justices continued to follow their political preferences.[195] For example, Selmi cites *Ledbetter v. Goodyear Tire & Rubber Co.*,[196] a post-CRA decision in which the Court made it substantially more difficult for plaintiffs to bring unequal pay claims.[197] Significantly, just two years after the decision, Congress passed and President Obama signed the Lilly Ledbetter Fair Pay Act of 2009, which amended Title VII in order to overturn this decision.[198]

The *Ledbetter* case poses a challenge to the strategic and integrated theories, specifically to the modelists who posit that the Supreme Court moves its position to avoid congressional override. The Supreme Court must have been aware of the risk that its *Ledbetter* decision could be overridden; Justice Ginsburg directly called for such an override in her dissent.[199] Given this clear risk of override, according to strategic models, the conservative members of the Court should have moderated their position to avoid congressional response;[200] however, they failed to do so. In fact, as Selmi explains, *Ledbetter* is just one of a number of post-CRA decisions in which the Court's conservative members did not moderate their preferences despite the Act and its strong signal that the elected branches intended a broader interpretation of Title VII.[201] Moreover, subsequent to the

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[194] Selmi, *supra* note 8, at 281.

[195] *Id.* at 282.

[196] 550 U.S. 618, 623–24 (2007).

[197] Selmi, *supra* note 8, at 299–300.

[198] *Id*. (citing Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 and 42 U.S.C.)).

[199] *Ledbetter*, 550 U.S. at 661.

[200] *E.g.*, Epstein et al., *supra* note 134, at 592–95.

[201] Selmi, *supra* note 8, at 298; Cross & Nelson, *supra* note 6, at 1457. As Cross and Nelson explain, the decisions limiting the scope of Title VII after the CRA "demonstrate that the courts do not seem to respond to the risk of an override." *Id.* at 1457. "Congress made quite clear in . . . the Civil Rights Act of 1991 that it wanted a more liberal interpretation of civil rights statutes and was prepared to legislate to this effect. Yet the Court continued its pattern of conservative interpretation of those statutes despite their amendment." *Id.*

publication of Selmi's analysis, the Supreme Court issued two additional decisions in Title VII which substantially limit Title VII's reach.[202] All of these postoverride ideology-based decisions would seem to undermine any claim that the strategic or integrated model can explain Title VII's jurisprudence.

Selmi, however, maintains this claim.[203] Although he describes a mix of post-CRA Supreme Court decisions, some apparently constrained by the Act and some apparently not, Selmi describes the overall behavior of the Court as strategic.[204] According to Selmi, the Court moved its position in a strategic response to the CRA, except in the "most ideological"[205] or "controversial and important"[206] cases. He concludes that the CRA changed the Court[207] in those cases that did not implicate its clear preferences,[208] but that in cases that mattered most[209] to the Court, the Justices followed their respective political preferences.[210] Selmi's explanation has appeal. It is indeed strategic for Justices to issue opinions that risk congressional rebuke only in cases that are most significant.

This is not, however, the precise meaning of strategic behavior according to political theory. In Selmi's explanation, the trigger for strategic movement is salience.[211] The Supreme Court will move its position in response to other branch preferences so long as the issue is not too important to the Justice's particular ideology.[212] According to strategic political theory, however, the trigger for strategic position movement is not salience, but rather, risk of override, or other congressional

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[202] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013) (holding that a heightened causation standard applies to Title VII retaliation claims); Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013) (limiting employer liability for sexual harassment by narrowly defining supervisor).

[203] Selmi, *supra* note 8, at 301–02.

[204] *Id.*

[205] *Id.* at 282.

[206] *Id.* at 292, 298 ("In the most significant cases . . . defendants continue to prevail, and often by five to four majorities. In these cases, the Court continues to impose its preferences, but now does so while also issuing a series of pro-plaintiff decisions, most of which likely do not implicate clear preferences of the Court.").

[207] *Id.* at 301 ("[T]he cases decided after 1991 reveal a decidedly different Supreme Court from the one that prompted passage of the CRA.").

[208] *Id.* at 298.

[209] *Id.* at 291.

[210] *Id.* at 291–92, 298, 300–01.

[211] *Id.* at 298.

[212] *Id.* at 290–91.

rebuke.[213] That is, the Court will move its position if it has reliable information that the current Congress would override or potentially use its other powers—such as budget—in response to a decision.[214]

Indeed, Congress is more likely to override a Court decision when it concerns controversial and important matters.[215] Overrides require effort and time only a motivated elected body will invest;[216] logically, Congress is less likely to do so for less significant issues. Selmi asserts that the Title VII pattern is to act according to preference even in the matters most likely to draw congressional attention.[217] This is the opposite premise of strategic political theory.[218] The refusal to move position in cases of ideological importance is actually more, or at least equally, consistent with the attitudinal model which claims that Justices decide cases according to political preference regardless of the views of its coequal branches.[219] In fact, a study by political science scholars Isaac Unah and Ange-Marie Hancock found that salience is a trigger for attitudinal, not strategic, voting by Justices.[220] Their empirical study finds that the more salient the issue is to the Court, the more likely the Court is to engage in ideology-based voting, rather than strategic behavior.[221]

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[213] *E.g.*, EPSTEIN & KNIGHT, *supra* note 9, at 12–15, 138–39, 154–57; Bergara et al., *supra* note 10, at 247–51; Cross & Nelson, *supra* note 166, at 1450, 1452, 1445–46, 1459–60; Epstein et al., *supra* note 134, at 592–94; Jeffrey A. Segal et al., *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 90 (2011); *see also* BAILEY & MALTZMAN, *supra* note 10, at 13–14 (describing strategic theory); EPSTEIN ET AL, *supra* note 126, at 85–86 (describing strategic theory); PACELLE ET AL., *supra* note 9, at 39–40, 42–45 (same).

[214] *E.g.*, EPSTEIN & KNIGHT, *supra* note 9, at 13–17, 140–41, 154–57; *see also* PACELLE ET AL., *supra* note 9, at 44–45 (describing the strategic premise that risk of override constrains the Court); Cross & Nelson, *supra* note 6, at 1451 (identifying the role of risk of override in strategic theory); Epstein et al., *supra* note 134, at 595 ("[According to strategic theory,] the Court will not, in the main, issue decisions that are unacceptable to the ruling regime."). The empirical basis for strategic theory matches its theoretical premise and demonstrates Court movement due to concern for risk of override or other congressional rebuke. *See, e.g.*, Bergara et al., *supra* note 10; Segal et al., *supra* note 213.

[215] *See* BAILEY & MALTZMAN, *supra* note 10, at 117.

[216] *See, e.g.*, Cross & Nelson, *supra* note 6, at 1452–53.

[217] Selmi, *supra* note 8, at 292.

[218] *See supra* note 201.

[219] *See supra* Part III.B.

[220] Unah & Hancock, *supra* note 154, at 209–13.

[221] *Id.* Bailey and Maltzman found the opposite: that strategic considerations were more likely to constrain the Court on salient issues. BAILEY & MALTZMAN,

Moreover, two political science analyses of the CRA came to the opposite conclusion of Selmi; both Jeb Barnes, and Frank Cross and Blake Nelson, respectively, found that the CRA did not constrain the Court from its ideological voting.[222]

Thus, the post-CRA history of Title VII is more indicative of an ideological, attitudinal Court rather than a strategic Court. As the CRA example demonstrates, the strategic model is not the most compelling explanation of Title VII's history and, particularly given the Court's resistance to Title VII overrides, the attitudinal explanation is more accurate.

D. Title VII and the Integrated Model

As explained in Part III.A., the integrated model of judicial decision making, like the strategic model, finds that Justices' political preferences influence decisions but are constrained by strategic concerns.[223] Although the integrated modelists improve the empirical basis for the role of strategic factors,[224] their studies are also premised on risk of override acting as the restraining force.[225] For the reasons explained above, this limits the utility of this theory in the Title VII context where that risk has been

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supra note 10, at 117–20. However, this conclusion still contradicts Selmi's finding that in the most salient post-CRA cases, the Court was less constrained. As noted above, Selmi's finding is more consistent with attitudinal voting.

[222] In his seminal study of overrides, Jeb Barnes describes the CRA as a failed override, explaining that the Supreme Court still followed its own preferences after its passage. BARNES, *supra* note 6, at 13–15 (noting, for example, that following the CRA, the Supreme Court still felt free to create its own employer-friendly standard for punitive damages, contrary to the language of the statute). Frank B. Cross and Blake Nelson similarly describe the Supreme Court's response to the CRA as ideological with the conservative Court ignoring Congress's clear message that it intended a broader interpretation of Title VII. Cross & Nelson, *supra* note 6, at 1456–57. Indeed, Cross and Nelson describe the Court's response to the CRA as a "model case study in the shortcomings of the legislative override." *Id.* at 1456; *see also* Widiss, *supra* note 42, at 538–45 (explaining how the Supreme Court's reliance on "shadow precedents" undermined the efficacy of the Civil Rights Act of 1991).

[223] BAILEY & MALTZMAN, *supra* note 10, at 15–16; PACELLE ET AL., *supra* note 9, at 53.

[224] BAILEY & MALTZMAN, *supra* note 10, at 101–20 (describing the lack of consensus in empirical strategic studies, the challenges for empirical studies in this area, and presenting methods to address those challenges); PACELLE ET AL., *supra* note 9, at 45–47, 51–62 (describing critiques of prior legal and strategic model empirical studies and presenting the research design of an approach to address these critiques).

[225] BAILEY & MALTZMAN, *supra* note 10, at 103–08; PACELLE ET AL., *supra* note 9, at 54–61.

routinely ignored by the Court. The integrated model, however, further finds that Justices' political preferences are also constrained by legal factors, and, specifically, this model offers empirical studies that demonstrate the restraining effect of precedent.[226] The role of precedent could therefore provide an alternative explanation for the Title VII cases where the Justices appear to vote contrary to ideology.[227]

For example, in *Watson v. Fort Worth Bank and Trust*,[228] the Court expanded Title VII in a liberal direction, holding that the disparate impact theory was not limited to objective practices such as screening tests and that subjective employment practices could be challenged for causing a disparate impact based on gender, race, or other protected category.[229] The decision was unanimous as to this holding with conservative Justices Scalia and Rehnquist joining moderate Justices O'Connor, White, and Kennedy—along with liberal Justices Stevens, Marshall, Blackmun, and Brennan—in voting for this liberal outcome.[230] The Supreme Court first created the disparate impact doctrine in *Griggs v. Duke Power Co.*,[231] and its long history of cases developing that theory played a major role in the *Watson* decision.[232] As Justice O'Connor explained in the opinion of the Court, "[O]ur decisions in *Griggs* and succeeding cases could largely be nullified if disparate impact analysis were applied only to standardized selection practices."[233] Thus, in *Watson*, precedent appeared to restrain the conservative—and potentially the moderate—Justices' political preferences, resulting in a unanimous liberal outcome.

Overall, the integrated model's theory and evidence regarding precedent offers a useful explanation for some of the Title VII cases where ideological voting did not occur. In a number of cases where the Justices voted contrary to political

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[226] BAILEY & MALTZMAN, *supra* note 11, at 121–39; PACELLE ET AL., *supra* note 9, at 51–62.

[227] PACELLE ET AL., *supra* note 9, at 68.

[228] 487 U.S. 977 (1988).

[229] *Id.* at 990.

[230] *Id.* at 981, 990.

[231] 401 U.S. 424 (1971).

[232] *Watson*, 487 U.S. at 989–91.

[233] *Id.* at 989.

preference, the Justices relied heavily on precedent.[234] That said, Congress has repeatedly overruled Supreme Court precedent on

[234] *E.g.*, Lorace v. AT&T Techs., Inc., 490 U.S. 900, 913 (1989) (Stevens, J., concurring) ("Although I remain convinced that the Court misconstrued Title VII in *American Tobacco Co. v. Patterson*, and in *Delaware State College v. Ricks,* the Court has correctly applied those decisions to the case at hand. And it is the Court's construction of the statute—rather than the views of an individual Justice—that becomes a part of the law." (citations omitted) (joining in a conservative outcome)); *see also* Thompson v. N. Am. Stainless LP, 562 U.S. 170, 173–74 (2011) (resulting in a unanimous liberal outcome based on *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), precedent); AT&T Corp. v. Hulteen, 556 U.S. 701, 710–11 (2009) (resulting in a conservative outcome for which liberal Justices Souter and Stevens joined, based on precedential impact of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)); Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270–71 (2001) (resulting in a unanimous conservative decision based on clear precedent concerning severe or pervasive); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78–79 (1998) (resulting in a unanimous liberal outcome relying on series of major precedents on harassment and reverse discrimination); Harris v. Forklift Sys., 510 U.S. 17, 21–22 (1993) (resulting in a unanimous liberal outcome based on *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), precedent); Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714–17 (1983) (resulting in unanimous decision with both conservative and liberal outcomes based in large part on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), precedent); Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 399–400 (1982) (resulting in a unanimous holding that retroactive seniority was appropriate remedy in light of precedent case *Franks v. Bowman Trans. Co.*, 424 U.S. 747 (1976)); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–56 (1981) (unanimous conservative outcome based on *McDonnell Douglas* and other precedent); Furnco Const. Co. v. Waters, 438 U.S. 567, 575–80 (1978) (resulting in a unanimous conservative decision relying on *McDonnell Douglas* and other precedent); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) (using reasoning based on *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), precedent and resulting in a conservative decision in which liberal Justices Brennan, Blackmun, Stewart, and Marshall joined); Nashville Gas Co. v. Satty, 434 U.S. 136, 139–43 (1977) (relying on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Gilbert* to determine whether employer policies regarding pregnancy leave were violations of Title VII and resulting in a unanimous liberal decision). The effect of precedent was not universal, however. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763–64, 766 (1998) (using binding precedent in *Meritor* and resulting in conservative Justice Rehnquist joining Justices Breyer, Souter, and Stevens in liberal decision, with Justices Scalia and Thomas dissenting); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (using binding precedent in *Meritor* and resulting in conservative Justice Rehnquist joining Justices Breyer, Souter, and Stevens in a liberal decision, with Justices Scalia and Thomas dissenting); *see also* Pa. State Police v. Suders, 542 U.S. 129, 141–44 (2004) (using analogous labor law precedent, consistent court of appeals outcomes, and analogous Title VII precedent, conservative Justices joined in a liberal outcome with conservative Justice Thomas dissenting); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110–11, 116, 123 (2002) (relying on statutory language and precedent, conservative Justice Thomas authored a liberal opinion joined by Justices Souter, Stevens, and Ginsburg, conservative Justices Rehnquist and Scalia dissenting).

Title VII.[235] As a result, the influence of the legal factor of precedent in Title VII jurisprudence is interrupted by, and stands in conflict with, the legal factor of statutory language.[236] Thus, precedent's constraining force may provide an explanation of the Title VII cases where Justices voted contrary to ideology, but only a limited one.[237] The open and perhaps more pressing question for Title VII analysis is what effect the law—in the form of statutory overriding language—has on the Supreme Court. The integrated model studies do not fully answer this question.

The effect of overriding statutes on the Supreme Court is particularly relevant as such statutes embody both strategic factors, that is the elected branches' viewpoint, and legal factors, such as a binding rule of law for a particular subject. As set forth above, the Title VII overrides were not effective in generally

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[235] *See supra* Part I.C.

[236] In fact, Deborah Widiss has found that the persistent influence of precedent undermines the effectiveness of the various amendments to Title VII. Widiss, *supra* note 42. Widiss, for example, describes the courts' practice of using "shadow precedents"—that is, continuing to follow overridden precedent despite explicit congressional amendments to Title VII which overturned those decisions. *Id*. at 536–56.

[237] *See* Jeffrey A. Segal & Harold J. Spaeth, *The Influence of* Stare Decisis *on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 983 (1996) ("90.8% of the [Supreme Court] votes conform to the [J]ustices' revealed preferences. That is, only 9.2% of the time did a [J]ustice switch to the position established in the landmark precedent."). The decision in *Gross v. FBL Financial Services, Inc.* provides a compelling example of the limits of precedent as an explanatory factor and the need to better understand the role of overriding statutory language. 557 U.S. 167, 174 (2009). In *Gross*, the Supreme Court refused to extend one of the CRA's overriding amendments to the Age Discrimination in Employment Act ("ADEA"). *Id.* at 174–75. The ADEA is a separate statute from Title VII, but it has many similarities in language. The CRA amended Title VII to create a lower causation standard, "mixed motive," that made it easier to for plaintiffs to prove discrimination. *Id.* at 173–74. However, Congress did not amend the ADEA in this manner. *Id.* Prior to *Gross*, courts generally interpreted the ADEA according to the same law and standards as Title VII. *Id.* at 183. In *Gross*, the Supreme Court held that because Congress only amended Title VII in the CRA, the CRA's broad language allowing for "mixed motive causation" could not apply to the ADEA. *Id.* at 174–75. The Court went even further to reject its own prior precedent that had judicially created a less stringent mixed motive standard, leaving ADEA plaintiffs with the much more difficult task of proving but-for causation. *Id.* at 178–79. Thus, the decision was strongly shaped by the Court's view of statutory language and history, not by precedent. *See* Selmi, *supra* note 8, at 299 (suggesting that the different results under Title VII and the ADEA may be a sign of the importance of statutory language). The limits of congressional override left the Court free to vote according to political preference and ignore precedent in the process. *See* Debra A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012).

constraining the Supreme Court's ideological voting patterns. However, in the narrow circumstance where the statute's language provided on-point guidance, the Supreme Court did seem to take notice.[238] Thus, in a number of Title VII cases where the Justices voted contrary to ideology, they appeared to do so in light of on-point statutory language.[239] This is consistent with Barnes's study, which found that the more directly an overriding statute addressed an issue, the more likely the override was to influence subsequent Court decisions.[240] Indeed,

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[238] For this restraint to work, however, the statute must be clear and substantive on the issue at hand. As the author has explained in prior work, if the statute is not sufficiently substantive and leaves room for interpretation, that room will allow for ideological voting. *See generally* Webber, *supra* note 119.

[239] *E.g.*, *White*, 548 U.S. 53, 61–62 (2006) (using statutory differences between Title VII's antidiscrimination and retaliation provisions to reach a unanimous liberal outcome); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (discussed *supra* in Part III.D.); *see also* Crawford v. Metro. Gov't of Nashville, 555 U.S. 271, 278–79 (2009) (reaching a unanimous outcome by reasoning that to rule otherwise would undermine *Faragher-Ellerth* precedent); UAW v. Johnson Controls, Inc., 499 U.S. 187, 211–24 (1991) (concurring in the outcome, conservative Justices Rehnquist and Scalia concur based on § 703(h) of Title VII and Pregnancy Discrimination Act amendment to Title VII's language); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68–69 (1986) (relying on statutory language regarding religious accommodation, liberal Justices Brennan and Blackmun joined the conservative outcome); Hishon v. King & Spalding, 467 U.S. 69, 73–77 (1984) (reaching a liberal outcome joined by Justices Rehnquist, Burger, White, and Powell); Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (finding that the BFOQ defense should be narrowly defined, based on "the restrictive language of § 703(e)" of Title VII along with legislative history and EEOC guidance and reaching a liberal outcome in which conservative Justices Burger and Rehnquist joined); *Teamsters*, 431 U.S. at 348–53 (exempting seniority systems from Title VII liability based on language of § 703(h) of Title VII in a decision where liberal Justices Stewart, Blackmun, and Stevens joined in a conservative result that); Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73–75, 79–83 (1977) (using the language of §§ 703(h) and 703(j) of Title VII to reach a conservative outcome joined by Justices Stewart, Blackmun, and Stevens); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–80 (1976) (holding unanimously among liberal, conservative and moderate Justices that Title VII applied to white employees as well as black employees) ("Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of 'such individual's race[.]' Its terms are not limited to discrimination against members of any particular race." (citations omitted)); *cf.* Landgraf v. USI Film Prods., 511 U.S. 244, 257–64 (1994) (concluding that the Civil Rights Act of 1991 had no clear statutory directive on retroactivity, the liberal Justices Ginsburg, Souter, and Stevens joined the conservative outcome); *Meritor*, 477 U.S. at 63–67 (recognizing sexual harassment as a form of sex discrimination by relying on statutory language, EEOC Guidelines, and uniformity of holdings among circuit courts resulting in a unanimous liberal outcome).

[240] BARNES, *supra* note 6, at 80, 90–91 (stating that prescriptive overriding statutes "on their face, attempt to resolve the override issue" and have more

even given the ideological behavior of the Court, it is unlikely that the Court would reject explicit statutory directives as doing so—in the absence of a constitutional basis—would be an affront to the basic power of the legislature.

Statutes, however, frequently leave room for interpretation or other open questions that provide the space for ideological decisions to enter. Moreover, straightforward statutory questions are far less likely to be resolved by the Supreme Court.[241] As a result, the Supreme Court may be slightly constrained in its ideological voting by the force of law in the form of statutory language, but this constraint is limited. Overall, legal factors in the form of precedent and direct statutory language offer some, albeit limited, explanatory utility for Title VII, and, to this extent only, the integrated model is effective.

IV. RESULTS AND IMPLICATIONS

The political science models of judicial decision making provide an empirical basis for concluding that Supreme Court Justices' political viewpoints have and continue to shape Title VII case law. The studies by proponents of the attitudinal, strategic and integrated models all demonstrate that the Justices' ideology plays a role in Supreme Court's decisions.[242] These results are consistent with the dozens of Title VII cases where the Court split along ideological lines.[243] Moreover, Barnes's study shows that Title VII's main subject, the protection of the rights of minorities, is an area where judicial ideology is particularly strong and particularly resistant to constraint.[244] Indeed, even in the face of the Civil Rights Act of 1991, a sweeping congressional override of over ten conservative

influence on the courts than partial overrides that delegate significant aspects of the law to the courts).

[241] William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 789 (2009) ("That a Justice's ideology plays a significant role in his or her votes . . . is not surprising; since the lower courts will have decided the straightforward cases—cases that can be decided on the basis of the orthodox materials of legal decision-making, such as statutory or constitutional text and precedent, the cases that the Supreme Court decides will tend to involve disputes that cannot be resolved legalistically.").

[242] *See supra* Part III.A.

[243] *See* EPSTEIN & KNIGHT, *supra* note 9, at 9–10.

[244] BARNES, *supra* note 6, at 171.

Supreme Court decisions, and the Lilly Ledbetter Fair Pay Act of 2009, which promptly overturned yet another restrictive Title VII decision, conservative Justices continue to vote to limit Title VII's reach.[245] Overall, the models provide a compelling case that Title VII's jurisprudence reflects ideology-based decision making by the Supreme Court.

Less successful are efforts to use the political science models of judicial decision making to explain the exceptions to ideological voting in Title VII. The strategic and integrated models offer theories on how and when Justices from a predominantly ideological Supreme Court can be constrained to vote contrary to their preference. However, given these models' failure to study enacted overriding statutes, the strategic and integrated theories do not provide an effective explanatory paradigm for Title VII. Instead, in this highly political area of law, only a smaller category of constraints—cases that are less salient, or governed by strong precedent or clear statutory language—appeared to have had any effect on the Court's otherwise ideological voting.

This result has important implications for advocates seeking to shape the laws of employment equity. As just one recent example, the established role of viewpoint in decision making may justify limits on the ability to use filibuster to block judicial appointments.[246] Moreover, those seeking to add important new protected classes[247] should consider whether the proposed law leaves room for ideological Supreme Court decisions that will undermine its effect. Further, if the Supreme Court will shape Title VII according to ideology more than law, perhaps the time and effort of yet another override is better spent on the presidential elections. Alternatively, this result may add a compelling reason to shift employment equity advocacy away

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[245] *See supra* Part III.C.

[246] S. Res. 15, 113th Cong. (2013) (enacted); *see also* S. Res. 16, 113th Cong. (2013) (enacted).

[247] *See* Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013).

from individual rights litigation to benefit-based laws[248] or other nontraditional approaches[249] that may be less susceptible to judicial interference.

[248] *See, e.g.*, *Our Issues*, BETTER BALANCE, http://www.abetterbalance.org/web/ourissues (last visited Apr. 10, 2015).

[249] *E.g.*, Kirsten K. Davis, *Extending the Vision: An Empowerment Identity Approach to Work-Family Regulation as Applied to School Involvement Leave Statutes*, 16 WM. & MARY J. WOMEN & L. 613, 658 (2010).