2012

# Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation

Deborah Widiss
*Indiana University Maurer School of Law*, dwidiss@indiana.edu

# Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation

Deborah A. Widiss*



---

* Associate Professor, Indiana University Maurer School of Law. I am grateful to Jim Brudney, Bill Eskridge, Charlie Geyh, Abbe Gluck, Tristin Green, Marty Katz, Leandra Lederman, Megan Mullett, Bill Popkin, Jamie Prenkert, Sandra Sperino, Peter Strauss, and Charlie Sullivan for their insightful comments on earlier drafts. I also benefited greatly from comments and questions from other participants in the Legislation Roundtable held at Columbia Law School in April 2011, the 2011 Big Ten Untenured Conference, and the 2011 Labor and Employment Law Colloquium. Noah Ellenberg provided fabulous research assistance in the initial stages of this project, and Laura Rossi provided welcome support in finalizing it for publication. My thanks too to the editors of the *Texas Law Review* for their conscientious work. This work was supported by a research stipend from the Maurer School of Law, with particular thanks to Dean Lauren Robel.

## I. Introduction

Our tripartite system of government places responsibility for lawmaking firmly in the legislative branch—and congressional overrides are the primary means through which Congress signals disagreement with judicial interpretations of statutes. But in *Gross v. FBL Financial Services, Inc.*,[1] the Supreme Court held that Congress's partial codification and partial override of *Price Waterhouse v. Hopkins*,[2] a judicial decision interpreting the causation standard under Title VII, did not control the interpretation of analogous language in the Age Discrimination in Employment Act (ADEA),[3] and further that Congress's "neglect[ing]" to amend the ADEA when it amended Title VII should be interpreted as a clear signal that Congress intended the language in the ADEA to be interpreted differently.[4] Strikingly, the Court did not even apply its own prior (partially overridden, partially codified) precedent. Rather, the Court adopted the standard proposed by the dissent in *Price Waterhouse*, an approach that was clearly disfavored by *both* Congress and a majority of the Justices in the earlier case. The *Gross* Court's reasoning rests on the counterintuitive conclusion that Congress, in expressing its disapproval of a judicial interpretation through enactment of an override, embraced the application of that disfavored interpretation to other statutes. Lower courts, following typical rules of statutory interpretation, have quickly applied *Gross* to reinterpret the causation standard under numerous other employment laws.[5]

The rule of interpretation that the Court announced in *Gross* is radically asymmetrical. It permits a single judicial interpretation to spread readily across multiple statutes but places upon Congress the burden of amending an

1. 129 S. Ct. 2343 (2009).

2. 490 U.S. 228 (1989).

3. *See Gross*, 129 S. Ct. at 2349 (stating that the Court had "never" held that the "burden-shifting framework" endorsed by Congress's post-*Price Waterhouse* amendments to Title VII was applicable to ADEA claims and holding that "we decline to do so now").

4. *Id.*

5. This has not been uniform, however. Courts have struggled to determine whether *Gross*, *Price Waterhouse*, or the causation standard in Title VII should be applied. *See infra* Part V.

uncertain, and constantly growing, group of statutes to end reliance on such a single judicial interpretation. This approach improperly cabins the effects of congressional overrides and dramatically aggrandizes the judicial role; it also unmoors the Supreme Court from the rules of precedent that typically constrain judicial interpretation. It distorts the separation of powers, making it difficult for overrides to serve their intended role as a check on judicial lawmaking, and causes significant confusion, inefficiency, and irregularity within statutory law. It also increases the risk of ends-oriented judicial interpretation.[6]

*Gross* has not been a popular decision. In the short time since it was decided, several commentators have argued against the but-for causation standard imposed by the Court[7] on the normative ground that it makes it too difficult for employees to prove that they were victims of discrimination in situations where the employer's action was based on a combination of legitimate and illegitimate factors.[8] Several also contend that, as a matter of jurisprudence, the Court's departure from *Price Waterhouse* was unwarranted.[9] The four dissenting Justices in *Gross* likewise argued that *Price Waterhouse* should have controlled the interpretation of the ADEA and that the test that the majority adopted was substantively problematic.[10]

My critique differs. I think that the Court's approach in *Gross* was fundamentally flawed; I also believe that simply following *Price Waterhouse* would have been almost as troubling. Rather, I contend that the Court was justified in revisiting the meaning of the ADEA's statutory language—but

---

6. *See infra* subpart II(A) & Part VI.

7. *Gross* interpreted the ADEA's prohibition on discrimination against an individual "because of such individual's age" to require a plaintiff to prove that age was the but-for cause of an adverse employment action, even if that action was allegedly based on a mix of legitimate and illegitimate factors. 29 U.S.C. § 623(a) (2006); *Gross*, 129 S. Ct. at 2350–51.

8. *See, e.g.*, Michael Foreman, Gross v. FBL Financial Services—*Oh So Gross!*, 40 U. MEM. L. REV. 681, 691–92 (2010) (arguing that plaintiffs lack access to relevant evidence needed to prove but-for causation in mixed-motive cases); Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857, 881 (2010) (contending that any form of causation standard is difficult for antidiscrimination plaintiffs to meet because the relevant evidence remains in the defendant's control but that "proving but-for causation is particularly difficult"); *cf.* Michael C. Harper, *The Causation Standard in Federal Employment Law:* Gross v. FBL Financial Services, Inc., *and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 133–39 (2010) (arguing that Congress should adopt a more lenient "contributing cause" standard for all employment discrimination statutes).

9. For examples of post-*Gross* commentary arguing that *Price Waterhouse* should have controlled the interpretation of analogous language in the ADEA, see Harper, *supra* note 8, at 107–08; Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 270 (2009); Katz, *supra* note 8, at 870–71; and Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 288–315 (2010). In earlier work, predating *Gross*, Professor Katz argued that lower courts could legitimately depart from *Price Waterhouse* to adopt a "unified" approach somewhat similar to that which I am proposing. Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 659–81 (2008) [hereinafter Katz, *Unifying Disparate Treatment*].

10. *See Gross*, 129 S. Ct. at 2354–57 (Stevens, J., dissenting) (arguing that *Price Waterhouse* should govern the ADEA); *id.* at 2358–59 (Breyer, J., dissenting) (arguing that proving but-for causation is very difficult for plaintiffs).

that in doing so, it should have applied a rebuttable presumption that the language of the ADEA be interpreted consistent with the meaning that Congress signaled it preferred for analogous language in Title VII.[11] My proposal builds on prior work that I and others have done regarding the particular challenge posed by the interpretation of "related" employment discrimination statutes following congressional overrides.[12] Writing prior to *Gross*, commentators discussed this question as a binary choice: should courts apply the overridden precedent—what I have called the "shadow precedent"—or the interpretation endorsed in the new legislative language? As I have demonstrated elsewhere, the same issue arises even in the interpretation of a single statute when courts are faced with substantive questions that are similar to the issue addressed in an overridden case but not squarely addressed by the text of the override.[13]

*Gross* dramatically changed the terms of debate by following neither the precedent nor the override. The Court asserted that because the Civil Rights Act of 1991 (1991 CRA), which amended Title VII to partially codify and partially override *Price Waterhouse*, did not explicitly address the causation standard in the ADEA, Congress must have intended that the statutes impose different standards.[14] I believe this conclusion is unwarranted. As a descriptive matter, I think it mischaracterizes the proper inference to be drawn from Congress's prior actions (and inactions). Although actual congressional "intent" may be impossible to verify, consideration of the overall structure of the 1991 CRA, as well as of legislative history, provides strong support for the opposite inference—i.e., that Congress expected that courts would apply its preferred causation standard to other antidiscrimination statutes that have substantive language similar to

---

11. In *Price Waterhouse*, the plurality and concurring opinions interpreted Title VII's prohibition on discrimination "because of" an individual's sex to establish liability if a plaintiff proved sex was a "motivating" or "substantial" factor in a decision based on a mix of legitimate and illegitimate factors, unless an employer could prove that it would have taken the same action without considering sex. Price Waterhouse v. Hopkins, 490 U.S. 228, 242, 250 (1989) (plurality opinion); *id.* at 259–61 (White, J., concurring); *id.* at 276, 278 (O'Connor, J., concurring). Justice O'Connor interpreted Title VII to permit shifting the burden to the defendant only when a plaintiff had "direct evidence" of discrimination. *Id.* at 276. Shortly after *Price Waterhouse* was decided, Congress amended Title VII to codify the motivating-factor standard and to replace the affirmative defense articulated in *Price Waterhouse* with a limitation on remedies. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified as amended at 42 U.S.C. §§ 2000e-2(m), 2000e5-(g)(B) (2006)).

12. This prior work includes Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651 (2000); Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093 (1993); Katz, *Unifying Disparate Treatment*, *supra* note 9; and Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217 (2007).

13. Widiss, *supra* note 12, at 542–46, 551–56.

14. *See Gross*, 129 S. Ct. at 2349 ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA.").

Title VII.[15] But I am not advocating use of legislative history to trump or go beyond the statutory language. The text of the ADEA can comfortably be interpreted to adopt the same causation standard as that endorsed by Congress in its amendment of Title VII.[16] Accordingly, the Court's rejection of that standard—in the absence of any affirmative indication from Congress that it intended the ADEA to be governed by a different standard—unnecessarily undermines jurisprudential values of fairness, efficiency, and predictability within statutory law.[17] It also increases the risk of ideological judging by interpreting overrides to have the anomalous effect of granting courts freedom from the constraints typically imposed by precedent and by Congress. (Notably, *Gross* is an employer-favoring decision issued by a sharply divided Court, with the five "conservative" Justices making up the majority.)[18]

Lower courts have already applied the reasoning in *Gross* to reinterpret the causation standard governing at least ten different federal statutory prohibitions on employment discrimination or retaliation, as well as the standard governing state analogues of several federal statutes.[19] Courts, however, have not been uniform in applying *Gross* to other statutes. Some have continued to follow *Price Waterhouse*, and a few have applied the standard set forth by Congress in its override of *Price Waterhouse*.[20] The one consistent theme in all of these decisions is that the current law is confused.

*Gross* and its aftermath are illustrative of a more general problem that I call the "hydra problem." Congress tried, through enacting an override, to supersede a judicial interpretation with which it disagreed. The Court interpreted this action—the metaphorical severing of a head—to permit the rapid growth of new "heads" in numerous other statutes. In *Gross*, the Court suggested that if Congress did not intend this result, it bore the burden of amending not just the statute actually interpreted in a prior decision but also all related statutes to which the disfavored judicial interpretation might be applied. I contend this is an unreasonable expectation. Even if Congress

---

15. *See infra* subpart III(D).

16. *See infra* subpart IV(B).

17. *See infra* Part V.

18. *See Gross*, 129 S. Ct. at 2346, 2352, 2358 (indicating that the majority decision was authored by Justice Thomas and joined by Chief Justice Roberts and Justices Alito, Kennedy, and Scalia, while Justices Stevens, Breyer, Ginsburg, and Souter dissented); *see also* Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, *available at* http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html (documenting the rise of "pro-business" decisions under the Roberts Court).

19. *See infra* subparts V(A)–(B) (discussing court decisions applying *Gross* to the antiretaliation provisions of Title VII, the Americans with Disabilities Act, the Rehabilitation Act, § 1981, the Family and Medical Leave Act, the Labor Management Reporting and Disclosure Act, the Jury Systems Improvement Act, the Employee Retirement Income Security Act, § 1983 claims raising public employees' First Amendment rights, and state analogues of several of these federal statutes).

20. *See infra* subparts V(A)–(B).

could accurately identify all potentially affected statutes, it would face significant barriers in amending them all separately. Shortly after *Gross* was decided, Congress considered bills that would override the decision by inserting language into the ADEA that would not only reject the Court's interpretation of the causation standard in the ADEA but also articulate a uniform causation standard that ostensibly would govern all other federal statutory or constitutional prohibitions on employment discrimination or retaliation; significantly, however, the bills did not propose actually amending any other statutes.[21] In light of *Gross*, this kind of "blanket" amendment is reasonable, but it is far from ideal. It might well be inadequately responsive to distinctions among statutes; it would also mean that language governing the causation standard of numerous statutes would be buried in the sections of the U.S. Code that codify the ADEA. In part because of these potential costs, even if Congress amended the ADEA to override *Gross*, it is relatively unlikely that it would enact a global override or separately amend all other potentially affected statutes. But this would not necessarily mean that Congress "chooses" or "prefers" that a standard of causation it affirmatively repudiated apply to other statutes; rather, I argue that it means that the terms by which the *Gross* Court requires Congress to signal such disagreement fail to respect adequately the institutional realities of Congress.

The anomaly of statutory interpretation is that courts, which in this context serve putatively as agents of Congress, set the rules for the judicial–congressional conversation through the canons of interpretation they adopt.[22] If courts employ canons that place expectations on Congress that are clearly unrealistic, they can work to undermine the promise of legislative supremacy in the statutory realm. The *Gross* Court justified its conclusion that Congress "chose" a different causation standard for the ADEA than Title VII by drawing a negative inference from Congressional inaction. I argue that inference is unwarranted.[23] I propose instead a rebuttable presumption that

---

21. Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. (1st Sess. 2009); Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (1st Sess. 2009). The two bills were substantively identical.

22. Numerous state legislatures have enacted statutes that seek to govern how courts interpret statutes, some with greater success than others. *See generally* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (cataloguing rules of interpretation enacted by state legislatures and discussing the extent to which they control judicial interpretations). Commentators disagree about the constitutionality of comparable action by Congress. *See infra* note 383.

23. *See infra* subpart VI(A). In other contexts, courts and commentators have long recognized that congressional inaction is often a dubious basis for inferring Congressional intent. *See, e.g.*, United States v. Wells, 519 U.S. 482, 496 (1997) ("[W]e have frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.") (citation omitted) (internal quotation marks omitted); Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (asserting that relying on "congressional inaction" to signal acquiescence to a prior judicial opinion "is a canard"); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90–108 (1988) (discussing concerns with inferring

enactment of an override calls for the (re)interpretation of the preexisting language in the statute amended—and analogous provisions in related statutes—consistent with the meaning endorsed by Congress, so long as the preexisting text can reasonably bear that meaning.[24] Importantly, the rule I propose only comes into play when an override endorses a plausible interpretation of preexisting statutory language. Thus a textualist jurist who categorically refuses to consider legislative history could comfortably apply this rule. It would promote the fair, efficient, and predictable development of statutory law, while still permitting courts to consider whether significant differences among statutes that are unrelated to the override merit distinct interpretations. Given the challenge of amending multiple statutes, I believe it would also be more likely to accord with legislative intent. That said, I also suggest that Congress make its intentions as clear as possible in duly enacted statutory language.

Part II explores the challenge that overrides pose to the standard rule of precedent and defines the hydra problem. Part III discusses in detail the multistep conversation between the courts and Congress regarding the standard of causation in employment discrimination statutes. Part IV imagines an alternative version of the story to illustrate how the conventions courts use to interpret overrides improperly minimize the significance of congressional interventions relative to judicial interpretations. Part V uses the rapid application of *Gross* in other contexts, as well as bills Congress has considered to override *Gross*, to argue that the putative response that the *Gross* Court indicates it expects from Congress is unreasonably difficult for Congress to achieve. Moreover, even if it were viable, it could cause significant new problems. Part VI argues that courts should instead adopt interpretive rules that more fairly respect the institutional realities of Congress; this would better permit overrides to play their expected role as a means for Congress to signal disagreement with judicial interpretations of statutes and further the orderly and consistent development of statutory law.

A note about scope and audience may be helpful. This Article identifies a problem of statutory interpretation that has arisen frequently in the employment discrimination context and posits that it is a latent tension inherent in the interpretation of overrides more generally. My hope is that the analysis that follows will be of interest both to scholars of statutory interpretation and to those who focus on employment discrimination law, as well as to practitioners of employment discrimination law, courts, and policy makers. But as is true of any case study, richness of detail comes at the cost of breadth of coverage. Moreover, as discussed more fully below,

---

acquiescence from inaction, including the possibility that Congress does not know about the relevant decision, has higher priorities than responding to it, or cannot agree on an appropriate response).

24. This rule could be announced by the Supreme Court as a general canon of interpretation. It is also possible that Congress could enact legislation directing courts to adopt this presumption. *See infra* note 406 and accompanying text.

employment discrimination is a particularly fertile ground for exploration of these issues because there are numerous statutes that are typically deemed "related," overrides are common, and it is a highly partisan area of the law. For all these reasons, employment discrimination may also be somewhat atypical; perhaps it is a "perfect storm" for the development of the hydra problem. I believe that the approach I advocate could be applied when interpreting the significance of overrides in other areas of law. However, further research is warranted to better understand the extent to which the hydra problem exists in other contexts as well as appropriate responses to it.

## II. Precedent and Overrides

In statutory interpretation cases, courts routinely extol the importance of precedent and look to prior interpretations of legislative language to resolve the case at bar. Scholarly commentary on the application of the rule of precedent in the statutory context has focused on the all-or-nothing questions of whether and when courts may properly overrule their own statutory precedents.[25] Questions regarding how courts determine whether a valid statutory precedent controls a different case, particularly when that case arose under a different statute, and the related question of how congressional overrides fit into the standard rule of precedent, have been far less considered. This part lays out the conceptual challenges that are implicit in the interpretation of overrides and can create the hydra problem. It shows how Congress's enactment of an override can be interpreted to have the counterintuitive effect of aggrandizing contemporary judicial power to reinterpret numerous other statutes, as illustrated by the detailed case study that follows. Part VI then returns to theoretical issues discussed in this part to question more directly the assumptions and presumptions that underlie

25. *Compare, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 23 (1949) ("Therefore it seems better to say that once a decisive interpretation of legislative intent has been made, and in that sense a direction has been fixed within the gap of ambiguity, the court should take that direction as given."), *and* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 208–09, 215 (1989) (arguing for absolute statutory stare decisis as a means of reducing judicial lawmaking), *with* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 52–55 (1994) (arguing that when the assumptions of a society or culture underlying a statute are discredited, the statute may be interpreted dynamically in order to fulfill its original functions), T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 46–47 (1988) (arguing that a "nautical" approach to statutory construction that takes into account the current legal landscape and is not bound by originalism is both sensible and defensible), *and* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2074–75 (2002) (arguing that courts should, at times, be willing to overrule statutory precedents to bring an interpretation in line with contemporary political preferences). Distinct issues may arise when considering statutory stare decisis at the circuit court level. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 344–47 (2005) (arguing that heightened statutory stare decisis for circuit court decisions is unwarranted because Congress is less likely to know about or prioritize responding to circuit court decisions than to Supreme Court decisions).

them and to propose an alternative approach that better respects the separation of powers and the orderly development of statutory law.

### *A. Statutory Interpretation Constrained by Precedent*

The basic workings of a rule of precedent are quite familiar. Under traditional common law principles, in the absence of statutory or constitutional directives, judges reason from a body of prior cases to resolve a contemporary dispute. In so doing, they must determine what the underlying rationale is for the prior decisions and whether the case at bar is relevantly similar to the prior cases such that it should be governed by the same rationale.[26] This approach furthers fairness (in that similar cases are treated alike), efficiency, and predictability—values that are generally considered important in the rule of law.[27] As Justice Brandeis famously observed, "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[28] Still, notwithstanding respect for precedent, common law courts reconsider prior precedents in response to changing needs or evolving norms; often, this occurs gradually as prior decisions are distinguished and new decisions slowly accumulate until ultimately a high court announces a new rule.[29] In the constitutional context, the Supreme Court has likewise permitted relatively flexible standards for overruling prior precedents, in large part because it is so difficult to amend the Constitution.[30]

In conducting statutory analysis, precedent plays a similar, but not identical, role. Statutes contain gaps and ambiguities, and often there can be more than one "reasonable" interpretation of statutory language.[31] Once a

---

26. For general discussions of the system of precedent, see, for example, PRECEDENT IN LAW (Laurence Goldstein ed., 1987); Eric Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988); and Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987). A symposium on precedent and the Roberts Court offers an interesting collection of more recent research on precedent from a variety of perspectives. Symposium, 86 N.C. L. REV. 1107 (2008).

27. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, [and it] fosters reliance on judicial decisions . . . ."); Schauer, *supra* note 26, at 595–601 (observing that reasons for following precedent include fairness, predictability, and efficiency).

28. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

29. *See, e.g.*, Bozman v. Bozman, 830 A.2d 450, 450, 470 (Md. 2003) (holding that abrogation of the common law rule of spousal immunity was warranted because it was a "vestige of the past [and] no longer suitable to our people" (alteration in original) (internal quotation marks omitted)).

30. *See, e.g.*, William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) ("The Court applies a relaxed, or weaker, form of that presumption when it reconsiders its constitutional precedents, because the difficulty of amending the Constitution makes the Court the only effective resort for changing obsolete constitutional doctrine.").

31. Courts are instructed to defer to an agency's reasonable interpretation of an ambiguity in a statute if they determine Congress intends the agency to act with the force of law and that the agency in fact did so. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in

court with precedential authority has issued an interpretation, that interpretation is expected to control future interpretation of that language by courts that are inferior in the judicial hierarchy, at least when they are faced with questions that are relevantly similar to the issue posed in the precedential case.[32] The Supreme Court and circuit courts also typically consider themselves bound by their *own* prior statutory precedents, although, as discussed below, the Supreme Court has not adopted a rule of absolute statutory stare decisis.[33]

The significant respect given to prior interpretations, particularly those of the Supreme Court, means that judicial glosses on the meaning of statutory terms become functionally part of the "law," even though they are not found in the actual statutory language. Later court decisions expound upon the prior interpretation, frequently providing new glosses, not on the statutory text itself but on authoritative interpretations of that text. This is true not just for statutes that the Supreme Court has designated "common law" statutes, such as the Sherman Antitrust Act, but for statutes more generally.[34] For example, in the employment discrimination context, the Supreme Court announced a multipart test to govern whether an employee has an actionable harassment claim.[35] The elements of the test are not found in the statutory language, but courts have since developed a significant body of case law that parses the language that the Court used and reasons by analogy from prior

---

the exercise of that authority."); Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."). In practice, courts retain considerable flexibility regarding whether they will defer. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1098 (2008) ("[O]ur study of the 1014 agency-interpretation cases from *Chevron* to *Hamdan* reveals that the Court's deference practice functions along a *continuum*, ranging from an anti-deference regime reflected in the rule of lenity to the super-strong deference the Court sometimes announces in cases related to foreign affairs.").

32. *See, e.g.*, Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1161–62 (2005) (discussing the hierarchical application of precedent).

33. *See id.* (stating that while both the Supreme Court and circuit courts typically follow their own precedents, they are not legally required to do so); *see also infra* note 45 and accompanying text.

34. For an interesting exploration of how "common law" statutes differ from other statutes (if at all), see Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common-Law Statutes" Different?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW (Shyamkrishna Balganesh ed., forthcoming 2012) (on file with author).

35. The Court announced this standard in two decisions handed down on the same day that include the same precise language. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee . . . [unless an employer can establish] (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."); Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 765 (1998) (repeating the test in identical language).

judicial decisions to determine the test's scope.[36] Although the Court stated that this test was an "interpretation" of the basic statutory prohibition on discrimination as informed in part by the consideration of principles of agency law,[37] the actual development of the doctrine would be hard to distinguish from common law. To lawyers trained in the United States, this may be so familiar as to seem inherent in the process of statutory interpretation. But in some civil code societies, at least as a formal matter, statutory interpretation decisions hold *no* precedential value.[38] Rather, the only controlling "law" is the statutory text itself.[39]

As a jurisprudential principle, the Supreme Court and lower courts describe the rule of precedent as an important constraint in statutory interpretation.[40] Numerous empirical studies have tried to gauge how effectively precedent *actually* constrains judges from issuing decisions in line with their ideological preferences.[41] (As discussed below, empirical research

---

36. Courts frequently disagree about the correct interpretation of aspects of this judicially created standard. *Compare, e.g.*, Monteagudo v. Asociación de Empleados del Estado Libre Asociado de P.R., 554 F.3d 164, 171–72 (1st Cir. 2009) (holding that it was not "unreasonable" as a matter of law for an employee to fail to file a sexual harassment complaint when the manager who handled complaints was a close friend of the alleged harasser), *with* Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 268 (4th Cir. 2001) (holding in a similar situation that it *was* unreasonable for an employee to fail to report harassment).

37. *See Ellerth*, 524 U.S. at 755 (arguing that the Court's newly developed discrimination rule was not purely discretionary "common law" but rather "statutory interpretation pursuant to congressional direction").

38. *See* Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 234 (1999) (asserting that judges in civilian jurisdictions are "*just* interpreters" whose decisions are only final for a particular case and are not authoritative in other cases, even similar ones). For case studies on the use of precedent in several civil code countries, see generally INTERPRETING PRECEDENTS (D. Neil MacCormick & Robert S. Summers eds., 1997). The editors of this volume suggest that increasingly in civil code countries, prior judicial interpretations of statutory language can exert influence, even if they are not technically binding as precedent. *See* D. Neil MacCormick & Robert S. Summers, *Further General Reflections and Conclusions*, *in* INTERPRETING PRECEDENTS, *supra*, at 531, 531–33, 536 (suggesting that though significant differences remain, the treatment of precedent in civil and common law countries has converged in the modern era so that it is of increasing importance in civil law jurisdictions).

39. *See* Michel Troper & Christophe Grzegorczyk, *Precedent in France*, *in* INTERPRETING PRECEDENTS, *supra* note 38, at 103, 107 (stating that in France, "[t]he only legitimate source of law is 'the law', which is equated with statutory law").

40. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (calling stare decisis an "indisputable . . . self-governing principle within the Judicial Branch" that carries "special force in the area of statutory interpretation").

41. This debate is often characterized as between adherents to an "attitudinal model," who argue that judges are heavily influenced by their ideological preferences, and adherents to a "legal model," who argue that judges are in fact constrained by precedent, statutory language, and congressional intent. *See* Kirk A. Randozzo et al., *Checking the Federal Courts: The Impact of Congressional Statutes on Judicial Behavior*, 68 J. POL. 1006, 1008 (2006) (describing this debate and collecting studies that provide evidence for each theory). There is empirical work on each side of the debate. For a study substantiating the attitudinal model by showing that, at least as far as the Supreme Court is concerned, ideological preferences play a significant role in decision making, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). For a study empirically testing the effect of regime-changing Supreme Court

also seeks to establish the extent to which strategic considerations, such as the likelihood of overrides, also play a role.)[42] Results are mixed, but recent studies typically conclude that both ideology and rule-of-law values, such as adherence to precedent, play a role in judicial decisions at all levels, with the general consensus that the Supreme Court is less constrained by precedent than lower courts.[43] In part, this reflects doctrinal distinctions. The Court permits itself to overrule even statutory decisions if they prove "unworkable" or become "obsolete" due to intervening changes in the law.[44] However, the Court typically opines that stare decisis should be observed particularly strictly in the statutory context because Congress may intervene to supersede prior judicial interpretations, and only rarely does the Court explicitly overturn statutory precedents.[45] The more significant difference between the Supreme Court and lower courts is the Supreme Court's willingness to distinguish precedents that many would expect to control a given case.[46]

---

decisions and finding that the Justices' voting is at least somewhat constrained by precedent, see Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

42. *See infra* text accompanying notes 79–80.

43. *See, e.g.*, Lindquist & Cross, *supra* note 32, at 1173 (asserting that precedential power is weakest at the level of the U.S. Supreme Court); *see also* Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919, 920–21 nn.3–5 (2008) (collecting and describing studies that seek to document the constraining effect of precedent relative to ideology). Much of the early work in the field focused on the Supreme Court's consideration of constitutional cases; more recently, lower courts and statutory precedents have received greater attention. *See, e.g.*, Christina L. Boyd & James F. Spriggs II, *An Examination of Strategic Anticipation of Appellate Court Preferences by Federal District Court Judges*, 29 WASH. U. J.L. & POL'Y 37, 77 (2009) (finding that district courts' propensity to follow precedent is influenced by their own ideology but not by anticipated ideology of the appellate court that will review their decisions); Lindquist & Cross, *supra* note 32, at 1195–96 (finding that statutory precedent exerted influence on lower court judges but that its constraining effects weakened over time); Chad Westerland et al., *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891, 901–02 (2010) (finding that circuit courts are constrained by the expected treatment of precedent by the contemporary Supreme Court as well as by prior treatment of that precedent in their own circuit).

44. *See Patterson*, 491 U.S. at 172–73 (noting that although prior statutory interpretations are given greater deference than constitutional ones, the Court will overrule a prior statutory precedent that has proven unworkable in practice).

45. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 280–84 (1972) (adhering to precedents excluding professional baseball from antitrust regulation, despite widespread criticism of the prior decisions, on the ground that Congress had signaled agreement with the Court's interpretation by failing to enact legislation overriding those decisions); *see also* Barrett, *supra* note 25, at 319–21 (discussing *Flood* as an example of the Supreme Court's heightened deference to statutory precedent); James F. Spriggs II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1097, 1107 (2001) (providing an empirical study of cases from 1946 to 1995 and finding that the Court is less likely to overrule statutory precedent than constitutional precedent, although both statutory and constitutional precedents are more likely to be overruled when "ideologically incongruent" with the contemporary Court).

46. *Cf.* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 191–92 (1988) (arguing that, at least as to constitutional principles, judges can "assemble diverse precedents into whatever pattern" they choose). Although lower courts also enjoy some flexibility regarding how broadly or narrowly they interpret Supreme Court precedent, studies suggest the expected preference of the contemporary Supreme Court plays a significant role in

Additionally, individual Justices may simply continue to adhere to their original position through a series of dissents.[47] Notwithstanding these caveats, it is probably fair to say that precedent exerts control over statutory interpretation even at the Supreme Court level, in part because the Court also cares about its own institutional legitimacy.[48] Thus, as Professor Lawrence Marshall expressed it, a court's distinguishing of precedent must at least pass the "red face test."[49]

### *B. Statutory Interpretation Constrained by Precedent Interpreting a "Related" Statute*

Precedent interpreting one statute can also exert influence on the interpretation of other statutes. Courts often state that in "related" statutes, identical or similar language should maintain consistent meanings. Thus, for statutes that are identified as *in pari materia* (in the same matter),[50] courts will apply prior judicial interpretations not just to subsequent cases that arise under the statute *actually* interpreted but also to identical or similar language in other statutes addressing similar issues.[51] Courts offer a variety of sometimes-overlapping justifications for this practice.[52] These include that Congress intends to incorporate authoritative interpretations of statutory text when it uses language from one statute in a related context;[53] that similar

---

lower courts' decision making. *See, e.g.*, Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 546–47 (2002) (finding that the ideology of the contemporary Supreme Court is a more important factor than the ideology of the circuit court panel in determining whether that panel will comply with new Supreme Court precedent overruling prior Supreme Court precedent); Westerland et al., *supra* note 43, at 901 (finding strong empirical support for the contention that circuit courts' compliance with precedent depends on their expectations regarding whether the contemporary Supreme Court would be constrained by the prior precedent).

47. *See* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 38 (1999) (describing how certain Justices sometimes follow a pattern of "strong[ly] preferential" voting, registering their continued rejection of a precedent by authoring a dissent in each successor case).

48. *See* Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 972–73 (2009) (collecting studies demonstrating that "courts have preferences for institutional legitimacy").

49. Marshall, *supra* note 25, at 218; *see also* Richards & Kritzer, *supra* note 41, at 315 (2002) ("Law matters in Supreme Court decision making in ways that are specifically jurisprudential. . . . We theorize and observe that both the justices' policy goals and legal considerations matter in Supreme Court decision making.").

50. BLACK'S LAW DICTIONARY 862 (9th ed. 2009).

51. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1066 (4th ed. 2007) (introducing the "*in pari materia*" rule as one of three canons of statutory construction under which an interpreter of a statute may look to other statutes for interpretive guidance); CALEB NELSON, STATUTORY INTERPRETATION 486–89 (2011) (discussing the canon).

52. *See* NELSON, *supra* note 51, at 487–88 (describing purpose-based, text-based, and intent-based rationales for interpreting statutes *in pari materia* consistently).

53. *See, e.g.*, Lorillard v. Pons, 434 U.S. 575, 581 (1978) (stating, in the context of the then-recently enacted ADEA, that "where, as here, Congress adopts a new law incorporating sections of

language within the statutes should be interpreted consistently so as to achieve purposes that are shared by both statutes;[54] and simply that the plain meaning of identical text will typically remain constant among related statutes.[55]

The intent-based rationales, in particular, rest on assumptions that are difficult to verify. As a threshold matter, it can be difficult to guess *ex ante* which statutes courts will determine to be "related," particularly because statutes may be deemed related for some purposes but not for others. For example, the Supreme Court has stated that the ADEA's substantive provisions governing private employment are derived *in haec verba* (verbatim)[56] from Title VII, and should generally be interpreted *in pari materia* with that statute, but that its procedural and remedial provisions borrow from the Fair Labor Standards Act (FLSA) and accordingly should follow interpretations of FLSA.[57] Confusingly, however, the Court later opined that almost identical procedural language found in a separate portion of the ADEA governing federal employment should be interpreted *in pari materia* with Title VII.[58] Even if Congress would reasonably assume that statutes would be deemed *in pari materia*, legislative drafters may not be aware of relevant judicial interpretations of the preexisting statute.[59] Assertions of "intent" are particularly dubious when courts borrow interpretations that postdate the enactment of the related statute.[60] Importantly, however, sometimes when intent-based rationales are weak, purposivist or textualist justifications may offer strong support for applying a consistent interpretation.[61] The opposite is also true. Sometimes an assessment of statutory purpose or context can

---

a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute").

54. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (citing the "common purpose" of the ADEA and Title VII as partial justification for interpreting the statutes consistently).

55. *See, e.g.*, *id.* (citing the almost-identical text of the ADEA and Title VII as partial justification for interpreting them consistently).

56. BLACK'S LAW DICTIONARY 853 (9th ed. 2009).

57. *Lorillard*, 434 U.S. at 584–85.

58. *See* Lehman v. Nakshian, 453 U.S. 156, 166–67 (1981) (stating that in addressing age discrimination in federal employment, "Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector, and one based not on the FLSA but . . . on Title VII" (footnote omitted)).

59. *See* ROBERT A. KATZMANN, COURTS AND CONGRESS 72–76 (1997) (describing a study that found that congressional staffers were mostly unaware of how circuit courts were interpreting statutes). *But see infra* note 82 and accompanying text (discussing studies showing that many Supreme Court and circuit court decisions are discussed in some manner in Congress).

60. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 260 (2005) (O'Connor, J., concurring) (criticizing the plurality opinion for applying a 1971 interpretation of Title VII to the ADEA, enacted in 1967).

61. *See, e.g.*, *id.* at 235–40 (plurality opinion) (citing purpose-based, textual, and agency-deference justifications for applying to the ADEA an interpretation of Title VII that postdated the ADEA's enactment).

suggest strong reasons for interpreting identical text to bear different meanings.[62]

Whether or not Congress intentionally borrows judicial interpretations, the practice of interpreting identical or similar language in statutes *in pari materia* to bear consistent meanings will often have the independent virtue of advancing the values served by precedent in a true common law context. That is, it will often promote fairness—in the sense of treating similar issues alike—to interpret distinct statutes that address related subjects (e.g., age discrimination and race discrimination) consistently. The practice will also typically promote efficiency and predictability. This is particularly essential because the Supreme Court and state supreme courts rule on any given statute relatively infrequently. For example, it has been almost fifty years since Title VII was enacted, and many other federal and state statutes have since been enacted that use similar language to prohibit discrimination in employment.[63] In that half century, the Supreme Court has directly addressed the standard of causation that should be applied to claims alleging a mix of legitimate and illegitimate motives just twice: *Price Waterhouse* (interpreting Title VII) and *Gross* (interpreting the ADEA). If lower courts lack an authoritative construction of the statute *actually* at issue in a given case, they naturally rely on authoritative interpretations of analogous language in related statutes. This is illustrated by the rapid exportation of the rule of causation announced in *Gross*, as well as the pre-*Gross* exportation of the rule of causation announced in *Price Waterhouse*.[64] If lawyers practicing in a given area can reasonably expect lower courts to do so, they likewise can have a good sense of how statutes will be applied and can advise their clients accordingly.

The "meaningful-variation" canon of statutory interpretation is the converse of interpreting statutes *in pari materia* consistently; courts assume that a difference between statutes that are otherwise similar is a purposeful signal by Congress that the statutes should bear distinctly different meanings on the relevant point.[65] At times, this conclusion is reasonable, particularly when language in the statute is specific enough to establish that Congress intended the distinction to be significant.[66] But in the absence of legislative

62. *See, e.g.*, Fogerty v. Fantasy, Inc., 510 U.S. 517, 522–25 (1994) (interpreting language in the Copyright Act regarding attorneys' fees differently from almost identical language in civil rights statutes in order to further distinct purposes). Of course, many would argue that these statutes are not *in pari materia* at all.

63. *See infra* notes 269–76 and accompanying text.

64. *See infra* subparts V(A)–(B).

65. *See, e.g.*, W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 88–92 (1991) (arguing that the existence of several statutes explicitly permitting the recovery of experts' *and* attorneys' fees required interpreting a statute that only explicitly referenced "attorney's fees" to preclude recovery of experts' fees).

66. For example, Congress recently enacted the Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 42 U.S.C.). Although the basic structure of GINA's substantive employment discrimination provisions

language establishing purposive distinctions, the inference of intentionality may often be unwarranted. For example, the variation may be a response to political calculations that have salience at the time that the later statute is enacted but were absent when the first statute was enacted, or congressional drafters may not even realize that the later statute largely echoes but differs in some way from an earlier statute or a different section of the same statute. The Court has recognized this concern, stating that the inference will be strong when "applied . . . to contrasting statutory sections *originally enacted simultaneously* in relevant respects" but should be applied more cautiously when there is less reason to infer that the difference is deliberate.[67] As discussed more fully below, I contend that generally it is improper to infer a "meaningful" variation when the distinction between otherwise similar statutes is created by language added to a given statute to override (or codify) prior judicial interpretations of that statute.[68] Additionally, whether or not the inference of intentionality is warranted in a given situation, application of this canon of interpretation does far less than interpreting similar statutes *in pari materia* consistently to advance predictability or uniformity in the law because it is often difficult for lower courts, lawyers, and the public to guess what significance higher courts will ascribe to variation among statutes.

It is also essential to distinguish the canon of interpreting statutes *in pari materia* consistently from what is sometimes called the "whole code" canon of statutory interpretation.[69] This is a more general—and far more controversial—proposition that statutory terms should bear consistent meaning across the U.S. Code as a whole. As a descriptive matter, it is far less likely that this approach accords with any true congressional "intent" since it strains credibility to suggest that in crafting or voting on new legislation, congressional lawmakers consider not just interpretations of closely related statutes but also interpretations of similar language used in radically different statutory contexts. As Judge Posner memorably observed, "Congressmen do not carry the statutes of the United States around in their heads any more than judges do."[70] Nor is it reasonable to assume that stat-

---

borrows from Title VII, GINA explicitly precludes interpreting that language to permit "disparate impact" causes of action and authorizes the creation of a commission to study whether disparate impact claims should be permitted in the future. *Id.* § 208, 122 Stat. at 917–18.

67. Field v. Mans, 516 U.S. 59, 75 (1995) (emphasis added).

68. *See infra* subpart VI(A).

69. ESKRIDGE ET AL., *supra* note 51, at 863 (describing a "whole code rule" under which "interpreters must consider the provision in light of the whole code as well as the whole statute"); *see also* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 221 (2000) (describing Justice Scalia's assertions that courts should interpret statutes so as to "ensure some coherence across the whole body of law"); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 225–26 (2010) (reporting an empirical study of recent cases finding a theoretical divide between Justices who prioritize coherence across the legal landscape and those that aim for best effectuating the policy embodied in a particular statute).

70. Friedrich v. City of Chicago, 888 F.2d 511, 516 (7th Cir. 1989).

utes addressing very different areas of law share purposes; for example, the objectives of an antidiscrimination law will not necessarily be furthered by interpreting language in the same way that similar language has been interpreted in a criminal statute or a securities law. The whole code canon of interpretation also does very little to support predictability and uniformity because it is all but impossible to guess where a court will turn.

The whole code canon is frequently invoked by jurists who ascribe to "textualist" modes of interpretation and claim that they constrain judicial activism.[71] But as Professor William Buzbee argues persuasively, whole code interpretation can actually facilitate, rather than constrain, ends-oriented judging.[72] The U.S. Code is so vast, and the body of judicial decisions interpreting it is so immense, that a determined jurist could likely find support for several different interpretations of a given term and could choose among them to advance ideological preferences. (As discussed in more detail below, the majority opinion in *Gross* is arguably a good example of this. The Court draws its interpretation of the ADEA from judicial interpretations of language in the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Fair Credit Reporting Act (FCRA).[73] Neither of these statutes is an obvious or predictable source of meaning for an employment discrimination statute.) Thus, to paraphrase the oft-quoted criticism of reliance on legislative history, whole code interpretation can be like looking over a crowd and picking out your friends.[74]

### *C. Statutory Interpretation Constrained by Congressional Overrides*

As I have discussed more fully elsewhere, both courts and commentators routinely cite the possibility that Congress can enact overrides to supersede judicial interpretation of statutes as a check on the lawmaking inherent in statutory interpretation.[75] This is deemed a crucial mechanism of maintaining legislative supremacy in the statutory realm.[76] Legal commentators frequently characterize overrides as a helpful "colloquy" between the courts and Congress; courts, acting as agents of Congress in this context, engage in a good-faith effort to interpret statutes in line with legislative intent

---

71. *See* Buzbee, *supra* note 69, at 230 ("[J]ustices most frequently utilizing [the whole code canon] are self-avowed textualists.").

72. *See id.* at 239 (explaining that "[m]ere text-to-text comparisons . . . provide virtually no constraining data points that a judge must evaluate and explain in reaching a result" and arguing that, consequently, "[t]he universe of ostensibly similar statutory provisions—frequently a huge universe—is putty for judicial molding").

73. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009) (citing Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131 (2008), and Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201 (2007), cases addressing RICO and FCRA, respectively).

74. *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Leventhal as observing that citing legislative history is like "looking over a crowd and picking out your friends").

75. *See* Widiss, *supra* note 12, at 518–23 (collecting and discussing commentary).

76. *Id.* at 520.

and welcome "corrections" from Congress when appropriate.[77] Public choice scholars, by contrast, often characterize the Supreme Court (at least) as a political actor in its own right but likewise suggest that the possibility of override serves as an important limit on courts.[78] Some empirical studies support the contention that courts interpret statutes to effectuate their own policy preferences insofar as they can do so without triggering an override,[79] although other studies have found little or no evidence that such strategic considerations determine outcomes.[80]

The efficacy of overrides as a tool of legislative supremacy depends on two assumptions. The first is that Congress pays attention to judicial decisions. Although, as noted above, studies suggest that Congress may miss some significant statutory interpretation decisions,[81] it is also true that many of the Supreme Court's statutory decisions and significant circuit court statutory decisions are discussed in some manner in Congress.[82] In an influential study, Professor William Eskridge found that each Congress typically overrides about a dozen Supreme Court decisions and about twice as many lower court decisions.[83] Other studies have found comparable results.[84] The second assumption is that overrides effectively constrain judicial activism. A study by political scientist Jeb Barnes found that even

77. *Id.* at 521. The term *colloquy* is from Professor Richard Paschal. Richard A. Paschal, *The Continuing Colloquy: Congress and the Finality of the Supreme Court*, 8 J.L. & POL. 143, 143 (1991).

78. *See, e.g.*, Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263, 265 (1990) (arguing that "the behavior of the Court can be understood as that of a self-interested, politically motivated actor" but that the Court is constrained by "[t]he ability of other political actors to take actions to reverse [it]").

79. *See, e.g.*, Mario Bergara et al., *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247, 260–63 (2003) (concluding that both ideology and politics seem to affect Supreme Court decision making and asserting that "the conclusion that the Court thinks strategically cannot be rejected"); Thomas G. Hansford & David F. Damore, *Congressional Preferences, Perceptions of Threat, and Supreme Court Decision Making*, 28 AM. POL. Q. 490, 504–05 (2000) (finding, in certain circumstances, that the Court is constrained by expectations regarding whether Congress will override judicial decisions).

80. *See* Clark, *supra* note 48, at 972 (reviewing studies and concluding that support for the contention that the Court acts strategically in statutory interpretation is "mixed at best").

81. *See supra* note 59 and accompanying text.

82. *See* Widiss, *supra* note 12, at 525 & nn.51–54 (collecting studies showing that Congress frequently discusses statutory decisions made by the Supreme Court and the circuit courts).

83. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 335–36, 338 tbl.1 (1991) (reporting that from 1975 to 1990, each Congress overrode an average of twelve Supreme Court decisions and an average of between twenty-three and twenty-four lower court decisions).

84. *See, e.g.*, Lori Hausegger & Lawrence Baum, *Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation*, *in* GREAT THEATRE: THE AMERICAN CONGRESS IN THE 1990S, at 224, 228 (Herbert F. Weisberg & Samuel C. Patterson eds., 1998) (finding that Congress overrode at least 5.6% of the statutory Supreme Court decisions issued in the 1978–1989 terms); *see also* JEB BARNES, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT–CONGRESS RELATIONS 197–209 (2004) (listing overrides).

after an override has been enacted, there is frequently significant judicial dissensus—defined as either a circuit split or significant intracircuit disagreement—regarding its application.[85] The likelihood of dissensus varies by subject matter. For example, Barnes's study found that tax overrides almost never generated dissensus but that civil rights overrides almost always did.[86] This at least raises a question as to whether courts use the lack of clarity regarding proper interpretation of overrides as a cover for advancing their own policy preferences.

In an earlier work, I developed a theoretical concept called "shadow precedents," which I defined as reliance by courts on a precedent that had been overridden by Congress.[87] Using examples from employment discrimination law, I showed that courts routinely rely on such overridden precedents.[88] This occurs when a new factual scenario arises that is substantially similar to the issue posed in the overridden precedent but is not squarely addressed by the text of the override itself. The interpretive challenges posed by overrides have not received much scholarly attention. To the extent that the question has previously been addressed, commentators (including myself) assumed it posed a binary choice: should courts follow the shadow precedent or follow the interpretation suggested by the override?[89] *Gross* answered "neither."

### *D. Statutory Interpretation Unconstrained: The Hydra Problem*

In Greek mythology, the Hydra was a multiheaded monster whose notable feature was that severance of any head resulted in the growth of a new head in its place.[90] The reasoning employed by the Supreme Court in *Gross* suggests that the same can be true for overrides. The enactment of an override—the metaphorical severing of a "head"—can result in multiple heads growing in many different statutes. This is what I call the hydra problem.

The hydra problem is the product of the interrelationship of the interpretive conventions described above. Following the enactment of a statute, ambiguous terms are interpreted by courts. Courts, using whatever interpretive methodology they favor, choose among the "reasonable" interpretations of the language (a decision that is sometimes influenced by a

---

85. BARNES, *supra* note 84, at 84, 90.

86. *Id.* at 169, 171; *see also* James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1235 (2009) (finding significant variation between the statutory interpretation techniques used in tax cases and those used in employment cases).

87. Widiss, *supra* note 12, at 532–33.

88. *Id.* at 538–60.

89. *See* sources cited *supra* note 12.

90. *See, e.g.*, INGRI PARIN D'AULAIRE & EDGAR PARIN D'AULAIRE, D'AULAIRE'S BOOK OF GREEK MYTHS 134 (1962).

stated obligation to defer to reasonable agency interpretations).[91] Once a court with precedential authority issues an authoritative interpretation of Statute *A*, that interpretation functionally becomes part of Statute *A*. Second, courts following the *in pari materia* canon apply that authoritative interpretation to a (unspecified and unpredictably growing) group of related statutes that include the same or similar language as Statute *A*. Third, Congress, exercising its authority over the interpretation of statutory language, overrides the judicial interpretation by amending Statute *A*, but Congress does not simultaneously amend all of the other (unspecified and unpredictably growing) related statutes. With respect to Statute *A*, the judicial gloss on the statutory language is superseded by the actual statutory amendment of the language by Congress. The difficult question is what governs the interpretation of the related statutes.

If the preexisting language of Statute *A* and the related statutes could reasonably bear *both* the interpretation the court provided and the interpretation endorsed by Congress in the override, there are three logically plausible answers to this question, although, as discussed in the parts that follow, I think there are significant problems with two of them. The first is that the override supersedes the judicial interpretation of Statute *A* but *not* its exportation to the group of related statutes, leaving the preexisting statutory precedent controlling the interpretation of related statutes. This is the approach endorsed by the dissent in *Gross*.[92] The second is that the override supersedes the judicial interpretation of Statute *A and* its exportation to the group of related statutes, and that the preexisting language of the related statutes should be reinterpreted by courts in line with the meaning endorsed by Congress in its amendment of Statute *A*. This is the approach I endorse.[93] The third is that the override supersedes the judicial interpretation of Statute *A* and its exportation to the group of related statutes but signals only that the interpretation of language in related statutes should differ from that adopted by Congress. The third option (which, for good reason, was not considered viable prior to *Gross*) dramatically increases contemporary judicial power, permitting—solely because of the override—courts to adopt a new judicial interpretation of the language in the related statutes, free from the constraint of following Congress's preferred interpretation or the need to justify a departure from the standard rule of stare decisis.

The basic contours of the hydra problem predated *Gross*. It can emerge any time Congress amends a statute to override a judicial interpretation but does not amend all related statutes to which the disfavored precedent might plausibly be applied. Employment discrimination law is particularly fertile ground for the hydra problem because it is a field that contains numerous statutes with similar language and because it is a field in which overrides are

91. *See supra* note 31.

92. *See infra* text accompanying notes 189–94.

93. *See infra* subpart VI(B).

quite common. My previous exploration of this issue was published before *Gross* was decided, but it briefly discussed confusion over the application of *Price Waterhouse* to other statutes, including the ADEA, as an illustration of shadow precedents.[94] Courts have also disagreed about whether amendments to Title VII overriding the standard for disparate impact liability[95] and the statute of limitations applied to seniority systems[96] should affect the interpretation of related statutes. Similar questions were at play in back-and-forths between the courts and Congress regarding extraterritorial application of discrimination laws[97] and the availability of attorneys' fees and experts' fees in a variety of statutes.[98] But *Gross* makes the hydra problem far more serious by holding that neither the prior precedent (which was not explicitly overruled) nor the override govern the interpretation of the related statutes. It also addresses the issue more directly than prior decisions and in a context

94. Widiss, *supra* note 12, at 546–51.

95. *See* Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (concluding that Congress's override of the pre-1991 judicial interpretation of the disparate impact standard in Title VII did not preclude its application to the ADEA). The relationship of these statutory provisions is complicated by an affirmative defense found in the ADEA but not in Title VII. *See* Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2405 (2008) (concluding that the disparate impact standard courts had developed interpreting Title VII needed to be modified as applied to the ADEA because the ADEA contains a statutory affirmative defense permitting decisions based on a reasonable factor other than age). Before *Smith* was decided, there was a significant circuit split regarding whether disparate impact claims were cognizable under the ADEA at all, fueled in part by the fact that Congress did not amend the ADEA when it amended Title VII to override the prior judicial interpretation of that statute. *See*, *e.g.*, Mullin v. Raytheon Co., 164 F.3d 696, 701, 703–04 (1st Cir. 1999) (collecting cases demonstrating the split and discussing the significance of the 1991 amendments).

96. *Compare* Casteel v. Exec. Bd. of Local 703, 272 F.3d 463, 467 (7th Cir. 2001) (holding that despite Congress's override of *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), *Lorance*'s reasoning remained persuasive when interpreting the ADEA), *and* Huels v. Exxon Coal USA, Inc., 121 F.3d 1047, 1050 n.1 (7th Cir. 1997) (applying *Lorance* in interpreting the ADA), *with* Casillas v. Fed. Express Corp., 140 F. Supp. 2d 875, 884–85 (W.D. Tenn. 2001) (finding that *Lorance* did not apply "because the ADEA provisions were generally derived from Title VII, [and] when Congress clarified what it originally meant in § 2000e-2(h), this clarification also applied to its ADEA counterpart, 29 U.S.C. § 623(f)(2)").

97. *See* EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 258–59 (1991) (holding that Title VII did not apply extraterritorially in part because it lacked language added to override judicial decisions interpreting the ADEA); *see also infra* text accompanying notes 226–35 (discussing this case and Congress's response in greater detail).

98. For the key steps in the conversation, see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269–71 (1975) (interpreting the absence of explicit fee-shifting language in an environmental statute to preclude awards of attorneys' fees), Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2006)) (authorizing awards of attorneys' fees in several civil rights statutes), Smith v. Robinson, 468 U.S. 992, 1012–21 (1984) (holding that the Education of the Handicapped Act, which was not amended by the Civil Rights Attorney's Fees Awards Act of 1976, did not authorize an award of fees and precluding companion claims under statutes that did permit fees), Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (explicitly authorizing attorneys' fees under the Education of the Handicapped Act), W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 102 (1991) (interpreting § 1988 to preclude shifting of experts' fees as part of attorneys' fees); and Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (explicitly authorizing experts' fees for cases brought pursuant to Title VII and the Americans with Disabilities Act, as incorporated by reference through the amendment of 42 U.S.C. § 1988).

that is of central importance in employment discrimination litigation.[99] As the next parts illustrate, *Gross* has quickly caused widespread upheaval and confusion, thus making it a particularly rich case study.

My preliminary research in other areas of statutory law suggests that the prevalence of the hydra problem in employment discrimination law may be atypical. Employment discrimination is an area of the law with an unusual abundance of distinct statutes that are typically interpreted *in pari materia*. It is also a politically charged area of the law. The Supreme Court is often sharply divided in employment discrimination cases, and Congress frequently overrides the Court's decisions.[100] Courts in turn demonstrate unusually high levels of disagreement about the meaning of civil rights overrides as compared to less partisan areas of the law.[101] These factors have significance in two respects. First, it could be that the hydra problem has emerged as a common problem in employment discrimination law precisely *because* it is such a contentious area of the law. Courts may seek to cabin the significance of an override because they disagree with the approach adopted by Congress or because they resent the fact that Congress has superseded their prior interpretation. Second, the partisan nature of the subject matter also suggests that the aggrandizement of contemporary judicial power implicit in the approach that the Court endorses in *Gross* is particular cause for concern. If overrides are interpreted to free judges from constraints of precedent and congressional directives, there is a real risk that judges will use that interpretive freedom to advance their own ideological preferences. Further study of the interpretation of overrides in other contexts is warranted

---

99. The actual significance of the difference between the causation standard applied in Title VII and the standard now applied in ADEA cases can be difficult to measure, but at least one simulated jury study found it influenced case outcomes. *See* David Sherwyn & Michael Heise, *The* Gross *Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 903 (2010) ("Findings from our study suggest that while the outcomes (involving employer liability) are comparable, plaintiffs in cases with a motivating factor jury instruction were significantly more likely to receive litigation costs and attorney fees than plaintiffs in cases with the pretext jury instruction.").

100. As discussed more fully below, the Civil Rights Act of 1991 overrode numerous Supreme Court decisions. *See infra* notes 201–12 and accompanying text. More recent statutory overrides of employment discrimination decisions include, for example, the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended at 29 U.S.C. §§ 626, 794a (Supp. III 2010) and 42 U.S.C. §§ 2000a, e-5 (Supp. III 2010)) (overriding Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)), and the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 29 U.S.C. § 705 (Supp. III 2010) and in scattered sections of 42 U.S.C.) (overriding Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), and Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002)). Many of the Supreme Court decisions that these acts overrode were 5–4 decisions. *E.g.*, *Ledbetter*, 550 U.S. at 620; *see* 136 CONG. REC. 1657 (1990) (statement of Sen. Metzenbaum) (criticizing a series of 5–4 decisions from the 1988 term as "revers[ing] longstanding precedents" and "den[ying] protection to the victims of employment discrimination," and describing the then-proposed bill that became the Civil Rights Act of 1991 as "a direct response to those decisions").

101. *See supra* notes 85–86 and accompanying text.

to determine how widespread the hydra problem is in other areas of statutory law and to assess potential responses.

## III. Causation in Employment Discrimination Law: The Real Story

The interpretive conundrum posed by overrides emerges over time; judicial interpretations of statutory language slowly accumulate, Congress responds, and then courts are called upon to interpret the significance of that response. This part illustrates the complexity of this interaction by providing a detailed discussion of the ongoing conversation between the courts and Congress regarding the standard of causation in employment discrimination law. It then identifies weaknesses in the Court's analysis in *Gross* to substantiate my claim that the Court's assertion that Congress "chose" that the ADEA and Title VII bear different causation standards is unwarranted. It demonstrates that consideration of the 1991 CRA as a whole, as well as of legislative history, offers strong support for the opposite conclusion—that is, that Congress intended and expected that its preferred causation standard would apply not only to Title VII but also to other similar statutes.

Title VII prohibits employers from discriminating against individuals "because of" their race, color, sex, national origin, or religion; numerous other employment statutes likewise prohibit discrimination against individuals "because of" other protected factors or conduct.[102] The first significant Supreme Court case analyzing this language in the context of alleged intentional discrimination assumed that the challenged employment action—in that case, failure to hire—was *either* "because of" an illegitimate factor *or* "because of" legitimate criteria.[103] In a series of decisions, the Court developed a framework of shifting burdens of production designed to ferret out whether any claimed nondiscriminatory rationale was pretextual, reasoning that such a finding supports an inference that the "true" (presumed sole, or at least clearly primary) motivation was discriminatory.[104] Courts applying this framework—typically called "pretext analysis"—soon found

---

102. 42 U.S.C. § 2000e-2(a) (2006); *see infra* notes 267–81 and accompanying text (discussing other statutes).

103. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (setting forth a burden-shifting evidentiary framework to determine whether a challenged determination was because of race or because of an employee's alleged unlawful conduct).

104. This standard evolved in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252–56 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506–11 (1993); and *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142–43 (2000). In *Reeves*, the Court assumed, without deciding, that this burden-shifting structure applied to the ADEA. *See Reeves*, 530 U.S. at 142 ("This Court has not squarely addressed whether the *McDonnell Douglas* framework . . . also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here."). In *Gross*, the Court once again mentioned that it had not yet squarely decided this question. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 n.2 ("[T]he Court has not definitively decided whether the evidentiary framework of *McDonnell Douglas* . . . utilized in Title VII cases is appropriate in the ADEA context." (citation omitted)).

that it was ill suited to assess the legality of employment decisions based on a mix of permissible and impermissible considerations because a claimed nondiscriminatory rationale could be *part* of the true justification for an action but not the primary or sole justification.[105] Courts therefore needed to determine whether in such "mixed-motive" cases a plaintiff bears the burden of showing that sex, race, or another proscribed factor simply played *a* role in the decision? A motivating role? A decisive role? In common speech, "because of" can bear all of these meanings. The issue in *Gross*, like the issue in *Price Waterhouse* and the issue that Congress addressed in its partial override and partial codification of *Price Waterhouse*, was what meaning the words held in antidiscrimination statutes.

### *A.* Price Waterhouse v. Hopkins

Ann Hopkins worked as a senior manager at the accounting firm Price Waterhouse.[106] After she had worked for the company for five years, the partners in her office proposed her as a candidate for partner.[107] Her candidacy was denied.[108] Evidence from the partners' deliberations suggested that this decision was based on a combination of concerns that she had weak interpersonal skills (a legitimate criterion) and concerns that she was insufficiently "ladylike" (an illegitimate criterion).[109] The Supreme Court splintered badly over whether this violated Title VII's prohibition on discrimination "because of . . . sex."[110] There were four opinions, none of which garnered a majority—a fact that becomes important in the subsequent story.[111]

A plurality opinion authored by Justice Brennan, on behalf of himself and Justices Blackmun, Marshall, and Stevens, began from the premise that Title VII seeks to balance "employee rights" to be judged without regard to sex or other prohibited criteria, with "employer prerogatives" to rely on any

---

105. *See, e.g.*, Lewis v. Univ. of Pittsburgh, 725 F.2d 910, 916 (3d Cir. 1983) (interpreting Title VII to require a showing that race was the determining factor or but-for cause of the adverse action rather than merely a substantial or motivating factor in that action); *id.* at 921–22 (Adams, J., dissenting) (arguing that the but-for standard would not adequately protect plaintiffs when race is one factor, but not the only factor, in an employment decision); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979) (considering a mixed-motive situation and holding that the jury should have been instructed that age must be proven by a preponderance of the evidence to be the determining or the but-for factor in the plaintiff's discharge).

106. Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989) (plurality opinion).

107. *Id.* at 233.

108. *See id.* at 231–32 (stating that Hopkins's bid for partnership was held over for a year, at which point the partners in her office refused to repropose her for partnership).

109. *Id.* at 234–36.

110. 42 U.S.C. § 2000e-2(a) (2006).

111. For a fascinating exposé of the discussions among the Justices regarding the appropriate causation standard and their struggle to find an approach that could garner five votes, see Struve, *supra* note 9, at 299–304.

qualities or characteristics not specifically prohibited.[112] The plurality opinion flatly states that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation,' . . . is to misunderstand them."[113] Relying on textual arguments, legislative history, its understanding of Title VII's underlying policies, and prior precedent interpreting Title VII, labor statutes, and constitutional provisions, the plurality announced that a plaintiff would instead bear the burden of showing that an illegitimate factor played a "motivating part" in the challenged decision.[114] If a plaintiff proved this, the burden would then shift to the defendant to prove that it would have made the "same decision" even if the illegitimate factor had not played a role.[115] A defendant who made this showing defeated liability entirely.[116]

Justice White concurred.[117] He agreed with the plurality that liability could be established if a plaintiff proved that sex or another illegitimate criterion was a motivating factor in an employment decision, relying almost exclusively on a prior First Amendment public-employee-retaliation case that had required a showing that protected speech was a "substantial . . . or . . . motivating factor" in an employment decision.[118] Justice White also agreed with the plurality that an affirmative defense should be available to defendants who could prove that they would have taken the same action, but he took issue with the plurality's assertion that an employer generally would need to provide "objective evidence" to support this defense.[119]

Justice O'Connor also concurred.[120] She stated that the standard should be whether sex or another prohibited criteria "[was] the 'but-for' cause of an adverse employment action," but like the plurality and Justice White, she endorsed a burden-shifting scheme that placed the ultimate burden of showing the absence of but-for causation on the defendant.[121] In Justice O'Connor's formulation, a plaintiff would need to show by "direct evidence" that sex, race, or another prohibited criteria "was a substantial factor in the decision";[122] this showing would justify the "strong medicine" of shifting the burden to the defendant to demonstrate it would have taken the same action.[123] Justice O'Connor drew an analogy to multiple-causation tort cases, where courts have recognized that "leaving the burden of persuasion on the plaintiff to prove 'but-for' causation would be both unfair and destructive of

112. *Price Waterhouse*, 490 U.S. at 239 (plurality opinion).
113. *Id.* at 240.
114. *Id.* at 250.
115. *Id.* at 242.
116. *Id.*
117. *Id.* at 258 (White, J., concurring).
118. *Id.* at 259 (internal quotation marks omitted).
119. *Id.* at 260–61.
120. *Id.* at 261 (O'Connor, J., concurring).
121. *Id.* at 261–62.
122. *Id.* at 276.
123. *Id.* at 262.

the deterrent purposes embodied in the concept of duty of care."[124] She opined that, similarly in this context, a showing that sex or another illegitimate factor was a "*substantial*" factor in an employment action was sufficient to "trigger[]" "the deterrent purpose of the statute" and place a burden on the employer to prove that reliance on the factor did not actually "cause[]" the challenged employment practice.[125]

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, dissented.[126] The dissent argued that "because of" naturally means "but-for" causation.[127] It also argued that the burden shifting endorsed by the plurality and concurring opinions would engender widespread confusion, particularly because the Court had already interpreted employment discrimination statutes to require shifting the burden of production (rather than that of persuasion) in cases alleging a single discriminatory motive, in order to determine whether any legitimate rationales offered by a defendant were pretextual.[128]

Because none of the opinions garnered five votes, lower courts have struggled to determine which opinion states the holding of the case. Most have applied Justice O'Connor's concurrence on the ground that it presents the narrowest holding supporting the outcome.[129] As discussed below, in *Gross*, the petitioner argued that Justice White's concurrence should be considered the controlling opinion, a position subsequently endorsed by the *Gross* dissenters.[130]

### *B. 1991 Civil Rights Act and* Desert Palace v. Costa

In 1991, Congress enacted the 1991 CRA, a major civil rights law that addressed *Price Waterhouse* and several other then-recent and wildly unpopular employment discrimination decisions by the Supreme Court.[131] Congress responded to *Price Waterhouse* in two ways. First, as described above, the primary operative language of Title VII, § 703(a), prohibits

---

124. *Id.* at 263.

125. *Id.* at 265.

126. *Id.* at 279 (Kennedy, J., dissenting).

127. *Id.* at 281.

128. *Id.* at 290–91.

129. *See, e.g.*, Erickson v. Farmland Indus., Inc., 271 F.3d 718, 724 (8th Cir. 2001) (applying the "direct evidence" and "substantial factor" standards from what it called Justice O'Connor's "controlling concurrence"); *see also* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotations omitted)).

130. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2357 (2009) (Stevens, J., dissenting); *see* Brief for Petitioner at 52–55, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2009 WL 208116 (arguing that because Justice White agreed with the plurality in endorsing a motivating-factor standard without a direct-evidence requirement, that standard should control).

131. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

discrimination "because of" an individual's race, color, religion, sex, or national origin.[132] The 1991 CRA added to § 703 a new subsection, subsection (m), which states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[133] This new provision codified the motivating-factor language endorsed as an interpretation of Title VII by the *Price Waterhouse* plurality opinion and Justice White's concurring opinion. Second, the 1991 CRA added a section to the remedial provisions that specifies that "[o]n a claim in which an individual proves a violation under § 703(m) and a respondent [employer] demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor," the court may grant declaratory relief, certain injunctive relief, and attorneys' fees and costs "directly attributable only to the pursuit of [that] claim," but not damages or an order requiring reinstatement, hiring, or promotion.[134] This provision overrides the plurality and concurrences in *Price Waterhouse*, replacing the absolute defense on liability with a limitation on remedies.

The House Education and Labor Committee Report accompanying the bill characterizes these changes as necessary because *Price Waterhouse* "sen[t] a message that a little overt sexism or racism is okay, as long as it was not the only basis for the employer's action."[135] The report continues: "If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. *Price Waterhouse* jeopardizes that fundamental principle."[136] The House Judiciary Committee Report includes similar language.[137] In other words, at least as understood by the authors of the committee reports, the 1991 CRA was necessary to override aspects of *Price Waterhouse* because the Court's interpretation undermined Congress's antidiscrimination objectives.

The House Judiciary Committee Report also indicates some awareness of the related-statute problem and signals that committee members, at least, thought that amending Title VII would be sufficient to end reliance on *Price Waterhouse* and other overridden precedents. The report specifies:

---

132. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 214, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2006)).

133. Civil Rights Act of 1991 § 107(a) (codified as amended at 42 U.S.C. § 2000e-2(m)).

134. Civil Rights Act of 1991 § 107(b) (codified as amended at 42 U.S.C. § 2000e-5(g)).

135. H.R. REP. NO. 102-40, pt. 1, at 47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 585.

136. *Id.*

137. *See* H.R. REP. NO. 102-40, pt. 2, at 17 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 710 ("*Price Waterhouse* . . . threaten[ed] to undermine Title VII's twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination.").

> A number of other laws banning discrimination, including the [ADA] and the [ADEA] are modeled after, and have been interpreted in a manner consistent with, Title VII. The Committee intends that these other laws . . . be interpreted consistently in a manner consistent with Title VII as amended by this Act. For example, . . . mixed motive cases involving disability under the ADA should be interpreted consistent with [the motivating factor and limitations on damages provisions].[138]

The 1991 CRA, however, did not amend these other statutes to include the motivating-factor language. As discussed more fully below, it did make an unrelated minor change to the ADEA and a different unrelated minor change to the Americans with Disabilities Act (ADA).[139]

Shortly after the 1991 CRA was enacted, courts began to struggle with three related questions regarding causation standards, all of which stem from the interpretative challenges posed by overrides. First, in substantive Title VII cases, did a plaintiff need to provide direct evidence of discrimination to obtain the benefit of the motivating-factor standard now set forth in § 703(m)? There was nothing in the text of the statute that referenced direct evidence. This potential requirement came from Justice O'Connor's concurrence in *Price Waterhouse*. In other words, this question really boiled down to whether, at least as applied to Title VII substantive claims, the 1991 CRA entirely superseded *Price Waterhouse*'s causation standard. The circuits split on the issue, as well as on what constituted direct evidence if it was required.[140] The Supreme Court ultimately resolved the matter in *Desert Palace v. Costa*.[141] In a unanimous decision, the Court began by noting that the new provisions in the 1991 CRA were a "respon[se] to *Price Waterhouse*."[142] The Court then treated the question as a straightforward matter of statutory interpretation, holding that § 703(m) requires a plaintiff to "demonstrate" that an illegitimate factor was a "motivating" factor and that a separate provision of the 1991 CRA defined "demonstrates" as "mee[ts] the burdens of production and persuasion."[143] Reasoning that Congress knows how to specify heightened proof standards when it wants to and that it had failed to in this instance, the Court concluded that direct evidence was not required.[144]

---

138. *Id.* at 4, *reprinted in* 1991 U.S.C.C.A.N. 694, 696–97.

139. *See infra* subpart III(D).

140. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003) (collecting cases demonstrating the circuit split on whether direct evidence was required); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 582–83 (1st Cir. 1999) (discussing different approaches taken in the circuit split on what counted as direct evidence).

141. 539 U.S. 90 (2003).

142. *Id.* at 94.

143. *Id.* at 98–99, 101 (citing 42 U.S.C. § 2000e(m) (2000) and 42 U.S.C. § 2000e-2(m) (2000)).

144. *Id.* at 99.

The second question regarding causation that lower courts faced was what relevance, if any, the 1991 CRA's amendment of Title VII's substantive provisions had for cases arising under other employment discrimination statutes—such as the ADEA and the ADA—and under the retaliation provisions of Title VII, which are located in a separate subsection from the antidiscrimination provisions.[145] This question likewise engendered widespread disagreement. The majority of courts reasoned that Congress's "failure" to amend these other statutes and Title VII's retaliation subsection should be understood as an indication by Congress that it expected *Price Waterhouse* to continue to control the interpretation of these statutes.[146] In other words, they applied *Price Waterhouse* as a shadow precedent. A minority of courts, by contrast, held that the approach endorsed by the 1991 CRA could be applied to other statutory provisions.[147] This was most common with respect to the antiretaliation provisions in Title VII (because they are part of the same statute) and the ADA, which explicitly adopts the remedial structure of Title VII and thus the remedial limitation set forth in § 706(g), as amended by the 1991 CRA.

The third question regarding causation that lower courts faced after the 1991 CRA, and particularly after *Desert Palace* was decided, was, with respect to mixed-motive cases brought under employment discrimination statutes other than Title VII in circuits that held that *Price Waterhouse* provided the controlling precedent, did a plaintiff need to have direct evidence of discrimination to obtain a mixed-motive instruction that could shift the burden to the defendant to prove it would have taken the same action?[148] This third question actually required answering two subsidiary questions. One is common to all Supreme Court decisions that fail to yield a majority decision: Which opinion provided the holding for *Price Waterhouse*? If Justice White's opinion, rather than Justice O'Connor's opinion, was deemed controlling, there would be no direct-evidence requirement. But since the general consensus was that Justice O'Connor's opinion controlled,[149] the second—crucial—question was particular to the

145. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 361 (8th Cir. 2008) (describing the quandary regarding the ADEA), *vacated*, 129 S. Ct. 2343 (2009); Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000) (describing the quandary regarding ADA claims); Woodson v. Scott Paper Co., 109 F.3d 913, 934 (3d Cir. 1997) (describing the quandary regarding Title VII retaliation claims).

146. *See* Widiss, *supra* note 12, at 549–51 (collecting cases applying *Price Waterhouse* to other statutes).

147. *See id.* at 550 & n.176 (collecting cases applying the motivating-factor standard in the 1991 CRA to other statutes).

148. This was the question addressed in the Eighth Circuit's decision in *Gross*, which was vacated by the Supreme Court. *See Gross*, 526 F.3d at 361–62 (holding that the rationale of Justice O'Connor's *Price Waterhouse* opinion requiring direct evidence of discrimination was not undermined by *Desert Place* and thus that direct evidence should be required in ADEA claims).

149. *See, e.g.*, *id.* at 362 ("[O]ur court adopted Justice O'Connor's concurring opinion as the controlling rule."); Erickson v. Farmland Indus., Inc., 271 F.3d 718, 724 (8th Cir. 2001) (stating that

interpretive challenges implicit in overrides and the complex interaction between Title VII and other statutes: Did the Court's analysis in *Desert Palace* (which interpreted the new language added to Title VII to override *Price Waterhouse* and other decisions) hold any relevance to the application of the rule announced in *Price Waterhouse* as applied to other statutes? This was the question on which the Court granted certiorari in *Gross*.[150] The question the Court answered, however, was quite different.

### *C.* Gross v. FBL Financial Services

Jack Gross began working for FBL Financial Group, Inc. (FBL) in 1971.[151] Thirty years later, he held the position of "claims administrator director."[152] In 2003, when Gross was fifty-four years old, FBL restructured positions; it gave many of Gross's responsibilities to a younger employee in a newly created position and changed Gross's title to "claims project coordinator."[153] Gross claimed that this was a demotion, and he presented what the trial court characterized as "ample" circumstantial evidence that it was motivated by his age.[154] He did not, however, have any direct evidence that age played a role in the decision.[155]

Gross filed a claim under the ADEA and the Iowa Civil Rights Act.[156] Notwithstanding the absence of direct evidence, the district court's charge to the jury specified that if they found that "age was a motivating factor" in the decision to demote Gross, they must issue a verdict for him unless FBL proved that it "would have demoted [Gross] regardless of his age."[157] The district court thus answered the second question in the previous subpart by concluding that, in most respects, *Price Waterhouse* governed causation under the ADEA but answered the third question above by determining that, after *Desert Palace*, a mixed-motive instruction could issue even in the absence of direct evidence. The jury entered a verdict for Gross and awarded him $46,945.[158] The Eighth Circuit reversed.[159] It held that Justice O'Connor's concurrence in *Price Waterhouse* controlled the interpretation of the ADEA and that *Desert Palace* was irrelevant because it relied primarily

---

Justice O'Connor's concurrence was controlling). *But see supra* note 130 and accompanying text (discussing the argument that Justice White's concurrence should be deemed controlling).

150. Petition for a Writ of Certiorari at i, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009) (No. 08-441), 2008 WL 4462099.

151. *Gross*, 129 S. Ct. at 2346.

152. *Id.*

153. *Id.*

154. Gross v. FBL Fin. Grp., Inc., No. 4:04-CV-60209-TJS, 2006 WL 6151670, at *5 (S.D. Iowa June 23, 2006), *rev'd*, 526 F.3d 356 (8th Cir. 2008), *vacated*, 129 S. Ct. 2343 (2009).

155. *Id.*

156. *Id.* at *1.

157. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2347 (2009) (alteration in original).

158. *Gross*, 2006 WL 6151670, at *1.

159. Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 358 (8th Cir. 2008), *vacated*, 129 S. Ct. 2343 (2009).

on textual language added to Title VII by the 1991 CRA and "did not speak directly to the vitality" of *Price Waterhouse*.[160]

The petition for certiorari asked, "Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?"[161] The opposition to the petition (filed by FBL's counsel in Iowa, who had litigated the case below) argued that there was not a significant circuit split regarding application of *Price Waterhouse* to mixed-motive cases under statutes other than Title VII and that the uncertainty created by *Desert Palace* regarding the necessity of direct evidence had "faded."[162] In other words, it was expected that the case would resolve the second and third questions set forth above. But after certiorari was granted, FBL retained an experienced Supreme Court litigator as its lead counsel;[163] a significant portion of its opposition brief on the merits was devoted to an argument that the Supreme Court should overrule *Price Waterhouse*, at least as applied to the ADEA.[164] The Court, in a 5–4 decision, ultimately did so.[165]

Purely as a matter of procedure, this was shocking. Generally, the Court will only answer questions raised in the petition or opposition to the petition for certiorari.[166] This ensures that all parties and amici know what issues are under consideration and can develop their arguments

---

160. *Id.* at 359, 362.

161. Petition for a Writ of Certiorari, *supra* note 150, at i.

162. Brief in Opposition to Petition for a Writ of Certiorari at 5 & n.5, 9, 17–18, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2008 WL 4824079.

163. *Compare id.* at 25 (listing Frank Harty as counsel of record), *with* Brief for Respondent at 56, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2009 WL 507026 (listing Carter G. Phillips as the counsel of record). Carter G. Phillips was counsel of record for FBL on the merits brief. Brief for Respondent, *supra*, at 56. Phillips is the Managing Partner of the Washington, D.C. office of Sidley Austin LLP; he is a former Supreme Court clerk and a former Assistant to the Solicitor General, and his professional biography asserts that he has argued more Supreme Court cases than any other lawyer currently in private practice. *Our People—Carter G. Phillips*, SIDLEY AUSTIN LLP, http://www.sidley.com/carter-phillips/.

164. *See* Brief for Respondent, *supra* note 163, at 26–40 (dedicating roughly one half of the argument portion of the brief to arguing that the Court should overrule *Price Waterhouse* as applied to the ADEA).

165. *Gross*, 129 S. Ct. at 2346, 2351–52 (2009).

166. *See id.* at 2353 (Stevens, J., dissenting) ("We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate." (internal quotation marks omitted)). The majority justified its actions on the grounds that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." *Id.* at 2348 n.1 (majority opinion) (alteration in original) (internal quotation marks omitted). For commentary about this move by the majority, see Hart, *supra* note 9, at 269 (calling the Court's action "remarkable" and "contrary to regular Court procedure for good reason"); Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. (forthcoming 2012) (manuscript at 29), *available at* http://ssrn.com/abstract=1781243 ("In *Gross* yet again, in order to make new law, the Court decided a question not put before it by the parties.").

accordingly.[167] The dissenters in *Gross* characterized it as particularly "irresponsible" to preclude the United States, which participated in the case as amicus curiae, from addressing in its brief questions regarding whether *Price Waterhouse* should be overruled.[168] Tellingly, when asked a question during oral argument about the advisability of "ditch[ing]" *Price Waterhouse*, the Assistant to the Solicitor General arguing on behalf of the government opposed the idea and said it would create "massive confusion, not only under the Age Act, but under the Americans with Disabilities Act, the Family Medical Leave Act, a variety of labor statutes, [and] disciplinary statutes."[169]

The Court's decision was equally surprising substantively. The legal analysis in the majority opinion begins with a proclamation that "[b]ecause Title VII is materially different [from the ADEA] with respect to the relevant burden of persuasion," the Court's prior decisions regarding Title VII "do not control our construction of the ADEA."[170] It then proceeds to recount the story set forth in the previous two subparts, but in a way that rhetorically erases the intricate web of connections between Title VII, the ADEA, *Price Waterhouse*, the 1991 CRA, and *Desert Palace* which had led to the question presented to the Court. The majority opinion relegates to a footnote the starting premise, well-established in prior Supreme Court precedent, that the substantive provisions of Title VII and the ADEA are generally interpreted identically because the ADEA was derived *in haec verba* from Title VII.[171] The *Gross* majority does, however, summarize the various holdings of *Price Waterhouse* before stating that "Congress has since amended Title VII."[172] This is factually correct—but it fails to acknowledge that the amendment was a direct response to *Price Waterhouse*'s interpretation of "because of" in Title VII (a fact the unanimous Court had admitted forthrightly in *Desert*

167. This may have been quite significant in *Gross*. In his opening brief, Gross argued at length that the direct-evidence requirement should be abandoned because it had been very confusing; the brief even quoted Justice Kennedy's dissent in *Price Waterhouse* on this point. *See* Brief for Petitioner at 30–42, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2009 WL 208116 (explaining the problems that followed from the direct-evidence requirement). Viewed against a backdrop that presumed *Price Waterhouse* applied, with an open question of whether direct evidence was required, this was probably good strategy. But if it had been apparent that the Court might abandon *Price Waterhouse* entirely, Gross's counsel might well have eschewed focusing on how "confusing" the current regime was. The amici likewise simply assumed that *Price Waterhouse* would apply. *See* Brief for the United States Amicus Curiae Supporting Petitioner at 20, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2009 WL 253859 (arguing that "*Price Waterhouse* does not require that [the] Court impose a direct evidence requirement under the ADEA").

168. *Gross*, 129 S. Ct. at 2353 (Stevens, J., dissenting).

169. Transcript of Oral Argument at 27–28, *Gross*, 129 S. Ct. 2343 (No. 08-441), 2009 WL 832958.

170. *Gross*, 129 S. Ct. at 2348.

171. *See id.* at 2349 n.2 (answering the dissent's argument that the Court "must incorporate its past interpretations of Title VII into the ADEA" in this case by pointing out that "the Court's approach to interpreting the ADEA in light of Title VII has not been uniform").

172. *Id.* at 2349.

*Palace*)[173] and accordingly might have bearing on the interpretation of the "because of" language in the ADEA.

The Court then states that it "cannot ignore Congress'[s] decision to amend Title VII's relevant provisions but not make similar changes to the ADEA," particularly because the 1991 CRA included a different amendment to the ADEA.[174] Having thus putatively severed the connection between Title VII and the ADEA, the *Gross* Court proceeds to interpret the "because of" language in the ADEA as if it were working on a blank slate. Its analysis begins with dictionary definitions of "because of" as meaning "by reason of" or "on account of."[175] These dictionary definitions might arguably describe a motivating-factor standard as readily as a but-for causation standard. But the Court does not just reject the causation standard enacted by Congress for Title VII. It also ignores a large body of precedent—both predating and postdating *Price Waterhouse*—interpreting several other employment and labor statutes and constitutional provisions to likewise impose a motivating-factor causation standard.[176] Instead, the *Gross* Court supports its conclusion that "because of" in the ADEA means but-for causation by citing a pair of recent decisions interpreting the Racketeer Influenced and Corrupt Organizations Act (RICO)[177] and the Fair Credit Reporting Act (FCRA)[178] to require but-for causation.[179] The language interpreted in these statutes was

---

173. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (stating that § 107 of the 1991 Civil Rights Act "'respond[ed]' to *Price Waterhouse*" (alteration in original)).

174. *Gross*, 129 S. Ct. at 2349.

175. *Id.* at 2350 (citing and quoting largely identical definitions found in 1 OXFORD ENGLISH DICTIONARY 746 (1933), THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 132 (1966), and 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966)).

176. As noted above, *Price Waterhouse* relied in part on earlier Supreme Court decisions interpreting both constitutional and statutory provisions. Price Waterhouse v. Hopkins, 490 U.S. 228, 249–50 (1989) (plurality opinion). Following *Price Waterhouse*, lower courts applied the Court's "motivating factor" causation standard to numerous other employment statutes. Widiss, *supra* note 12, at 549–51. The *Gross* Court does support its assertion that the ADEA requires a showing of but-for causation by quoting a passage in a prior ADEA decision stating that a claim "'cannot succeed unless the employee's protected trait actually played a role in [the employer's decision-making] process *and had a determinative influence on the outcome*.'" *Gross*, 129 S. Ct. at 2350 (alteration in original) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). This statement is inapposite because *Hazen Paper* was litigated as a pretext case where the sole issue before the Court was whether reliance on an employee's pension status—which correlated with age—constituted a violation of the statute. *Hazen Paper*, 507 U.S. at 608–09. Moreover, to the extent it is deemed to have any relevance in the mixed-motive context, the quoted statement, which does not identify which party bears the burden for this showing, could just as readily be describing the standard announced in *Price Waterhouse* as the standard that the Court adopts in *Gross*. Additionally, as the *Gross* dissent points out, there are other passages in *Hazen Paper* that seem to endorse the motivating-factor test. *Gross*, 129 S. Ct. at 2355 (Stevens, J., dissenting).

177. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2006).

178. Fair Credit Reporting Act, 15 U.S.C. §§ 1681a–1681x (2006).

179. *See Gross*, 129 S. Ct. at 2350 (citing Bridge v. Phx. Bond & Indem. Co., 128 S. Ct. 2131 (2008) and Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201 (2007)). The Court also includes a "*cf.*" citation to a general torts treatise. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984)).

not even "because of"; the RICO case interpreted "by reason of,"[180] and the FCRA case interpreted "based on."[181] Having ostensibly justified a but-for standard, the Court relies on prior ADEA pretext cases that hold that the plaintiff retains the burden of proof to make this showing.[182] The sleight of hand is thus complete. Without explicitly overruling *Price Waterhouse*, the majority in *Gross* adopts the precise but-for standard that the dissenters in *Price Waterhouse* had unsuccessfully advocated and that Congress had clearly repudiated.

After this analysis, the Court returns to petitioners' claim that *Price Waterhouse* should control. Rather than addressing the claim head on, the Court merely states that "it is far from clear that the Court would have the same approach [as stated in *Price Waterhouse*] were it to consider the question today in the first instance."[183] This might well be correct, but it should be entirely irrelevant. The whole point of a rule of precedent is that it generally binds future courts, even if they might resolve a given question differently than the prior court had. The Court ultimately makes a gesture to the standards typically employed by courts to justify overruling prior statutory precedent—which include whether a standard has proven "unworkable"[184]—by stating that "courts have found it particularly difficult to craft an instruction to explain [*Price Waterhouse*'s] burden-shifting framework."[185] As Catherine Struve documents, the support cited for this proposition entirely failed to prove the Court's contention.[186] Additionally, because Title VII's causation standard now differs from that of the ADEA, and because the Court failed to explicitly overrule (whatever is left of) *Price Waterhouse*, its decision actually engenders widespread *new* confusion.[187]

Justice Stevens authored a dissent, joined by Justices Breyer, Ginsburg, and Souter.[188] Stevens's dissent argued that *Price Waterhouse*'s interpretation of "because of" in Title VII should control the interpretation of the analogous language in the ADEA.[189] The dissent characterized the

180. *See Bridge*, 128 S. Ct. at 2141 (interpreting 18 U.S.C. § 1964(c)'s provision providing remedies for "any person injured . . . by reason of a violation of section 1962 of this chapter").

181. *See Safeco*, 127 S. Ct. at 2205 (interpreting 15 U.S.C. § 1681m(a)'s provision prohibiting "adverse action[s] . . . based in whole or in part on any information contained in a consumer [credit] report" (second alteration in original)).

182. *See Gross*, 129 S. Ct. at 2351 (citing Ky. Ret. Sys. v. EEOC, 128 S. Ct. 2361, 2363–66 (2008) and Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141, 143 (2000)).

183. *Id.* at 2351–52.

184. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) (explaining that a "traditional justification for overruling a prior case" is when "inherent confusion [has been] created by an unworkable decision").

185. *Gross*, 129 S. Ct. at 2352.

186. *See* Struve, *supra* note 9, at 293–97 (arguing that the authorities cited in support of the proposition that the burden-shifting instruction would be unduly confusing to juries do not actually substantiate that assertion).

187. *See infra* subparts V(A)–(B).

188. *Gross*, 129 S. Ct. at 2352 (Stevens, J., dissenting).

189. *Id.* at 2353–57.

majority's decision to eschew the standard in Title VII as amended by the 1991 CRA as "reasonabl[e]," although it referenced, in a footnote, the legislative history suggesting that Congress may have expected that its approach *would* govern these other statutes.[190] Nonetheless, it deemed Congress's actions an important part of the analysis, arguing that Congress "substantially endorsed" *Price Waterhouse*'s motivating-factor analysis, "provid[ing] all the more reason to adhere to that decision's motivating-factor test" rather than the but-for standard "repudiated" by *Price Waterhouse* twenty years before.[191] And it pointed out, in response to the majority's stated concerns about workability, that the approach in *Gross* will complicate "every case in which a plaintiff raises both ADEA and Title VII claims."[192] The dissent then went on to answer the question on which certiorari was granted. Justice Stevens contended that in *Price Waterhouse*, Justice White's opinion, rather than Justice O'Connor's opinion, was controlling and thus that *Price Waterhouse* did not actually require direct evidence.[193] He further contended that any uncertainty regarding this point should be resolved by *Desert Palace*'s holding that heightened evidentiary standards should not be inferred without a clear statutory basis.[194]

Justice Breyer filed a separate dissent, joined by Justices Ginsburg and Souter, which argued on policy grounds that since the "employee likely knows less than . . . the employer about what the employer was thinking" when making an employment decision, the burden to show that the employer would have made the same decision absent consideration of an impermissible factor should rest with the defendant.[195]

### *D. An Almost Irrelevant Fact: The 1991 Civil Rights Act's Separate Amendment of the ADEA*

The *Gross* Court placed great emphasis on the fact that Congress responded to *Price Waterhouse* by adding the motivating-factor language to Title VII but did not add that language to the ADEA, particularly since Congress simultaneously made a different amendment to the ADEA.[196] The

190. *Id.* at 2356 & n.6.

191. *Id.* at 2356.

192. *Id.* at 2356–57.

193. *See id.* at 2357 (arguing that Justice White's concurrence is controlling because Justice White agreed with the plurality on the motivating-factor test and the lack of need for direct evidence, and thus provided a fifth vote for the rationale explaining the result of *Price Waterhouse*); *see also* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)).

194. *Gross*, 129 S. Ct. at 2357–58.

195. *Id.* at 2358–59 (Breyer, J., dissenting).

196. *Id.* at 2349, 2350 & n.3 (majority opinion) ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA.").

*Gross* dissent likewise deemed this quite significant.[197] So have other commentators.[198] Simply put, I think this a serious mistake.

First, the *Gross* Court mischaracterized the facts. The *Gross* Court stated that Congress "contemporaneously amended the ADEA in *several* ways."[199] This is incorrect. The 1991 CRA explicitly amended the ADEA in just one respect: it added language to require the Equal Employment Opportunity Commission (EEOC) to notify plaintiffs in ADEA cases—as it notified plaintiffs in Title VII cases—regarding the disposition of administrative complaints.[200] Second, and more importantly, consideration of the 1991 CRA as a whole provides strong support for the opposite inference—that is, that Congress intended and expected that the ADEA would be interpreted in line with the amendments to Title VII.

To see this, it is first necessary to describe in somewhat greater detail the 1991 CRA. As is true of much legislation, the 1991 CRA does many things. One of its primary purposes was to respond to numerous Supreme Court decisions interpreting employment discrimination statutes.[201] As discussed above, in response to *Price Waterhouse*, the 1991 CRA amended Title VII but did not add comparable motivating-factor language to the ADEA, the ADA, or other statutes.[202] In response to Supreme Court decisions concerning the standard of proof in disparate impact cases,[203] the applicability of consent decrees,[204] and the statute of limitations in cases challenging seniority provisions[205]—all decisions arising under Title VII—the 1991 CRA similarly amended Title VII but not the ADEA, the ADA, or other statutes (although one of the provisions added to Title VII incorporates by reference claims arising under other employment discrimination

197. *See id.* at 2356 (Stevens, J., dissenting) ("Because the 1991 Act amended only Title VII and not the ADEA with respect to mixed-motives claims, the Court reasonably declines to apply the amended provisions to the ADEA.").

198. *See, e.g.*, Harper, *supra* note 8, at 100–01 ("Section 107, however, amended only Title VII, not the ADEA or any other federal law.").

199. *Gross*, 129 S. Ct. at 2349 (majority opinion) (emphasis added). The Court supports this statement by citing to § 115 of the Act—which contains the revisions regarding EEOC notification—and § 302 of the Act, which is not an amendment to the ADEA but rather a reference within newly created antidiscrimination protections for certain government employees to the definition of age contained within the ADEA. Civil Rights Act of 1991, Pub. L. No. 102-166, § 115, 105 Stat. 1071, 1079 (codified as amended at 29 U.S.C. § 626(e) (2006)); Civil Rights Act of 1991 § 302 (codified as amended at 2 U.S.C. § 1202 (2006)).

200. Civil Rights Act of 1991 § 115 (codified as amended at 29 U.S.C. § 626(e) (2006)).

201. *Id.* § 3.

202. *Id.* § 107(a).

203. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (holding that a defendant could defeat a claim of disparate impact by showing merely that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer").

204. *See* Martin v. Wilks, 490 U.S. 755, 762–68 (1989) (holding that third parties affected by a consent decree could challenge the agreement even when they had known about the litigation and failed to intervene in the prior action).

205. *See* Lorance v. AT&T Techs., Inc., 490 U.S. 900, 911 (1989) (holding that the statute of limitations on challenging a seniority system ran from the time of the system's adoption).

statutes).[206] In response to a decision regarding the possibility of bringing harassment claims under § 1981,[207] the 1991 CRA amended only § 1981.[208] In response to a decision considering the availability of expert fees under § 1988,[209] the 1991 CRA amended only § 1988.[210] In all of these overrides, Congress amended only the statute *actually* interpreted in the prior judicial interpretation. There was one departure from this pattern. In response to a decision interpreting Title VII to preclude extraterritorial jurisdiction,[211] Congress added language to Title VII and the ADA that it had previously added to the ADEA—but, as discussed below, this is likely explained by the fact that in this instance Congress was responding to a hydra problem that had already developed.[212]

---

206. Civil Rights Act of 1991 §§ 104–105 (codified as amended at 42 U.S.C. § 2000e (2006), and 42 U.S.C. § 2000e-2(k) (2006)) (establishing a disparate impact standard that requires a defendant to prove that a challenged practice is "job related" and a "business necessity"); *id.* § 108 (codified as amended at 42 U.S.C. § 2000e-2(n) (2006)) (precluding third parties from challenging consent decrees if they had actual notice and a reasonable opportunity to object to the proposed order or if their interests were adequately represented in prior challenges); *id.* § 112 (codified as amended at 42 U.S.C. § 2000e-5(e) (2006)) (providing that the statute of limitations for challenging an intentionally discriminatory seniority system runs from when it is adopted, when an individual becomes subject to it, or when a person is injured by its application). The override of *Martin v. Wilks*, concerning consent decrees, differs from the other overrides in that the amendment codified within Title VII specifies that it applies to all claims "of employment discrimination under the Constitution or Federal civil rights laws." *Id.* § 108 (codified as amended at 42 U.S.C. § 2000e-2(n) (2006)). In other words, this adopts a "blanket amendment" approach similar to that which Congress considered in the bills proposed to override *Gross*—and with it concerns regarding notice and overbreadth. *See infra* text accompanying notes 370–77. The difference between the structure of the *Martin* override and the other overrides interpreting substantive language in Title VII may well be explained by the fact that *Martin v. Wilks*, although arising under Title VII, did not interpret specific language in Title VII; rather it relied on general principles of procedural law. *Martin*, 490 U.S. at 762–69; *see also infra* note 223 (discussing commentary on the significance of this difference and its implications for assessing the significance of the other overrides on interpretation of the ADEA).

207. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989) (holding that racial harassment claims were not actionable under § 1981 because that section does not apply to conduct occurring after the formation of a contract).

208. *See* Civil Rights Act of 1991 § 101 (codified as amended at 42 U.S.C. § 1981 (2006)) (expanding the prohibition on discrimination in § 1981 to include discrimination occurring in the terms and conditions of employment).

209. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 102 (1991) (interpreting § 1988 to preclude shifting of experts' fees as part the allowed shifting of attorneys' fees).

210. *See* Civil Rights Act of 1991 § 113 (authorizing the court to award expert fees in its discretion for cases brought to enforce § 1981a, which addresses claims pursuant to various civil rights statutes, including Title VII and the ADA). This is probably appropriately characterized as a "partial" override, in that the amendments only explicitly made experts' fees available in certain employment discrimination contexts, and the prior decisions had concerned the availability of these fees in other, additional contexts. *See supra* note 98 and accompanying text. This may be because the 1991 CRA focused on employment, or it may be that Congress purposefully chose to simply carve out a limited exception from the interpretation previously announced by the Court.

211. *See Aramco*, 499 U.S. 244, 259 (1991) (holding that Title VII did not apply extraterritorially).

212. *See* Civil Rights Act of 1991 § 109 (adding language expanding the definition of employee to include a United States citizen in a foreign country and inserting a new subsection relating to

The 1991 CRA also included substantive amendments and expansions of various employment discrimination laws that were not directly responsive to Supreme Court interpretations. Most of these *reduced* disparities among the various federal employment discrimination statutes, although they did not make them identical. For example, Congress permitted plaintiffs in Title VII and ADA suits to recover compensatory and punitive damages, up to statutory caps,[213] making the remedial structure of these statutes more comparable to that of § 1981 (which permitted uncapped damages)[214] and the ADEA (which permitted double damages for willful violations).[215] Congress also explicitly permitted jury trials in Title VII cases (and, by reference, in ADA cases),[216] again making Title VII and the ADA more similar to the ADEA and § 1981, which had already been interpreted to permit jury trials.[217] And, as noted above, Congress amended the ADEA to make the EEOC's notice requirements more similar to those it followed when enforcing Title VII.[218] The 1991 CRA also created a Glass Ceiling Commission to study barriers to advancement faced by women and minorities,[219] enacted a separate statute that prohibits discrimination against certain government employees,[220] and

covered entities in foreign countries). For a discussion of the hydra problem at issue, see *infra* text accompanying notes 226–37. Congress may also have thought it important to add specific language to both statutes regarding potential conflicts with foreign jurisdictions' laws, although this arguably could have also been addressed through interpretation of the preexisting language. *See Aramco*, 499 U.S. at 275 (Marshall, J., dissenting) (arguing that the text of Title VII prior to the 1991 CRA provided support for applying the law extraterritorially to U.S. employers employing U.S. citizens abroad while avoiding conflicts with foreign law).

213. Civil Rights Act of 1991 § 102 (codified as amended at 42 U.S.C. § 1981a (2006)).

214. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459–60 (1975) (holding that compensatory and punitive damages are available under § 1981 and that backpay awards under § 1981 are not restricted to the two years specified for backpay recovery under Title VII).

215. *See* 29 U.S.C. § 626(b) (2006) (incorporating § 216(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which, in cases involving willful violations, provides for the payment of an equal amount of liquidated damages in addition to unpaid minimum wages or unpaid overtime).

216. *See* Civil Rights Act of 1991 § 102 (codified as amended at 42 U.S.C. § 1981a (2006)) (permitting jury trials under Title VII and the ADA).

217. *See* Lorillard v. Pons, 434 U.S. 575, 585 (1978) (holding that the ADEA permits jury trials); Lewis v. Univ. of Pittsburgh, 725 F.2d 910, 912 (3d Cir. 1983) (describing a case in which the plaintiff had a jury trial on race discrimination claims brought pursuant to § 1981 and § 1983 and a bench trial for race discrimination claims brought pursuant to Title VII).

218. *Compare* Civil Rights Act of 1991 § 115 (codified as amended at 29 U.S.C. § 626(e) (2006)) ("If a charge filed with the Commission under [the ADEA] is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought . . . against the respondent named in the charge within 90 days after the date of the receipt of such notice."), *with* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 105–06 (codified as amended at 42 U.S.C. § 2000e-5(f)(1) (2006)) ("If a charge filed with the Commission [under Title VII] . . . is dismissed by the Commission, . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved.").

219. Civil Rights Act of 1991 § 203.

220. *Id.* § 302.

authorized the EEOC to establish a Technical Assistance Training Institute and to carry out educational and outreach activities.[221]

The Court in *Gross* asserts that it is important to consider the 1991 CRA as a whole when determining what inference to draw from Congress's "neglect[ing]" to amend the ADEA when it added the motivating-factor language to Title VII.[222] As a general principle, I agree that this could have relevance. As noted above, the 1991 CRA responded to several different decisions interpreting Title VII by enacting overrides. If, with respect to some of these overrides, Congress had amended both Title VII and the ADEA, and if, with respect to the override of *Price Waterhouse*, it had amended just Title VII, there would be far stronger support for the inference that Congress affirmatively chose to have the ADEA interpreted differently from Title VII with respect to mixed-motive claims. But that was not the case. Rather, the only change that the 1991 CRA made to the ADEA was the small technical revision concerning EEOC procedures. Looked at in context, I assert that this is almost entirely irrelevant to resolving the question posed by *Gross*. Moreover, even if Congress *had* amended both the ADEA and Title VII with respect to some of the other overrides, it would still be essential to carefully consider context before concluding that Congress's "neglect[ing]" to add motivating-factor language to the ADEA was a purposeful and meaningful choice to impose different causation standards under the two statutes.[223]

The Court in *Gross* cites a single case, *EEOC v. Arabian American Oil Co.*[224] (*Aramco*), in support of its pivotal assertion that "[w]hen Congress

---

221. *Id.* § 110 (codified as amended at 42 U.S.C. § 2000e-4(j) (2006)); *id.* § 111 (codified as amended at 42 U.S.C. § 2000e-4(h) (2006)).

222. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349–50 (2009) (asserting that Congress's "contemporaneous[] amend[ment] of the ADEA" was an important factor in its analysis).

223. *Id.* at 2349. It is important to note that Congress's override of *Martin v. Wilks*, 490 U.S. 755 (1989), specified that the new language added to Title VII applied to any consent decree "resolv[ing] a claim of employment discrimination under the Constitution or Federal civil rights laws," thus implicitly reaching claims that arise under the ADEA although not specifically identifying the ADEA. 42 U.S.C. § 2000e-2(n) (2006). For an argument that this distinction is significant and supports a conclusion that the overrides of interpretations of Title VII's substantive language, including the modification of the causation standard in *Price Waterhouse*, should not be applied to the ADEA, see Eglit, *supra* note 12, at 1118–20, 1172–202. For an argument that the issue addressed in *Martin* and its override differed significantly from the other overrides because *Martin* involved a "principle of general application in Anglo-American jurisprudence" rather than "the direct interpretation of statutory language" in Title VII, and that it accordingly has little relevance for assessing the appropriateness of applying the other overrides to the ADEA, see Prenkert, *supra* note 12, at 248 n.212. I find Professor Prenkert's analysis persuasive on this point. For reasons explained more fully in the text, I think that since the preexisting statutory language in the ADEA and other statutes could reasonably be interpreted consistently with the meaning Congress endorsed in the other overrides, it would be appropriate to do so. The provision overriding the holding of *Martin* is different because it was not interpreting preexisting text at all, and accordingly, there is no comparable preexisting text in the ADEA, ADA, or other statutes.

224. 499 U.S. 244 (1991).

amends one statutory provision but not another, it is presumed to have acted intentionally."[225] Ironically, *Aramco* was also the result of a hydra problem concerning the relationship of Title VII and the ADEA, and the decision and its subsequent history illustrate the risks in assuming that selective amendment is evidence of purposeful distinctions. Because the interpretive question in *Aramco* is so similar to that posed by *Gross*, a brief description is warranted. The question in the case was whether Title VII applied extraterritorially to citizens.[226] Title VII, as initially enacted in 1964, stated that it would not apply to employers with respect to "employment of aliens outside any State";[227] the ADEA, as initially enacted in 1967, lacked any explicit reference to aliens and incorporated by reference[228] language in the Fair Labor Standards Act (FLSA) that excluded "any employee whose services . . . are performed in a workplace in a foreign country."[229] In the early 1980s, some lower courts (reasonably) relied upon this distinction to hold that Title VII *did* apply to citizens extraterritorially but that the ADEA did not.[230] In 1983, Congress held a hearing on the issue in which these decisions were discussed,[231] and in 1984, Congress amended the ADEA to add explicit language applying the statute extraterritorially to citizens.[232] Given this background, it is not surprising that Congress did not make

225. *Gross*, 129 S. Ct. at 2349 (citing *Aramco*, 499 U.S. at 256). In the same general discussion, the *Gross* Court also cites *Lindh v. Murphy*, 521 U.S. 320, 330 (1997). *Gross*, 129 S. Ct. at 2349. Although the Court in *Lindh* likewise determined that a variation was meaningful, the decision contains a far more nuanced consideration of factors in the negotiation process that should be considered before reaching such a conclusion. *See Lindh*, 521 U.S. at 329–30 (stating that the difference might not be indicative of congressional intent if "the two chapters had evolved separately in the congressional process").

226. *Aramco*, 499 U.S. at 246.

227. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1 (2006)).

228. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 7, 81 Stat. 602, 604 (codified as amended at 29 U.S.C. § 626(b) (2006)) (incorporating FLSA's procedural and enforcement mechanisms).

229. *See* Cleary v. U.S. Lines, Inc., 728 F.2d 607, 608 (3d Cir. 1984) ("[FLSA § 13(f)] provides that the acts covered by it shall not apply 'to any employee whose services during the workweek are performed in a workplace within a foreign country . . . .'" (alteration in original)).

230. *See, e.g.*, Zahourek v. Arthur Young & Co., 567 F. Supp. 1453, 1456–57 (D. Colo. 1983) (holding that the ADEA does not apply extraterritorially), *aff'd*, 750 F.2d 827 (10th Cir. 1984); Cleary v. U.S. Lines, Inc., 555 F. Supp. 1251, 1263 (D.N.J. 1983) (dismissing the case on the grounds that the ADEA does not apply extraterritorially), *aff'd*, 728 F.2d 607 (3d Cir. 1984); Bryant v. Int'l Schs. Servs., Inc., 502 F. Supp. 472, 482 (D.N.J. 1980) (holding that Title VII *did* apply extraterritorially), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982).

231. *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the S. Comm. on Labor & Human Res.*, 98th Cong. 1–2 (1983) (statement of Sen. Charles E. Grassley, Chairman, S. Subcomm. on Aging).

232. *See* Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(a), 98 Stat. 1767, 1792 (codified as amended at 29 U.S.C. § 630 (2006)) (adding to the ADEA: "[t]he term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country," subject to limited exceptions to facilitate compliance with foreign law).

analogous changes to Title VII.[233] In *Aramco*, decided in 1991, the Supreme Court ignored this context completely and held that Title VII did not apply extraterritorially in part because it lacked specific language comparable to that that had been added to the ADEA in 1984.[234] Congress swiftly disagreed, overriding the decision seven months later in the 1991 CRA.[235] *Aramco* is, in my terminology, a shadow precedent. I contend that its statements regarding the presumed significance of variation between statutes should have no persuasive value. Rather, *Aramco* should perhaps be cited in conjunction with the override for the contrary proposition that distinctions between statutes frequently are *not* intentional.[236] The *Gross* Court, however, cited *Aramco* without qualification or acknowledgement that its holding had been superseded.[237]

In *Gross*, the Court took a similarly blinkered approach to the relationship between the ADEA and Title VII, once again ignoring the significance of context when interpreting an override. The Court asserted that because Congress "neglect[ed]" to add motivating-factor language to the ADEA, it "cho[se]" to have the ADEA interpreted differently from Title VII.[238] Stated more generally, the Court's reasoning implies the counterintuitive conclusion that Congress disagreed with multiple judicial interpretations of Title VII strongly enough to enact overrides superseding them but "chose" to grant courts total freedom regarding how to interpret the same language in the ADEA, ADA, and other employment statutes. I assert that considering the 1991 CRA as a whole supports a different, and I think

---

233. It may also have been significant that the amendment to the ADEA regarding extraterritoriality was an addition to a bill that primarily amended a *different* statute concerning older Americans, making any potential amendment of Title VII particularly unlikely.

234. *Aramco*, 499 U.S. 244, 258–59 (1991).

235. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077 (codified as amended at 42 U.S.C. §§ 2000e(f) (2006)) (explicitly stating in the definition of *employee* that "[w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States," subject to limited exceptions to facilitate compliance with foreign law).

236. The fact that the 1991 Congress overrode the decision does not resolve definitively whether the 1964 Congress that enacted Title VII or the 1984 Congress that amended the ADEA intended Title VII to apply extraterritorially. It does, however, suggest that the inference of meaningful variation may well be unwarranted.

237. In a further odd twist, in 1983, Justice Thomas (the author of the *Gross* majority opinion) was Chairman of the EEOC. *Clarence Thomas*, EEOC, http://www.eeoc.gov/eeoc/history/35th/bios/clarencethomas.html (listing Clarence Thomas as the EEOC's eighth Chairman, and stating that he served from May 6, 1982, to March 8, 1990). In that capacity, he testified to the subcommittee considering amending the ADEA, arguing that Title VII already permitted extraterritorial application—in other words, he disagreed with the conclusion subsequently reached by the Supreme Court in *Aramco*. *Age Discrimination and Overseas Americans, 1983: Hearing Before the Subcomm. on Aging of the S. Comm. on Labor & Human Res.*, 98th Cong. 3 (1983) (statement of Clarence Thomas, Chairman, Equal Employment Opportunity Commission). At the time then-Chairman Thomas testified, the analysis differed from the precise question faced by the Court in *Aramco* because it predated Congress's addition of explicit language regarding the ADEA's extraterritoriality; nonetheless, the implicit flip in position is still striking.

238. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349, 2350 n.3 (2009).

far more plausible, conclusion: Congress consistently assumed that amending Title VII would be sufficient to end reliance on disfavored judicial interpretations of language in Title VII and to signal that analogous provisions in other statutes should be interpreted in line with the meaning accorded to the relevant language by Congress. This latter proposition accords well with the 1991 CRA's other substantive amendments (those not made in response to specific judicial interpretations), which increased consistency in the remedial and procedural rules applied to the various employment discrimination statutes.[239] It also is exactly what the committee report asserts—that is, that the committee "intends that these other laws [banning discrimination and] modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act."[240]

Of course, it is impossible to know whether this sentence in the committee report accurately represents the intention of a majority of the 1991 Congress. It could be that proponents of the overrides were able to muster sufficient votes to amend Title VII but that they lacked support to amend even the most obvious other potentially-affected laws. I contend, however, that it is likely they simply thought it was unnecessary. In 1991, as opposed to today, it was probably reasonable for congressional drafters to assume that statements in committee reports would be deemed significant by courts. Now that would be far less true.[241] But in arguing that "because of" in the ADEA should be interpreted consistently with the meaning that Congress afforded that language in Title VII—i.e., that it prescribes a motivating-factor test—I am not urging that legislative history be used to trump statutory text or to go beyond the language of the statute. That is not necessary because, as the next part demonstrates, the preexisting text can easily bear the meaning Congress signaled it preferred. Even jurists who categorically reject any consideration of legislative history could reach the result that I advocate simply by interpreting the plain text of the ADEA and recognizing the independent value of promoting the consistent and coherent development of statutory law.

## IV. Causation in Employment Discrimination Law: An (Imaginary) Alternative Story

The path from *Price Waterhouse* to the 1991 CRA to *Desert Palace* to *Gross*, including the surprising U-turn in *Gross*, illustrates the peculiar challenges implicit in the interpretation of statutory overrides. Judicial and academic commentary regarding overrides consistently characterizes them as a means for Congress to "correct" judicial interpretations with which it

239. *See supra* notes 213–18 and accompanying text.

240. H.R. REP. NO. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 697.

241. *Cf.* ESKRIDGE ET AL., *supra* note 51, at 990 n.j (collecting scholarly commentary both skeptical of and sympathetic to the Supreme Court's more cautious use of legislative history during the past two decades).

disagrees.[242] Implicit in such statements is the fundamental recognition that there are often two or more plausible interpretations of statutory language. If an override "clarifies" statutory language by adopting a meaning that the preexisting statutory language could comfortably bear, it arguably functions as an interpretation of a statute by a higher "court"—except that it is not a court at all but, instead, the legislature. In this respect, overrides differ significantly from new legislation or other kinds of amendments that correct mistakes in statutes or respond to new or unanticipated problems. When interpreting such overrides, the conclusions and inferences drawn by courts should reflect these realities (as I contend the approach taken by the Supreme Court in *Gross* did not). Part VI proposes an alternative approach. But first, it is helpful to illustrate just how significant these distinctions are by considering how the issue in *Gross* would have been resolved if it had been a subsequent Supreme Court decision, rather than Congress, that superseded *Price Waterhouse*'s interpretation of Title VII.

### *A. A Judicial Interpretation of Title VII Establishing a Motivating-Factor Causation Standard with a Limitation on Remedies*

Imagine that Congress did not respond to *Price Waterhouse* in the 1991 Civil Rights Act. Imagine instead that a different case arises, maybe ten years after *Price Waterhouse*, in which a different woman, call her Beth, claims that she was denied a promotion at least in part because of her sex. Unlike Ann Hopkins, however, there is no direct evidence that sex played a role in the decision; rather, there is simply extensive circumstantial evidence.

Beth sues her employer under Title VII. The trial court refuses to issue a motivating-factor instruction on the grounds that Justice O'Connor's concurrence provides the controlling opinion in *Price Waterhouse*.[243] Beth appeals. The circuit court reverses on the ground that Justice White's concurrence was controlling. Imagine that by now there is a significant circuit split regarding whether direct evidence is required to shift the burden in a mixed-motive case. Beth's employer appeals, and the Supreme Court grants certiorari. As in *Price Waterhouse*, the Court understands that resolution of the matter turns on the interpretation of "because of" in

242. *See, e.g.*, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 576 (1982) ("The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court."); Flood v. Kuhn, 407 U.S. 258, 284 (1972) ("If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court."); ESKRIDGE, *supra* note 25, at 151 ("[D]ynamic statutory interpretation, even against legislative expectations, is subject to override by the legislature and in fact may even be a stimulus to legislative deliberation."); Marshall, *supra* note 25, at 208–15 (arguing for absolute statutory stare decisis so that Congress will know it is responsible for correcting interpretations with which it disagrees).

243. This assumes that sometime between *Price Waterhouse* and Beth's case Congress acted (as it did in 1991) to permit jury trials under Title VII. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (codified as amended at 42 U.S.C. § 1981a (2006)) (permitting jury trials). If it had not, the reasoning discussed above could apply in a bench trial.

Title VII. The Court deems the plurality and concurring opinions in *Price Waterhouse* to be highly instructive. But, as is typical after a fractured opinion, the Court returns to the matter determined to establish a clear rule that can garner majority support and with the benefit of having seen how the approaches articulated in the prior opinion played out in the real world.

Recall that in *Price Waterhouse*, the plurality and Justice White's concurrence held that showing that sex played a "motivating" role in an employment decision was sufficient to shift the burden to the defendant to prove that it would have taken the same action anyway, and that neither opinion required direct evidence.[244] It is fair to assume, as well, that in the years between *Price Waterhouse* and Beth's (hypothetical) case, lower courts that tried to apply Justice O'Connor's direct-evidence standard had found it unwieldy (as indeed they did).[245] In Beth's case, a majority of the Court clarifies that a plaintiff can establish liability by showing that sex, race, or another impermissible criterion was a "motivating" factor in a decision and that a plaintiff may use any kind of evidence to do so. Thus, so far the Court's holding in Beth's case merely ratifies a fair reading of *Price Waterhouse* if one deems Justice White's concurrence controlling because it provides a fifth vote for the motivating-factor standard.[246]

The majority in Beth's case then goes beyond *Price Waterhouse* to hold that a showing by the employer that it would have taken the same action in any event does not avoid liability; rather, it only reduces remedies. This is a change from *Price Waterhouse*. Justice Kennedy's dissent in *Price Waterhouse* argued that the causation standard articulated by the plurality was internally inconsistent in that it explicitly rejected a but-for causation standard but then implicitly adopted that standard by permitting employers to escape liability entirely if they could show that they would have taken the same action.[247] The new majority in Beth's case decides there is merit in this argument. But rather than adopting the consistent but-for standard Justice Kennedy had advocated, the majority in Beth's case decides it is essential that "because of" consistently means "motivating factor." Accordingly, it holds that the plurality in *Price Waterhouse* was mistaken in interpreting Title VII to permit an affirmative defense to liability once a plaintiff has proven that an illegitimate criterion was a motivating factor in a decision.

Nonetheless, the majority wants to avoid providing a windfall to plaintiffs and unfairly penalizing defendants who would have taken the same action even if they had not considered the illegitimate factor. The majority

---

244. *See supra* notes 112–19 and accompanying text.

245. *See* Harper, *supra* note 8, at 102–04 (documenting disagreement among lower courts on how to apply the "direct-evidence" standard).

246. *See supra* note 130 and accompanying text (explaining that the dissenting justices in *Gross* held Justice White's concurrence controlling).

247. Price Waterhouse v. Hopkins, 490 U.S. 228, 285 (1989) (Kennedy, J., dissenting).

realizes that Title VII's remedial provisions adequately address this concern. Even prior to the 1991 CRA, Title VII stated,

> No order of the court shall require the . . . hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was . . . refused employment or advancement or was suspended or discharged *for any reason other than discrimination* on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) [the antiretaliation provision] of this title.[248]

Before *Price Waterhouse* was decided, several circuits had relied on this remedial language in mixed-motive contexts to hold that a showing that sex, race, or another prohibited factor played a role in an employment decision was sufficient to establish liability, but that backpay and reinstatement would not be available if an employer could prove it would have taken the same action absent discrimination.[249] The plurality opinion in *Price Waterhouse* rejected this interpretation, holding that this limitation on remedies was not applicable in individual mixed-motive cases because prior Supreme Court precedent had interpreted it as pertaining to class actions or pattern-or-practice cases.[250]

The majority in Beth's case, however, reconsiders this determination. It notes that the plain language of the provision seems quite apt for balancing the competing objectives at stake in mixed-motive cases. This interpretation would permit a court to order injunctive relief, such as a prohibition on considering an applicant's femininity, if a plaintiff establishes that sex was a motivating factor in a decision.[251] But if a defendant established that the plaintiff would not have been promoted anyway, she would not receive back pay or front pay or be promoted. The majority determines that it is appropriate to place the burden on making this "same action" showing on the

---

248. 42 U.S.C. § 2000e-5(g) (1988) (emphasis added).

249. *See, e.g.*, Fadhl v. City & Cnty. of San Francisco, 741 F.2d 1163, 1166–67 (9th Cir. 1984) (holding that litigants can establish liability by showing sex was a "significant factor" in a decision but that back pay and reinstatement are not available if an employer proves it would have made the same decision absent discrimination); Patterson v. Greenwood Sch. Dist. 50, 696 F.2d 293, 295 (4th Cir. 1982) (holding that a victim of discrimination is not eligible for back pay or reinstatement if the employer can prove "by clear and convincing evidence" it would have taken the same action absent discrimination (internal quotation marks omitted)); Day v. Mathews, 530 F.2d 1083, 1085 (D.C. Cir. 1976) (same); King v. Laborers Int'l Union of N. Am., 443 F.2d 273, 278–79 (6th Cir. 1971) (holding that a victim of discrimination is not eligible for back pay or reinstatement if the employer can prove it had a lawful nondiscriminatory motivation for its actions that "considered by itself" would have resulted in the same action). In her brief to the Supreme Court, Ann Hopkins relied on this statutory language and some of these decisions to argue that an employer's showing it would have taken the same action should limit remedies rather than serve as an affirmative defense. *See* Brief for Respondent at 31–43, *Price Waterhouse*, 490 U.S. 228 (No. 87-1167), 1988 WL 1025872.

250. *Price Waterhouse*, 490 U.S. at 244–45 n.10 (plurality opinion).

251. Section 2000e-5(g)(1) does not explicitly reference "declaratory relief," but this could be included within the general authorization of "any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1) (2006).

defendant, since it can most readily present evidence concerning its decision-making process. This interpretation achieves Title VII's dual remedial objectives of making plaintiffs whole (but not providing unwarranted relief) and deterring future discrimination.[252] Finally, citing Title VII's attorneys' fees provision, which also preexisted the 1991 CRA,[253] the majority specifies that a plaintiff who succeeds on showing that the employment practice was motivated at least in part by a prohibited factor may recover attorneys' fees and costs related to that claim, even if she ultimately is not eligible for hiring, promotion, reinstatement, or back pay.

Thus, the Court in Beth's case ultimately concludes that a plaintiff can succeed in a mixed-motive claim under Title VII by proving (using either direct or circumstantial evidence) that race, color, sex, religion, or national origin was a motivating factor in an employment decision, but her remedies will be limited if an employer proves it would have taken the same action anyway. In other words, the interpretation of Title VII announced by the majority in Beth's case—based entirely on the text of Title VII *as it existed prior to the enactment of the 1991 CRA*—is precisely the standard adopted by Congress in the 1991 CRA.[254] Of course, the story imagined above is not the only way that the Supreme Court, faced with a case like Beth's, could rule—but it is at least an entirely plausible interpretation of Title VII's preexisting statutory language.

### *B. Application of the Judicial Interpretation of Title VII to the ADEA*

Now imagine that some years after Beth's case is decided, Jack Gross brings his suit under the ADEA contending that he was demoted at least in part because of his age. He presents circumstantial evidence of discrimination but no direct evidence. Assume that the Supreme Court grants certiorari. The Supreme Court in this imaginary story, like the actual Supreme Court in *Gross*, would need to determine whether the standard of causation applicable in mixed-motive claims under Title VII also applies to the ADEA. This analysis would differ considerably from that actually

252. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–19 (1975) (explaining that the purpose of Title VII is to force companies to eliminate discriminatory employment practices and to "make persons whole for injuries suffered on account of unlawful employment discrimination").

253. 42 U.S.C. § 2000e-5(k) (1988).

254. There is actually one subtle difference. The remedial provision as it existed prior to the 1991 CRA, now subsection (g)(2)(A), refers not only to race, color, religion, sex, or national origin, but also to the antiretaliation provisions. *See* 42 U.S.C. § 2000e-5(g) (1988) (precluding certain remedies if action was taken "for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title"); *see also* 42 U.S.C. § 2000e-3(a) (1988) (prohibiting retaliation). Accordingly, the decision issued by the majority in Beth's case would naturally have applied to the antiretaliation provisions as well as the substantive provisions of Title VII. Even prior to *Gross*, lower courts were divided over whether the language added by the 1991 CRA to respond to *Price Waterhouse* applies to the antiretaliation provisions. *See, e.g.*, Woodson v. Scott Paper Co., 109 F.3d 913, 933 & n.23 (3d Cir. 1997) (providing examples of lower court decisions reaching opposite conclusions on this issue).

applied by the Court in *Gross* because there would be no congressional action with respect to Title VII, and no "failure" of congressional action with respect to the ADEA, to justify departing from the judicial interpretation of analogous language in Title VII.

As discussed above, the ADEA's substantive language was derived *in haec verba* from Title VII.[255] This is a strong argument for interpreting "because of" in the ADEA the same way that the (hypothetical) Court in Beth's case interpreted the language in Title VII—i.e., to prescribe the motivating-factor test with a limitation on remedies if the employer proved it would have taken the same action anyway. The Court might also note that the policies of the statutes are also quite similar[256] and that there is an independent virtue in interpreting the ADEA consistently with Title VII because it is relatively common for an individual to challenge a single employment action under both statutes.[257]

The Court, however, might be given pause by two arguably relevant differences between the statutes. First, although the ADEA's substantive provisions are largely derived from Title VII, its remedial provisions incorporate by reference the FLSA rather than Title VII.[258] Thus, the Court deciding the ADEA case would not be interpreting language that was precisely the same as the remedial language in Title VII. The relevant remedial language that applies to the ADEA, however, is quite flexible, providing that employers "shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of [the relevant] section," as well as for attorneys' fees.[259] This flexible language would permit the Court to adopt a standard, like that adopted with respect to Title VII in Beth's case, limiting a defendant's exposure on remedies if it could show that it would have taken the same action regardless of consideration of age.

The second relevant textual difference between Title VII and the ADEA is more significant—and it is one that arguably should have factored into the Court's analysis in *Gross* itself, although neither the majority opinion nor the dissents addressed it. The ADEA's prohibition on discrimination "because of [an] individual's age" parallels Title VII's prohibition on discrimination "because of [an] individual's race, color, religion, sex, or national origin."[260] A separate section of the ADEA provides that "[i]t shall not be unlawful" for any employer "to take any action otherwise prohibited" by the key substan-

255. Lorillard v. Pons, 434 U.S. 575, 584 (1978) ("In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII.").

256. *See* Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (stating that the ADEA and Title VII "share a common purpose").

257. *See infra* text accompanying notes 332–36 (describing the confusion regarding the standard of proof following *Gross* in cases where plaintiffs bring cases under both the ADEA and Title VII).

258. 29 U.S.C. § 626(b) (2006).

259. *Id.* § 216(b).

260. *Id.* § 623(a)(1).

tive provisions "where the differentiation is based on reasonable factors other than age" (typically known as the RFOA defense).[261] Title VII does not include analogous language. It could be argued that adopting the standard articulated by the majority in Beth's case—that a decision based on age is unlawful when age was a motivating factor in the decision even if the defendant proves it would have taken the same action anyway—would be in tension with this provision. An appropriate means of reconciling these provisions might be to state that in the ADEA, as opposed to in Title VII, a showing by an employer that it would have taken the same action regardless of any consideration of age would be a complete defense rather than simply a limitation on remedies—in other words, that the ADEA would be governed by the standard announced in *Price Waterhouse*.

This would be a relatively small difference between the causation standard under Title VII and that of the ADEA. Additionally, even if Congress disagreed with this interpretation of the ADEA, it could readily modify the ADEA to signal that it should be interpreted consistently with Title VII. (This assumes that the interpretive conventions that I propose in Part VI were adopted in place of the rule announced in *Gross*. Otherwise, amending the ADEA to address this issue could cause a hydra problem, just as Congress's actual amendment of Title VII to address *Price Waterhouse* caused a hydra problem.) Notably, whether or not the ADEA was interpreted slightly differently from Title VII, interpretation of other related statutes

---

261. *Id.* § 623(f)(1). The Supreme Court has interpreted the RFOA provision as narrowing disparate impact liability under the ADEA. *See* Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395, 2404 (2008) (replacing the "business necessity" test applicable in disparate impact cases under Title VII with a requirement that a defendant must prove only that a challenged action was based on a "reasonable factor other than age"); Smith v. City of Jackson, 544 U.S 228, 239 (2005) ("It is, accordingly, in cases involving disparate impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'"). Justice Thomas disagreed with this analysis, contending that disparate impact liability was not available under the ADEA at all. *See Meacham*, 128 S. Ct. at 2407 (Thomas, J., concurring in part and dissenting in part) ("I write separately to note that I continue to believe that disparate impact claims are not cognizable under the [ADEA]."); *Smith*, 544 U.S. at 248 (O'Connor, J., concurring in judgment, joined by Justices Kennedy and Thomas) ("I would . . . affirm the judgment below on the ground that disparate impact claims are not cognizable under the ADEA."). In *Smith*, Justice Thomas (and also Justice Kennedy) joined a concurrence authored by Justice O'Connor that adopts the interpretation of the RFOA that I imagine above. The concurrence answers the majority's contention that absent disparate impact liability, the RFOA would be unnecessary, *id.* at 238–39 (majority opinion), by explaining that

> the RFOA provision . . . plays a distinct (and clearly nonredunant) role in "mixed motive" cases. In such cases, an adverse action taken in substantial part because of an employee's age may be "otherwise prohibited" by § 4(a). The RFOA exemption makes clear that such conduct is nevertheless lawful so long as it is "based on" a reasonable factor other than age.

*Id.* at 253 (O'Connor, J., concurring in judgment) (citations omitted). This interpretation of the RFOA exemption is obviously hard to square with Justice Thomas's subsequent opinion (joined by Justice Kennedy) in *Gross* that mixed-motive claims are not available under the ADEA at all. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009).

would almost certainly start from the Court's interpretation of Title VII (that is, Beth's case) rather than the modified standard applied in the ADEA.

### *C. The Significance of This Alternative Story*

This thought experiment demonstrates two important principles. First, the causation standard governing Title VII adopted by Congress in the 1991 CRA was a perfectly plausible interpretation of the language of Title VII *as it preexisted the 1991 CRA*. This is not surprising, since in many respects the 1991 CRA simply codifies the judicial interpretation of Title VII in *Price Waterhouse*.[262] For this reason, as discussed more fully in Part VI, I assert that the override should be understood as a clarifying gloss on the meaning of the preexisting language—that is, "because of"—rather than a substantive addition to Title VII that creates a meaningful variation between Title VII and other employment statutes that lack this language.

The second important principle demonstrated by this thought experiment is the asymmetry implicit in the Court's treatment of congressional interpretations versus its own interpretations. If Congress had not overridden *Price Waterhouse* but instead a later Supreme Court had interpreted the language of Title VII analogously to how Congress amended it in 1991, the later Court interpretation of Title VII would almost certainly govern the interpretation of the ADEA (possibly as modified by the RFOA provision). This would be true even if the Court interpreted just the language of Title VII. In fact, a judicial holding that affirmatively reached the ADEA in a Title VII case might be castigated as improperly going beyond the case presented to the Court. Additionally, if neither Congress *nor* the Supreme Court had returned to the standard governing mixed-motive cases under Title VII (that is, if the hypothetical Beth's case had never been decided), it is likely that *Price Waterhouse* would have been deemed controlling on the interpretation of analogous language in the ADEA.

It is important to note explicitly that this analysis assumes that the Court disinterestedly applies its precedents and general principles of statutory interpretation. As discussed above, a large body of empirical literature suggests, by contrast, that ideology often plays a significant role in determining the outcome of Supreme Court decisions.[263] If the hypothetical Supreme Court deciding the hypothetical Jack Gross's case had a pro-employer preference, it theoretically could point to the small differences in statutory language discussed above to distinguish Beth's hypothetical case and interpret the ADEA to require but-for causation. Alternatively, it could explicitly overrule Beth's hypothetical case. But I assert that it would be relatively unlikely to either distinguish or overrule Beth's case (or, if Beth's case had not been decided, *Price Waterhouse*) because it would be difficult

262. *See* discussion *supra* subpart III(B).

263. *See supra* notes 41, 43 and accompanying text.

to provide a credible justification for doing so. In *Price Waterhouse* itself, the dissent by Justice Kennedy assumed that the judicial interpretation of Title VII would also apply to the ADEA.[264] It is the fact that Congress intervened that permitted the Supreme Court in *Gross* to interpret language in the ADEA quite differently from analogous language in Title VII without blatantly violating standard principles of statutory interpretation and stare decisis.

The difference in outcomes between the real story and this alternative imaginary story is not inappropriate *if* the *Gross* Court's assertion that Congress affirmatively "chose" to have the ADEA interpreted differently from Title VII is correct, or at least if it is unproblematic to interpret a failure to amend the ADEA as an implicit choice by Congress to have the ADEA interpreted differently. If it were relatively easy for Congress to indicate—in a manner that would control future judicial interpretations without creating new problems—that similar language in other statutes should be interpreted in line with the amendments it made to Title VII, the onus the *Gross* Court places on Congress to do so might be reasonable. The problem, as the next part shows, is that these assumptions are deeply flawed.

## V. The Hydra Problem Illustrated

In *Gross*, the Supreme Court suggested that the only way Congress could have ensured that its preferred interpretation of "because of" in Title VII was applied to other statutes was to amend all other statutes that include comparable language.[265] This part demonstrates how difficult this would be by showing how quickly *Gross* has been applied to numerous other statutes. Recognizing the difficulty in separately amending all of these statutes, Congress has considered bills that would override *Gross* and use a blanket amendment to govern the causation standard in "any" federal law forbidding employment discrimination or retaliation.[266] This approach is probably reasonable in light of the reasoning in *Gross*, but it would create a host of new problems. This part explores the messy aftermath of *Gross*; Part VI proposes a different approach.

---

264. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 292 (1989) (Kennedy, J., dissenting) ("Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under 42 U.S.C. § 1981 or the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials."). Justice Stevens makes this very point in his dissenting opinion in *Gross*. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2354 (2009) (Stevens, J., dissenting) ("Justice Kennedy's dissent in *Price Waterhouse* assumed the plurality's [Title VII] mixed-motives framework extended to the ADEA . . . .").

265. *See Gross*, 129 S. Ct. at 2349 ("We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."); *cf.* Katz, *supra* note 8, at 884 (arguing that due to the Court's antiunification stance in *Gross*, it will likely "reject burden-shifting in any statute that does not expressly require it").

266. *E.g.*, Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. § 3 (1st Sess. 2009); *see also* discussion *infra* subpart V(C).

### *A. Application of* Gross *to Non-ADEA Federal Statutes*

The root of the hydra problem in employment discrimination is a web of similar federal and state statutes prohibiting certain conduct by employers. As discussed above, Title VII prohibits discrimination "*because of* such individual's race, color, religion, sex, or national origin,"[267] and a separate provision prohibits discrimination against an individual "*because*" she opposes or complains about discriminatory actions.[268] The ADEA prohibits employment discrimination "*because of* such individual's age,"[269] and a separate provision prohibits discrimination "*because*" she has sought to enforce rights under the ADEA.[270] The ADA, as originally enacted, prohibited discrimination against an individual "*because of* the disability of such individual,"[271] and a separate provision prohibits discrimination "*because*" an individual has sought to enforce her rights under the statute.[272] The Genetic Information Nondiscrimination Act,[273] the Immigration Reform and Control Act,[274] the Occupational Safety and Health Act,[275] and the Energy Reorganization Act[276] are examples of the wide range of additional federal statutes that use "because" or "because of" as the operative causal language to prohibit discrimination. Numerous other federal statutes, including § 1981,[277] § 1983,[278] the Family and Medical Leave Act (FMLA),[279] the Employee Retirement Income Security Act (ERISA),[280] and

267. 42 U.S.C. § 2000e-2(a)(1) (2006) (emphasis added).

268. *Id.* § 2000e-3(a) (emphasis added).

269. 29 U.S.C. § 623(a) (2006) (emphasis added).

270. *Id.* § 623(d) (emphasis added).

271. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102(a), 104 Stat. 327, 331 (emphasis added). This was the original language of the ADA. In 2008, the ADA was amended and this operative language was changed to prohibit discrimination "on the basis of disability," probably for reasons unrelated to the issue of mixed motives that is a focus here. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5, 122 Stat. 3553, 3557 (codified as amended at 42 U.S.C. § 12112(a) (Supp. II 2009)).

272. 42 U.S.C. § 12203(a) (2006) (emphasis added).

273. *Id.* § 2000ff-1(a) (Supp. III 2010) (prohibiting discrimination against an employee "because of genetic information with respect to the employee").

274. 8 U.S.C. § 1324b(a)(1)(A)–(B) (2006) (prohibiting discrimination against an employee "because of such individual's national origin, or . . . because of such individual's citizenship status").

275. 29 U.S.C. § 660(c)(1) (2006) (prohibiting discrimination against an employee "because" such employee files a complaint).

276. 42 U.S.C. § 5851(a)(1)(D) (2006) (prohibiting discrimination against an employee "because" such employee is participating in a proceeding under this chapter of the Atomic Energy Act).

277. *Id.* § 1981(a) (providing equal rights "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property").

278. *Id.* § 1983 (providing redress for deprivations of federal rights under color of state law).

279. 29 U.S.C. § 2615(a)(2) (2006) (prohibiting discrimination against an individual "for" opposing practices made unlawful under the Act).

the Uniformed Services Employment and Reemployment Rights Act,[281] do not use the words "because of" in their operative language but likewise prohibit discrimination against an individual, in what could colloquially be referred to as "because of" certain factors or conduct.

As discussed in Part II, statutory provisions that are identical or similar to each other in related areas are typically interpreted consistently.[282] Prior to *Gross*, lower courts were already split regarding whether to apply *Price Waterhouse* or Title VII's motivating-factor standard to employment discrimination statutes other than Title VII.[283] *Gross* complicates this picture even more. *Gross* is a definitive statement by a true majority of the Supreme Court that "because of" in the ADEA means that the plaintiff bears the burden of proving through direct or circumstantial evidence that age was the "but-for" cause of a challenged employment decision.[284] Under standard principles of statutory interpretation, lower courts must deem this interpretation to be highly relevant when interpreting identical language in other similar statutes. And the *Gross* Court's reasoning—that this interpretation was appropriate because Congress failed to amend the ADEA when it amended Title VII—can likewise be applied to all other statutes that were not amended when Congress enacted the 1991 CRA. But because the *Gross* Court did not explicitly overrule *Price Waterhouse* and because there are small variations among the statutory provisions at issue, many lower courts have been confused about how to proceed. There is a burgeoning split among the circuits.

Immediately after *Gross* was decided, the Seventh Circuit took an extremely aggressive approach to applying *Gross* to other federal statutes. It first addressed the issue in a First Amendment retaliation claim. The court rejected prior Supreme Court and circuit precedent that held that a plaintiff needed to show only that protected speech was a motivating factor in a decision[285] and held instead, citing *Gross*, that the plaintiff needed to prove but-for causation.[286] The court went beyond this particular context, however, to characterize *Gross* as establishing that "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is

280. 29 U.S.C. § 1140 (prohibiting discrimination against participants in or beneficiaries of employee benefit plans "for exercising" rights under covered plans or "for the purpose of interfering" with an individual's benefit rights).

281. 38 U.S.C. § 4311(a)–(b) (2006) (prohibiting discrimination "on the basis of" uniformed service or "because" an individual sought to enforce rights under the Act).

282. *See supra* subpart II(B).

283. *See supra* notes 145–47 and accompanying text.

284. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350–51 (2009) ("[T]he plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action.").

285. *See* Fairley v. Andrews, 578 F.3d 518, 525 (7th Cir. 2009) (explaining that decisions so holding "do not survive *Gross*").

286. *Id.*

part of the plaintiff's burden *in all suits under federal law*."[287] In a subsequent ADA case, the circuit relied on this more general proposition to hold that the standard there was also but-for causation; the court noted that, unlike the ADEA, the ADA incorporates Title VII's remedial provisions—including § 706(g)(2)(B), the limitation on remedies in mixed-motive cases—but held that since it did not similarly incorporate § 703(m), the mixed-motive liability standard, or include "comparable stand-alone language," *Gross*'s interpretation of "because of" controlled.[288] The Seventh Circuit likewise applied *Gross* to the Labor Management Reporting and Disclosure Act, which prohibits discrimination against employees "*for* exercising any right," on the ground that dictionary definitions equate "for" with "by reason of" and "because of."[289] These cases at least had the virtue of establishing a clear rule (albeit one I contend is unwarranted). But just as this Article was being finalized for publication, a Seventh Circuit decision held that the first case in this chain was unjustified in concluding that *Gross* overruled the motivating-factor standard previously applied to First Amendment retaliation cases and reinstated the old standard for First Amendment claims.[290] The latest decision, however, did not disavow the ADA or LMRDA precedents; rather, it cited them in support of a statement (probably appropriately characterized as dicta) that although *Gross* did not change the causation standard for First Amendment retaliation claims, "*Gross* may have implications for suits under other statutes as well" as the ADEA.[291]

Other circuits have been more measured in their initial responses to *Gross*. The Fifth Circuit, for example, held that retaliation claims under Title VII were governed by *Price Waterhouse* rather than *Gross*.[292] The court acknowledged that *Gross*'s reasoning might suggest that retaliation claims under Title VII, which similarly arise from discrimination "because of" protected acts[293] and which were not addressed explicitly in the provisions added by the 1991 CRA, likewise require a showing of but-for causation.[294] But the court relied instead on *Gross*'s admonition that courts

287. *Id.* at 525–26 (emphasis added).

288. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 962 (7th Cir. 2010) ("[A] plaintiff . . . must show that his or her employer would not have fired him but for his . . . disability.").

289. Serafinn v. Local 722, Int'l Bhd. of Teamsters, 597 F.3d 908, 914–15 (7th Cir. 2010) (quoting 29 U.S.C. § 529 (2006) and 6 OXFORD ENGLISH DICTIONARY 25 (1989)).

290. Greene v. Doruff, 660 F.3d 975, 979 (7th Cir. 2011) (holding that if a plaintiff in a First Amendment retaliation case shows his speech was a motivating factor in the adverse action, the burden shifts to the defendant to show it would have taken the same action anyway); *see also* Brown v. Cnty. of Cook, 661 F.3d 333, 335 (7th Cir. 2011) (same). The *Greene* court also collected several post-*Gross* decisions from other circuits that likewise continue to apply the motivating-factor standard to First Amendment claims. *Greene*, 660 F.3d at 977–78.

291. *Greene*, 660 F.3d at 977.

292. Smith v. Xerox Corp., 602 F.3d 320, 329 (5th Cir. 2010).

293. 42 U.S.C. § 2000e-3(a) (2006).

294. *Xerox*, 602 F.3d at 328.

"must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."[295] Prior Fifth Circuit precedent held that *Price Waterhouse*, including Justice O'Connor's direct-evidence requirement, was applicable to retaliation claims under Title VII.[296] Citing a rule that it could not overrule prior circuit precedent "unless such overruling is *unequivocally* directed by controlling Supreme Court precedent," the court distinguished *Gross*, which had not explicitly overruled *Price Waterhouse*'s construction of "because of" in Title VII, from *Desert Palace*, which it construed as having unequivocally overruled the direct-evidence requirement, to hold that retaliation claims under Title VII could proceed under a mixed-motive framework as articulated in *Price Waterhouse* but without the direct-evidence requirement.[297] One member of the panel filed a dissent, citing the Seventh Circuit precedent discussed above and calling the majority's distinguishing of *Gross* "lame."[298]

Some district courts in other circuits have followed the Fifth Circuit's approach,[299] while others have applied the reasoning in *Gross* to preclude mixed-motive analysis in Title VII retaliation claims.[300] And at least one district court suggested that, even after *Gross*, mixed-motive Title VII retaliation claims are properly assessed using the motivating-factor language added to Title VII by the 1991 CRA.[301]

The interpretive challenges posed by the ADA are similar to those at play in the Title VII retaliation context, with the added wrinkle, noted above, that the ADA incorporates by reference Title VII's remedial provisions, including the limitation on remedies applicable to mixed-motive claims under Title VII.[302] As initially enacted, the ADA prohibited discrimination "because of" an individual's disability or "because" an individual sought to

---

295. *Id.* at 329 (internal quotation marks omitted).

296. *See id.* at 330 (citing Fabela v. Socorro Indep. Sch. Dist., 329 F.3d 409, 415 (5th Cir. 2003) and Fierros v. Tex. Dep't of Health, 274 F.3d 187, 192 (5th Cir. 2001)).

297. *Id.* at 329–32 (citations omitted) (internal quotation marks omitted).

298. *Id.* at 337 (Jolly, J., dissenting). A more recent Fifth Circuit decision, with a far more cursory analysis of the issue, reaffirmed *Xerox* but stated that the burden subsequently shifts back to the employee to prove but-for causation. *See* Nunley v. City of Waco, No. 11-50119, 2011 WL 3861678, *5 (5th Cir. Sept. 1, 2011) ("Thus, our decision in *Xerox* did not dispense with this final 'but for' requirement for avoiding summary judgment."). The court supported this assertion with a cite to a retaliation claim analyzed under the pretext framework rather than the mixed-motive framework. *See id.* (quoting Manaway v. Med. Ctr., 430 F. App'x 317 (5th Cir. 2011)); *Manaway*, 430 F. App'x at 325 n.4 (holding that the plaintiff waived her mixed-motive theory because she failed to assert it prior to appeal). This suggests that the *Nunley* court perhaps did not appreciate the extent to which these causation standards differ. *See supra* subpart III(A).

299. *See, e.g.*, Nuskey v. Hochberg, 730 F. Supp. 2d 1, 5 (D.D.C. 2010) (announcing that the court would follow the Fifth Circuit's analysis in *Smith v. Xerox Corp.*).

300. *See, e.g.*, Beckford v. Geithner, 661 F. Supp. 2d 17, 25 n.3 (D.D.C. 2009) (holding that a mixed-motive theory could not be used in a suit involving the antiretaliation provision of Title VII).

301. Beckham v. Nat'l R.R. Passenger Corp., 736 F. Supp. 2d 130, 145 (D.D.C. 2010).

302. 42 U.S.C. § 12117 (2006) (incorporating Title VII's remedies).

enforce rights under the Act;[303] it was amended shortly before *Gross* was decided (to override different Supreme Court cases limiting the scope of qualifying disabilities) and now prohibits discrimination "on the basis of" disability.[304] Prior to *Gross*, most circuits had held that the ADA permitted mixed-motive claims, with most applying the 1991 CRA's motivating-factor standard with a limitation on remedies but others applying Justice O'Connor's concurrence in *Price Waterhouse*.[305] But since *Gross*, the trend seems to be to hold that mixed-motive claims are no longer cognizable under the ADA. As noted above, the Seventh Circuit held this explicitly,[306] and the Second Circuit, without deciding the issue, characterized it as "questionable" whether mixed-motive claims remain permissible.[307] Several district courts have likewise held that the ADA now requires plaintiffs to prove but-for causation,[308] although a few continue to apply pre-*Gross* circuit precedent permitting mixed-motive claims.[309] Few of these decisions analyze the amended ADA (because it became effective relatively shortly before this Article was published), but an administrative decision from the Merit Systems Protection Board concludes that the amendment does not substantively change the analysis and the ADA no longer permits mixed-motive claims.[310]

A related but somewhat different set of issues arises with respect to § 1981. Section 1981 was enacted shortly after the Civil War, and it provides that "all persons . . . shall have the same right, in every State and

303. Americans with Disabilities Act of 1991, Pub. L. No. 101-336, § 102, 104 Stat. 327, 331–33 (codified as amended at 42 U.S.C. § 12112 (2006)) (prohibiting discrimination "against a qualified individual with a disability because of the disability of such individual"); 42 U.S.C. § 12203(a) (2006) (prohibiting discrimination "because" an individual opposes or participates in a challenge to discriminatory acts).

304. 42 U.S.C. § 12112 (Supp. II 2009) (prohibiting discrimination against a qualified individual "on the basis of disability").

305. *See, e.g.*, Head v. Glacier Nw., Inc., 413 F.3d 1053, 1063–65 (9th Cir. 2005) (interpreting "because of" to require proof that disability was a "motivating factor" in a decision and collecting cases from seven other circuits also permitting mixed-motive claims under similar standards); *cf.* Garcia v. S.U.N.Y. Health Scis. Ctr., 280 F.3d 98, 112 (2d Cir. 2001) (suggesting, without clearly deciding, that *Price Waterhouse* might govern the analysis). By contrast, the Sixth and Tenth Circuits never permitted mixed-motive claims under the ADA, reasoning that the statute was partially modeled on the Rehabilitation Act, which precludes mixed-motive claims. *See* Macy v. Hopkins Cnty. Sch. Bd., 484 F.3d 357, 363 n.2 (6th Cir. 2007) (explaining the circuit split on this point).

306. *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 960–62 (7th Cir. 2010) (imposing a but-for standard).

307. Bolmer v. Oliveira, 594 F.3d 134, 148 (2d Cir. 2010).

308. *See, e.g.*, Saviano v. Town of Westport, No. 3:04-CV-522 RNC, 2001 WL 4561184, at *6 (D. Conn. Sept. 30, 2011); Warshaw v. Concentra Health Servs., 719 F. Supp. 2d 484, 503 (E.D. Pa. 2010); Ross v. Indep. Living Res. of Contra Costa Cnty., No. C08-00854 TEH, 2010 WL 2898773, at *6 (N.D. Cal. July 21, 2010) (all adopting a but-for standard).

309. *See, e.g.*, Doe v. Deer Mountain Day Camp, Inc., 682 F. Supp. 2d 324, 343 & n.40 (S.D.N.Y. 2010) (applying a motivating-factor standard but noting that the plaintiff's proof would satisfy a but-for standard as well).

310. Southerland v. DOD, 2011 M.S.P.B. 92, at *16–17 (2011).

Territory . . . to make and enforce contracts . . . as is enjoyed by white citizens."[311] Although it does not explicitly mention employment, this language has long been interpreted to protect against race-based employment discrimination.[312] In general, courts have interpreted § 1981's substantive reach to be largely coterminous with Title VII's, although its procedural requirements and remedies differ.[313] Courts have generally applied *Price Waterhouse* to permit mixed-motive claims under § 1981 and most continued to apply *Price Waterhouse* even after the 1991 CRA, reasoning that Congress had failed to amend § 1981 in this respect.[314] This reasoning could suggest that *Gross*'s reasoning is now applicable instead. But the Third Circuit suggested (without formally deciding) that it might well continue to apply *Price Waterhouse* on the ground that § 1981 does not include the "because of" language interpreted in *Gross*.[315] The court explained that burden shifting is appropriate, reasoning that if race played "any role" in a challenged decision, the plaintiff has not enjoyed "the same right" as other similarly situated persons, but if the defendant proves the same decision would have been made regardless, "then the plaintiff has, in effect, enjoyed 'the same right' as similarly situated persons."[316]

It is not even clear what causation standard to apply to claims brought by federal employees under the ADEA itself. These claims are not governed by the language governing private employers interpreted by the Court in *Gross* but instead by a separate provision of the ADEA, § 633a(a), which provides that all personnel decisions affecting federal employees "shall be

311. Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2006)).

312. *See, e.g.*, CBOCS W., Inc. v. Humphries, 553 U.S. 442, 448 (2008) (citing cases back to 1977 in which federal appeals courts concluded that the language of § 1981 encompassed employment retaliation claims); *id.* at 457 (holding that § 1981 encompasses retaliation claims); McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 287 (1976) (holding that § 1981, like Title VII, "is applicable to racial discrimination in private employment against white persons").

313. *See CBOCS*, 553 U.S. at 455 (stating that there is a "necessary overlap" between Title VII and § 1981 but that "the remedies available [under the two statutes], although related, and although directed to most of the same ends, are separate, distinct, and independent" (internal quotation marks omitted)). The key substantive difference between the statutes is that disparate impact claims are not cognizable under § 1981. *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982) ("We conclude, therefore, that § 1981 . . . can be violated only by purposeful discrimination.").

314. *See* Katz, *Unifying Disparate Treatment*, *supra* note 12, at 647 n.22 (collecting cases in which courts refused to apply the 1991 CRA framework to § 1981 claims); *see also* Brown v. J. Kaz, Inc., 581 F.3d 175, 182 n.5 (3d Cir. 2009) (applying the *Price Waterhouse* framework instead of the 1991 Title VII amendments to a § 1981 claim); Aquino v. Honda of Am., Inc., 158 F. App'x 667, 676 (6th Cir. 2005) (refusing to extend the 1991 Title VII amendments to § 1981 claims); Mabra v. United Food & Commercial Workers, 176 F.3d 1357, 1358 (11th Cir. 1999) (holding that the 1991 mixed-motive amendments do not apply to § 1981 claims); Hardy v. Town of Greenwich, 629 F. Supp. 2d 192, 199 (D. Conn. 2009) (citing Metoyer v. Chassman, 504 F.3d 919, 933–34 (9th Cir. 2007)) (noting that while the Second Circuit has not directly addressed whether the 1991 mixed-motive amendments apply to § 1981 claims, other circuits have addressed the issue, and only the Ninth Circuit has held that the 1991 amendments apply to § 1981).

315. *Brown*, 581 F.3d at 182 n.5.

316. *Id.*

made *free from* any discrimination based on age."[317] Citing prior Supreme Court precedent that had referred to the "sharp" differences between these provisions, the D.C. Circuit held that reading § 633a to require "but-for" causation would "divorce" the phrase from its plain meaning and that a federal employee could establish liability simply by "proving that age was *a* factor in the employer's decision."[318] The court further stated that "'[a]ny,' after all, means any" and that accordingly there was no requirement that age be a substantial factor in the decision.[319] Relying on the First Amendment retaliation decision that was significant in *Price Waterhouse*'s analysis rather than *Price Waterhouse* itself, the court then held that to avoid unwarranted windfalls, a plaintiff could only recover back pay or reinstatement if but-for causation were established, but the court declined to resolve which party would bear the burden of proving the same action would, or would not, have occurred.[320] By contrast to this careful analysis, several district courts have applied *Gross* to claims under § 633a without noting the difference in language at all or have noted it but held it makes no difference.[321] Similar questions have also arisen under the Rehabilitation Act (which prohibits discrimination "solely by reason of" a disability and retaliation "because of" protected acts),[322] the Jury Systems Improvement Act (which prohibits discrimination "by reason of" jury service),[323] and ERISA (which prohibits discrimination "for" exercising rights under benefits plans).[324]

---

317. 29 U.S.C. § 633a(a) (2006) (emphasis added).

318. Ford v. Mabus, 629 F.3d 198, 205–06 (D.C. Cir. 2010).

319. *Id.* at 206.

320. *Id.* at 207 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977)). *See supra* text accompanying notes 249–50 (discussing a similar interpretation of remedies under Title VII prior to *Price Waterhouse*).

321. *See, e.g.*, Frankel v. Peake, Civ. No. 07-3539 (WJM), 2009 WL 3417448, at *4 (D.N.J. Oct. 20, 2009) (citing *Gross* to hold that, in a summary judgment motion, a plaintiff needed to "show a disputed material fact, which would allow a reasonable jury to determine that age was the 'but for' cause of the employment action at issue"); Wagner v. Geren, No. 8:08 CV 208, 2009 WL 2105680, at *4 (D. Neb. July 9, 2009) (stating that it is the plaintiff's "burden to present evidence . . . that . . . the adverse action would not have occurred 'but for' [the plaintiff's] age"); Glenn v. Bair, 643 F. Supp. 2d 23, 29 (D.D.C. 2009) (holding that "[a]t all times . . . the plaintiff retains the burden of persuasion to prove . . . that age was the but-for cause of the challenged employer decision" (internal quotations omitted)).

322. 29 U.S.C. § 794 (2006); 34 C.F.R. 100.7(e) (2011); *see, e.g.*, Gard v. U.S. Dep't of Educ., 752 F. Supp. 2d 30, 36 (D.D.C. 2010) (citing *Gross* for the proposition that a "plaintiff seeking vindication under the Rehabilitation Act must prove that his disability was the 'sole' or 'but-for' reason for the employer's actions or inactions, regardless of whether the plaintiff advances a claim of discrimination based on disparate treatment, mixed-motive, or retaliation").

323. 28 U.S.C. § 1875 (2006); *see, e.g.*, Williams v. District of Columbia, 646 F. Supp. 2d 103, 109 (D.D.C. 2009) (citing *Gross* for the rule that a plaintiff must demonstrate that jury service was the but-for cause of the challenged adverse employment action).

324. 29 U.S.C. § 1140 (2006); *see, e.g.*, Cameron v. Idearc Media Corp., No. 08-12010-LTS, 2011 WL 4054864, at *5, *9 (D. Mass. Sept. 9, 2011) (citing *Gross* to hold that mixed-motive claims are not cognizable under the ADEA and then stating "[t]he framework for analysis of the Plaintiffs' ERISA claim is essentially the same as that discussed . . . with regard to the ADEA claim").

Agency interpretations can further complicate matters. For example, the FMLA makes it unlawful to discriminate against any individual "because" such individual files or participates in a proceeding relating to her substantive rights and, in a separate provision, "for opposing any practice" made illegal.[325] These provisions substantively parallel the antiretaliation provisions in Title VII but use slightly different wording.[326] A Department of Labor regulation that predates *Gross* interprets these provisions to mean that employers "cannot use the taking of FMLA leave as a negative factor in employment actions."[327] The Sixth Circuit, after *Gross*, reasoned that the regulation's language suggested that mixed-motive analysis was appropriate and therefore applied *Price Waterhouse*.[328] The Tenth Circuit, by contrast, recently stated (without deciding) that after *Gross* "there is a substantial question whether a mixed-motive analysis would apply in a retaliation claim under the FMLA."[329] District courts in various other circuits have similarly applied pre-*Gross* circuit precedent that applies *Price Waterhouse* to FMLA retaliation claims but have noted that there are strong arguments that *Gross* should apply instead.[330]

Time, or subsequent Supreme Court decisions, will gradually resolve some of the confusion regarding the analysis of these statutes, but the sheer number of different statutes involved, and the small differences in language among them and even within them, ensure that clarity will not be quickly forthcoming. Notably, even if courts uniformly applied *Gross* to all statutes other than Title VII, *Gross* and its quickly multiplying progeny will also pose a challenge any time a plaintiff seeks to bring a claim under both Title VII and any of these other statutes. It is common practice to bring race-discrimination claims under Title VII and § 1981 because § 1981 provides a

---

325. 29 U.S.C. § 2615(a)(2), (b)(1) (2006).

326. *Compare* 29 U.S.C. § 2615(a)(2), (b) (2006) (specifying that "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter" or "because such individual has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter"), *with* 42 U.S.C. § 2000e-3(a) (2006) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing . . . .").

327. 29 C.F.R. § 825.220(c) (2008).

328. *See* Hunter v. Valley View Local Schs., 579 F.3d 688, 691–92 (6th Cir. 2009) (holding that the FMLA "authorizes claims in which an employer bases an employment decision on both permissible and impermissible factors"); *cf.* Wilson v. Noble Drilling Servs., Inc., 405 F. App'x 909, 912 n.1 (5th Cir. 2010) (noting uncertainty as to whether the mixed-motive framework applies in FMLA cases but declining to resolve the issue).

329. Twigg v. Hawker Beechcraft Corp., 659 F.3d 987, 1004 (10th Cir. 2011).

330. *See* Burgess v. JHM Hotels, LLC, C.A. No. 6:08-3919-HMH-BHH, 2010 WL 1493132, at *6 (D.S.C. Apr. 13, 2010) (noting that there was a "serious question" as to whether the *Price Waterhouse* mixed-motive framework survived *Gross*); Rasic v. City of Northlake, No. 08 C 104, 2009 WL 3150428, at *17 (N.D. Ill. Sept. 25, 2009) ("[T]here is a serious question as to whether the mixed-motive theory of FMLA retaliation survives the Supreme Court's recent decision in *Gross* . . . .").

more generous remedial scheme in certain respects.[331] If § 1981 is interpreted in line with *Gross*, these two claims will be assessed under different causation standards. Plaintiffs also often bring claims under both the ADEA and Title VII.[332] Even prior to *Gross*, these kinds of "intersectional" claims posed challenges because they required proceeding under two distinct statutes and raised complex challenges regarding appropriate comparators, often a key element of proving an employment discrimination claim.[333] *Gross*, and the enhanced pleading standards imposed by the *Iqbal*[334] and *Twombly*[335] decisions, make such compound cases far more difficult. A plaintiff now may be required to plead facts sufficient to support causal standards that are in tension (e.g., that a given decision was based in part on sex and that age was *the* but-for cause of the decision); some courts have responded by dismissing the ADEA claims immediately.[336] Even if a court permits both claims to go forward, the jury would need to be charged on two different causal standards.[337] The same is true for a myriad of potential statutory combinations. This tension is not simply a matter of clarification; it is the necessary result of *Gross*'s rejection of the standard endorsed by Congress in the 1991 CRA. It will remain a problem unless and until Congress overrides, or the Court overrules, *Gross* or unless and until Congress amends Title VII.

---

331. *See* DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW 316 (8th ed. 2010) (stating that "as a practical matter, discrimination claims based on race or ancestry should be brought under both § 1981 and Title VII" because under § 1981 compensatory and punitive damages are uncapped and back-pay awards are not limited to two years).

332. *See, e.g.*, Cathy Ventrell-Monsees, President, Workplace Fairness, Statement at the EEOC Meeting: Age Discrimination in the 21st Century—Barriers to the Employment of Older Workers (July 15, 2009), *available at* http://www.eeoc.gov/eeoc/meetings/7-15-09/ventrell-monsees.cfm (remarking that an "increasing number of older women and older minorities . . . pursue claims under the ADEA and Title VII").

333. *See* Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 103–06 (2003) (describing how older women face challenges in proving prima facie disparate treatment on account of age *or* sex in situations where discrimination is occurring because of both age *and* sex, and neither their older male nor their younger female coworkers are being discriminated against). Courts disagree about how to analyze these claims. For a case permitting age to be considered as a "plus" factor relevant in the Title VII analysis, see Arnett v. Aspin, 846 F. Supp. 1234, 1240 (E.D. Pa. 1994).

334. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

335. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

336. *See* Brian S. Clarke, *Grossly Restricted Pleading:* Twombly/Iqbal, Gross, *and Cannibalistic Facts in Compound Employment Discrimination Claims*, 2010 UTAH L. REV. 1101, 1103–04 & n.22 (giving examples of post-*Gross* cases in which courts have dismissed cases due to pleadings of inconsistent facts for different theories of discrimination, as well as examples of courts allowing cases to proceed despite inconsistent alternative theories).

337. *Cf.* Sherwyn & Heise, *supra* note 99, at 903 (finding differences in outcomes depending on whether juries received a mixed-motive instruction or a pretext instruction).

### *B. Application of* Gross *to State Employment Discrimination Statutes*

State courts, and federal courts applying state employment discrimination law, face a different challenge. Many states and localities have enacted employment discrimination laws that prohibit age discrimination in the same statute—often the same sentence—as they prohibit race, color, sex, religion, and national-origin discrimination.[338] State statutes also often prohibit, again in a single statute, discrimination on the basis of disability, veteran status, and various other factors that are addressed in distinct federal laws, as well as additional factors, such as sexual orientation or marital status that are not addressed in federal law at all.[339]

As a general matter, most states borrow liberally from federal interpretations of employment discrimination law when interpreting their own statutes.[340] In cases brought in federal court that include both federal and state claims, it is quite common for courts to analyze the claims in detail under federal law utilizing precedents interpreting those laws and then declare in a single sentence that state law claims are resolved identically.[341] This is not to say that there cannot be significant differences between the two bodies of law; for example, especially prior to the recent amendments to the ADA, state protections against disability discrimination were sometimes far

338. *See, e.g.*, CAL. GOV'T CODE § 12920 (West Supp. 2012) ("It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation."); N.Y. EXEC. LAW § 296 (McKinney Supp. 2012) ("It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."); OR. REV. STAT. § 659A.006(2) (2009) ("The opportunity to obtain employment or housing or to use and enjoy places of public accommodation without unlawful discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status, age or disability hereby is recognized as and declared to be a civil right.").

339. *See supra* note 338.

340. NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 76:9 n.45 (7th ed. 2011) (listing state court cases which refer to federal case law in interpreting state antidiscrimination statutes); *see also, e.g.*, AutoZone, Inc. v. Reyes, 272 S.W.3d 588, 592 (Tex. 2008) ("By adopting the [Texas Commission on Human Rights Act], the [Texas] Legislature intended to correlate state law with federal law in employment discrimination cases . . . . Therefore, we look to federal law to interpret the Act's provisions." (quotations and citations omitted)).

341. *See, e.g.*, Ames v. Cartier, Inc., 193 F. Supp. 2d 762, 767 (S.D.N.Y. 2002) ("As an initial matter, the court notes that analysis of claims of discrimination under [New York State law and New York City law] proceeds under the same analytical framework as Title VII claims. . . . Therefore, the following discussion of plaintiff's Title VII claims applies equally to his state and local law claims." (citation omitted)).

more robust than the ADA.[342] Even when the substantive standards are similar or identical, it can be quite important to the parties how claims under state or local statutes are resolved, because the remedial provisions of some state or local statutes are more generous than those under federal law.[343]

Interpretation of mixed-motive claims under state statutes was messy even before *Gross*. Because many state statutes had not been amended after the 1991 CRA, some courts applying state law have applied *Price Waterhouse* to claims of discrimination on the basis of race, sex, religion, or national origin rather than the motivating-factor test and the remedies limitation of the 1991 CRA.[344] Others have applied the 1991 CRA standard, often without separate discussion.[345] *Gross* adds another layer of uncertainty. In a case decided after *Gross*, the Supreme Court of Alaska recently permitted mixed-motive claims on the basis of age, even though none of its prior decisions had done so explicitly.[346] The defendant argued *Gross* should apply.[347] The court disagreed. It acknowledged that it "look[ed] to federal discrimination law jurisprudence generally" but reasoned that the Supreme Court's analysis in *Gross* relied on distinctions between the ADEA and Title VII that did not exist in Alaskan law and that applying *Gross* would "result in a different analytical framework for age discrimination claims than for other discrimination claims . . . prohibited by the same sentence in the same statute."[348]

---

342. *See* Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV. 321, 334–35 (2003) (stating that although the vast majority of states had adopted antidiscrimination laws that tracked the ADA, several states rejected federal case law that narrowed the scope of qualifying disabilities and instead interpreted their identically worded state statutes to provide broader protections). For a specific instance of a state court interpreting a state statute to provide more robust protections than federal law, see State Div. of Human Rights v. Xerox Corp., 480 N.E.2d 695, 698 (N.Y. 1985).

343. For example, the New York Human Rights Law permits uncapped punitive damages. *See* Greenbaum v. Handelsbanken, 67 F. Supp. 2d 228, 266 (S.D.N.Y. 1999) (holding that a state law capping damages awards did not apply to punitive damages). Title VII, by contrast, caps such damages on a sliding scale (based on the size of the defendant) that ranges from $50,000 to $300,000. 42 U.S.C. § 1981a(b)(3) (2006).

344. *See, e.g.*, Harrison v. Olde Fin. Corp., 572 N.W.2d 679, 684 n.15 (Mich. Ct. App. 1997) (noting that because Michigan's Civil Rights Act was patterned after the 1964 federal Civil Rights Act, the 1991 amendments to Title VII overriding *Price Waterhouse* did not affect the court's reasoning).

345. *See, e.g.*, *Ames*, 193 F. Supp. 2d at 767 (stating, in a case applying Title VII's mixed-motive framework, that "analysis of claims of discrimination under the New York State Human Rights Law and the New York City Human Rights Law proceeds under the same analytical framework as Title VII claims"); *see also* Mittl v. N.Y. State Div. of Human Rights, 794 N.E.2d 660, 662 (N.Y. 2003) ("The standards for establishing unlawful discrimination under [New York law] are the same as those governing title VII cases under the Federal Civil Rights Act of 1964 . . . .").

346. Smith v. Anchorage Sch. Dist., 240 P.3d 834, 842 (Alaska 2010).

347. *Id.*

348. *Id.*

Similar reasoning has been applied (primarily by federal courts) to permit, notwithstanding *Gross*, mixed-motive claims of discrimination on the basis of age under state statutes in (at least) Michigan,[349] Missouri,[350] Iowa,[351] Puerto Rico,[352] and Massachusetts.[353] By contrast, the Second Circuit flagged the issue and assumed, without deciding, that *Gross* would apply to claims under the New York Human Rights Law.[354] There are also numerous cases post-*Gross* that simply state, without more analysis, that state law follows federal ADEA law;[355] it is unclear whether these decisions are deciding that mixed-motive claims are not available at all or are arising in cases in which pretext analysis would be applicable anyway. This issue arose on remand after the Supreme Court decision in *Gross* itself. The Eighth Circuit permitted Jack Gross's mixed-motive claim to advance under the Iowa Civil Rights Act.[356]

### *C. The Problem with Potential Congressional Responses to the Hydra Problem*

Shortly after *Gross* was decided, Congress began considering bills to override it and restore the possibility of mixed-motive claims under the

349. *See* Schmitz v. Village of Breckenridge, No. 08-14599-BC, 2009 WL 3273255, at *11–13 (E.D. Mich. Oct. 9, 2009) (concluding that *Gross* did not apply to age discrimination claims under state law because the distinctions between the ADEA and Title VII were not present in the Michigan statute).

350. *See* Baker v. Silver Oak Senior Living Mgmt. Co., 581 F.3d 684, 689–90 (8th Cir. 2009) (stating that the Missouri Human Rights Act "is less demanding than the ADEA" as interpreted in *Gross* and requires only a showing that "age was a *contributing factor* in the [employer's] termination decision" (alteration in original) (internal quotation marks omitted)).

351. *See* Gross v. FBL Fin. Servs., Inc., 588 F.3d 614, 617–21 (8th Cir. 2009) (allowing the plaintiff's mixed-motive age-discrimination claim under the Iowa Civil Rights Act to go to a jury).

352. *See* Vélez v. Thermo King de P.R., Inc., 585 F.3d 441, 452 n.7 (1st Cir. 2009) (explaining that plaintiff's burden to establish age discrimination under Puerto Rican law was "lighter" than under the ADEA as interpreted in *Gross* and that plaintiff's prima facie case shifts a burden of persuasion to the defendant to prove that the challenged action "was not motivated by discriminatory age animus" (internal quotation marks omitted)).

353. *See* Diaz v. Jiten Hotel Mgmt., Inc., 762 F. Supp. 2d 319, 339 n.15 (D. Mass. 2011) (suggesting that a mixed-motive jury instruction could be appropriate for an age discrimination claim under Massachusetts law even while recognizing that "[m]ixed-motive instructions are no longer appropriate under the ADEA after *Gross*").

354. Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 105 n.6 (2d Cir. 2010).

355. *See, e.g.*, Holt v. U.S. Bank Nat'l Ass'n, No. 4:09CV00818 JLH, 2010 WL 3614135, at *3 & n.5 (E.D. Ark. Sept. 8, 2010) (stating that claims under Arkansas law are analyzed using the same *McDonnell Douglas* burden-shifting framework as are ADEA claims); Puckett v. McPhillips Shinbaum, No. 2:06-CV-1148-ID, 2010 WL 1729104, at *5 & n.3 (M.D. Ala. Mar. 30, 2010) (delivering a recommendation from the magistrate judge to the district court that the plaintiff's success or failure under the ADEA also determines the outcome of the plaintiff's state claims); Horan v. Sears Roebuck & Co., No. 3:07cv1582 (WWE), 2009 WL 3820654, at *1 n.1 (D. Conn. Sept. 28, 2009) (stating that Connecticut courts look to ADEA precedent in analyzing claims under the Connecticut Fair Employment Practices Act).

356. *Gross*, 588 F.3d at 617, 621.

ADEA and other non-Title VII statutes.[357] When introduced in 2009, it was expected that these bills might pass relatively easily,[358] but ultimately they failed to progress after hearings were held.[359] There is far less likelihood that the more conservative 112th Congress will pass comparable legislation. Nonetheless, close examination of the bills is warranted to illustrate how the broad reach of the Court's reasoning in *Gross* caused Congress to at least consider enacting bills with a similarly unmoored approach. The bills were substantively identical; for convenience, I will quote from the House bill in the discussion that follows.

The findings in the bill explicitly repudiate the Court's reasoning in *Gross*:

> Congress has relied on a long line of court cases holding that language in the [ADEA], and similar antidiscrimination and antiretaliation laws, that is nearly identical to language in title VII . . . would be interpreted consistently with judicial interpretations of title VII . . . including amendments made by the Civil Rights Act of 1991. The Supreme Court's decision in [*Gross*] . . . has eroded this long-held understanding of consistent interpretation and circumvented well-established precedents.[360]

This statement of Congress's reliance and expectations not only differs from the approach taken by the majority in *Gross*; it also differs from the approach taken by the dissenters in *Gross*, who would have applied *Price Waterhouse*, rather than the 1991 CRA's standards.[361] Instead, the bill asserts that Congress expected precisely what was stated in the committee report that accompanied the 1991 CRA: the override of *Price Waterhouse* would govern the interpretation of related statutes.[362]

The bill states its purpose as ensuring the standard for proving disparate treatment is "no different" under the ADEA than under Title VII as amended by the 1991 CRA, and it would amend the ADEA to insert motivating-factor

---

357. For the proposed law, which was introduced in substantively identical form in both chambers of Congress, see Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. (1st Sess. 2009) and Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (1st Sess. 2009).

358. *See* Judy Greenwald, *Age-Bias Bill Would Ease Burden for Plaintiffs*, BUS. INS. (Oct. 18, 2009), http://www.businessinsurance.com/article/20091018/ISSUE01/310189980 ("Legislation that seeks to make it easier for employees to prevail in age discrimination cases looks likely to win approval, observers say.").

359. Jacqueline Go, Comment, *Another Move Away From Title VII: Why* Gross *Got It Right*, 51 SANTA CLARA L. REV. 1025, 1027 n.18 (2011).

360. H.R. 3721 § 2(a)(3).

361. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2356 (Stevens, J., dissenting) (stating that rejecting the 1991 CRA's standard was "reasonabl[e]" but that the Court should have "adhere[d] to [*Price Waterhouse*'s] motivating-factor test").

362. *See supra* text accompanying note 138. Of course, it is impossible to know definitively whether the committee report that accompanied the 1991 CRA was a correct statement of that Congress's legislative intent. Justice Scalia and others would be quick to point out that a statement in a committee report has not garnered a majority vote in both houses.

language as well as a limitation on remedies that is almost identical to the changes in Title VII made by the 1991 CRA.[363] But it would actually go beyond existing Title VII law to respond to interpretative questions that have arisen since 1991. First, it would amend the text of the ADEA to state explicitly that a plaintiff may rely on "any type or form of admissible circumstantial or direct evidence."[364] This would codify the holding of *Desert Palace*. Second, it would add language—language that lacks a specific textual analogue in Title VII—indicating that a plaintiff may also succeed by showing that "the practice complained of would not have occurred in the absence of an impermissible factor."[365] This language would codify the but-for standard that typically governs pretext cases. And third, probably most importantly, it would address the ongoing confusion regarding when and how courts determine whether to issue a mixed-motive instruction by providing explicitly that "[e]very method for proving either such violation" (that is, either a motivating-factor test or but-for causation) "shall be available to the plaintiff."[366]

Amending only the ADEA with this language would invite a new hydra problem: courts, following the reasoning in *Gross*, might continue to apply the but-for causation standard announced in *Gross* to other statutes or choose to adopt yet a different causation standard. The bill, not surprisingly, seeks to avoid this. The bill goes far beyond simply a statement in a committee report, or even statutory language setting forth congressional findings and purposes, regarding expectations about how courts would interpret Congress's actions. Instead, the bill's substantive language provides that the causation standard it announces would apply to:

> (A) this Act [the ADEA], including subsection (d) [concerning retaliation];
>
> (B) any Federal law forbidding employment discrimination;
>
> (C) any law forbidding discrimination of the type described in subsection (d) [concerning retaliation] or forbidding other retaliation against an individual for engaging in, or interference with, any federally protected activity including the exercise of any right established by Federal law (including a whistleblower law); or
>
> (D) any provision of the Constitution that protects against discrimination or retaliation.[367]

The breadth of these provisions is striking. The bill seeks to avoid the hydra problem—and the challenge of identifying which particular statutes *Gross* might be applied to—by reaching (almost) any and all statutes that it ever

363. H.R. 3721 §§ 2(b), 3.
364. *Id.* § 3.
365. *Id.*
366. *Id.*
367. *Id.*

might affect. The bill does, however, provide an exception for retaliation claims to the extent that any particular law has "an express provision regarding the legal burdens of proof applicable to that claim."[368]

Given the Court's refusal in *Gross* to consider amendments to Title VII to hold any relevance to the interpretation of the ADEA, the "blanket amendment" approach is a reasonable response on the part of Congress. The number of different laws to which *Gross* has already been applied (e.g., Title VII's retaliation provisions, the ADA, the Rehabilitation Act, ERISA, the Juror Act, the FMLA, § 1981, § 1983 First Amendment retaliation claims[369]) makes clear that it would be quite onerous for Congress to separately amend each of these statutes to end reliance on *Gross.* This is particularly true because every law has champions and opponents, and there can be large political obstacles to opening up a given statute to amendment. While enactment of the *Gross* override bill would be equivalent to amending these other statutes, it might not trigger the same political concerns because its effects would be far less obvious. It also might be referred only to the committees with jurisdiction over the ADEA, rather than the far larger group of committees with jurisdiction over any of the relevant statutes implicated.[370] Moreover, even if Congress separately amended all of the statutes to which *Gross* has already been applied, *Gross* could still be applied to statutes in other contexts that Congress had not considered.[371]

But to say that a blanket amendment is a reasonable response to *Gross* is not to say that it is ideal. Far from it. If this bill were enacted as written, it would mean that language codified with the substantive provisions of the ADEA would govern the standard of proof applied in statutes scattered across the Code. This would include not only employment discrimination statutes but also any other federal statute that addresses retaliation in any context. There would be no indication in the codification of those other statutes that causation was governed by language found in the codification of the ADEA. (The bill protects plaintiffs who might be unaware of these provisions at the outset of a lawsuit by stating explicitly that "the plaintiff need not

368. *Id.*

369. *See supra* subpart V(A).

370. This relates to a notice problem discussed more fully below. *See infra* note 372 and accompanying text.

371. The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, overrode *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), a decision regarding the statute of limitations in Title VII cases alleging pay discrimination. In that statute, Congress addressed the hydra problem in a more modest fashion: it explicitly amended the text of Title VII, the ADEA, the ADA, and the Rehabilitation Act, the acts where the issue might be expected to arise most frequently. Lilly Ledbetter Fair Pay Act of 2009 §§ 3–5. This was insufficient to end reliance on *Ledbetter* as a shadow precedent. In a recent case arising under the FMLA, the district court held *Ledbetter* controlling because Congress had not amended the FMLA when it amended these other statutes. Maher v. Int'l Paper Co., 600 F. Supp. 2d 940, 950 n.5 (W.D. Mich. 2009).

plead the existence of this subsection.")[372] Indeed, although its stated purpose is to make interpretation of the ADEA "no different than the standard" under Title VII,[373] the bill, if enacted, would by its terms supersede the language in Title VII itself. Title VII would no longer be governed by its own motivating-factor language; it would be governed by the new language in the ADEA. Courts would then need to determine whether the precedents interpreting these provisions in Title VII would have relevance to the Title VII-derived provisions of the ADEA, which would by their terms circle back to apply to Title VII.

Beyond mere notice problems, the blanket amendment approach would create difficult situations where the standards it imposes conflict with preexisting substantive provisions of law. The statute creates an exception for retaliation claims that explicitly include a different standard of proof,[374] but it has no analogous exception for substantive employment discrimination claims. This would likely create confusion and conflicts (that would need to be resolved by the courts) in statutes that *do* have explicit conflicting language. For example, the Rehabilitation Act prohibits discrimination "solely by reason of" disability.[375] This language reasonably has been interpreted (long prior to *Gross*) to prohibit mixed-motive claims.[376] If the proposed bill were enacted, a provision buried in the ADEA would supersede the clear language of the Rehabilitation Act and a significant body of precedent interpreting that language.[377]

At the same time, notwithstanding the striking breadth of this draft language (and the notice and substantive conflict problems it engenders), the bill would still be insufficient to end entirely the hydra problem. Courts interpreting antidiscrimination mandates in other areas of statutory law—e.g.,

---

372. H.R. 3721 § 3. Obviously, Congress could identify all relevant provisions and indicate that they should be amended separately, but this draft bill does not do so, and any attempt to do so would lose the advantages that the blanket amendment provides in terms of not forcing Congress to attempt to identify all relevant laws to which *Gross* might be applied and muster the political will to amend them all.

373. *Id.* § 2(b).

374. *Id.* § 3.

375. 29 U.S.C. § 794(a) (2006).

376. *See* Davenport v. Idaho Dep't of Envtl. Quality, No. CV 05-054-E-LMB, 2008 WL 5061678, at *1–2 (D. Idaho May 20, 2008) (applying Ninth Circuit precedent to conclude that because of the use of the phrase "'*solely* by reason of,' . . . a mixed motive analysis is not appropriate when applying the Rehabilitation Act"); *see also* Parker v. Columbia Pictures Indus., 204 F.3d 326, 337 (2d Cir. 2000) ("The elimination of the word 'solely' from the causation provision of the ADA suggests forcefully that Congress intended the statute to reach beyond the Rehabilitation Act to cover situations in which discrimination on the basis of disability is one factor, but not the only factor, motivating an adverse employment action.").

377. On the other hand, a general rule of statutory interpretation governs against repeals or modifications of statutes by implication. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 550 (1974) (holding that in the absence of expressed intent to repeal, repeal by implication is only appropriate when there is an irreconcilable difference between earlier and later statutes). It is thus possible that courts would apply this canon and refuse to enforce the causation standard announced in the *Gross* override if language in other statutes was clearly inconsistent.

housing or education—frequently look to Title VII case law because the language of these other acts largely parallels that of Title VII and there is dramatically more case law under Title VII than these other laws.[378] The *Gross* override would not reach these laws. Courts might reinterpret the "because of" language of these other statutes consistently with the amended ADEA-now-superseding-Title VII standard, but they could also apply *Gross*'s reasoning and refuse to do so. Nor would this language (or any congressional directive) address the hydra problem as it plays out in the state courts, although enforcing a uniform federal standard would avoid the particular challenge now faced in the interpretation of state laws that prohibit age discrimination in the same sentence as they do race, sex, religion, or national-origin discrimination. Additionally, despite language that purports to reach interpretation of constitutional claims, it is not clear whether Congress would have the power to dictate a causation standard to the courts in that context. Congress is the ultimate arbiter of statutory law, but the courts decide the meaning of constitutional law.

In sum, in light of *Gross*, the blanket-amendment approach of these bills is a reasonable, and maybe the best, way for Congress to supersede *Gross* without creating (much of) a new hydra problem. But there are real disadvantages to forcing Congress to take such action to end reliance on a disfavored interpretation. It is also quite possible that some combination of these concerns would mean that Congress—even if it ultimately enacts a *Gross* override—would pass a bill that did not include language applying the amendments to all other employment discrimination and retaliation statutes. Courts would then likely continue to rely on *Gross* as a shadow precedent in interpreting other employment discrimination or retaliation statutes, despite Congress's clear repudiation of the but-for standard as applied to the ADEA and its equally clear previous repudiation of that standard as applied to Title VII.

Further, assume for a moment that Congress does not muster the political will to pass the proposed *Gross* override bills. For reasons I discuss in Part VI, I do not think that this would necessarily indicate that Congress agrees with the Court's interpretation in *Gross* or the application of the standard announced in *Gross* to other statutes, but rather that the test imposed by the Court is unreasonable. If this is correct, Congress also faces something close to a catch-22 with respect to any future legislation. *Gross* establishes clear Supreme Court precedent that in the ADEA, and arguably in all other employment discrimination statutes, "because of"—in the absence of explicit motivating-factor language—means but-for causation. If

378. *See, e.g.*, Hayut v. State Univ. of N.Y., 352 F.3d 733, 744–45 (2d Cir. 2003) (borrowing from Title VII "hostile environment" case law to determine whether plaintiff presented sufficient evidence to support a claim under § 1983 regarding harassment in the education context); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988) (drawing upon the parallel between Title VII and the Fair Housing Act and holding that because Title VII does not require a plaintiff to prove discriminatory intent, neither does the Fair Housing Act).

Congress were to enact a new employment discrimination statute (e.g., the proposed Employment Non-Discrimination Act, which would prohibit discrimination on the basis of sexual orientation or gender identity[379]), and if it wanted to permit mixed-motive claims, it certainly would be wise to include motivating-factor language like that found in Title VII.[380] A choice to do so, however, could be deemed by courts as further confirmation that Congress intends statutes that lack such language (e.g., the ADA, § 1981, GINA) to be interpreted differently. On the other hand, a failure on Congress's part to include explicit motivating-factor language in any post-*Gross* employment discrimination statute would almost certainly be interpreted by courts as a conscious choice to preclude mixed-motive claims.

## VI. Realizing Congress's Role in Creating Statutory Meaning

The foundational premise of legislative supremacy grants Congress the ultimate authority to shape statutory law, as expressed by Congress's unquestioned prerogative to supersede judicial interpretations of statutes with which it disagrees by enacting overrides.[381] This power stands in sharp contrast to constitutional adjudication, where the courts have final authority to declare the meaning of constitutional principles and thus can strike down statutes as unconstitutional.[382] But the anomaly of statutory interpretation is that, at least in the federal system, courts, though ostensibly serving as "agents" of Congress in this context, set the rules by which the congressional–judicial conversation is conducted.[383] Thus, for the promise of legislative supremacy to be realized, the rules developed by courts—that is, the conventions of statutory interpretation—must themselves respect the separation of powers and Congress's authority to create statutory meaning.

---

379. Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. § 2 (2011); Employment Non-Discrimination Act, H.R. 1397, 112th Cong. § 2 (2011).

380. I credit Jamie Prenkert for this point.

381. *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281–82 (1989) (arguing that the principle of legislative supremacy precludes judicial policy making when statutory directives are clear).

382. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

383. I thank Peter Strauss for making this observation. Many state legislatures have enacted rules that seek to govern statutory interpretation by courts, typically codifying some, but not all, standard canons of statutory interpretation. *See generally* Scott, *supra* note 22, at 343–44 (2010). Commentators disagree regarding the extent to which such codes should bind state courts and about the constitutionality of comparable directives by Congress to the federal courts. *Compare id.* at 344 (arguing that state courts should follow state legislative directives), *and* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2140, 2143–47 (2002) (arguing that Congress could impose such rules and discussing the benefits of its doing so), *with* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 99–100 (2003) (arguing that Congress does not have the power to prospectively control judicial interpretation), *and* Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 841 (2009) (arguing that many such directives would be unconstitutional violations of the separation of powers doctrine).

Numerous conventions of statutory interpretation rely on assertions regarding Congress and congressional intent that are impossible to verify. In many instances, this is relatively unproblematic and often serves to promote predictability, efficiency, and fairness. But when the fictions of statutory interpretation make assumptions about what Congress does—and what Congress may reasonably be expected to do—that clearly fail to accord with reality, they may work to undermine legislative supremacy. I contend that the interpretive principle announced by the Court in *Gross* falls into this category. It also has created widespread confusion among lower courts and resulted in similar cases being treated quite differently without any affirmative indication by Congress that it intends these differences. I propose an alternative approach that can better permit overrides to play their expected role in securing the separation of powers and that also advances independent interests in the fair, predictable, and efficient interpretation of statutes.

### *A. The Fictions of Statutory Interpretation as Applied to Overrides*

In *Gross*, the Court placed great significance on a difference between Title VII and the ADEA: Title VII, subsequent to the 1991 CRA, includes language stating explicitly that an unlawful act is established by showing that race, color, religion, sex, or national origin is a "motivating factor" in an employment decision, while the ADEA lacks this language.[384] The Court does not merely note these differences. It states that they must be understood to mean that Congress "cho[se]" to have the identical "because of" language in the statutes interpreted differently.[385] This claim rests on unverified, and largely unverifiable, assumptions by the Court about what Congress "meant" by its prior actions and what Congress could or should do in the future if this was not in fact what Congress meant. The fact that these assumptions resulted in the Court adopting a causation standard for the ADEA—and its quickly being applied to numerous other statutes—that Congress had clearly repudiated for Title VII should at least make one pause to consider whether these assumptions are warranted. I contend they are not.

I am not claiming that I (or anyone else) know definitively what causation standard the 1964 Congress that enacted Title VII, or the 1967 Congress that enacted the ADEA, intended for mixed-motive claims. I think it is probably accurate to say that neither Congress had a specific intent regarding this particular issue.[386] Nor am I claiming to know definitively that

384. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2348 (2009) (rejecting the petitioner's argument that decisions construing Title VII should control the Court's decision on the ground that "Title VII is materially different with respect to the relevant burden of persuasion").

385. *Id.* at 2349, 2350 & n.3.

386. As a threshold matter, some would take issue with the basic premise that Congress, a collection of 535 voting members with individual objectives and agendas, can have any unified intent at all. Others argue, I think convincingly, that one can nonetheless ascribe "group intent" to Congress. *See, e.g.*, LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 82–83 (2010) (arguing in favor of attributing group intent to Congress because

the 1991 Congress intended the causation under the ADEA to be interpreted consistently with the motivating-factor standard it explicitly adopted for Title VII. As demonstrated in subpart III(D) above, I think that consideration of the 1991 CRA as a whole, as well as the explicit statement in the committee report that the committee expected the motivating-factor standard to be applied to statutes similar to Title VII,[387] provides compelling support for this inference. And Part V demonstrates that it would be quite onerous for Congress to identify and amend all statutes that use causation language similar to Title VII.

But whether or not one agrees with my analysis regarding legislative intent and the potential barriers to the congressional action that the *Gross* Court expects, it should be obvious that Congress did not affirmatively indicate in statutory language (or in any other way) that it did *not* intend the causation standard under the ADEA to be the same as that of Title VII. At most, one can draw a negative inference from Congress's "neglect[ing]" to amend the ADEA and all other potentially applicable statutes when it amended Title VII.[388] It is also essential to recognize the Court in *Gross* does not categorically refuse to consider legislative intent. Although the Court asserts that it simply interprets the "ordinary meaning" of the text, it justifies its failure to apply either *Price Waterhouse* or the standard endorsed by the 1991 CRA on the explicit ground that the Court "must give effect to Congress' choice."[389] Moreover, since, as discussed in Parts III and IV, either "but for" or "motivating factor" is a plausible interpretation of "because of," plain meaning analysis does not provide a definitive resolution. A key issue in the case, therefore, is how the Court determines congressional intent. The *Gross* majority ignores a clear statement in the committee report (generally considered the most reliable source of legislative history[390]) that is directly on point in favor of a negative inference derived from Congress's

---

"we routinely attribute intent to a group of people based on the intent of a subset of that group, provided that there is agreement in advance about what role the subgroup will play"); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864–65 (1992) (reviewing critiques of ascribing group intent to Congress but concluding that while "[a]ll this is to say that ascribing purposes to groups and institutions is a complex business, and one that is often difficult to describe abstractly[,] . . . that fact does not make such ascriptions improper").

387. *See supra* text accompanying note 138.

388. *Gross*, 129 S. Ct. at 2349.

389. *Id.* at 2350 & n.3 (citation omitted).

390. *See, e.g.*, FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 171 (2009) (referring to committee reports as "a relatively reliable indicator of legislative intent" as compared with sponsor statements and other sources of legislative history); ESKRIDGE, *supra* note 25, at 222 fig.7.1 (depicting committee reports as the "most authoritative" in the hierarchy of legislative-history sources used by the Supreme Court); *see also* George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 43 ("Committee reports are well-regarded because, in the words of Justice Harlan, they represent the 'considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969))).

inaction. It is accordingly appropriate to probe the validity of this inference, just as courts and commentators have long probed the validity of legislative history as a source from which to infer congressional intent.[391]

As discussed in subpart II(B), courts typically assume that identical or similar language in "related" statutes should be interpreted consistently, and accordingly, courts borrow authoritative interpretations of one statute when interpreting another. Courts offer a variety of intent, purpose-based, and textual justifications for this practice. In the discussion above, I suggested that even if not grounded in a verifiable congressional intent, consistent interpretation of identical or similar language in statutes *in pari materia* will often be justified by other rationales that undergird statutory interpretation.[392] Moreover—and of crucial importance—in the absence of a reaction by Congress to a given judicial interpretation, there are rarely grounds to question the underlying premise that the Court's interpretation determines what the relevant language in the primary statute means. And interpreting related statutes consistently has the separate virtue of making statutory law develop in a relatively uniform manner, thus promoting efficiency, predictability, and fairness.

Subpart II(B) described the inference that variation among otherwise similar statutes is "meaningful" as the converse of interpreting statutes *in pari materia* consistently. As discussed in subpart I(B), in contrast to application of the *in pari materia* canon, the application of the meaningful-variation canon of interpretation does little to promote fairness, efficiency, or predictability. Accordingly, application of this canon is primarily justified by inferences based on assumptions about congressional intent. In decisions prior to *Gross*, the Court has emphasized that context can be important in assessing whether this inference reflects *actual* purposive action by Congress; for example, the Court has stated that the inference is at its strongest when applied to "contrasting statutory sections *originally enacted simultaneously* in relevant respects."[393] Even in this situation, the assumption is more likely to be valid when applied to a bill that addresses a single subject and progresses in an orderly fashion through the committee process. By contrast, "variation" in sections that are enacted simultaneously may be more likely to be inadvertent when the sections are part of an omnibus bill that addresses multiple subjects, or when there are significant amendments made on the House or Senate floor or in conference committee.[394] Some might argue, however, that even if this rule sometimes

391. *See* ESKRIDGE ET AL., *supra* note 51, at 990 n.j (collecting scholarly commentary debating the reliability of legislative history as a means of inferring congressional intent).

392. *See supra* subpart II(B).

393. Field v. Mans, 516 U.S. 59, 75 (1995) (emphasis added).

394. *Cf.* Lindh v. Murphy, 521 U.S. 320, 329 (1997) (observing that where provisions "evolve[] separately in the congressional process, only to be passed together at the last minute," there is a risk that, "in the rough-and-tumble," no one considers the significance of differences between the texts of the different provisions passed).

is applied in the absence of true congressional intent, it can help "discipline" Congress into taking greater care in drafting.[395] This is at least plausible, in that it is not clearly beyond the capability of congressional drafters to read carefully a bill before enactment and consider whether variation of otherwise similar provisions is meaningful. Although undoubtedly some mistakes would slip through, consistent application of this canon to provisions enacted simultaneously might result in greater care and clarity in drafting, a significant benefit that could outweigh the possibility that it would sometimes be applied when the inference is unwarranted.

But as applied to overrides, the inference of a meaningful variation is far more attenuated—and I assert that it will often operate to undermine actual congressional intent. This is true for two primary reasons. First, the so-called meaningful variation is not the result of independent drafting decisions made by Congress; rather, it is a response to a judicial interpretation with which Congress disagreed. Often (as Part IV demonstrated was true in the case of Congress's response to *Price Waterhouse*) the preexisting language of a statute could reasonably be interpreted consistently with the meaning Congress endorses in an override. If this is the case, the preexisting language of *other* similar statutes can also reasonably be interpreted to bear the meaning that Congress endorses in the override. If, rather than enacting an override, Congress was expected to signal its disagreement with a judicial interpretation by issuing a special committee report[396] or enacting a joint resolution[397]—and if courts consistently respected such signals and overruled their prior precedents accordingly—then Congress could effectively supersede a judicial interpretation without creating variation in statutory language among otherwise similar statutes. But instead, Congress is expected to signal disagreement with prior judicial

395. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 636 (1995) (describing canons that Schacter characterizes as "disciplinarian" as justified by a belief that "politics easily runs amok, and the court must 'discipline' the political process through deliberately crafted interpretive rules" and observing that "[t]he principal form of discipline is narrow, text-based interpretation that limits the reach of legislation by requiring exacting specificity in statutory language").

396. I am not suggesting that this would be an ideal approach. It would be quite hard to determine whether such a report represented the interests of a true majority of Congress. *See generally* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1994) (discussing risks posed by reliance upon post-enactment legislative history, although ultimately arguing that it should be considered at times and proposing factors that courts should consider when assessing its reliability).

397. A joint resolution, unlike a committee report, is passed by both houses of Congress and signed by the President, thereby eliminating concerns that it did not represent the desires of a true majority of Congress or satisfy the Constitution's bicameralism and presentment requirements. *See* U.S. CONST. art. 1, § 7, cl. 3 ("Every . . . Resolution . . . to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him . . . .").

interpretations by substantively amending statutory text.[398] This creates a variation among otherwise similar statutes, but it is quite different from distinctions made by Congress within a statute when initially enacted. And, at least at the time when Congress passed the 1991 CRA, there was little reason for Congress to assume that courts would interpret a failure to amend all potentially related statutes as a "choice" to endorse a different interpretation.

Second, as Part V demonstrated, there are significant barriers to expecting Congress to identify and then amend the uncertain and unspecified group of statutes to which a disfavored interpretation might be applied. Courts and commentators have long questioned the validity of inferring congressional approval of prior judicial interpretations from congressional inaction because it is quite difficult to enact legislation and because Congress must juggle many competing priorities.[399] In this context, likewise, the rules of interpretation adopted by courts should be cognizant of the institutional realities of Congress. It makes no sense to infer purpose to congressional inaction when the expected action would be prohibitively difficult. Moreover, as demonstrated in Part V, the kind of blanket amendment override that the *Gross* rule invites would cause its own problems. Accordingly, as described more fully in the next subpart, I conclude that a variation among otherwise-similar statutes that is the result of a congressional override of a prior judicial interpretation generally should not be presumed to be "meaningful"; in other words, such variation generally should not be read as signaling congressional intent that the preexisting language common to both statutes bear different interpretations.

Note too that the interpretive approach adopted by *Gross* causes similar problems if Congress codifies, rather than overrides, a judicial interpretation. Codification is relatively common, permitting Congress to signal its approval of a judicial opinion and thus solidify the outcome, expand the reasoning to applications not addressed by the Court, or incorporate the interpretation into

---

398. *Cf.* Flood v. Kuhn, 407 U.S. 258, 275, 285 (1972) (holding that Congress's failure to enact an override of prior judicial opinions excluding professional baseball from antitrust regulation should be understood as approval of those prior decisions).

399. *See, e.g.*, United States v. Wells, 519 U.S. 482, 496 (1997) ("[W]e have frequently cautioned that it is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." (citations omitted) (internal quotation marks omitted)); Johnson v. Transp. Agency, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (disagreeing with the majority's reasoning that because Congress had not amended Title VII to override a prior Court decision interpreting Title VII to permit affirmative action, the Court could assume that its prior interpretation was correct and stating that "congressional inaction is a canard"); Zuber v. Allen, 396 U.S. 168, 185 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 11 (1942) ("The search for significance in the silence of Congress is too often the pursuit of a mirage."); Eskridge, *supra* note 23, at 94 (citing formalist, realist, and systemic problems with inferring legislative intent from legislative inaction and concluding that "legislative inaction rarely tells us much about relevant legislative intent").

a larger law reform.[400] In this context as well, if Congress only amended the statute actually interpreted by the courts—even if only to emphasize its agreement with the prior judicial interpretation—it would create a variation among otherwise similar statutes. The reasoning announced in *Gross* would interpret this as granting courts license to depart from an interpretation endorsed both by prior judicial opinions and by Congress. In fact, recall that Congress's response to *Price Waterhouse* in the 1991 CRA could be characterized as largely codifying the interpretation of Title VII endorsed by five Justices in that case, in that it adopted the same "motivating factor" standard and simply replaced the affirmative defense on liability with a limitation on remedies.[401] This illustrates a different reason for codification: *Price Waterhouse* was a splintered decision and it was unclear whether Justice White's or Justice O'Connor's concurrence should be deemed to provide the holding of the case. Thus, the 1991 CRA's response to *Price Waterhouse* could be characterized as a statement that the *Price Waterhouse* Court interpreted the meaning of "because of," the preexisting language shared by Title VII and the ADEA, almost, but not precisely, right. Despite this endorsement, the Court in *Gross* deems Congress's failure to amend the ADEA grounds to interpret "because of" in the ADEA quite differently.[402]

At root, the interpretive questions posed by overrides call into question the separate interpretive fiction, implicit in the judicial hierarchy, that a declaration by the Supreme Court is an "authoritative statement of what [a] statute mean[s] *before* as well as *after* the decision of the case giving rise to that construction."[403] Citing this principle, the Supreme Court has reasoned that even a decision by the Court that is counter to the unanimous interpretations of the courts of appeals does not "change[]" the law but rather "finally decide[s]" what it has "*always* meant and explain[s] why the Courts of Appeals had misinterpreted the will of the enacting Congress."[404] With respect to lower federal courts, this premise is necessary to permit precedent to function effectively. But when Congress intervenes to supersede the prior judicial interpretation, it raises the question of whether the prior judicial interpretation really should be an "authoritative statement" of what a statute

400. *See, e.g.*, Nancy C. Staudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 N.Y.U. L. REV. 1340, 1354, 1386–87 (2007) (discussing an empirical study finding that Congress codified 7% of Supreme Court tax cases and exploring reasons for codification).

401. *See supra* text accompanying notes 133–34. As noted above, this was deemed quite significant by the dissenters in *Gross*, who characterized Congress's actions as "ratif[ying] *Price Waterhouse*'s [motivating-factor test]." *Gross*, 129 S. Ct. at 2355 (Stevens, J., dissenting); *see also* text accompanying note 191.

402. My thanks to Jamie Prenkert for helping me articulate this point.

403. Rivers v. Roadway Express, Inc., 511 U.S. 298, 312–13 (1994) (emphasis added).

404. *Id.* at 313 n.12. This discussion arose in the context of the retroactivity of overrides. *See* Widiss, *supra* note 12, at 534–36 (summarizing and discussing the Court's reasoning in *Rivers*, which held that, generally, a substantive override of an interpretation of a civil rights statute would not be applied retroactively).

means. The overriding Congress does not necessarily know the will of the enacting Congress—but neither does the Court. The interpretive proposal that I endorse suggests that, on balance, given this uncertainty, the recognition that statutory text can often bear multiple plausible interpretations, the barriers to amending multiple statutes, and the problems with enacting a blanket override, it is better to privilege congressional signals over judicial signals—a position I develop in the next subpart.

### *B. Better Respecting the Institutional Capabilities of Courts and Congress*

*Gross* shows how application of standard principles of statutory interpretation and standard rules of precedent to the interpretation of overrides means that congressional amendment of a single statute—the statute actually interpreted in a given case—can be understood as a license to depart both from the prior precedent and from the meaning Congress ascribes. By contrast, a judicial interpretation of a single statute, such as *Gross*'s interpretation of the ADEA, is readily applied by lower courts to numerous other statutes. This aggrandizes the judicial role relative to the congressional role in ascribing meaning to statutory text and turns the premise of legislative supremacy on its head. In prior work, I advocated that courts adopt a rebuttable presumption that overrides require "fresh" statutory interpretation of preexisting language rather than ongoing reliance on the shadow precedent.[405] In light of *Gross*—in which the Court engaged in fresh interpretation as if on a blank slate and with a strong presumption *against* adopting the preferred interpretation signaled by Congress—I realize that my proposal needs to be clarified. The fresh interpretation I argue is warranted should be *consistent with the meaning Congress signaled it ascribes to the relevant language*, so long as the preexisting language can reasonably bear such meaning. This interpretive rule could be announced by the Supreme Court, or, potentially, enacted by Congress as a general instruction to govern the interpretation of overrides and the statutes they amend.[406]

Under the approach I suggest, enactment of an override that endorses a plausible interpretation of the *preexisting* language would function in a manner similar to a decision by a court higher than the Supreme Court. It would explain how that language should be interpreted in the context actually addressed in the override and would create a rebuttable presumption that in situations "relevantly similar" to the issue addressed head-on in the override—including statutory provisions that would typically be interpreted

405. *See* Widiss, *supra* note 12, at 566 (arguing that "[r]ather than simply relying on Congress to draft specific overrides 'more clearly,' courts interpreting overrides should do so in a manner that is more respectful of the significance of a congressional override" and proposing that the courts adopt a rebuttable presumption that overrides require "fresh" statutory analysis of preexisting language).

406. As discussed above, commentators disagree about whether Congress can constitutionally direct how courts interpret statutes. *See supra* note 383 and accompanying text.

consistently under the *in pari materia* canon—the interpretation suggested by Congress should likewise apply. In other words, this is the same reasoning a court would employ if the interpretation at issue were put forth by a superior court rather than by Congress. Rather than being deemed to create a meaningful variation between statutes (or within a single statute), the override would inform the understanding of preexisting language common to multiple statutes. This would not mean that Congress could not enact overrides that carve out a narrow rule from a more generally applicable interpretation or that change the interpretation of one statute but not multiple statutes. Congress simply would need to enact statutory language that made this intent clear, perhaps partially codifying the prior interpretation in some key statutes or enacting a "findings or purposes" clause stating an intent to change only the interpretation of a single statute. The approach I advocate would simply shift the inference drawn from legislative "silence" regarding related statutes from a presumption that Congress "chose" to grant courts absolute freedom in interpreting such statutes to a presumed preference for the interpretation endorsed in the override.

Importantly, under the approach I advocate, the statutory language itself still controls, thus mitigating the risk that application of this rule would undermine compromises reached through the legislative process. "Because of" can mean both motivating-factor and but-for causation. The issue in *Gross* was simply which of these plausible interpretations should be adopted, with the added knowledge that in Title VII, a substantively similar statute, Congress had explicitly stated that proving an illegitimate criterion was a motivating factor in a decision was sufficient to establish liability. In this circumstance, I suggest that courts should understand the override as functionally reinterpreting "because of" in Title VII.[407] Then, applying the standard *in pari materia* canon, courts would naturally interpret "because of" in related statutes, such as the ADA and the ADEA, to also establish a motivating-factor standard (unless, as discussed below, other differences between the statutes, such as the ADEA's "reasonable factor other than age" defense, affected this analysis). Courts might reasonably conclude as well that related statutes that contain similar but not identical words—e.g., "on the basis of" or "by reason of"—that could also reasonably be interpreted to establish a motivating-factor standard should likewise be interpreted consistently.[408]

---

407. As noted, Congress added an explicit provision defining the causal standard as "motivating factor" and a limitation on remedies, but, as established in Part IV, the preexisting language of Title VII could also easily bear this interpretation.

408. Sometimes courts deem such small differences to be a meaningful variation, while other times they gloss over differences and instead aver that the language is similar enough that it should bear a consistent meaning. In the particular example given in the text, courts have generally interpreted these differences in causation language among employment discrimination statutes to be insignificant. *See supra* text accompanying notes 289, 323–24 (discussing how courts have applied

If, by contrast, the preexisting language of a related statute could *not* reasonably bear the meaning signaled by Congress through enactment of an override, courts would be free (indeed, expected) to consider the significance of such differences. The Rehabilitation Act, which prohibits discrimination "solely by reason of" a disability,[409] is a good example of this. Even under the approach I advocate, courts could reasonably interpret this language to preclude mixed-motive claims; if Congress disagreed, it would be appropriate to expect Congress to amend the statute explicitly. Moreover, even if Congress were to amend the Rehabilitation Act to override decisions interpreting the "solely by reason of" language to preclude mixed-motive claims, that override would not necessarily call for reinterpretation of any other statutory provisions that also prohibit actions "solely by reason of" a given factor because that language cannot reasonably be interpreted to permit mixed-motive claims. In other words, the rule I am proposing would make a distinction between overrides (including, I contend, Congress's partial codification and partial override of *Price Waterhouse*) that endorse a plausible interpretation of preexisting language and overrides (such as a potential modification of the Rehabilitation Act to permit mixed-motive claims) that correct a prior mistake, update a statute, or choose a substantively different policy that was not a plausible interpretation of the preexisting language.

Similarly, courts could reasonably consider the significance of statutory differences entirely unrelated to the override that might have bearing on a given interpretive question. For example, as discussed above, although Title VII and the ADEA both prohibit discrimination "because of" specified factors, the ADEA also explicitly provides that acts based on a "reasonable factor other than age" are not unlawful;[410] Title VII does not include an analogous provision. Under the rule I propose, courts could assess the significance of such differences when determining whether "because of" in the two statutes should bear a consistent meaning; again, this would be the same analysis that they would naturally undertake if a judicial interpretation,

---

*Gross*'s interpretation of "because of" to other statutes prohibiting discrimination "on the basis of" or "by reason of" the outlawed conduct).

409. 29 U.S.C. § 794(a) (2006). The Rehabilitation Act and its relationship to other antidiscrimination statutes provides a good example of the complexity that can arise when applying the *in pari materia* canon. Long before *Gross*, courts struggled to determine whether to interpret the causation standard under the ADA as consistent with Title VII or with the Rehabilitation Act. The Supreme Court has never ruled on this question. Most circuits concluded (at least prior to *Gross*) that mixed-motive claims were cognizable under the ADA because the operative language of the relevant provision was drawn from Title VII, but the Sixth and Tenth Circuits followed Rehabilitation Act precedent to preclude mixed-motive claims under the ADA as well. *See* Macy v. Hopkins Cnty. Sch. Bd., 484 F.3d 357, 363 n.2 (6th Cir. 2007) (discussing this split). As noted above, *Gross* raises new questions regarding the viability of mixed-motive claims under the ADA. *See supra* notes 303–10 and accompanying text.

410. 29 U.S.C. § 623(f) (2006).

rather than a congressional amendment, established the motivating-factor standard in Title VII.[411]

The outer scope of the rule I propose would flow naturally from the analysis, admittedly fuzzy at times, that courts currently undertake when determining whether statutes are similar enough that judicial interpretations of a given statute's language should be applied to other statutes.[412] In other words, the Court's reasoning in *Gross* relied heavily upon the foundational premise that the ADEA and Title VII were similar enough that it would have been natural for Congress to amend them both if it wanted to indicate that a specific consistent causation standard would govern both. This was a plausible (although I assert, as discussed above, a deeply flawed) proposition only because they were *already* recognized as related statutes that were typically interpreted consistently. The Court would not have assumed that Congress would naturally have amended a criminal statute that also included the words "because of" when it enacted the *Price Waterhouse* override, and accordingly, it would have been unlikely to infer any significance from Congress's failure to do so. My approach simply suggests that, as applied to statutes that courts typically deemed to be related, there would be a rebuttable presumption that Congress's interpretation of shared language be applied just as a judicial interpretation of shared language is applied. This has the significant added benefit of making it more likely that statutes in a related area will—absent clear statutory language to the contrary—be interpreted in a relatively consistent manner, increasing predictability, efficiency, and fairness. But if statutes are too dissimilar to expect that a judicial interpretation of similar language would be applied, there would be neither a positive nor negative inference drawn from Congress's amendment of one statute when determining the meaning of language found in such other statutes.

A few additional limitations are important to note. As I explained in previous work, this rule would only apply to nonconstitutional decisions.[413] If a court strikes down a statute on constitutional grounds, its constitutional analysis is fully binding precedent. The rule would only apply to the aspects of the precedential case that are related to the issue addressed in the override.[414] Although my approach would preclude reliance on the general rationales undergirding an interpretation that was overridden, it would permit

411. *See supra* text accompanying notes 260–61 (discussing the significance of the RFOA defense in the causation question).

412. *See supra* subpart II(B).

413. *See* Widiss, *supra* note 12, at 569 (limiting the proposed interpretative rule to nonconstitutional rulings because the courts, not Congress, "have ultimate authority for constitutional interpretation" and observing that "[t]o the extent that a court either struck down or narrowly interpreted a statute on constitutional grounds, the court's constitutional analysis would continue to be applied").

414. *Id.*

ongoing reliance on other parts of a precedential case unrelated to the override.

The interpretative regime I suggest would promote the orderly development of statutory law in a relatively uniform, predictable, and consistent fashion, not only within the federal system but also between federal and analogous state statutes.[415] Indeed, state courts and federal courts applying state law have long implicitly adopted the approach I advocate by interpreting state statutes that are generally similar to analogous federal law in line with such federal law, even if the state statutes were not themselves amended to include an override. Thus, for example, it was quite common, at least prior to *Gross*, for courts to interpret "because of" in state statutes to mean that a plaintiff must show that an illegitimate criterion was a motivating factor in a decision, even if the state language had not been amended to include the motivating-factor language added to Title VII.[416]

Given the challenges to amending multiple statutes, discussed in Part V, I think the approach I advocate is also, on balance, more likely to accord with congressional intent. But it is not necessary to consider legislative intent to adopt this rule. A jurist who refused to consider intent at all could reach the same result by interpreting the plain meaning of the text and recognizing the independent virtue of the consistent and coherent development of the law. The key is that the presumption I suggest would supersede what I contend are flawed indicators of intent that courts currently infer from congressional inaction associated with overrides.

The approach I advocate avoids the excesses that are otherwise encouraged by the rule announced in *Gross*. As noted, *Gross* suggests that to end reliance on *Price Waterhouse* and to control interpretation of related statutes, Congress should have amended each and every other discrimination

---

415. The potential that a given interpretation of federal law will be unworkable or administratively difficult because of the interrelationship of federal laws is clearly a factor that courts can legitimately consider when engaging in statutory interpretation. For example, as noted above, both Justice Kennedy (dissenting in *Price Waterhouse*) and Justice Stevens (dissenting in *Gross*) cited potential confusion among related statutes as significant in their analysis. *See supra* notes 192, 247 and accompanying text. *See generally* Anita S. Krishnakumar, *The Anti-messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1800082 (demonstrating that courts frequently cite administrability concerns as a factor in statutory interpretation). It is less clear that courts should, as a normative matter, consider potential confusion caused by interpreting federal statutes differently from state statutes. Clearly, when the language adopted by a relevant legislative body (either Congress or a state legislature) or surrounding principles of federal or state law merit interpreting statutes differently, it is appropriate for courts to do so notwithstanding any potential confusion. *See supra* text accompanying note 342 (discussing state courts that, prior to the ADA amendments of 2008, interpreted state disability laws to apply more broadly than did the pre-2008 ADA). That said, it is obvious from a purely descriptive perspective that *Gross* has caused widespread confusion regarding state law. *See supra* subpart V(B). One benefit of the rule that I propose, even if it is not a normative justification for the rule, is that it would mitigate this confusion.

416. *See, e.g.*, Ames v. Cartier, Inc., 193 F. Supp. 2d 762, 767 (S.D.N.Y. 2002) (applying the Title VII mixed-motive standard, including the motivating-factor analysis, to state and local claims based on statutes in which motivating-factor language was not added following *Price Waterhouse*).

and retaliation statute. Institutional realities suggest that it would be quite hard for Congress to live up to this putative expectation. But even if it did, this is a second-best result. It requires (or at least makes it quite likely) that Congress would seek to enact a blanket amendment of all relevant statutes, because listing or selectively amending some would only increase the significance ascribed to a failure to list or amend others. Such a global approach might well sweep in statutes that already include language in tension with the override. If Congress considered each law individually, it might choose to except out such statutes, but given the all-or-nothing choice implicit in a blanket amendment, I think it is likely that Congress would at least sometimes err on the side of overinclusiveness. My approach, by contrast, gives courts the interpretive space to consider whether *truly meaningful variation* among statutes—e.g., the Rehabilitation Act's prohibition of decisions made "solely by reason of" disability[417]—merits a different interpretation.

A criticism of my proposal might be that it continues to rely on and trust courts to do responsible statutory interpretation. If one believes that courts act primarily to achieve their ideological objectives, then a rebuttable presumption such as that I suggest will make little difference. This is a risk, but it guards against the opposite risk that enacting an absolute rule that an override supersedes preexisting judicial interpretations could permit a special-interest override to swallow up a general rule.[418] More generally, although there is a significant body of empirical research demonstrating that ideology plays a role in judicial decision making, it is also well documented that courts independently care about institutional legitimacy.[419] Adoption of a rule such as that I advocate would shift the default in a way that would, I believe, often shift judicial behavior. That said, the approach I advocate is warranted in part because of the danger that the rule announced in *Gross* empowers courts to engage in ends-oriented adjudication.

Importantly, the rule itself is ideologically neutral. The rule I propose would tend to shift the relative balance of power between courts and Congress to more fully realize Congress's authority to shape statutory law. As applied to the particular issue addressed in *Gross*, application of the rule I propose would make it easier for plaintiffs in employment discrimination lawsuits to establish unlawful discrimination. This is a position more typically favored by Democrats than by Republicans.[420] Even in this context,

417. *See supra* note 409 and accompanying text.

418. *See* Widiss, *supra* note 12, at 571–72 (discussing this concern more fully).

419. *See supra* notes 41–49 and accompanying text.

420. The proposed override of *Gross* was sponsored primarily by Democrats in both the House and the Senate. *See* Protecting Older Workers Against Discrimination Act, S. 1756, 111th Cong. (1st Sess. 2009) (listing as sponsors Senators Harkin, Leahy, Durbin, Specter, Kohl, Schumer, Franken, Sanders, Brown, Cardin, Merkley, Feinstein, Dodd, Boxer, Lautenberg, Kaufman, and Nelson of Florida); Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (1st Sess. 2009) (listing as sponsors Representatives George Miller of California, Conyers,

it would also make it easier for plaintiffs in "reverse discrimination suits," such as challenges to affirmative action programs or diversity-based hiring, to establish unlawful discrimination,[421] and here the typical ideological alignment is reversed. But the more general point is that in other contexts, or at other times, Congress could be more conservative than the Court, and applying this rule could support interpretations more typically favored by conservatives than by liberals.

Acknowledging that ideology can play a role in judicial interpretation does help underscore that the rebuttable presumption I advocate still places an onus on Congress to draft overrides clearly and to consider strategies that minimize the risk that a hydra problem develops. The more concretely Congress defines the scope of an override, the more completely it controls judicial interpretation. This is true whether or not courts adopt (or Congress enacts legislation requiring) the interpretive rule I advocate, although they are obviously more essential in the absence of the approach I propose. As a threshold matter, congressional drafters should obviously be aware that courts may ascribe little or no significance to statements in committee reports or other legislative history. Therefore, even if it would be institutionally difficult to amend all potentially affected statutes, it would be prudent for Congress to enact findings and purposes that explicitly state an intent to change the interpretation of similar language in related statutes or that explicitly repudiate prior judicial interpretations. Use of definitional amendments rather than the addition of separate substantive provisions might ameliorate the problem (although courts might still consider the absence of a comparable definition in a related statute grounds to infer that Congress did not intend the definition to apply to other statutes).[422] A more radical departure from current practice would be to override a prior judicial interpretation by enacting a joint resolution that does not modify the preexisting statutory language but clearly—in language passed by both houses and signed by the President—indicates Congress disagrees with the

---

Andrews, Nadler of New York, Courtney, Chu, Clarke, Holt, Hare, Kildee, Loebsack, Sablan, Scott of Virginia, Hirono, Woolsey, Bishop of New York, and Sestak).

421. *Cf.* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281–83 (1976) (establishing that "reverse" racial discrimination claims brought by whites are analyzed under the same burden-shifting framework as claims brought by racial minorities).

422. This could be addressed to some extent by enacting a stand-alone definition applicable to multiple statutes, but that could lead to difficulties similar to those posed by the blanket amendment considered to override *Gross*. *See supra* text accompanying notes 372–77. There is a separate risk that addressing a specific aspect of the meaning of a more general term would be considered a purposeful exclusion of other potential meanings of the same general term. For example, as I have discussed elsewhere, courts have reasoned that Congress's failure to explicitly mention breastfeeding when it amended Title VII to add a definition of *sex* as including "pregnancy, childbirth, or related medical conditions"—an amendment enacted to override a Supreme Court decision holding that pregnancy discrimination was not sex discrimination—is reason to conclude that Title VII does not prohibit discrimination on the basis of breastfeeding, even though that also might plausibly be included in a more general understanding of discrimination because of "sex." Widiss, *supra* note 12, at 551–56.

prior interpretation and sets forth a different (plausible) interpretation of the preexisting language; this would only be effective, however, if courts in turn understood such a resolution as compelling the overruling of the disfavored precedent and requiring reinterpretation of the preexisting language in the manner Congress dictates.[423] To some extent, these drafting strategies could be used in place of the rule of interpretation I advocate; note, however, that most would still be ineffective under the reasoning applied in *Gross*. Because of this concern, I believe these drafting strategies would be more effective as supplements to the rule I propose than as alternatives to it.[424]

Finally, it is crucially important to recognize that once the text of an override is part of a statute, it informs future interpretation of the statute more generally. Accordingly, enactment of an override and corollary presumptions of so-called meaningful variations stemming from an override may have entirely unforeseen consequences. For example, lower courts have long been divided regarding how to assess employer liability for decisions made in reliance on reports or evaluations by biased subordinates (typically known as "cat's paw" liability).[425] In the past two decades, a wide split among circuits developed regarding the standard that should be applied under

423. This is particularly complicated for lower courts that cannot legitimately ignore precedent from a higher court that they consider on point. *See* Widiss, *supra* note 12, at 572–74 (fleshing out this concern and arguing that lower courts should not be bound by overridden aspects of precedent). Additionally, enactment of a resolution "clarifying" the meaning of prior legislation could raise complicated retroactivity questions. *See Legislation—Declaratory Legislation*, 49 HARV. L. REV. 137, 138 & n.3 (1935) (collecting now extremely dated case law applying such declarations prospectively and asserting retroactive application would raise constitutional concerns). The Supreme Court has since stated that Congress may generally make an override retroactive without violating the Constitution but that Congress must enact statutory language expressing this intent clearly. Rivers v. Roadway Express, Inc., 511 U.S. 298, 313 (1994). Courts presumably would likewise conclude that a joint resolution that was intended to supersede a prior judicial interpretation and indicate a different interpretation for preexisting statutory language would be applied prospectively only, unless the resolution included language explicitly making the resolution retroactive.

424. This is also important to ensure that overrides Congress enacted prior to *Gross* are effective. In some sense, *Gross* is a result of what could be characterized as a bait and switch on Congress regarding the significance courts will ascribe to legislative history and the inferences that would be drawn from "neglect[ing]" to amend all other potentially relevant statutes. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009); *cf.* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 85 (1994) (describing significant changes in courts' statutory interpretation canons as having a "bait and switch" quality).

425. *See* EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 484 (10th Cir. 2006) ("In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decision-making power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action."); Sara Atherton Mason, Note, *Cat's Paw Cases: The Standard for Assessing Subordinate Bias Liability*, 38 FLA. ST. U. L. REV. 435, 436–37 (2011) ("The cat's paw principle derives from a fable . . . in which a monkey convinces a gullible cat to pull chestnuts from a hot fire. . . . [W]ith subordinate bias liability, the monkey is the person who convinces the decisionmaker, the cat, to unknowingly engage in employment discrimination." (footnotes omitted)).

a variety of employment discrimination statutes.[426] In March 2011, the Supreme Court first analyzed the question in *Staub v. Proctor Hospital*.[427] This case arose under the Uniformed Services Employment and Reemployment Rights Act (USERRA), an Act that, like Title VII, includes explicit motivating-factor language.[428] The Court relied heavily on the motivating-factor language to hold that liability could be established if the biased report was a "proximate cause" of the decision, even if the ultimate "decisionmaker's exercise of judgment is *also* a proximate cause of the employment decision."[429] Prior circuit court decisions had not deemed the existence of motivating-factor language in Title VII, or its absence in the ADEA and ADA, significant in their analysis of cat's paw claims; the decisions had instead discussed basic agency principles implicit in all employment discrimination statutes and suggested that a consistent standard should be employed.[430] But, post-*Staub*, two circuit courts have highlighted this distinction in holding that a higher standard applies to cat's paw claims under the ADEA.[431] Similar analysis could be done with respect to the ADA or any other statute that lacks explicit motivating-factor language.[432] On the other hand, some courts have readily applied *Staub* to statutes that lack explicit motivating-factor language,[433] further confusing the already muddy waters left behind by *Gross*. Such issues will continue to arise unless and until courts adopt a more realistic and productive approach to interpreting overrides.

---

426. *BCI Coca-Cola*, 450 F.3d at 484–85 (collecting cases demonstrating the variety of standards applied by various circuits).

427. 131 S. Ct. 1186 (2011).

428. 38 U.S.C. § 4311(c)(1) (2006). USERRA probably includes this language because it was enacted in 1994, when the 1991 CRA and the fight over *Price Waterhouse* were still fresh in congressional memories. Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2, 108 Stat. 3149, 3153 (codified as amended at 38 U.S.C. § 4311(c)(1) (2006)).

429. *Staub*, 131 S. Ct. at 1192.

430. *See, e.g.*, Russell v. McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir. 2000) (collecting and discussing "cat's paw" cases that analyze derivative liability under the ADEA, Title VII, and § 1981 in terms of agency principles and not mentioning differences in language among these statutes).

431. *See* Wojtanek v. Dist. No. 8, Int'l Ass'n of Machinists & Aerospace Workers, 435 F. App'x 545, 549 (7th Cir. 2011) (holding that in cat's paw cases under the ADEA, a subordinate's age-related bias must be "the *determinative* factor—not just a motivating factor" in the decision to take adverse action against the plaintiff); Simmons v. Sykes Enters. Inc., 647 F.3d 943, 949–50 (10th Cir. 2011) (holding that the plaintiff must prove that a subordinate's age-related animus was the but-for cause of the ultimate decision).

432. *See* Mark J. Chumley, *Cat's Paw Liability Arguably Not an Option in ADA Cases in the 6th and 10th Circuits*, KEATING MUETHING & KLEKAMP PLL (Mar. 18, 2011), http://www.kmklaw.com/assets/pdf/blogpost_164.pdf (arguing that in addition to ADEA claims, "ADA claims in the Sixth and Tenth Circuits should also be outside the [*Staub*] decision since they require that a disability be the 'sole reason' for adverse employment action").

433. *See, e.g.*, Ordogne v. AAA Tex., LLC, No. H-09-1872, 2011 WL 3438466, at *1, *4 (S.D. Tex. Aug. 5, 2011) (applying *Staub* in a § 1981 case); Blount v. Ohio Bell Tel. Co., No. 1:10-CV-01439, 2011 WL 867551, at *1, *6 (N.D. Ohio Mar. 10, 2011) (applying *Staub* in a FMLA case).

## VII. Conclusion

Overrides are expected to play a central role in ensuring that Congress has the power to ascribe meaning to statutory text. The approach taken by the Supreme Court in *Gross* undermines this expectation. The Court interprets Congress's "neglect[ing]" to amend statutes other than the statute actually interpreted in the overridden precedent as a license to disregard both likely congressional intent and prior Court precedent.[434] The Court's putative expectation that Congress must amend all other statutes to which a disfavored application might be applied is unreasonable. Rather than serving as a tool for promoting legislative supremacy, enactment of an override, as interpreted by the Court in *Gross*, has the perverse effect of aggrandizing the judicial role. Courts should instead employ a rebuttable presumption that enactment of an override calls for fresh interpretation of preexisting language in line with the meaning signaled by Congress, so long as the language can plausibly bear that interpretation. This approach would better respect the institutional capabilities of courts and Congress. It furthers the promise of legislative supremacy and the independent objectives of efficient, consistent, and fair development of statutory law.

434. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009).