
Scott A. Moss
University of Colorado Law School

Sandra Sperino
Temple University, James E. Beasley School of Law

Robin R. Runge
University of North Dakota School of Law

Charles A. Sullivan
Seton Hall University School of Law

Follow this and additional works at: http://scholar.law.colorado.edu/articles

Part of the Disability Law Commons, Health Law and Policy Commons, Labor and Employment Law Commons, Legislation Commons, Sexuality and the Law Commons, and the Supreme Court of the United States Commons

Citation Information

Copyright Statement
Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact erik.beck@colorado.edu.
Professor Scott A. Moss*: Today's topic is "Reviving Employee Rights? Recent and Upcoming Employment Discrimination Legislation." At any given year, you could do an update on the status of legislation. PJ O'Rourke once asked when our government would decide that we have enough law – when could we say "Stick a fork in it, it's done?" I think we've seen enough of the political system to know that the answer is, "Never". The Congress is never done legislating. There always is more to do, or at least a perception of more to do. But while major employment and civil rights legislation is a constant over time, it's not consistent over time, and we are entering an interesting period, which is why we are here.

In the past half century or thereabouts, there have been a few periods during which we have seen a real flurry of important employment or civil rights legislation. We all know, of course, the 1964 to 1968 period when we had the Civil Rights Act of 1964, itself really several pieces of important legislation; the Voting Rights Act of 1965; and the Fair Housing Act of 1968. I will skip over the 1970s in the interest of time. In 1990 to 1994, there was another little flurry of legislation, from the Americans with Disabilities Act to the Civil Rights Act of 1991 and the Family Medical Leave Act. And we are here today because we may be at the beginning of another such period. We have the ADA Amendments Act in 2008, the

* Associate Professor of Law, University of Colorado School of Law.
Ledbetter Act in 2009⁹ and, as we will hear today, this just may be the tip of the iceberg of what is below the surface and coming to the surface. We overstate the point if we say that we are entering a period on par with the mid-60s era, but I think it does not exaggerate to say that, depending on how things shake out in the coming years, this period could be up there with the early 90s in terms of remaking the landscape of our field, at least to some degree, and that of course depends on what passes and what doesn't.

There are many reasons why these historical moments happen. We are at a point, after eight years of a president, and to a lesser extent of Congress, that was reluctant to undertake major expansions of employee rights. So there is a bit of a bottleneck and a backlog in the legislative works.

Another reason these events come in waves is that we passed the major laws in the early 90s and it takes a decade or so for the courts to sift through how they will interpret these laws. We now have the benefit of time to reflect on what worked, what didn't, and what is enough. The ADA was passed in 1990. We had Supreme Court decisions from 1998 to 2002 or so, and then we reflected upon the impact of those decisions.¹⁰ So we may be at the right historical point because we are both removed in time from the last such flurry of legislation and also have had a bottleneck of pending proposals.

We all know that there is a wave of possible legislation. We have heard about a lot of it, and we know the general contours of what is being proposed, but we don't necessarily know the exact details of some of these laws. We also don't know how far along they are, and we don't know where certain bills are in the pipeline ahead of others. We hope that today's panel will be an informational panel, rather giving you our views on the merits of the law—a we-report-you-decide panel, like Fox News.

With that background, let me introduce our panelists. The first two panelists came from a call for presentations we put out for junior faculty to


¹⁰. Toyota Motor Mfg., Ky, Inc. v. Williams, 534 U.S. 184 (2002) (limiting the definition of "major-life activity" to those activities that an individual is required to perform on a day-to-day basis, and not including the category of "working"); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (establishing that to properly determine whether an individual is disabled under the ADA, the individual must be considered in his or her mitigated state). The goal of the ADAAA was to overturn the Supreme Court decisions in Sutton and Toyota, and to reiterate the Congressional intent to keep the scope of the ADA broad and inclusive. Therefore, an individual must be considered in his unmitigated state to determine whether he has a disability under the ADA. Further, the category of working is considered to be a "major life activity" under the ADA. Pub. L. No. 110-325, § 2(a), 122 Stat. 3553.
really get their hands dirty and eat their vegetables and mix the metaphors and come up with these great handouts that show pending legislation and its status. So, if grading didn't ruin their December vacations, certainly producing these charts did, and we can all appreciate their sacrifice for our edification.

Our first panelist is Sandra Sperino, who is in her second year at Temple University, Beasley School of Law. She is no stranger to employment discrimination academia having published, by my count, ten articles in the last five years while holding various faculty positions. Before entering academia Sandra spent many years as an employment litigator where her work litigating appeals included writing the briefs in a case that went to the U.S. Supreme Court, so she is well suited for the task at hand here.

Our next panelist, who is splitting up the legislative update with Sandra, is Robin Runge, a new Assistant Professor at the University of North Dakota School of Law. But she is not new to our field and is a veteran of legislative reform efforts in particular. Robin is a former D.C. and San Francisco based employment litigator and policy advocate who worked with the late Senator Ted Kennedy's staff on legislation to amend the FMLA, apropos of what she will be discussing today, and also participated in other efforts to expand various federal employment and other discrimination laws. At the University of North Dakota, she teaches in the employment and housing law clinic, where she litigates employment discrimination claims.

Our third panelist is Charles Sullivan, who has been teaching and publishing on employment discrimination for a couple more years than Robin and Sandra have. We have fewer than two hours so I can't do a dramatic recitation of Charlie's publications. Suffice it to say that they include numerous bright red casebooks that we all know and love and read to our children at night, and he is also, most importantly perhaps, the

11. These handouts are available at <http://www.law.temple.edu/Pages/Faculty/N_Faculty_Sperino_Main.aspx>.


author of my favorite academic paper ever, a 2005 paper entitled, "The Under-Theorized Asterisk Footnote," which I highly recommend to you. It is an empirical study of the puffery we academics engage in through the asterisk footnote after our names. He has been teaching at the Seton Hall University School of Law for just over thirty years having previously taught at the University of South Carolina and University of Arkansas Law Schools. Charlie will take a shot at answering the question proposed by our title, "Reviving Employee Rights?" The reason for the question mark is that the big question posed by all this legislation is whether it all matters, and whether it will make a difference. So Charlie will give some mix, whatever he chooses, of historical perspective on other legislative reform efforts and their impact or lack of impact, and on what the possible outcomes and impact might be of these legislative reform efforts. He will be discussing essentially the forest after Sandra and Robin detail the trees.

Professor Sandra Sperino*: Good afternoon and thank you everyone for coming. I want to start by thanking Scott for inviting me to be on this panel. When I got the invitation this summer, I was really excited about the topic – who wouldn't be – reviving employee rights, or are we in this time of revival? Then I did all the work that Scott asked me to do, and I was not so excited about the topic anymore. It had nothing to do with the work; it had to do with what I anticipated this panel was going to discuss. As we started preparing for the panel, we thought the Employment Non-Discrimination Act (ENDA)16 was going to be passed and we thought the Arbitration Fairness Act17 was going to be enacted. We thought the Paycheck Fairness Act18 had a good chance of becoming law. Instead what we have to talk about are some older pieces of legislation that have had some updates recently. Over the last year, we have significant developments in the ADA Amendments,19 and I will refer to them that way rather than the ADAAA, and we have the Genetic Information Non-Discrimination Act (GINA),20 both of which were passed by the Bush Administration. Then we had the Lilly Ledbetter Fair Pay Act.21

* Assistant Professor of Law, Temple University, James E. Beasley School of Law.
I want to suggest a change of the panel's title, if Scott will allow it, to maybe, "Resuscitating Employee Rights." We appear to be taking employee rights back to the spot that they were in before we had some really problematic Supreme Court decisions that got in the way. Maybe it is not so much of a revival but just a return to what we all thought was the law in the first place.

Robin and I were tasked with providing information to everyone about pending employment discrimination legislation, and that task at first seemed quite easy until we started our search of possible bills to include. Our initial research ended up with 200 pieces of legislation, which we have organized into three charts.

The shortest chart is a chart of actually enacted legislation. There is a brief summary of that legislation. The next chart is a detailed summary of important pending legislation that Robin and I felt belonged within the scope of this panel, upcoming employment discrimination legislation and legislation that is important to the field, such as the Arbitration Fairness Act. But to not leave out anything others might view as potential pieces of employment discrimination legislation and wanting to be thorough we created a third chart that includes other pending legislation that might be of interest to people in this room that really does not fall within the aegis of our panel here today. The charts, updated since this talk was given, are available at http://www.law.temple.edu/Pages/Faculty/N_Faculty_Sperino_Main.aspx.

We have broken our talk into three pieces. First, I am going to address selected non-discrimination legislation and procedural legislation, and Robin will take over the ENDA discussion at the end. That will leave selected unpaid and paid leave legislation for Robin, and then we leave Charlie with the big picture.

I will not cover the field of all enacted and pending legislation. Rather, I picked out legislation of importance. I think I have actually found a new favorite pending piece of legislation, the Protecting Older Workers against Discrimination Act,22 which I am hoping does not get abbreviated to POWADA – it just does not sound right. First I will discuss GINA,23 the Arbitration Fairness Act,24 the Notice Pleading Restoration Act,25 and then Robin will talk about ENDA.26

GINA, has two parts. Title I covers genetic information and health services,\footnote{§§ 101-06, 122 Stat. at 883-905.} which I am not going to deal with, and Title II covers genetic information in employment.\footnote{§§ 201-13, 122 Stat. at 905-20.} Recall that this was signed into law by President George W. Bush, but, importantly, it did not take effect until November of 2009, so the employment discrimination provision is still recent legislation. Some of the health services provisions went into effect earlier, but the employment provisions are fairly recent.

This law should be familiar to those who teach employment discrimination law because the employment discrimination provisions of GINA are largely modeled after Title VII. However, genetic information is described in a way that may limit the scope of what some people think would be covered by GINA. Genetic information is defined as information about an individual's genetic test, the genetic test of family members, or the manifestation of a disease or disorder in a family member.\footnote{§ 201(4)(A), 122 Stat. at 885 (to be codified at 42 U.S.C. § 2000ff(4)(A)).} GINA does not cover manifestation of the disease in a covered employee. I think many people when they were thinking about this act thought there would be a considerable overlap with the ADA; but manifestation of a disease is not covered by the act, so there is not as much overlap as we may have anticipated.

I wanted to get a sense of whether the defense bar thought that GINA was reviving employee rights. Based on the blogs, the defense bar is saying GINA is a solution in search of a problem.\footnote{See, e.g., The Genetic Information and Non-Discrimination Act: Quick Fix or Permanent Solution?, ST. LOUIS UNIV. J. HEALTH LAW & POLY BLOG, (July 8, 2008), <http://lawblogs.slu.edu/healthlaw?p=189>; D. Maimon Kirschenbaum, New Anti Employment Discrimination Law Prohibits Genetic Discrimination, EMPLOYMENT LAWYER BLOG, (Mar. 1, 2010, 6:52 PM), <http://www.employment-lawyer-blog.com/2010/03/new-anti-employment-discrimina.html>; Adria B. Martinelli, The GINA's Out of the Bottle – and It's a New Weapon in the Work-Family Arsenal, THE DELAWARE EMPLOYMENT LAW BLOG, (Feb. 4, 2010) <http://www.delawareemploymentlawblog.com/2010/02/the_ginas_out_of_the_bottle.html>; Allen Smith, Coordinate GINA Compliance with Leave, ADA and HIPAA Policies, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (June 30, 2008), <http://www.shrm.org/LegalIssues/FederalResources/Pages/CoordinateGINACompliancewithLeave,ADAandHIPAAPolicies.aspx>.} Defense lawyers do not think it is a big deal at least as far as the non-discrimination in employment provisions go. Employers are attuned to the increased cost of health services if someone has a genetic condition, but for the most part the defense bar has said: our employers usually are not collecting this kind of information, they are usually not acting on it, it is not a big deal, GINA is going to help a very small number of plaintiffs. What employer attorneys do seem concerned about are the other, non-employment, parts of the act.
GINA also prohibits the collection of genetic information, with certain exceptions,\(^3\) and prohibits retaliation.\(^2\) It also, very similarly to the ADA, requires that any genetic information that is collected be kept in a separate file.\(^3\) The concern from the defense bar is largely that when an employer collects routine medical information that it gets either through ADA inquiries, or medical exams that are undertaken for some reason, all of this information will end up advertently or inadvertently in an employee's file and then the employer will be liable under the GINA collection provisions. I thought that sounded like a legitimate concern until I looked at the EEOC's proposed regulations and this is one instance where I think the EEOC has actually taken a pretty defense oriented or very conservative viewpoint about the scope of GINA, at least in certain circumstances. The regulations try to calm the fears of employers by providing that as long as an employer is not exceeding the scope of a normal ADA request, if it puts something on the request that says it is not seeking the employee's genetic information, but accidentally ends up with that information, it will not be considered to have violated GINA.\(^3\)

One of the things that this act will do in practice is require employers to modify, some of their ADA practices, which may work in favor of employees in the end. Employers may have to be more circumspect about the kinds of information that they ask for, especially when they conduct medical exams. I think one of the key issues that will come up is when employees go in for that medical exam, that medical exam asks for family history information that is now clearly prohibited for the employer to have. Therefore, I think employers are going to step back and not be asking for as much information.

Does GINA resuscitate or revive employee rights? Maybe it revives them a tiny bit, but I do not think it goes that far. It was not overly controversial legislation—about thirty-five state laws already prohibited very similar conduct\(^3\) but now we have federal legislation.

\(^3\) § 202(b), 122 Stat. at 907-08 (to be codified at 42 U.S.C. § 2000ff-1(b)).
\(^2\) § 207(f), 122 Stat. at 917 (to be codified at 42 U.S.C. § 2000ff-6(f)).
\(^3\) § 206(a), 122 Stat. at 913 (to be codified at 42 U.S.C. § 2000ff-5(a)).
\(^3\) By the time GINA was enacted, thirty-four states and the District of Columbia had enacted statutes prohibiting discrimination in employment on the basis of genetic information. For a chart listing...
On to the Ledbetter Act which was the first piece of legislation that President Obama signed into law. It essentially sought to reverse the Ledbetter decision, and I want to talk briefly today about whether it does that or whether it does something more. Charlie has written that we may get a little bit more out of the Ledbetter Act than just a reversal of the Ledbetter decision. The Ledbetter Act reinstated the EEOC's paycheck accrual rule as to how the limitations period worked not only in Title VII but the Age Discrimination in Employment Act (ADEA), the ADA, and the Rehabilitation Act. Some might say this is a revival of employee rights. But I argue that it is not really a revival right; we are just getting back most of what we had before the Supreme Court took it away.

There might be a little ray of sunshine through the Ledbetter Act, though. The Ledbetter Act's language, "when an individual is affected by the application of a discriminatory compensation decision or other practice," may allow a plaintiff to challenge things like lateral transfers or evaluations that at a later time result in compensation discrimination. Courts now have a very difficult time recognizing that a plaintiff has a claim if a negative evaluation goes into the file or if there is a lateral transfer. The courts' understanding is that these are not adverse enough to be cognizable under some of the employment statutes, and so Charlie and others have argued that perhaps the Ledbetter Act is one way to get around some of those other decisions.

them with links to the statutory provisions and a comparison of common protections, see Genetic Employment Law: NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=14280> (last updated Jan. 2008); see also Alissa Johnson, Plunging into the Gene Pool, NATIONAL CONFERENCE OF STATE LEGISLATURES (2007), <http://www.ncsl.org/IssuesResearch/Health/StateLegislaturesMagazinePlungingIntotheGen/tabid/13790/Default.aspx> (while the laws enacted in each state were different, they generally prohibited employers from requesting applicants and potential employees from undergoing genetic testing prior to, or contingent on, an offer of employment).


40. Charles A. Sullivan, Raising the Dead?: The Lilly Ledbetter Fair Pay Act, 84 TUL. L. REV. 499 (2010).

41. See Lucero v. Nettle Creek Sch. Corp., 566 F.3d 720 (7th Cir. 2009) (finding that reassignment of teacher from twelfth grade/Honors/AP English classes to seventh grade English class not actionable despite the teacher's argument that the new position was not as prestigious); McCrary v. Aurora Pub. Sch., 57 F. App'x 362 (10th Cir. 2003) (finding that teacher who was transferred was not subject to an adverse employment action since she received same salary and benefits, had same seniority in position, and had same job responsibilities).

42. Sullivan, supra note 40, at 545-46 (noting that "[t]here is surely something wrong with creating a cause of action for which the statute of limitations expires before the cause of action accrues" and theorizing that the Ledbetter Act could shift focus from actions that caused immediate harm, to those that have a proscribed effect, and make these actionable as well); see also Carolyn E. Sorock,
One of the most interesting parts about the Ledbetter Act is what was left behind. When the Ledbetter Act was presented in the House of Representatives, there was another piece of legislation attached to it, the Paycheck Fairness Act, and the Paycheck Fairness Act passed the House, but when the Ledbetter Act made its way to the Senate, the Paycheck Fairness Act got cut off. The Paycheck Fairness Act is an extension of the Equal Pay Act. It seeks to make it more difficult for employers to justify gender-based pay disparities. In essence, it makes the employer prove that a pay disparity is based on a bona fide factor other than sex and then it lists some ways in which the employer is required to do that. The employer would be required to justify why these pay disparities exist in the first place. In addition, the Paycheck Fairness Act would increase the remedies available under the Equal Pay Act, which I think is long overdue. As many of us who practice in the remedies area know, some of the Equal Pay Act provisions only allow for back pay and liquidated damages, and for low wage workers, that remedy is not much money. So if the Paycheck Fairness Act were actually enacted, punitive damages and other sorts of compensatory damages would be available to employees.

Now we get to my favorite piece of legislation, the Protecting Older Workers against Discrimination Act. By the name, you would think it would amend the ADEA, and that is one thing that it does, but it also attempts to do some other fascinating things. It would amend the ADEA to ensure that the standard for proving unlawful disparate treatment — and here is the interesting part — and the standards of other anti-discrimination statutes, are no different than the standards for making the same proof under Title VII.

This is a response to the Supreme Court's decision in Gross v. FBL Financial Services, Inc. In the past, the Supreme Court had interpreted the

Comment, Closing the Gap Legislatively: Consequences of the Lily Ledbetter Fair Pay Act, 85 CHI.-KENT L. REV. 1199, 1210-12 (2010) (arguing that the broad language of the Ledbetter Act opens up the "possibility for discrimination based on denial of promotions, demotions, denial of training opportunities, denial of assignments, and anything else that could have an effect on an employee's compensation by causing them to be paid less than others").
relevant causal language in Title VII to embody a motivating factor standard, and then all of a sudden, I think now because Justices Scalia and Thomas maybe have convinced more of the Court that they are right, the Supreme Court interpreted the exact same language in the ADEA as requiring but-for causation, without a clear explanation for the different treatment for the same words.\textsuperscript{52} Why does this become my favorite piece of legislation? It's because it does a lot of little sneaky things. From the title, you would think this just amends the ADEA. It is just a response to \textit{Gross}, not a big deal. However, the bill not only adds new language into the ADEA, but also purports to add the motivating factor language into "any Federal law forbidding employment discrimination," any law forbidding retaliation, and "any provision of the Constitution that protects against discrimination or retaliation" unless the law has an express provision regarding the legal burdens of proof.\textsuperscript{53} In essence what the law seeks to do is insert its version of motivating factor broadly across civil rights and other types of legislation. Also, the statute indicates that plaintiffs under the ADEA may use the \textit{McDonnell Douglas}\textsuperscript{54} proof structure when proceeding with ADEA claims.\textsuperscript{55} The Supreme Court has assumed that it is okay to use \textit{McDonnell Douglas} but it has not actually decided the issue.\textsuperscript{56} So this statute will codify, if it's enacted, that \textit{McDonnell Douglas} can be used, so that question can also be resolved. Just by looking at the name and thinking the statute is a response to \textit{Gross}, you might think it is a very limited piece of legislation, but indeed it does quite a bit more.

We come to the Arbitration Fairness Act, which seeks to limit the use of pre-dispute arbitration agreements, for our purposes, in employment discrimination suits and other types of civil rights lawsuits.\textsuperscript{57} It also tries to take questions about the validity or enforcement of certain kinds of pre-dispute arbitration agreements out of the arbitrator's hands and back into the courts,\textsuperscript{58} which has been a fairly contentious issue over the years.\textsuperscript{59}

\textsuperscript{52} \textit{Id.} at 2351.
\textsuperscript{53} H.R. 3721 §§ 3(5)(B)-(D), 3(6); S. 1756 §§ 3(5)(B)-(D), 3(6).
\textsuperscript{54} McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (established the burden-shifting framework of establishing proof in an employment discrimination case under Title VII).
\textsuperscript{55} H.R. 3721 § 3(4); S. 1756 § 3(4).
\textsuperscript{56} See O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996) (assuming the \textit{McDonnell Douglas} framework was applicable to the ADEA, as the parties did not contest that point); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).
\textsuperscript{58} H.R. 1020 § 2(c); S. 931 § 402(b)(1).
\textsuperscript{59} \textit{Compare} Rent-a-Center v. Jackson, 130 S. Ct. 2772, 2776-79 (2010) (enforcing an arbitration contract's delegation to the arbitrator to determine validity of the arbitration agreement with \textit{id.} at
Unfortunately, the House version and the Senate version of this bill still have pretty important differences in them. For example, the House version broadly excludes collective bargaining agreements from the Arbitration Fairness Act, and the Senate version has some exemptions for collective bargaining agreements, but then has exemptions on its exemptions — so in other words certain collective bargaining agreements would be exempted, or certain provisions of collective bargaining agreements would be exempted, but there are certain provisions the labor unions would not be able to subject to arbitration. Additionally, the Senate version does a better job of defining its terms. The House version provides operative language, but the Senate version goes further to define what the operative language is supposed to mean, which people who are against the Arbitration Fairness Act actually think is pretty important because some of the terms can have multiple meanings or are ambiguous. Also, the Senate version limits the validity and enforcement issues that are going to be subject to court decision, rather than an arbitrator's decision. In essence, the House language could be read as subjecting almost any validity or enforcement question, perhaps on any arbitration agreement, to court decision. The Senate version makes it a little more clear that it is really talking about whether these types of agreements, the ones that would fall within the Arbitration Fairness Act, are valid or not.

And finally there is the Notice Pleading Restoration Act, which seeks to return pleading standards to a Conley v. Gibson standard, the standard that most of us taught until a few years ago. I am not sure what effect this will have on employment discrimination cases because we really have not seen the full effects that Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal have had on discrimination cases. Because Swierkiewicz v. Sorema N.A. was an employment discrimination case, we still may be still seeing some of the benefits of Conley v. Gibson, so maybe

2781-84 (Stevens, J., dissenting) (discussing the controversy and disagreeing with enforcement).
60. H.R. 1020 § 2(d).
61. S. 931 § 402(b)(2).
62. S. 931 § 402(b)(1).
63. S. 1504, 111th Cong. (as referred to the S. Comm. on the Judiciary, July 22, 2009).
64. 355 U.S. 41, 46 (holding that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").
67. 534 U.S. 506 (2002) (holding that an employment discrimination complaint had no heightened pleading standard and need not contain specific facts that would give rise to a prima facie case of discrimination).
employment discrimination law has not been affected as much by *Twombly* and *Iqbal* as other type of claims.

**Professor Scott A. Moss:** Before we turn it over to Robin, I want to ask one moderator's question for Sandra. Getting back to your favorite law, the Protecting Older Workers against Discrimination Act, that proposed legislation protects many people other than older workers. It says that all employment related claims enjoy the standard set by Title VII. But under Title VII, the motivating factor standard, according to most authority I have seen, applies only to discrimination claims, whereas retaliation claims according to at least some circuit authority I have seen, still face the *Price Waterhouse* but-for test.\(^6\) Does the Protecting Older Workers against Discrimination Act, in saying that all employment claims employ Title VII standards, acknowledge that Title VII has two different standards?

**Professor Sandra Sperino:** It's not clear. One of the interesting parts of the legislation is its opening provision. The introductory language says that when Congress adopted the ADEA and subsequent legislation, it was largely relying upon what was going on with Title VII when it made its assumptions about the language that was inserted.\(^6\) So I think there is still some ambiguity. It is at least redirecting the courts to look back and assume that Congress was relying on a certain understanding of employment discrimination law, and maybe that understanding is not as set as we would like it to be. And with that, I will turn it back to Robin.

**Professor Robin R. Runge\(^*\):** Thanks Sandra. Picking up on the theme that Sandra started with and moving into my part of the presentation, I will start with ENDA and move into pending leave from work legislation. ENDA is an interesting bill from a longitudinal perspective. The majority of the bills that Sandra discussed have been introduced recently for the first time or have been around for maybe two Congresses, in some instances in response to particular cases from the Supreme Court or other developments. In contrast to the bills that I will be talking about, many of which have been pending for fifteen years. ENDA is a perfect example. ENDA has been pending in some form since 1994. If passed, it would prohibit discrimination in employment based upon sexual orientation.\(^7\)

---

68. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that an employer could escape liability if it could prove that it would have taken the same action without considering the improper characteristic).


* Assistant Professor of Law, University of North Dakota School of Law.

More recent versions have expressly included prohibiting discrimination in employment based on sexual identity.\footnote{Employment Non-Discrimination Act. H.R. 2981, § 4, 111th Cong. (2009); H.R. 3017, § 4, 111th Cong. (2009); S.1584, § 4, 111th Cong. (2009).} In recent years there has been some strife within the LGBT communities and members of Congress, including Representative Barney Frank and others, about whether to give up on prohibiting discrimination based on sexual identity to try to get protection from discrimination based on sexual orientation passed.\footnote{Carolyn Lochhead, Rights Champion Tells off Gay Allies, S.F. CHRON., Oct. 12, 2007, at Al; Jeremy Herb, Frank Battles for Transgender Workers' Rights: Fight Expected over Provision in Current Bill, BOSTON GLOBE, May 14, 2010, at 2.} I am not extraordinarily well versed on that, so I am not going to go into it but just wanted to flag that that has been a heated point in efforts to pass this legislation.

Because the legislation has been pending for a long time, there was, as Sandra said, extraordinary hope, last fall especially, that it was finally going to pass. The most recent hearings that were held in the House and Senate are indications of that hope, and in preparing for this talk, I recalled statements that Senator Kennedy made in a Senate hearing stating that this legislation is a priority and is going to pass.\footnote{The Employment Non-Discrimination Act: Hearing on S.1284 Before the Comm. on Health, Educ., Labor & Pensions, 107th Cong. 107-307 (2002) (statement of Edward M. Kennedy, Chairman).} So I think that hope still exists. The legislation is due.

Only twenty states and the District of Columbia currently expressly prohibit discrimination in employment based on sexual orientation.\footnote{Equal Opportunity: Laws, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/workplace/equal_opportunity/equal_opportunity_laws.asp> (last viewed Nov. 8, 2010).} This stands in contrast to many other pieces of employment legislation, like the FMLA, which about half the states had passed some version of by the time it was passed by Congress. So ENDA would be very forward looking, especially if it is able to pass with sexual identity included. I am hopeful that this bill will become law.

Modeled after Title VII of the Civil Rights Act of 1964 in many ways, ENDA covers employers of fifteen or more employees.\footnote{H.R. 2981, § 3(a); H.R. 3017, § 3(a); S.1584, § 3(a).} However, it does not include a disparate impact claim.\footnote{H.R. 2981, § 4(g); H.R. 3017, § 4(g); S. 1584, § 4(g).} But beyond that, its coverage is very similar to what we are familiar with under Title VII, the ADA, and other federal anti-discrimination statutes.

I want to move into the pending leave legislation. Before I do, I thought it would be good to remind ourselves about the FMLA because if we start talking about legislation that would amend it, we should know...
what we are amending. In the context of an employment discrimination panel, you may wonder how leave from work fits. There is a very firm anti-discrimination provision in the FMLA. The FMLA is a bill that took fifteen years, others would say eighteen years to pass. It was the first bill that President Clinton signed when he came into office, and it is the only federal legislation today that requires employers to provide any kind of job guaranteed leave from work. This is all we have, and it's unpaid leave. But the passage of the FMLA was a watershed moment. I am going to talk in more detail about the FMLA, and then I am going to talk about unpaid and paid leave bills, some of which have already passed, but others which have not yet, but I think will.

The FMLA provides for up to twelve weeks of unpaid leave every twelve months to eligible employees.77 Eligible employees are those who have worked for at least a year and 1250 hours in the last year prior to taking the leave.78 Employers covered by the FMLA are employers that have fifty or more employees within a seventy-five mile radius.79 It may sound like the FMLA covers a huge percentage of employees and employers, but in fact it does not. About 40 percent of the workforce is not covered by this piece of legislation.80 And having just moved to North Dakota, where the entire population is 600,000 people, the majority of employees and employers are not covered by the FMLA.

Employees may take the leave provided by the FMLA for their own serious health condition or that of their child, their spouse, or their parent, and also for the birth of a child or for the placement of a child with the employee or for adoption or for foster care.81 That leave is unpaid.82 The FMLA allows an employee to take accrued sick or vacation time with FLMA leave in some circumstances.83 An employer is required to provide continued health benefits while an employee is out on FMLA leave, consistent with the arrangement existing before the leave was taken. If an employee has some form of health insurance and the employer paid some percentage of it, that continues while the employee is on FMLA leave.84 Additionally, after the leave ends, the employer must return the employee

78. Id. § 2611.
79. Id. § 2614.
82. Id. § 2612(c).
83. 29 C.F.R. § 825.207 (2010); see 29 U.S.C. § 2612(d)(2).
84. 29 U.S.C. § 2614(a).
to the same position or a similar position. The employee cannot be fired for taking the leave. And as I mentioned, it is illegal under the act for an employee to be discriminated against for exercising rights under the act. I like to think of it as "bubble time" for lack of a better description. It can't be counted on an employee's absences, it can't be considered in decisions on promotions, it's like it never happened.

As of 2002, over twenty states had some form of state unpaid, job guaranteed leave law. Now, states have adopted laws that are broader than the FMLA to include time off to attend a child's school event or for other kinds of related issues. In addition, in the last couple of years, we have seen paid leave legislation introduced in the states and paid leave legislation pending on the federal level. California, New Jersey, Washington State, and the District of Columbia have some form of paid leave legislation. These are very complicated statutes, in terms of how the leave and the pay are calculated, where the money comes from, and what percentage of your salary you get while you are out, but importantly only Washington State's provides job protection with the paid leave. So we have paid leave passing in the states but it doesn't have the same job protection that you get with the FMLA. So you have some interesting situations happening in these states where employees accessing the paid leave must also be covered by the FMLA to ensure their jobs are protected if they take the leave. Just last year, the District of Columbia passed the Accrued Sick and Safe Leave Act, which provides a sliding scale of days off depending on the size of the employer. Employees of an employer that has 100 employees or more get up to seven days, employees of an

85. Id.
86. Id. § 2615.
89. CAL. UNEMP. INS. CODE §§ 3300-06 (West 2009).
91. WASH. REV. CODE § 49.86.020 (2009).
94. D.C. CODE § 31-131.01-17.
employer that has fifty to ninety-nine employees get up to five days, and employees of an employer that has twenty-five to forty-nine employees get up to three days.\textsuperscript{95} This is the only paid leave in the country that goes beyond paid leave to care for your own serious health condition or for the birth of a child and actually includes taking paid leave to address the employee’s victimization from domestic violence, sexual assault, or stalking, or caring for a family member who is a victim of those crimes.\textsuperscript{96}

As of today, ten states have legislation that requires employers of a certain size or larger to provide some form of unpaid, job guaranteed leave to victims of domestic violence, sexual assault, and stalking.\textsuperscript{97} On the federal level, President Obama mentioned this type of legislation in his agenda last fall.\textsuperscript{98} This mention is important in the context of thinking about what might be passed by Congress. These laws provide job guaranteed leave from work to employers who are victims of these crimes to go to court, to seek medical attention, to access support services, or to obtain legal assistance.\textsuperscript{99} This leave is not just about taking leave for injuries or illnesses caused by the victimization; it goes beyond that to addressing that victimization in a legal forum.

Moving into pending legislation, I want to start with amendments to the FMLA, now that we reacquainted ourselves with what that is. Since the FMLA passed, in every Congress there has been some form of legislation introduced to expand the coverage and scope of the act. From the beginning, there have been efforts to lower the threshold number of employees and to expand the reasons for taking leave. The first amendments to the Family Medical Leave Act that passed were a part of the National Defense Authorization Act of 2008,\textsuperscript{100} and then most recently in 2009.\textsuperscript{101} These two pieces of legislation significantly expanded the FMLA's coverage. A third bill, the Technical Corrections Act, covered flight attendants and pilots who were unintentionally left out of coverage

\textsuperscript{95} D.C. CODE § 31-131.02(b)(4) (2009).
\textsuperscript{96} Id.
\textsuperscript{98} Agenda: Family, CHANGE.GOV: OFFICE OF THE PRESIDENT ELECT, <http://change.gov/ agenda/family_agenda/> (last viewed Nov. 8, 2010).
\textsuperscript{99} CAL. LAB. CODE §§ 230, 230.1; COLO REV. STAT. § 24-34-402.7; FLA. STAT. § 741.313; HAW. REV. STAT. § 378-72; 820 ILL. COMP. STAT. 180/15(3); KAN. STAT. ANN. § 44-1132; ME. REV. STAT. tit. 26, § 850; N.Y. PENAL LAW § 215.14; N.C. GEN STAT. § 50-B-5.5; OR. REV. STAT. § 659A.270.
under the FMLA, because of how their hours of work are counted.\footnote{102} The National Defense Authorization Act of 2008 created two new kinds of leave,\footnote{103} which no one seems to know about. These are in response to the fact that we have been at war for nearly ten years, and an increasing percentage of our population has been overseas as a part of the armed forces. The act creates two different kinds of leave for the individuals who are called up to military service overseas and who may experience injuries related to that, or for family members who, as a result of an individual being called up for service may need to miss work. The first kind of leave that was created is the qualifying exigency leave, which requires employers covered by the FMLA to grant an employee eligible under the FMLA twelve weeks of unpaid leave in a twelve month period for qualifying exigencies arising out of the employees' spouse, son, daughter, or parent who is on active duty or who has been notified of an impending call or order to active duty.\footnote{104} The regulations that were issued in 2008 give some examples of what exigency leave is, those things that you have to do to prepare for the person to report or to take care of things while the person is gone.\footnote{105} It is important to note that the qualifying exigency leave is only for family members of military in the regular armed forces.\footnote{106} It didn't extend to the reserves.\footnote{107} The other kind of leave that was created by the 2008 amendments is military caregiver relief. This provision expands the FMLA to provide leave to a covered service member who is a current member of the Armed Forces including the National Guard or reserves, who is undergoing medical treatment, recuperation or therapy, or is otherwise an outpatient. The leave is limited to a combination of a total of twenty-six work weeks of leave for any FMLA-qualifying reason during a single twelve month period.\footnote{108} So an eligible employee may take another twelve weeks, if the employee has an injury or illness incurred in the line of active duty. This provision is a big expansion, given that an employer may be required to give an employee twenty-six weeks of leave instead of twelve.\footnote{109} Let me summarize these two kinds of new FMLA leave. An individual service member employee who experiences injuries or illness caused by
service may take leave to heal from the injuries or illness. Also, a family member of a service member who is an eligible employee may take leave to care for the service member if he or she has been injured or to take care of matters related to that service member's current or impending absence when the service member has been or will soon be called in to service. It is very narrowly focused in one way – on people in the active services or reserves or armed forces, but in another way, it is very expansive – the reasons one can take the leave have been expanded from the original FMLA. These amendments have redefined what a serious health condition is under these circumstances, and it's not just the immediate family members that can take the leave. The caregiver leave is not just a parent, spouse, or child, but also includes next of kin. So now we have tweaked, just in this context, who can take the leave, what the leave can be taken for, and which relationships matter.

These are the first amendments to the FMLA that have passed since the FMLA was adopted in 1993 even though many bills, five to ten every session, have been introduced in each Congress. So the passage of these amendments is really significant in many ways. Having said that, I do not see the gates opening so that all of the amendments to the FMLA that have been pending over the years will now pass. These amendments were about the military, these bills passed when we were at war; attached to bills funding over war efforts.

The third amendment to the FMLA that was passed is a very technical but important bill. Basically, Senator Murray and several other members of Congress recognized that pilots and flight attendants had been found to not be covered by the FMLA because of the way their hours were counted, but this result was not what Congress had intended. The amendment clarified that flight crew members would be considered to meet the FMLA's hours requirement if they had worked or had been paid for 60 percent of the applicable monthly guarantee, which is a term of art in that field, or the equivalent of that annualized over the preceding twelve months. The cause of their not being covered by the FMLA was that even though these employees are paid for the time, they are required not to work between shifts, and that time not working, though compensated, was not counted for the FMLA. There were at least two cases where flight attendants or pilots had litigated this issue under the FMLA, and the courts expressly held that they were not covered under the FMLA because they did not meet the

110. Id.
112. Id.
hours requirements.\textsuperscript{113}

This brings us to pending federal unpaid leave legislation. The first category is leave from work for crime victims to address their victimization. Some form of legislation has been pending in Congress since 1996 to provide job guaranteed leave to victims of domestic violence, and I have worked on all the iterations of those bills. The bills are in the updated chart that can be found at http://www.law.temple.edu/Pages/Faculty/N_Faculty_Sperino_Main.aspx. They provide some form of job guaranteed leave for victims of domestic violence, sexual assault, or stalking: the Domestic Violence Leave Act\textsuperscript{114} and the Security and Financial Empowerment Act.\textsuperscript{115} The members of Congress involved in those pieces of legislation have been working on them almost continuously since 1996, in addition to Senators Wellstone and Kennedy who were both champions of those bills for many years, but who are sadly no longer with us.

In addition the David Ray Richardson Hate Crimes Prevention Act,\textsuperscript{116} would give time off from work to address victimization caused by a hate crime. These bills all provide unpaid leave from work. These bills are not amendments to the FMLA. So this type of legislation is going in a different direction than the military families legislation. There is a long standing debate going on among my peers about whether it is better to tweak, play with, amend, fix, or expand the FMLA or to go in a different direction entirely. These bills reflect a decision to move away from the FMLA.

The next category of leave legislation, aims to expand the FMLA by changing the definition of covered employer, the definition of an eligible employee, and the qualifying reasons for taking FMLA leave. Some form of legislation has been pending to do these things since the FMLA was passed, and these are the most recent iterations. The first eliminates the hours requirement.\textsuperscript{117} As a former legal aid lawyer – elimination of the 1250 hours threshold, in the FMLA would result in many more low income workers eligible for FMLA leave. This is a huge barrier for low income working women particularly. The second would lower the number of employees required for employer coverage by the FMLA.\textsuperscript{118} Again, because the number of employees who are required for employer coverage

\begin{enumerate}
\item H.R. 2515, 111th Cong. (2009).
\item H.R. 739, 111th Cong. (2009).
\item H.R. 262, 111th Cong. (2009).
\item Family Fairness Act, H.R. 389, 111th Cong. (2009).
\end{enumerate}
is fifty, almost 40 percent of the workforce isn’t covered by the FMLA. Dropping the number of employees to twenty-five would clearly be more inclusive. The third bill expands the qualifying relationships under the FMLA to include taking leave to care for siblings, same sex spouses or domestic partners, and their child or parent.\(^{119}\) Currently, if my sister became ill, I could not take time from work to care for her under the FMLA. If I had a domestic partner who became ill, I could not take time off to care for her. The last piece of legislation in this group would expand the FMLA to permit an employee to take leave for providing a living organ donation.\(^{120}\)

The last thing I want to mention is part of Sandra’s theme that these legislative proposals are bringing us back to where we started for employee rights rather than moving us forward. In 2008, the U.S. Department of Labor issued new regulations amending the regulations that were issued initially with the FMLA, and those amendments did two things. First, they explained and incorporated the two different kinds of military leave that I have already described.\(^{121}\) Second they addressed recent U.S. Supreme Court cases and attempted to clarify the coverage of the FMLA while also limiting its scope.\(^{122}\) The Family Medical Leave Restoration Act\(^ {123}\) is a pending bill that would repeal these regulations and restore the original regulations.

There are also six bills pending in Congress that would require some employers to provide some form of paid leave to employees for specific reasons. Representative DeLauro from Connecticut and Senator Kennedy introduced the Healthy Families Act. Under this Act, employers of fifteen or more employees would be required to permit employees to earn at least one hour of paid sick time for every thirty hours the person works, increasing over time and varying by the different size of employers to about seven days of paid leave per year.\(^ {124}\) Employers may provide more generous paid leave, but they would not be required to.\(^ {125}\) This paid leave is

---

121. 73 Fed. Reg. 67,934 (Nov. 17, 2008).
125. Id.
similar to what some employers voluntarily give employees now. An employee can take the sickness leave to go to the doctor, and to take care of a close family member.\textsuperscript{126} The bill also expressly provides that an employee can use this time if the employee is a victim of domestic violence, sexual assault, or stalking, to address the victimization.\textsuperscript{127} So, we are seeing those issues surface again here in the context of paid leave on a federal level.

There are several other pieces of legislation pending that will create some form of paid leave, and the chart has brief descriptions of those. These have not seen the same traction as the Healthy Families Act, they don't have as many co-sponsors and we haven't seen hearings. They are all modeled on the same idea of creating for the first time a mandate for employers of certain size or larger to provide paid leave to employees. Studies show that 30 to 50 percent of the workforce in this country currently has no paid off time from work at all.\textsuperscript{128} Again, as a person who represented low income workers for seven years, the vast majority of my clients missed one day of work, were fired, and had no rights at all. So the Healthy Families Act and similar bills currently pending in Congress could make a profound difference by mandating paid leave.

Lastly, the Family Income to Respond to Significant Transitions Act encourages states to pass paid leave legislation.\textsuperscript{129} The last bill in this category is a response to H1N1. It says you shouldn't be fired if you are staying home from work because you have H1N1; so it requires employers of a certain size or larger to provide five paid sick days every twelve months to stay home if an employee has H1N1.\textsuperscript{130}

\textbf{Professor Charles A. Sullivan}: My role here has been variously described as presenting the big picture, talking about the forest now that we have examined the trees, and looking at things from 30,000 feet. What it really means in my mind is, I am supposed to state the obvious. Fortunately, I'm pretty good at stating the obvious, and I'd like to state the obvious about the whole legislative enterprise. By the way, the nice thing about being at the 30,000 foot level is that it's hard to be wrong even if you

\begin{itemize}
  \item \textsuperscript{126} \textit{Id. § 5(b)(1)-(3).}
  \item \textsuperscript{127} \textit{Id. § 5(b)(4).}
  \item \textsuperscript{129} H.R. 2339, 111th Cong. (2009).
  \item \textsuperscript{130} Emergency Influenza Containment Act, H.R. 3991, 111th Cong. (2009).
  \item * Professor of Law, Seton Hall University School of Law.
\end{itemize}
make a lot of mistakes in the details.

Where I start is that Congress and the Supreme Court (and the courts generally), have been playing two different games. If you look at what the Democrats have been doing over the last forty years, more or less, is passing legislation and the Republicans, by and large, don't try to repeal those statutes – even on those rare occasions (albeit more common recently) when they've had the theoretical power to do so. They fight it when the Democrats seek to pass legislation and try to narrow it, but really the grand strategy is to make sure the courts are packed with the kind of people who give that legislation a narrow interpretation. And that strategy has been very successful. Given the two games that are being played, you might think that maybe the Republican control-the-courts game is really the more important one.

The problem we face is that federal judges, at least the kind of federal judges we've had for a long time now, don't like employment discrimination suits. All sorts of research reveals how little success plaintiffs have had, for example, the ADA studies which showed plaintiffs lost 97 percent of all cases.\textsuperscript{131} Other areas did better, but not a whole lot better. Of course, theoretically, it might be because these are really lousy suits, but it might also be because the judges just don't like these suits very much. While judges can deal with suits they don't like in a lot of ways, the one I want to focus on is interpreting the statutes to radically reduce their impact. We've seen that quite a lot. One of my favorite examples, not even a Supreme Court case, is Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.\textsuperscript{132} At issue there was the Older Worker's Benefit Protection Act,\textsuperscript{133} whose language would suggest that an employee can't agree to arbitrate future claims; that is, an employee couldn't waive in advance her right to a jury trial. If the statute had been read the way it was written, there would have been no predispute arbitration agreements where Age Discrimination in Employment Act claims were concerned. Needless to say, the Rosenberg court doesn't so hold. The relevant sentence says that

\begin{footnotes}
\item[132.] 170 F.3d 1 (1st Cir. 1999).
\end{footnotes}
only "knowing and voluntary" waivers are effective, and waiver isn't knowing and voluntary if it purports to "waive rights or claims that may arise after the date the waiver is executed." Well, "claims" would suggest the underlying causes of action, but "rights" seems broader, and suggest things like jury trial. And, after all, if substantive matters can't be waived because of the "claims" language, what else could "rights" refer to but procedural rights? But, no. For the Rosenberg court, both "rights" and "claims" means substantive rights or claims. That is just one example of what the lower courts have done.

And that leads us to Gross, where the Supreme Court interpreted the exact same language differently in two different statutes (Title VII and the ADEA) to mean two different things. And the Court compounded its confusion by its arrogance in not bothering to explain to us why it was doing that.

There are lots of other familiar examples. Some of these have been legislatively overruled, including General Electric Co. v. Gilbert to go back a ways, and Ledbetter v. Goodyear Tire & Rubber Co., most recently. Some of them we can hope will be overruled, such as Iqbal, which I think is probably the biggest threat to employee discrimination that we are presently facing.

It's also important to note that it doesn't take much for a court to interpret the essence of a statute away. These are usually not complicated interpretive exercises. In Iqbal, the issue is the meaning of "short and plain statement." And in Ledbetter the only word being interpreted was "occur." Other examples include. Toyota Motors Manufacturing v. Williams and Sutton v. United Airlines, Inc., both interpreting "disability." Of course, we fixed these interpretations, or we have tried to

135. 170 F.3d at 4.
141. Id. at 1949 (analyzing FED. R. CIV. P. 8).
142. 550 U.S. at 621.
143. 534 U.S. 184 (2002).
145. Williams, 534 U.S. at 198; Sutton, 527 U.S. 489.
fix them in the Americans with Disabilities Amendment Act of 2008.\textsuperscript{146} And then there's \textit{General Dynamics Land Systems v. Cline}.\textsuperscript{147} Without regard to whether the Court was right, the point is that the reach of the statute turned on the meaning of a single three-letter word, "age."\textsuperscript{148} In \textit{Patterson v. McLean Credit Union}, the Court was figuring out the meaning of "making and enforcing contracts,"\textsuperscript{149} and in \textit{TWA v. Hardison}, the only words being construed were "reasonable accommodation" and "undue hardship."\textsuperscript{150} Some of these have been overridden or there have been efforts to override, and some of them haven't.

Of course, Congress doesn't approach drafting laws like the American Law Institute approaches drafting a Restatement, and, despite the elaborate processes of the American Law Institute, even Restatements often have their own interpretive difficulties. So how might we deal with the problem of ambiguity in statutes given that courts are masters in finding ambiguity, whether or not it's there?

The answer might be to change the ground rules for the courts. During the period in which these employment discrimination decisions have been rendered, and not coincidentally, the courts have devised a different approach to statutory construction, mostly called textualism, which has robbed Congress of one of the principal mechanisms that it used to have to make sure the courts didn't warp its enactments -- shaping the meaning of a statute through its legislative history. The use of legislative history to guide courts is a little like a Restatement's "comments," although admittedly far less precise. But a statute and committee reports which explain the statute are at least roughly analogous to a Restatement and its comments explaining its blackletter. Of course, a textualist court doesn't look at committee reports unless the statute is ambiguous -- and perhaps not then if you're a true textualist. So the Supreme Court has, either by design or coincidence, empowered the judiciary to do what it wants with the statute as long as the judges can reach their preferred results textually.

A current example is the question of whether the courts take what I call a "causation only" approach to interpreting the operative language of the Lilly Ledbetter Fair Pay Act.\textsuperscript{151} I hope they say that the statute reaches what it seems to say -- "a discriminatory compensation decision or other

\textsuperscript{146} Pub. L. No. 110-325, 122 Stat. 3553 (codified in several sections of 29 and 42 U.S.C.)
\textsuperscript{147} 540 U.S. 581 (2004).
\textsuperscript{148} Id. at 586.
\textsuperscript{149} 491 U.S. 164, 176-77 (1989).
\textsuperscript{150} 432 U.S. 63, 76-77 (1977).
practice" that results in "discrimination in compensation." But if they want to narrow it, the courts might parse the language grammatically and say that "compensation" decision should be interpolated between "other" and "practice." So what it really means, and I am confident where the Supreme Court would want to go on this one, is "discriminatory compensation decision or other discriminatory compensation practice." This would prevent the act from having any effect at all in the situation where someone is not promoted and therefore doesn't get any raise because he is not promoted. The courts would then say that the "practice" at stake is not a "compensation" practice but rather a "promotion" practice, and the violation occurred when the promotion was denied. If we look at the legislative history, the better reading of it would be that "other practice" means any other practice. But I'm afraid the Court is going to say that we don't really have to look at the legislative history because the language is so clear grammatically.

So what should we do about this problem? I am back to my role as Captain Obvious. Well, we could appoint better judges. First of all, it's a long term process. Second, it turns out that appointing empathetic judges is not necessarily such a good idea; really, it was a bad thing in the court of public opinion when the President tried appointing one empathetic judge, and then she had to disclaim empathy before she got on the Court. Not to mention, the Obama Administration hasn't been so good in appointing even people who are not called empathetic as judges to the lower courts. So it is not like this problem is being solved very fast, even though that's potentially one solution.

Then there is a second solution which is to write better statutes. Now most people in this room don't remember Lester Maddox, but he was a racist governor of Georgia and was famous, among other things, for his response when asked how he could improve the prisons in the state. He replied, "we can't improve the prisons until we get a better class of prisoner." I kind of think that that's similar to asking Congress to write better statutes. It's always to be hoped for but not to be expected. Not to

152. Charles A. Sullivan, Raising the Dead?: The Lilly Ledbetter Fair Pay Act, 84 Tulane L. Rev. 499 (2010).
154. See Lois Romano, Carter and Ford on the Same Team: A Joint Crusade for Voter Registration, Wash. Post, Oct. 1, 1983, at Cl (reporting that former President Carter related, "I remember when Georgia was 'blessed' by having Lester Maddox as governor, and one question raised in his term of office was improvement of our prison system. And under pressure from the news media, Lester Maddox finally shouted in desperation quite sincerely: 'The only time we'll improve our prison system is to have a better class of prisoner.'").
mention that some of the time the ambiguities in the statutes, the failures, are the results of a political process everybody has agreed to. They are not going to decide this issue because of the virtues of vagueness, and they can all vote for a law if they don't get too specific. So I mean that's inherent in the process, but even if this result is not inevitable, think of all the things on the list I provided and ask yourself how many would have been avoided by more specific statutory language.

That gets me to think a little more radically, and perhaps take a page from someone else's text. I am thinking of the Defense of Marriage Act (DOMA), a right wing effort that changed the definition of marriage throughout all fifty titles of the United States Code by virtue of altering a single provision – the definition of marriage in the Dictionary Act. We might think about such a dramatic approach to solving some of the problems in our field. To start at the very beginning, why not define "employment," a term which is almost never defined in the federal employment statutes except circularly: an employee is a person employed by an employer, and an employer is someone who employs fifteen or more employees. Trying to figure out who we want those statutes to protect is the kind of out-of-the-box thinking that we might want to talk about.

Another approach along these lines is congressional adoption of rules of construction. I have to say, that I am not so certain that a statutory provision that says the definition of disability shall be construed in favor of broad coverage is going to do a whole lot of good, but it can't do any harm. I do think that another ADAAA provision will be effective, although it's framed as a rule of construction (and I am not sure why it's a rule of construction rather than just a rule): "[T]he determination of whether a disability substantially limits a major life activity shall made without regard to ameliorative or mitigating measures." That's the kind of statutory language I think that might be very helpful. Admittedly, in the case of a legislative override we know exactly what the problem is. Looking down the road to what the courts might do with statutory language is harder, but it's not impossible to predict the kinds of things the courts might do and try to lay down rules of construction in the statute itself.

And then there is my favorite. Why don't we just take back the ground that the Court has taken from us? Congress has the power to influence the

159. Id. § 12102 (4)(E).
interpretation of a statute by its legislative history, and the Court has taken that away. Suppose Congress were to pass a DOMA-like statute, i.e., one that prescribed what courts should do prospectively, instructing the courts to look at the legislative history in interpreting laws.\textsuperscript{160} We could, of course, define what we mean by legislative history. It could be anything to everything, but most likely would encompass committee reports.

Why don't we do this? Justice Scalia can be quite biting when he talks about the legislative history and occasionally points out that, say, committee reports aren't generated until the statute has already passed.\textsuperscript{161} I do think there is a delegation problem with respect to Congress passing a statute and incorporating by reference a document that has yet to be written. So I don't deny that there are constitutional problems lurking in the background with respect to this, but if a committee report exists at the time that Congress acts, I see no difficulty with Congress instructing the courts to look at that committee report to determine the legislative history. This would reinvest Congress with some of the power that has been taken away from it without at the same time requiring Congress to write better laws. While some think there are some constitutional problems with that approach, I doubt it, and, anyway, even starting down that road would be very instructive and really allow Congress to reengage the courts.

Now if you are going to say that if Justice Kennedy can write Gross not bothering to tell us why he has a different way of interpreting the exact same language differently, can't he find a way to take something like this or any of my other proposals and ignore it. And the answer is yes. But you know there may be some shame yet among some of the justices who have taken this approach. We can't expect a total solution to this problem but I think we can expect at least some better results if Congress takes a more aggressive approach to what it is doing when it is making law. And it's not just writing those laws but working to ensure that the laws when they actually get applied will accomplish something at least remotely connected to what at least some of the members Congress had in mind. This isn't a panacea but, for a big picture kind of guy like me, this is forest that we should be worrying about and the trees are all subordinate to that.

