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If It Is Broken, then Fix It: Needed Reforms to Employment Discrimination Law: 2009 Annual Meeting of the Association of American Law Schools Section on Employment Discrimination Law

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IF IT IS BROKEN, THEN FIX IT: NEEDED REFORMS TO
EMPLOYMENT DISCRIMINATION LAW: 2009 ANNUAL MEETING
OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS SECTION
ON EMPLOYMENT DISCRIMINATION LAW

Professor Melissa Hart*: Today's panel reflects an extremely diverse group of papers. I will just say a little bit about each of the speakers and what they are going to talk about.

Minna Kotkin is from Brooklyn Law School, where she runs the employment law clinic. She writes extensively in the area of employment discrimination law. She is considering the counter-intuitive problem that some plaintiffs, who have multiple protected categories within their identity, experience multi-forms of possible discrimination and who are therefore different from other plaintiffs, may have a harder time with their cases than those who have fewer differences.

Joe Steiner, from South Carolina Law School, is examining the Supreme Court's decision in the *Twombly*¹ case, which held that pleadings must set forth sufficient facts to state a plausible or reasonable claim. He considers what impact that rule has had already on employment discrimination claims and proposes an alternative to that rule.²

Professor Roberto Corrada, of the University of Denver College of Law, author of several casebooks and an active participant in our community, has proposed an integrated framework for consideration of religious discrimination claims, looking at how direct discrimination claims and accommodation claims should be considered together.

Deborah Widiss, who is a Visiting Professor at Brooklyn Law School, is presenting a paper that also won the AALS Scholarly Paper Award this year. She is examining the ways that courts narrowly interpret congressional overrides of judicial decisions in the employment discrimination area and how that creates what she calls shadow precedents, Supreme Court decisions that have been overridden but still continue to play an important role in the way the law develops.

* Professor of Law, University of Colorado School of Law.

1. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

2. Professor Steiner's presentation is not being published as part of the AALS Program of the Section on Employment Discrimination Law because his article, dealing with the subject matter of his presentation, is being published by the law review at the University of Illinois College of Law.

Minna Kotkin*: Today's topic is what is wrong with current employment discrimination law, and I am going to talk about its successes and failures. The workplace is now American society's most diverse atmosphere, far surpassing neighborhoods or schools.³ The anti-discrimination laws certainly have created positive change. But it is well recognized that there is still a good share of discrimination in the workplace.⁴ My thesis, simply put, argues that this discrimination is largely directed at the "complex claimant":⁵ workers who face bias because they are different in multiple ways. Put another way, these workers fall within more than one of the protected categories: older women of color or older workers with disabilities, for example. Employers may now accept or even embrace a certain amount of diversity, but the complex claimant still faces stereotypical thinking and judicial hostility.⁶ Empirical evidence demonstrates that cases involving complex claimants are much more likely to be unsuccessful in the courts than those that assert only a single claim of bias. As Melissa said, this is somewhat counter-intuitive and I am going to explore some of the reasons for this situation.

I want to begin with a review of employment discrimination law's standard critique. We know from experience and empirical studies that plaintiffs disproportionately lose in the courts. One group of scholars has

* Professor of Law, Brooklyn Law School. For a fuller discussion of the themes discussed in this presentation, see Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439 (2009).

3. See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L. J. 1, 8 (2000) ("Since the enactment of Title VII, the workplace has become a *comparatively* integrated social environment – compared, that is, to other places in which adult citizens interact with each other." (emphasis in original)).

4. See Laura Beth Nielson & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663 (2005).

5. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994).

6. See *Sheridan v. E.I. Dupont de Nemours & Co.*, 100 F.3d 1061, 1085 (3d Cir. 1996) (Alito, J., dissenting) (referring in dissent to multiples claims as a "rather common tactic," citing the following cases: *Roxas v. Presentation College*, 90 F.3d 310 (8th Cir. 1996) (alleging race, national origin, gender, and age discrimination); *Lawrence v. Nat'l Westminster Bank of N.J.*, No. 95-5603, 1996 WL 589189 (3d Cir. Oct. 15, 1996); *Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996) (including age, religion, and retaliation); *Ford v. Bernard Fineson Dev. Ctr.*, 81 F.3d 304 (2d Cir. 1996) (including race, age, and gender); *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996) (alleging age, gender, and retaliation); *Evans v. Technologies Applications & Ser. Co.*, 80 F.3d 954 (4th Cir. 1996), (including age and gender); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) (involving gender and disability); *Americanos v. Carter*, 74 F.3d 138 (7th Cir. 1996) (alleging age, gender, and national origin discrimination); *Castillo v. Frank*, 70 F.3d 382 (5th Cir. 1995) (including age, gender, and national origin); *Meinecke v. H & R Block*, 66 F.3d 77 (5th Cir. 1995) (involving age and gender); *Johnson v. Off. of Sen. Fair Emp. Practices*, 35 F.3d 1566 (Fed. Cir. 1994) (including gender and religion); *Dashnaw v. Pena*, 304 U.S. App. D.C. 247, 12 F.3d 1112, 1114 (D.C. Cir. 1994) (including age, national origin, religion, and race); *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035 (7th Cir. 1993) (involving age and gender)).

pointed to the prevalence of “unconscious racism,”⁷ “negligent discrimination,”⁸ and “implicit bias.”⁹ They make the claim, that the nature of discrimination has changed to become more subtle and less easily identified,¹⁰ and our laws and litigation techniques are too crude a vehicle by which to address it.

A second critique is that the system is inherently biased in how it processes discrimination cases. For example, there are those who point to “plaintiff phobia,”¹¹ a trend that all employment discrimination litigators are well aware of. It is a result of a more conservative judiciary and a reaction to the so-called litigation explosion.

Finally, the “structuralist”¹² school of scholarship draws from both these critiques and concludes that the courts are not equipped to identify or remedy the kind of discrimination that exists today. They argue that we must analyze and reform the workplace’s inherent regulatory mechanisms in order to root out current forms of discrimination.

My narrative of what’s wrong with our discrimination laws does not challenge these critiques as a general matter. However, I suggest that for the complex claimant, discrimination remains not so subtle. For example, the stereotypes for women may have loosened, but the stereotypes for older African American women or older women with serious illnesses are very much still in play. You can create any number of combinations, but the more protected characteristics that you pile on, the more likely there is discrimination and the less likely you are to win your case.

In an article that explores these themes in depth, I address the

7. Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

8. David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993). For other excellent explorations of this theme, see Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Ann C. McGinley, *!Viva La Evolución! Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415 (2000).

9. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 978-88 (2006); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063 (2006).

10. I use the term “subtle” rather than “unconscious” bias, because it more accurately reflects workplace practices and keeps within the framework of the anti-discrimination laws, as Michael Selmi notes. See Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 COLUM. HUM. RTS. L. REV. 657 (2003); see also Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) (arguing that negligent discrimination should not be actionable).

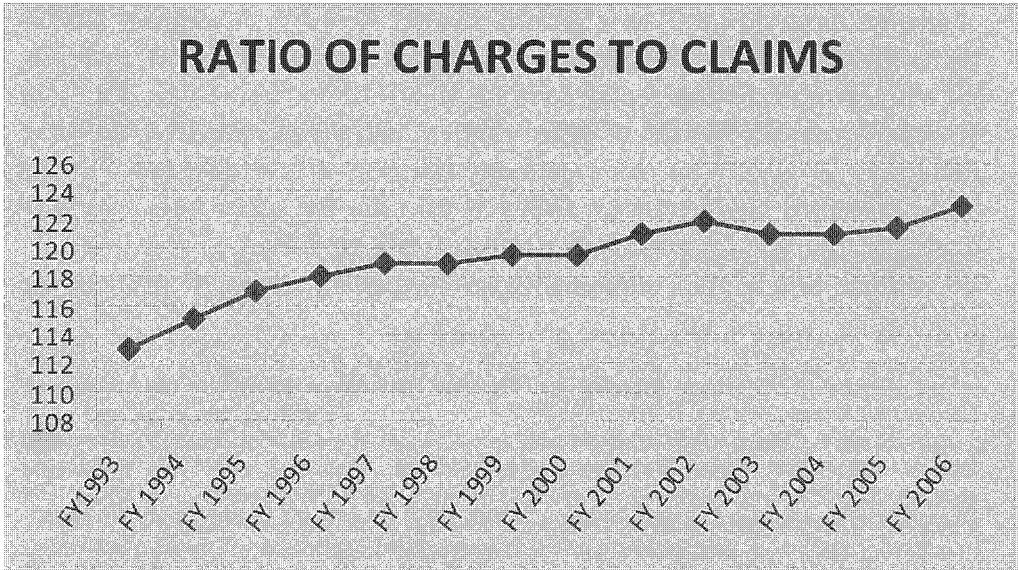
11. See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919 (2009).

12. Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). For a summary of this literature, see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 4-11 & nn. 10-32 (2006).

doctrinal basis for addressing complex claims, which begins with the “sex plus analysis.”¹³ I also talk about intersectional scholarship,¹⁴ particularly the works of Kim Crenshaw¹⁵ and Kathryn Abrams,¹⁶ which were instrumental in introducing the notion of complex claimants to the courts. I will skip these discussions today. Instead, I will focus on the growth of complex claims and how they fare in the court. I will also offer some suggestions for better resolution of these claims.

Many of you probably know that the Equal Employment Opportunity Commission (EEOC) statistics track not only the number of charges filed, but also the number of claims made, thereby providing some evidence of the number of multiple claims. I analyzed the EEOC dataset starting with 1993, when the Civil Rights Act of 1991¹⁷ and the ADA were in full force, to compare the ratio of charges to claims. The following graph shows the growth of charges to claims in a clear upward trajectory:

Figure 1:



13. Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1463 (2009).

14. *Id.* at 1481.

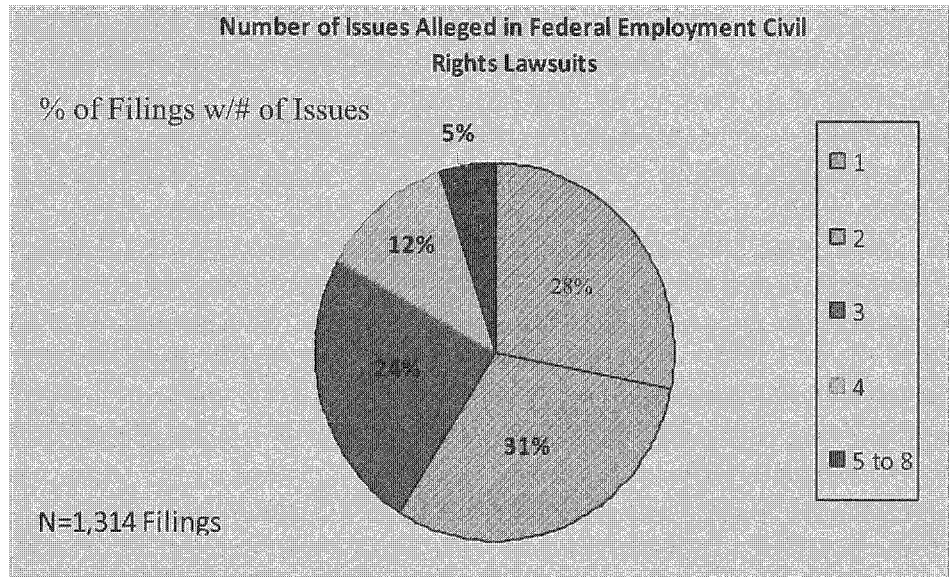
15. Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

16. Abrams, *supra* note 5, at 2517-40.

17. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

This trend is even more pronounced when court filings are analyzed. In a yet unpublished study, Laura Beth Neilson reviewed 1314 employment discrimination case files, and found that only 31 percent of discrimination cases asserted a single ground for discrimination.¹⁸

Figure 2:



What happens to these claims in the courts? This is somewhat difficult to determine. We have a number of datasets and statistical studies on win/lose rates for plaintiffs and defendants, some of which analyze the results by race, sex, and other statutory bases. However, these studies do not code for multiple claims and therefore are not particularly helpful. In order to obtain some limited empirical data, I analyzed a year’s worth of age/gender claims and race/gender claims in the federal district courts for the Southern and Eastern Districts of New York. I found twenty-six substantive decisions. Of those, only one multiple claim survived the summary judgment stage: 3.8 percent of the sample. The Federal Judicial Center’s recent study found that 27 percent of plaintiffs prevail at the

18. Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States*, RESEARCHING LAW (American Bar Foundation, Chicago, IL.), Spring 2008, available at <<http://www.americanbarfoundation.org/uploads/cms/documents/rlspring08.pdf>>; see also generally Laura Beth Nielson & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 687 (2005).

summary judgment phase.¹⁹ So when we compare the two studies, we find that multiple claimant cases have a dramatically lower rate of success. Obviously, this is a very small sample but it certainly bore out my anecdotal impression of what happened to these cases.

Why do complex claimants fare so poorly? First, there is a significant problem with the EEOC intake questionnaire that claimants file as the first step in pursuing a remedy for discrimination. The questionnaire reads:

Do you believe this action was taken against you because of: (Check the one(s) that apply and specify your race, sex, age, religion or ethnic identity.)

☐ RACE ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☐ AGE

☐ RETALIATION ☐ COLOR ☐ DISABILITY ☐ OTHER, EXPLAIN BRIEFLY.²⁰

Claimants almost always appear in the EEOC office without a lawyer at this stage,²¹ and will likely check those boxes that apply to them. This is the genesis of the multiple claim problem. Pro se litigants, uneducated about discrimination law and often without clear explanation for their termination or other adverse employment action, have little information upon which to base their claim and often assume that it is due to a number of their personal traits.

Then these cases take on a life of their own. They proceed through the EEOC and to the federal courts, either pro se or with a lawyer, but are bound for failure. Because lawyers loathe to drop claims before discovery commences, they may hold on to them much longer than they should. At the summary judgment phase, judges fail to engage in any detailed consideration of the intersectional nature of discrimination. One judge went as far as saying that multiple claim cases are like “throwing spaghetti at the wall.”²² When judges see a race/sex/age case, they view the litigant as a

19. Federal Judicial Center Memorandum, *Estimates of Summary Judgment Activity in Fiscal Year 2006*, at 9-10 tbl. 4 (Apr. 12, 2007), available at <[http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf)>; see also Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 884-88 (2007).

20. EEOC Intake Questionnaire Form 283. For a discussion of this process, see *Holowecki v. Fed. Express Corp.*, 440 F.3d 558 (2d Cir. 2006), *aff'd* 128 S. Ct. 1147 (2008); see also Laurie M. Stegman, Note, *An Administrative Battle of the Forms: The EEOC's Intake Questionnaire and Charge of Discrimination*, 91 MICH. L. REV. 124 (1992).

21. See *Williams v. N.Y. City Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006) (“EEOC charges frequently are filed out by employees without the benefit of counsel . . .”); *Ezell v. Potter*, 400 F.3d 1041, 1047 (7th Cir. 2005) (“We recognize that employees often file an EEOC charge without the assistance of a lawyer and we therefore read the charge liberally.”).

22. Michael Bologna, *Judges Warn Employment Lawyers Against Motions for Dismissal, Summary Judgment*, 19 EMP. DISCRIMINATION REP. (BNA) 595 (Dec. 4, 2002) (quoting federal District Court Judge Ruben Castillo of the N.D. Ill., who criticized plaintiffs’ lawyers “for filing wide-ranging claims alleging discrimination on multiple levels – a strategy akin to ‘throwing a plate of spaghetti at

crank just trying to get any claim to stick.

There are also evidentiary problems with the litigation of multiple discrimination claims. The first is the difficulty of finding comparators. For many complex claims, the evidentiary pool is too small to find the appropriate statistical, anecdotal, or “me too” evidence that is needed to demonstrate pretext.²³ One illustrative case is *Jeffers v. Thompson*,²⁴ which involved a black fifty-five-year-old woman who was working in a very small bureau of the Medicaid office at the Department of Health and Human Services (HHS). She was up for a promotion but didn’t get it and claimed race, gender and age discrimination. The court looked at nineteen employees who had already been promoted to similar positions and among them found two African American women, two white women, and one older male. From this, the court determined there was no discrimination. The plaintiff was the only older African American woman among the seven qualified candidates under consideration, but as long as the employer could point to individuals from each of the asserted categories, the court was satisfied that the employer did not discriminate.

Here, better evidence may have come from looking at the entire Medicaid bureau of HHS. Unfortunately, courts’ reluctance to grant broad discovery in many of these cases creates a problematic barrier. The interesting thing about *Jefferies* was that the court openly acknowledged that the more specific the composite class the more onerous the burden of persuasion.²⁵ Lawyers and claimants do not normally recognize this and, as a result, bring multiple claims too readily. For these cases to have any possibility of success, a wide evidentiary pool is needed.

The second evidentiary issue is the lack of social science data and expert testimony relating to the complex and nuanced stereotypes that these kinds of claimants are subject to the workplace. There has been interesting work done in this area and it is meeting with some success in the so-called “maternal wall” cases. For example, Joan Williams and her institute have put together a huge body of social science data relating to the stereotypes against women with children.²⁶ They established the Cognitive Bias

the wall to see what sticks”).

23. See *Elion v. Jackson*, 544 F. Supp. 2d 1 (D.D.C. 2008) (finding that evidence showing an employer’s previous discriminatory conduct in the form of “me too” evidence from a prospective witness would be relevant and thus admissible in a Title VII discrimination case and holding that whether this information was more probative than prejudicial must be decided case by case and based on the circumstances of the individual plaintiff).

24. 264 F. Supp. 2d 314 (D. Md. 2003).

25. *Id.* at 327.

26. Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS & EMP. POL’Y J.

Working Group of the Program on Work-Life Law, which met over a two-year period with social scientists, law professors, and practitioners and developed a body of data on prevalent stereotypes and a list of experts that can be used in cases. These discrimination cases are finally being successfully litigated.²⁷

My final recommendation is that we need to do the same kind of research for some of the other classifications that come up frequently, such as older women, older women of color, and people with age claims related to disabilities. These classifications also bring to mind nuanced stereotypes that require more social science data and expert testimony.

Professor Roberto Corrada*: I would like to thank Melissa Hart for putting this panel together and I want to briefly mention that we celebrated in Colorado this year because Amendment 46, which was the equivalent of Proposition 209 in California, was defeated and a large reason for that was Melissa Hart's work as the lead attorney and co-chair in the "No on 46" campaign. Regardless of what you think about affirmative action, that amendment was deceptive as we learned in that campaign, and Melissa led the charge. A large part of the reason for the success was simply educating people that the amendment was not a civil rights amendment in the traditional sense of the word. The fact that the message got out was I think one of the reasons that the amendment was defeated. So Melissa Hart, great work.

My article is about the confluence of disparate treatment and accommodation in religion cases. What happens when some evidence of bias shows up in an accommodation context? In the article that I wrote, which is going to be forthcoming in the *Cincinnati Law Review*²⁸ but is available right now on the Social Science Research Network (SSRN),²⁹ I isolate three different mixed discrimination/accommodation cases. A case that you are probably not familiar with, that I was involved in, is *Reed v. FAA*.³⁰ Two cases that you might be familiar with, and are in a number of

401 (2003); see also, *Symposium: Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMP. RTS. & EMP. POL'Y J. 287 (2003).

27. See *Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973 (W.D. Wis. 2003), where a plaintiff's supervisor admitted that although the plaintiff was qualified, he did not consider her for the promotion because she had children and he assumed she did not want to relocate her family. She was awarded over a million dollars in damages, later reduced.

* Professor of Law, University of Denver College of Law.

28. Roberto L. Corrada, *Toward an Integrated Disparate Treatment and Accommodation Framework for Title VII Religion Cases*, 77 CINCINNATI L. REV. 1411 (2009).

29. It can be downloaded from <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=960171>.

30. 438 F.3d 1063 (10th Cir. 2006).

casebooks, are *Brown v. Polk County*³¹ and *Wilson v. U.S. West Communications*.³² All three are mixed disparate treatment and accommodation cases.

Probably my paper should have been titled, “A Funny Thing Happened to Me When I Tried an ACLU Case,” rather than the title it has. Because of the time, I will talk today primarily about only one of the cases, the *Reed* case, and briefly mention *Brown* and *Wilson* after that. Don Reed was an air traffic controller in Pueblo, Colorado. I was chair of the ACLU legal panel in Colorado when the ACLU agreed to take his case, because of the nature of the case. He was religious, a Sabbatarian, and had a fundamental belief that he should take the Sabbath off, and his Sabbath was Saturday. He had been accommodated for seven years in his job and then suddenly was fired after not being accommodated. Usually when somebody is accommodated for that long a period of time it means that the employer really doesn’t have a problem accommodating the person. So, in fact, when I got into the case, I quickly found as I suspected, and as is true in so many of these cases, that what happened was a new supervisor showed up who had a problem with the challenge to authority that came from the accommodation, and the first thing that he did was to take Don Reed out of the position called Quality Training Supervisor (QATS) which was a position that was outside of the normal seniority bidding system, with the person working the normal five days a week as a schedule. So even though he had little seniority, he did not have to engage in bidding and was accommodated for seven years.

Joe Hof, the supervisor, said that the position should not be privileged that way, even though it was not a much sought after position and nobody had an issue with it going to Don. Then, in addition, Hof proceeded to apply intense scrutiny to Don’s religion. He often asked questions like, “exactly what type of emergency would it take to get you in here on a Saturday” – those sorts of questions. And one time Hof actually yelled at Don, because Don had taken a flight back on a Saturday, that his religion was a “scam.” So there was some decent direct evidence of religious discrimination in the case.

But clouding the bias in this case were the issues of accommodation. After he was taken out of the QATS position Don had to bid, and he had low seniority and it was a seven-day facility. It is an air traffic control facility and he wasn’t senior enough to get Monday through Friday on his own. The air traffic facility was unionized and he worked with some very

31. 61 F.3d 650 (8th Cir. 1995) (en banc).

32. 58 F.3d 1337 (8th Cir. 1995).

creative union folks to set up various swaps and coverage changes with other controllers and that worked for a couple of years. Then he was fired, and mainly the problem was that the air traffic control facility started to lose staffing. Once you lose staffing, the swaps become tougher.

We pled the case as a disparate treatment case and, in the alternative, as an accommodation case. We had evidence on both so we pled that way. Before the FAA Administrative Law Judge, we were pretty successful with respect to the evidence on both sides. We had lots of evidence of bias; we also had evidence that there were some accommodations that had not been made that could have been made, including putting him in the QATS position, which had no specific prerequisite or requirement.

The ALJ apparently felt that all that bias stuff is sort of thorny and messy, and the accommodation issues were much more straightforward, and saw that we could win the case on accommodation. So he gave us the victory on the accommodation theory, finding it unnecessary to reach bias. Of course we were really upset because if an ALJ finds bias that is much tougher to overturn on appeal. Accommodation is much more technical, so we felt somewhat vulnerable on appeal, especially in this process. The appeal was to the Merit System Protection Board in Washington, D.C., which does not often grant oral argument. We weren't granted oral argument, and they reversed. They found that a number of accommodations that had been provided were reasonable and that the FAA did what it needed to do, and that was all there was to it. They focused only on the accommodation claim since nothing had been done with the bias issue.

Now this was a federal employee and so you get two bites at the apple. So my wife, who is a litigator, then took the case straight into federal district court *de novo* and she won a \$2.25 million jury verdict. The jury clearly seemed to dislike the supervisor Joe Hof, and that might explain the money. Of course, with caps, the award was taken down to \$1 million but the jury found both that there was disparate treatment based on bias and also failure to accommodate. There was an appeal to the Tenth Circuit, and the Tenth Circuit upheld the district court on the bias claim. But interestingly, the FAA defended the bias claim on appeal by arguing it had offered reasonable accommodations and that was its only obligation. I scrambled to find something that said you can't use a reasonable accommodation defense in a bias case and I found nothing that said that, it being such an obvious proposition. Fortunately, the Tenth Circuit did not have a problem, and upheld the bias case, but it bothered me. One minor goal of my article was simply to have something plaintiffs could cite that said you couldn't borrow from one framework in a different framework

case. That proposition alone is fairly uncontroversial and I like to think that I did something useful just having that in a law review article.

There are two concerns with this type of case. The first one was the ALJ deciding that he didn't want to bother with one part of the case, bias, and went instead with accommodation. Ideally, a judge would see the evidence and find that there was a violation on both counts, but he decided, perhaps, that this was a winner and he did not want to have to mess with bias because it would be a longer opinion. I haven't seen a lot of cases where those kinds of decisions are explicitly made, but I suspect that those kinds of things happen and they may show up in other more subtle ways. For example, a judge may spend more time writing the accommodation part of the case. So that was one thing that bothered me, this idea that judges have the discretion to choose which framework to go with, and their thinking might be that the damages are more or less similar, in accommodation versus bias cases.

The second thing that bothered me was the FAA borrowing a defense from one framework and arguing that defense in another framework. Actually, unless you understand the structure of Title VII, that by itself does not sound unreasonable, to say we offered a reasonable accommodation. The statute requires that. How could there be a problem? Now if you know something about Title VII, you understand that there are two separate ways to go, and I will talk very quickly about the other two cases that I discuss in the article.

The *Brown* case was brought by a man who was a supervisor in a county government.³³ He was fired, in part, because he brought his religion into the workplace. He had a bible and, among other things, he required his secretary to type up his bible study notes.³⁴ He lost in the district court because the district court judge found it was an accommodation case; the accommodation framework is much more favorable to employers and so Brown lost.³⁵ The case went up on appeal and the Eighth Circuit said not only was it a disparate treatment case, not simply an accommodation case, but it was a mixed motive case.³⁶ The evidence of religious bias was so strong because one of the reasons he was fired was explicitly because he

33. *Brown v. Polk County, Iowa*, 832 F. Supp. 1305, 1308 (S.D. Iowa 1993).

34. *Id.* at 1309. Brown also held Bible study and prayer meetings, and quoted the Bible in support of his encouragement to subordinates to maintain a strong work ethic.

35. *Id.* at 1314.

36. *Brown v. Polk County, Iowa*, 61 F.3d 650, 654-57 (8th Cir. 1995) (en banc) (reasoning that the reprimand given to Brown was a refusal to accommodate his religious practices and so if it was unreasonable, the termination based in part on that reprimand was disparate treatment on the basis of religion).

brought religion into the workplace. The court did not even remand the case; it decided it right there, mixed motive, he wins.³⁷

The other case, the *Wilson* case, is very interesting. It has been written about a lot and involves an anti-abortion button.³⁸ The woman who sued US West had a fairly large anti-abortion button with a picture of a fetus and it was the picture of the fetus that apparently was a huge problem.³⁹ That case probably was rightly decided. It was tricky because again the district court judge viewed it as an accommodation case and the employer presented three options for accommodation, 1) cover the button, 2) allow just the language of the button without the picture of the fetus, and 3) no button at all.⁴⁰ So the court said there were reasonable accommodations offered.⁴¹ A couple of other problems with the case were, first, that the court felt that her religious belief was different from what she said it was.⁴² Again, this was on summary judgment so that kind of finding at summary judgment has been criticized. But the part of the case that bothers me the most was that there was a lot of hostility by co-workers related to the button. Because this was a summary judgment accommodation case, that hostility was not fleshed out the same way it would have been if the court had followed a *McDonnell Douglas* or mixed motive type of framework to deal with bias evidence. The judge handled the bias question on the side, basically, and part of the opinion says I just do not think there was any bias here⁴³ – again, an accommodation case handling bias on the side. And it bothers me because I think, who knows, if she had not had a religious reason but just was upset about a miscarriage and maybe had a button with a picture of a fetus, something like that but not religious, she might not have faced the same kind of hostility. In other words, it is unclear in that case where the hostility was coming from. I am not saying that case was wrongly decided. It just bothers me that the evidence of hostility was not handled properly and I think one of the reasons for this was that the judge

37. *Id.* at 657.

38. *Wilson v. U.S. West Commc'n*, 58 F.3d 1337, 1339 (8th Cir. 1995).

39. See *id.* at 1338-39.

40. *Id.* at 1339, 1341-42.

41. *Id.* at 1341-42.

42. *Id.* at 1340-41.

43. *Id.* at 1341. The court stated,

Moreover, U.S. West did not oppose Wilson's religious beliefs, but rather, was concerned with the photograph. The record demonstrates that U.S. West did not object to various other religious articles that Wilson had in her work cubicle or to another employee's anti-abortion button. It was the color photograph of the fetus that offended Wilson's co-workers, many of whom were reminded of circumstances unrelated to abortion. Indeed, many employees who opposed Wilson's button shared Wilson's religion and view on abortion.

framed the case as an accommodation case and then had no reason to focus on the bias evidence in a rigorous way.

What do we make of all this? I first looked at the legislative history of the 1972 accommodation amendments to see if I could find anything about the interplay between discrimination/bias and accommodation. After 1964, the EEOC realized that a lot of religion claims are accommodation claims, but the 1964 statute explicitly said discrimination because of religion. So EEOC issued a regulation, 1605.1(b) in 1967 requiring accommodation of religious practice.⁴⁴ That was overturned on the basis that the 1964 statute required bias and only if there was discrimination could you mandate an accommodation for religious practice.⁴⁵ That is why the 1972 amendments were required – to mandate that neutral, well-meaning employers also had to accommodate. And so to me the accommodation framework should only be available to neutral, well-meaning employers. In other words, if there is evidence of bias in a case, that changes the entire dynamic, and this is important because the accommodation framework is very employer friendly. It is much easier for employers to win accommodation cases than straight-up bias cases.⁴⁶

I briefly considered whether I should argue for a disparate treatment/accommodation framework for religion cases. In other words, accommodation cases that have evidence of bias, as a separate category, but I dismissed that option because it increases the potential for misclassification. Remember, one of the issues is that the ALJ or judge may say, “Oh this is an accommodation case and we will only deal with it that way,” as the ALJ actually did in the *Reed* case, and ignore bias evidence. Also, framework borrowing, mixing elements from different types of cases, could actually increase if there are three rather than two (or better, one) frameworks. So I essentially set out to think about an integrated or uniform framework.

With only one framework for Title VII religious claims, judicial discretion is severely minimized as all religion cases are treated the same way. Here is the way a single or unified framework would operate. One, the employee must establish that he or she has a sincerely held belief or practice that did or did not conflict with a work requirement. Two, the employer knew or had reason to know of the belief or practice. And three, the employee suffered an adverse employment action. That would set out a

44. 42 C.F.R. § 1605.1(b) (1967).

45. See *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court* 402 U.S. 689 (1971) (per curiam).

46. See Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 321 (1997).

prima facie case by the employee. At this point, the framework would essentially follow a *McDonnell Douglas* or mixed motive framework. The employer would now either have to show that it would have taken the same action regardless or it would have to give a legitimate non-discriminatory reason, and that could be attacked by the plaintiff on pretext grounds. That handles any bias in a traditional bias framework. At that point, if the employer survives the bias challenge, if there is no accommodation component in the case, the case is dismissed. If, however, there is an accommodation angle in the case then you proceed to the accommodation case. So, were reasonable accommodations offered or was there an undue hardship?

The idea here is that every religion case has to be treated the same, which means judges have little discretion; they have to strain any evidence of bias through a bias framework first, before getting to accommodation. The bottom line here is judicial discretion is limited by forcing consideration of all angles of the evidence to ensure that the easier accommodation framework for employers is only accessed by well-meaning or neutral employers and minimizes misclassification errors. In other words, you handle the bias first, if it exists, and it is only when the employer survives the bias challenge that the case proceeds into an accommodation analysis. And, finally, this reduces the mischief vis-à-vis strategic uses of parts of alternative frameworks; a practice I call “framework- borrowing” which I hope does not become popular. Thank you.

Deborah Widiss*: Thank you. This paper, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*,⁴⁷ provides an interesting counter-point for some of the issues the other panelists have discussed. If you think the doctrine being developed in the cases they’ve discussed is not right, the response is basically, “Well, go to Congress and have it overridden.” In this paper, I am looking at the effectiveness of overrides (that is, statutory amendments that supersede judicial interpretations of a statute). I identify particular statutory interpretation questions that arise when courts must interpret overrides, focusing on the relationship between the override and the precedent that it is superseding. And what I have found is that courts often continue to rely on the overridden precedent, a phenomenon that I call relying on a “shadow

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47. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009).

precedent.”

I should be clear that in most of the cases that I analyze in the paper, courts do not ignore the fact that an override has been enacted. But it is not apparent how a court should decide a new factual scenario that arises under a statute if the new scenario is in some sense relevantly similar to the issue addressed in the precedent case – and would pretty clearly be governed by the precedent case but for the override – but is not squarely addressed by the text of the override itself. In that situation, you see courts saying everything from, “Oh, yes, the override functionally erases that precedent entirely,” to “No, no, it is a narrow exception to the rule announced in the precedent case, and Congress of course intended and acquiesced in our ongoing use of the precedent in every context not directly addressed by the override.”

The examples that I use in the paper are all pulled from employment discrimination law. In the paper, I talk more generally about the significance of overrides in the separation of powers, but for this discussion, I am going to focus on how we see reliance on shadow precedents shaping employment discrimination doctrine. One recent decision where this issue is quite prominent is the *Ledbetter v. Goodyear Tire & Rubber Co.*⁴⁸ case. *Ledbetter* has since been overridden itself, as I discuss briefly in a post-script added to this transcript. The issue in *Ledbetter* was, when does the statute of limitations begin to run for a pay discrimination claim? Was it when Lily Ledbetter had a discriminatory evaluation several years in the past, or did it restart with each new pay check that she received? As you all know, in a five-to-four decision, the Supreme Court held that the limitations period began to run when she had the discriminatory evaluation in the past.⁴⁹ The majority decision relied very heavily on *Lorance v. AT&T Technologies, Inc.*,⁵⁰ where the issue had been, when does the statute of limitations begin to run to challenge a seniority system? In *Lorance*, the Court had held that it began to run when the seniority system was put into place, not later when its effects were felt.⁵¹ The *Ledbetter* majority opinion’s reliance on *Lorance* would be unremarkable except that *Lorance* had been overridden. Two years after *Lorance* was decided, Congress amended Title VII to state that the statute of limitations to challenge a seniority system may run from when an individual is injured by the application of a seniority system, even if that is

48. 550 U.S. 618 (2007).

49. *Id.* at 621.

50. *Lorance v. A T & T Technologies, Inc.*, 490 U.S. 900 (1989).

51. *Id.* at 913.

long after the seniority system is put into place.⁵² The dissent in the *Ledbetter* case, written by Justice Ginsburg on behalf of four justices, argued that the majority was wrong to rely on *Lorance* because it was overridden.⁵³ The dissent contended that the override should be understood as entirely superseding *Lorance* and its rationale and that it was a clear signal from Congress that it agreed with the dissent in *Lorance*. But the *Ledbetter* majority responded to this whole argument in a footnote, saying the override of *Lorance* just concerned seniority systems and that the amendment has no relevance in the larger proposition set forth in the majority opinion in *Lorance*.⁵⁴ It's that dichotomy and confusion that I am looking at in the paper.

Let me give you one other example, which in some sense I think is even more surprising. This is a group of recent cases in which courts rely on *General Electric Co. v. Gilbert*.⁵⁵ *Gilbert* is an infamous decision; when you teach it, students can't believe that discrimination on the basis of pregnancy was not recognized as sex discrimination. But in *Gilbert*, the Court reasoned that because the employer's insurance policy did not identify any condition for which men were covered and women were not, but rather simply excluded a single condition – pregnancy – that happened to only affect women, there was not any sex discrimination.⁵⁶ Congress, as you all know, overrode *Gilbert* by enacting the Pregnancy Discrimination Act (PDA), which defined sex under Title VII as “including but not limited to pregnancy, childbirth or a related medical condition.”⁵⁷ If you go back to the committee reports and statements made by sponsors in enacting the PDA, Congress was quite clear that it disagreed with the analysis that the Court had used in *Gilbert*.⁵⁸ Congress instead agreed with the dissents in *Gilbert* that had argued that Title VII, as initially enacted, should have been recognized as sufficient to address the problem: if you discriminate on the basis of a characteristic that is unique to one sex or the other, that should have been recognized as sex discrimination.⁵⁹ This is what all the courts of appeals had held and what the EEOC had held prior to *Gilbert*.⁶⁰

Obviously, there are debates about looking at legislative history when

52. Civil Rights Act of 1991, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1078-79 (1991) (codified at 42 U.S.C. § 2000e-5(e)(2) (2006)).

53. *Ledbetter*, 550 U.S. at 653-54 (Ginsburg, J., dissenting).

54. *Id.* at 627 n.2.

55. 429 U.S. 125 (1976).

56. *Id.* at 136-40.

57. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)).

58. H.R. Rep. No. 95-948, at 2 (1978), reprinted in 1978 U.S.C.A.N. 4749, 4750.

59. H.R. Rep. No. 95-948, at 2; S. Rep. No. 95-331, at 2-3 (1977).

60. *AT & T Corp. v. Hulteen*, 129 S. Ct. 1662, 174 (2009) (Ginsburg, J., dissenting).

doing statutory interpretation. The nice thing about this example is that the Supreme Court itself has looked at this legislative history when interpreting the PDA. In *Newport News Shipbuilding & Drydock Co. v. EEOC*,⁶¹ which was decided shortly after the PDA was enacted, the Supreme Court relied on this legislative history to state that the PDA was enacted to make clear that Congress disagreed with the result in *Gilbert*, and further that Congress disagreed with the test of discrimination that was used in *Gilbert* and that Congress indicated that it agreed with the dissents in *Gilbert*.⁶² So it is quite clear the Supreme Court has already understood that the PDA was intended to completely override *Gilbert*.

Notwithstanding that, you still see courts relying on *Gilbert* as binding precedent. In the paper, I look at cases currently bubbling up in the lower courts being brought by women who allege they have been discriminated against at work based on choosing to breastfeed or expressing breast milk.⁶³ Courts have consistently held that these employees cannot state a Title VII claim. The reasoning that courts use is as follows. They start with the text of the PDA and say it's not pregnancy, it's not childbirth, and it's not a related medical condition (you might quibble on the last point, but they have been consistent in saying that the PDA's reference to "medical conditions" only applies to conditions directly tied to pregnancy – because women can choose not to breastfeed, breastfeeding is not directly enough tied to pregnancy).⁶⁴ Then courts say that there is no way to distinguish the breastfeeding cases from *Gilbert*: it is a condition that is unique to one sex and therefore they are bound by *Gilbert*. Thus, they hold there is no sex discrimination. What I am arguing in the paper is that this is an inappropriate way of looking at the question. I think that, given the override, courts should be doing a fresh statutory analysis of what Title VII's prohibition on discrimination "because of sex" means, rather than simply adopting the Court's interpretation in *Gilbert*, since it was clearly repudiated by Congress.

The whole issue raises some significant separation of powers issues, which I go into in detail in the paper. For now, let me just say that in each of the examples I use, there was very good legislative history suggesting

61. 462 U.S. 669 (1983).

62. *Id.* at 676.

63. See *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990) (analogizing to *Gilbert*), *aff'd*, 951 F.2d 351 (6th Cir. 1991) (unpublished table decision) (neither approving nor disapproving of the district court's analysis regarding *Gilbert*).

64. See *Wallace*, 789 F. Supp. at 869; see also *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (D. Colo. 1997) (finding that breastfeeding is not a "medical condition" under the PDA).

that Congress expected and intended the enactment of the override to be sufficient to end reliance on the precedents. So when courts continue to rely on the overridden precedents, the overrides are not playing the role that they are expected to play in terms of ensuring legislative supremacy (that is, that Congress is the ultimate arbiter of statutes and statutory meaning). Also, without getting into too much detail, reliance on these shadow precedents doesn't actually serve the values that are typically served by reliance on precedent. Precedent is usually justified as ensuring that similar cases are being treated similarly and as promoting efficiency and predictability in the law. Where you have courts relying on these shadow precedents, you have similar cases being treated differently without any affirmative indication from Congress that it intended those differences. Nor is it predictable; courts are all over on how they resolve these issues. Nor is it efficient.

After discussing these problems, I try to think about what an appropriate response would be. There are two obvious possibilities. One is that Congress should be doing something different in the way it drafts overrides. The other is that courts should be doing something different in the way they interpret overrides. I think both are true. Often, when I talk about this paper, people's first response is: Well, just put the onus on Congress. If courts resolve these issues in an ad hoc and unpredictable way, have a rule that an override will always be interpreted narrowly. That rule will be information forcing in that Congress will have to make clear exactly how much it disagrees with the precedent. Congress will have to make those judgment calls in statutory language that passes both houses of Congress and is signed by the President.

I think Congress would be well served to think about these questions more when it drafts overrides. Congress should be as clear as possible about the extent to which it disagrees with the underlying rationale of a decision that it is overriding. But I do not think that the responsibility to address the interpretive puzzles posed by overrides should rest solely with Congress.

I have two different concerns. One is a practical one that this simply would be an unreasonable burden to place on Congress. This is most clearly illustrated by a third kind of "shadow precedent" scenario that I talk about in the paper, which arises when you have one statute that is interpreted and other statutes that borrow that interpretation. For example, if courts have interpreted language in Title VII a given way, they will borrow those interpretations when interpreting similar language in the Americans with Disabilities Act (ADA) or the Age Discrimination in

Employment Act (ADEA). I look at the issue as it arises with respect to *Price Waterhouse v. Hopkins*.⁶⁵ The particular question is whether the standard regarding mixed-motive claims as expressed in *Price Waterhouse* should continue to govern interpretation of the ADA and the ADEA, notwithstanding that *Price Waterhouse*'s mixed motive analysis as applied to Title VII was overridden in the 1991 Civil Rights Act. As you probably know, the Supreme Court just granted *certiorari* in a case that raises that issue pretty directly (the decision in that case, *Gross v. FBL Financial Services*, is discussed briefly in a post-script at the end of this transcript).⁶⁶ The Court has also skirted around the issue of whether *Wards Cove Packing Co. v. Atonio*⁶⁷ should apply to these other statutes, as well as whether *Lorance* should apply to these other statutes. In *Smith v. City of Jackson*,⁶⁸ the Court stated, with no real analysis, that *Wards Cove* applies to the ADEA; later, it backed away from that statement a little bit in *Meacham v. Knolls Atomic Power Laboratory*,⁶⁹ but it has not ever really struggled with what it would mean to require that Congress amend each and every other one of these statutes to end reliance on an overridden precedent.

A rule that requires Congress to amend all of these other statutes would place a considerable burden on Congress. That is part of the reason why I do not believe that the answer to the interpretive challenges posed by overrides should be entirely that Congress just needs to draft overrides differently. Notably, Title VII is not a model just for the ADA and the ADEA. It is used in interpreting Title VIII, Title VI, Title IX and a whole host of other employment statutes. To suggest that Congress needs to amend each and every one of those other statutes to end reliance on an interpretation of Title VII with which it disagrees would place an enormous burden on Congress and make the possibility of an effective override of an interpretation far less accessible.

A similar issue arises if you think back to the discussion of the scope of an override as relates to substantive questions, as in the override of *Gilbert* or *Ledbetter*. Again, many would suggest that Congress just needs to be clear in statutory language that it disagrees with the interpretative rationale of the case. There are cases you can imagine where that would be relatively simple. *Gilbert* is one. Congress could have drafted something

65. 490 U.S. 228 (1989).

66. *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343 (2009).

67. 490 U.S. 642 (1989).

68. 544 U.S. 228 (2005).

69. 126 U.S. 2395 (2008).

that says if you discriminate on the basis of a characteristic that is unique to one sex or the other, that is sex discrimination. You can imagine statutory language like that, but if you think about a lot of cases and the multiple sorts of rationales that led to the results, it's harder to imagine. It would lead to very cluttered statutes.

My other concern with simply placing an onus on Congress to draft overrides "more clearly" is that it doesn't answer the question of how Congress signals that it disagrees with the interpretation of the language that was already in the statute – for example, that "because of sex" really should be interpreted as itself having been sufficient to reach pregnancy without the addition of the specific reference to pregnancy in the PDA. For both of these reasons, I advocate in the paper that courts also should change the way they interpret overrides. I am proposing that they should do a fresh statutory interpretation, not only of the text of the override but of the pre-existing statutory language, with a rebuttable presumption against relying on the prior judicial interpretation.

Obviously, this is not to say Congress couldn't pass a narrow override; it could generally codify the approach taken in a case and then carve out an exception. What my proposal would do is shift the presumption that is associated with congressional silence regarding some other potential application of the interpretative rationale. Currently, such "silence" is often assumed to be acquiescence to the ongoing application of an overridden case; under my proposal, such "silence" would be presumed to be disapproval of the ongoing application of the overridden case. I would just add very briefly that there are two limitations on the proposal. First, it would not apply to constitutional adjudication by the courts; to the extent that the Court has narrowly interpreted a statute or struck it down on constitutional grounds, the Court's constitutional reasoning would remain a fully binding precedent even if Congress subsequently enacted an override. Second, it would not be relevant to aspects of the precedent that were unrelated to the override.

Postscript: Shadow Precedents Applied:
Gross v. FBL Financial Services

The AALS panel occurred in January 2009, six months before the Supreme Court decided *Gross v. FBL Financial Services*.⁷⁰ Since *Gross* directly relates to the issues that are addressed in my paper, I thought I

70. *Gross v. FBL Financial Services*, 129 S. Ct. 2343 (2009).

would add a few brief thoughts on the approach that the Supreme Court took in *Gross*.

In *Gross*, the Court struggled with the specific question I explore in my paper: What significance should be accorded to the fact that Congress specifically overrode *Price Waterhouse's* analysis of mixed-motive claims by amending Title VII but that it did not at the same time amend the ADEA? As a brief reminder, in *Price Waterhouse*, four justices joined a plurality opinion that interpreted the Title VII's prohibition on discrimination "because of" race, color, religion, sex, or national origin to mean that a showing that sex (or another protected criteria) was a "motivating" factor in an employment decision would be sufficient to shift the burden to the employer to justify the action;⁷¹ Justice White and Justice O'Connor each separately concurred, but interpreted the language as requiring a showing that sex was a "substantial" factor.⁷² Justice O'Connor's concurrence is typically considered to provide the holding for the case. Three justices dissented, arguing that a plaintiff should have to prove that sex was the "but-for" cause of the decision.⁷³ Congress cleared up the issue with respect to Title VII by amending the statute to largely codify the plurality's interpretation, while also adding an affirmative defense (the amendments are considered an override because they supersede Justice O'Connor's interpretation).⁷⁴

The confusion arose because Congress did not amend the ADEA, the ADA, or other discrimination statutes that include the same "because of" language. Courts therefore have struggled when faced with mixed-motive claims under these other statutes. Prior to *Gross*, most held that Justice O'Connor's concurrence in *Price Waterhouse* should govern interpretation of these other statutes.⁷⁵ A few reinterpreted the language in these other statutes in line with the Congressional amendments of Title VII.⁷⁶ No one followed the roundly-rejected dissent in *Price Waterhouse* – until the Supreme Court's decision in *Gross*.⁷⁷

71. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989) (plurality opinion).

72. *Id.* at 258-59 (White, J., concurring); *id.* at 265-66 (O'Connor, J., concurring).

73. *Id.* at 279-95 (Kennedy, J., dissenting).

74. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (2006)).

75. See, e.g., *Gross v. FBL Fin. Servs.*, 526 F.3d 356, 361-62 (8th Cir. 2008); *Glanzman v. Metropolitan Mgmt. Corp.*, 391 F.3d 506, 512 n.3 (3d Cir. 2004); *EEOC v. Warfield-Rohr Casket Co.*, 364 F.3d 160, 164 n.2 (4th Cir. 2004); *Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1305 & n.2 (11th Cir. 2000) (per curiam).

76. See, e.g., *Fast v. S. Union Co.*, 149 F.3d 885, 889 (8th Cir. 1998) (applying the "motivating factor" standard enacted in the 1991 CRA).

77. See *Gross v. FBL Financial Services*, 129 S. Ct. 2343, 2354-55 (2009) (Stevens, J., dissenting).

In a five-to-four decision, reflecting the common conservative-liberal split, the Court interpreted the “because of” language in the ADEA as requiring a showing that the illegitimate criterion is a “but-for” cause of the decision.⁷⁸ The Court justified its disregard of the 1991 amendments by noting that Congress had amended Title VII but not the ADEA,⁷⁹ although, as Justice Stevens points out in dissent, there is persuasive legislative history suggesting Congress intended the amendments to apply to the ADEA as well.⁸⁰

At first blush, this may seem reasonable. Why shouldn’t we expect Congress to amend the ADEA along with Title VII? The problem with this resolution is that there’s no limiting principle. It’s not too difficult for Congress to draft language that supersedes a statutory interpretation in the particular context of the precedent with which it disagrees. But it is quite difficult for Congress to anticipate every statute and every situation where such an overridden precedent might be deemed relevant.

The Ledbetter Fair Pay Act,⁸¹ the first statute signed into law by President Obama, is a good example of how hard it is for Congress to amend all relevant statutes. The Act was an override of *Ledbetter v. Goodyear Tire*, which, as discussed above, concerns the statute of limitations for pay-related claims under Title VII.⁸² Congress clearly tried to anticipate and resolve the problem of how the override would relate to other similar statutes. In addition to amending Title VII, the Fair Pay Act also amends the comparable provisions in the ADEA and specifies that it will apply to claims brought under the ADA and the Rehabilitation Act of 1973; it makes these changes retroactive to the day before *Ledbetter* was decided.⁸³ But even this has not been enough to end reliance on the Court’s repudiated holding. A recent district court case, *Maher v. International Paper Co.*,⁸⁴ while noting correctly that the Act amends all of these other statutes, held that *Ledbetter* remains “persuasive authority except where overruled by statute” – and applied it to a claim brought under the Family and Medical Leave Act.⁸⁵ In other words, it applies *Ledbetter* as a shadow precedent. (The scope of the Fair Pay Act as related to Title VII is also open to question, and courts are already also struggling with how the

78. *Id.* at 2350.

79. *Id.* at 2350 n.3.

80. *Id.* at 2355-56 (Stevens, J., dissenting).

81. Pub. L. No. 111-2, 123 Stat. 5 (2009).

82. *Id.* § 2.

83. *Id.* §§ 3-6.

84. 600 F. Supp. 2d 940 (W.D. Mich. 2009).

85. *Id.* at 950 n.5.

Ledbetter Fair Pay Act affects the precedential value of *Ledbetter* in non-compensation-related claims.)⁸⁶

As discussed in the remarks recorded above, in my paper, I advocate an alternative approach to better allow overrides to play their expected role in preserving the separation of powers. Although I agree that Congress would be well-served by drafting overrides to head off some of these issues, I also argue that courts should adopt interpretive conventions that are more respectful of the significance of the override. Specifically, I propose that enactment of an override should create a rebuttable presumption that the prior judicial interpretation of the pre-existing statutory language is superseded, and that courts should therefore do “fresh” interpretation of the language. But, importantly, rather than deeming Congress’s “failure” to amend the ADEA free license to adopt the *Price Waterhouse* dissenter’s interpretation of Title VII, an interpretation that Congress clearly rejected, the Court should, I believe, have reinterpreted the language in the ADEA in line with the interpretation Congress endorsed in Title VII: that is, that a plaintiff may succeed in a claim by showing that age was a motivating factor in the decision.

86. *E.g.*, *Darensburg v. Metropolitan Trans. Comm’n*, 611 F. Supp. 2d 994, 1041-42 (N.D. Cal. 2009) (considering whether Ledbetter Fair Pay Act affected the continuing violation/discrete act distinction for non-compensation injuries).

