

Is There a Madness to the Method?: Torts and Other Influences on Employment Discrimination Law

CHARLES A. SULLIVAN*

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I. INTRODUCTION

There is an old joke, popularized by Stephen Hawking in *A Brief History of Time*, which involved a well-known scientist who gave a lecture on astronomy:

He described how the earth orbits around the sun and how the sun, in turn, orbits around the center of a vast collection of stars called our galaxy. At the end of the lecture, a little old lady at the back of the room got up and said: “What you have told us is rubbish. The world is really a flat plate supported on the back of a giant tortoise.” The scientist gave a superior smile before replying, “What is the tortoise standing on?” “You’re very clever, young man, very clever,” said the old lady. “But it’s turtles all the way down!”¹

The question before us is the influence of tort law on the interpretation of the anti-discrimination statutes, and I’ll spare the reader an historical exegesis that might lead us to conclude that it’s torts all the way down.² However maybe the broader point is that it’s *law* all the way down, and that our current

* Andrea J. Catania Endowed Professor of Law, Seton Hall Law School. B.A., Siena College, 1965; LL.B., Harvard Law School, 1968. I thank my coauthors, Michael J. Zimmer and Rebecca Hanner White for their graciousness in permitting me to draw on their work. I am especially appreciative to Brian Sheppard for bearing with my rambles on this subject and to Mike Zimmer for his suggestions.

¹ STEPHEN W. HAWKING, *A BRIEF HISTORY OF TIME* 1 (1988).

² What we now call contract law (whose origins trace back to the writ of assumpsit, creating a more general avenue to enforce promises than the writs of covenant and debt) developed out of what we now call tort law (the writ of trespass on the case). See 1 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 1.6, at 17–22 (3d ed. 2004) (explaining how assumpsit developed out of the trespass on the case, first reaching “misfeasance” in the performance of one’s undertaking and ultimately reaching “nonfeasance”).

system of categorizing legal doctrines into neat subject matters may be due more to our need to teach law students pieces of the so-called seamless web than to any natural cleavages in intellectual discourse.³

In other words, any legal inquiry can draw on only a limited number of concepts, and there is a natural tendency to analogize to concepts with which the attorney or judicial mind is familiar. It may be that the tendency can be overdone, but it is not because “torts” (or any other system of doctrine) has nothing to offer outside the sphere for which it was invented. The real problem for interpreting the anti-discrimination statutes is not that the Court is looking to tort law; rather, the problems are the Court’s choice of what tort law to look to and its failure to adapt tort doctrine to the goals of the anti-discrimination laws.

II. IS THERE A TORT PROBLEM?

Admittedly, tort law seems to have a special resonance in these inquiries, although, as will be developed, there is a strong argument to be made that judicial borrowing from agency law is at least as problematic.

In any event, as developed in the scholarship,⁴ recent decisions have looked to tort principles of causation for the link between the prohibited

³There is, admittedly, a core to Contracts (enforcing promises) and to Torts (unhelpfully defined as a civil wrong that is not a breach of contract), but the doctrinal “packages” reflected in those terms are blurred and contested, certainly at the margins. While there are Restatements of Contract and of Torts (or at least, most recently, of pieces of Torts), there are also Restatements—some would say mishmashes—of less doctrinal subjects. Most obviously, the pending Restatement of Employment Law (Proposed Final Draft, April 18, 2014) comprises both pure contracts (e.g., oral and written promises of job security, noncompetition agreements.) and pure torts (public policy tort, defamation, invasion of privacy). See *generally* RESTATEMENT (THIRD) OF EMPLOYMENT LAW (Proposed Final Draft 2014). But it also embraces doctrines of uncertain provenance: is the duty of loyalty a kind of implied-in-fact contract or something akin to negligence’s duty of care? And it does not take much excavation to show that, even in the iconic Restatements, there were efforts to patrol the borders of the discipline marked out by the American Law Institute (ALI). One example is the debate whether “promissory estoppel” was “contractual” or was better viewed as a species of quasi-contract. See 4 AM. LAW INST., PROCEEDINGS AT FOURTH ANNUAL MEETING, app. at 112 (1926).

MR. COUDERT: Could not an injustice be done by placing these in the category of quasi contracts rather than trying to twist the facts into a contract in order to do justice where it won’t always work out justice?

MR. WILLISTON: What has that to do with the cases I have cited? They are not based on quasi contract, they are based on the idea of enforcing the promises that are made.

Id.

⁴See, e.g., Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 34; Sandra F. Sperino, *The Tort Label*, 66 U.

motive and the adverse employment action,⁵ and, more radically, transplanted “proximate cause” from negligence law to the intentional “tort” of disparate treatment discrimination.⁶ In both cases, the doctrines were deployed to limit liability. However, we should not forget the dog that didn’t bark—there are numerous employment discrimination doctrines that do not derive from tort law,⁷ and tort analysis has sometimes been used to assist plaintiffs. For example, Professor William Corbett argues that the *McDonnell Douglas* structure, whatever its currently recognized limitations, is a kind of *res ipsa loquitur* analysis that may have been invoked to improve plaintiffs’ proof prospects.⁸ And the Lilly Ledbetter Fair Pay Act⁹ can be thought of as having deployed the “discovery” rule from tort law¹⁰ to expand the limitations periods of the anti-discrimination statutes.¹¹

Whether this makes employment discrimination tort-centric,¹² I leave to others, but looking to tort law is not limited to the anti-discrimination statutes. After all, the Court sometimes speaks of “statutory torts,”¹³ and often of

FLA. L. REV. 1051, 1052–53 (2014); Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1432–33 (2012).

⁵ See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177–78 (2009); see also *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2451–52 (2013) (applying *Gross* analysis to retaliation cases under Title VII).

⁶ *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1192, 1194 (2011).

⁷ Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527, 539–40 (2013) (“Despite recent talk of the tortification of Title VII, the ban against individual liability stands as a testament to the un-tort-like status and history of Title VII.”) (footnote omitted). Further, sexual harassment, for example, is the only “tort” for which the tortfeasor is not liable even though his or her employer is. See *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998).

⁸ William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 493 (2013) (“If the Court believed that employment discrimination was common enough that judges were willing to infer discrimination from a flimsy prima facie case and a showing of pretext, then *res ipsa* should have functioned well enough in helping plaintiffs present cases based on circumstantial evidence.”).

⁹ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

¹⁰ *E.g.*, *Gefre v. Davis Wright Tremaine, LLP*, 306 P.3d 1264, 1274 (Alaska 2013) (“The common-law discovery rule tolls the running of an applicable statute of limitations ‘[w]here an element of a cause of action is not immediately apparent.’ It ‘developed as a means to mitigate the harshness that can result from the [accrual] rule’s preclusion of claims where the injury provided insufficient notice of the cause of action to the plaintiff.’”) (citations omitted).

¹¹ See generally Charles A. Sullivan, *Raising the Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 549–54 (2010).

¹² See, *e.g.*, Michael J. Zimmer, *Hiding the Statute in Plain View: University of Texas Southwestern Medical Center v. Nassar*, 14 NEV. L.J. 705, 713–22 (2014).

¹³ The first instance is Justice Brandeis in *Bradford Electric Light Co. v. Clapper*, and his language drew an explicit parallel: “Workmen’s compensation acts are treated, almost universally, as creating a statutory relation between the parties—not, like employer’s

“constitutional torts,” the latter when it is describing private causes of action seeking damages for violations of constitutional provisions, either in *Bivens* claims¹⁴ or in § 1983 actions.¹⁵ It could as easily speak of “constitutional claims,” but the tort label is frequently used by the Supreme Court and is pervasive in the commentary.¹⁶ Admittedly, the tort analogy in this context seems often invoked to justify some limitation on the cause of action, often by recognizing an immunity.¹⁷

liability acts, as substituting a statutory tort for a common law tort.” 286 U.S. 145, 157–58 (1932). For later uses describing either state or federal claims, *see* *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 769 n.15 (2005) (“The state cases cited by the dissent that afford a cause of action for police failure to enforce restraining orders vindicate state common-law or statutory tort claims—not procedural due process claims under the Federal Constitution.”) (citations omitted); *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 863 (1982) (White, J., concurring) (explaining that § 43 of the Lanham Act “goes beyond § 32 in making certain types of unfair competition federal statutory torts”) (quoting *Ives Labs., Inc. v. Darby Drug Co.*, 601 F.2d 631, 641 (2d Cir. 1979) (internal quotation marks omitted)); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 419 (1953) (Jackson, J., dissenting) (“This decision seems to me to so confuse maritime law with common and statutory tort law as to destroy the integrity of the former as a separate system based on the peculiarities and risks of seagoing labor.”).

¹⁴The Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* recognized a private right of action against federal officers for victims of a Fourth Amendment violation. 403 U.S. 388, 397 (1971). It did not use the term “constitutional tort,” but that label has since been often applied to *Bivens*-type claims. *See* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 73 (2001). Such “direct” constitutional suits have been recognized under the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228, 230 (1979), and the Cruel and Unusual Punishments Clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14, 17 (1980). As the *Malesko* Court wrote, “[s]ince *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants.” *Malesko*, 534 U.S. at 68. Further, a number of the Court’s decisions in the *Bivens* line have limited the reach of the doctrine. *See* *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 477–78 (1994) (repeatedly using the term “constitutional tort” while disallowing a *Bivens* claim against a federal agency); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (holding that improper denial of Social Security disability benefits, even if resulting from violations of due process by government officials, did not give rise to a *Bivens* action in light of the “elaborate remedial scheme devised by Congress”).

¹⁵*See* *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“Congress adopted this common-law system of recovery when it established liability for ‘constitutional torts.’”); *Imbler v. Pachtman*, 424 U.S. 409, 417, 417 n.10 (1976) (explaining that §1983 was intended to create “a species of tort liability” in favor of persons who are deprived of “rights, privileges, or immunities secured” to them by the Constitution).

¹⁶*E.g.*, John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 262 (2000); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 279, 284 (2010); Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 10 (1980).

¹⁷*See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982) (establishing qualified immunity for presidential aides); *Imbler*, 424 U.S. at 427–31 (recognizing prosecutorial

That said, neither the description of the cause of action as tort-like nor the resort to insights provided by tort law strikes me as, *per se*, problematic. In approaching statutory enactments, like the anti-discrimination laws, the courts have a host of concepts to draw on in interpreting statutory language, which results in multiple possible readings. The question is not whether tort law provides a source of inspiration but, rather, how apt the application is. Justice Souter captured my view in *Hartman v. Moore*, a case involving alleged retaliatory prosecution, with the issue being “whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it).”¹⁸ He wrote:

As for the invitation to rely on common-law parallels, we certainly are ready to look at the elements of common-law torts when we think about elements of actions for constitutional violations . . . but the common law is best understood here more as a source of inspired examples than of prefabricated components of *Bivens* torts.¹⁹

He then applied a functional analysis closely linked to the rationale for the violation in choosing to require a plaintiff to prove that the prosecution lacked probable cause as an element of the claim.²⁰ While not a plaintiff-friendly result, the analysis was not a blind application of proffered tort analogies. Thus, I take more seriously the critiques of the *how* the law of torts is applied than looking to torts in the first place.²¹

III. OR A STATUTORY INTERPRETATION PROBLEM?

But resort to tort (or contract or antitrust or anything else), is permissible (in theory at least) only when Congress has not carefully enough defined the parameters of the inquiry. In some cases, Congress may constrain the judiciary—either adopting in some relatively explicit way a concept used elsewhere or defining a term so precisely that competing definitions are excluded. But rarely does Congress speak so clearly, leaving the courts free to pick and choose among potentially applicable concepts. Some seem so

immunity in a § 1983 suit); *see also* *Carey v. Phipps*, 435 U.S. 247, 266–67 (1978) (requiring a showing of actual damages from a denial of due process).

¹⁸ *Hartman v. Moore*, 547 U.S. 250, 258 (2006).

¹⁹ *Id.* (citation omitted).

²⁰ *Id.* at 265–66 (“In sum, the complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically in defining the elements of the tort. Probable cause or its absence will be at least an evidentiary issue in practically all such cases. Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff’s case, and we hold that it must be pleaded and proven.”).

²¹ *See* Chamallas, *supra* note 7, at 539–41; Corbett, *supra* note 8, at 492–506.

pervasive that there can be little doubt that Congress “intended” them to apply. Others are fairly contestable.

An example might help. Take the remedies section, § 706(g)(1), of Title VII, which, as originally enacted, provided:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.²²

This passage bristles with terms whose meaning could be viewed as being drawn from earlier law. The court “may enjoin” the proven unlawful practice, which draws on the equity law of injunctions. But proof of a violation of whatever right was at issue did not, in equity, necessarily lead to an injunction,²³ and Congress’s use of “may” (rather than “must”) reinforces the notion that the decision to enjoin is not automatic.

Further, the language clearly authorizes a court to order a defendant to do something, not merely to cease doing something. The power to order positive relief is made even clearer by the reference to “reinstatement or hiring of employees.” Like Title VII, equity allowed both mandatory and prohibitory orders,²⁴ but equity had generally refused to specifically enforce personal service contracts. While most of the decisions in this regard came from refusals to order employees to specifically perform,²⁵ there were cases rejecting suits requiring employers to keep employees in service.²⁶ Thus, Title VII’s express authorization of reinstatement or hiring may have been critical to ensure that such relief is available. However, the statute does not tell us *when* hiring or reinstatement is appropriate, which would seem to permit—if not encourage—courts to look to more general equitable principles for guidance.

²² 42 U.S.C. § 2000e-5(g)(1) (2012). The 1972 Amendments added some provisions, including authorization of “any other equitable relief as the court deems appropriate,” providing that “[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge” of discrimination with the EEOC. *Id.* The 1991 amendments moved the amended language into subsection (g)(1) when Congress added (g)(2) to the paragraph. *See id.* § 2000e-5(g).

²³ *See* 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.9(2), at 228–30 (2d ed. 1993).

²⁴ *Id.* § 2.9(1), at 224.

²⁵ 3 DOBBS, *supra* note 23, § 12.22(2), at 496–98.

²⁶ *Id.* § 12.21(4), at 489–90. Even today, fifty years after Title VII’s enactment, equity may well be barred from requiring the employment of individuals when there is no statutory violation. *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW §§ 9.04, 9.06 (Proposed Final Draft 2014).

In any event, because reinstatement can be “with . . . backpay,”²⁷ Congress also authorized a monetary remedy—although the remedy seems limited, else Congress would have used “compensatory damages” rather than backpay.²⁸ But what is “backpay” in the first place? After fifty years, the answer is fairly clear;²⁹ however, the early Title VII courts had to look somewhere for guidance, and an obvious source is the National Labor Relations Act (NLRA), given that the remedial language of Title VII somewhat tracks the remedies provisions of the NLRA. These provisions authorize the National Labor Relations Board (Board), upon finding a violation, to issue an order requiring the violator “to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act].”³⁰ Perhaps Congress wanted the courts to look to NLRA’s jurisprudence over the previous thirty years of Board and court decisions in determining whether backpay under Title VII includes straight salary, benefits, overtime, vacation pay, or all of the above.³¹ Or perhaps there are differences between the NLRA and Title VII that counsel against such borrowing.³²

²⁷ 42 U.S.C. § 2000e-5(g).

²⁸ Congress presumably chose backpay rather than compensatory damages to maximize the chances that the award could be made by a judge rather than a jury: In 1964, entrusting enforcement to Southern juries might well have resulted in effective nullification of the statute. See Matthew F. Davis, Comment, *Beyond the Dicta: The Seventh Amendment Right to Trial by Jury Under Title VII*, 38 U. KAN. L. REV. 1003, 1023–24 (1990). Indeed, there was some debate about how “automatic” backpay awards could be without triggering the right to a jury trial: the less discretionary such awards are, the more they sound like damages that should be awarded by a jury. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 442 (1975) (Rehnquist, J., concurring) (“But precisely to the extent that an award of backpay is thought to flow as a matter of course from a finding of wrongdoing, and thereby becomes virtually indistinguishable from an award for damages, the question (not raised by any of the parties, and therefore quite properly not discussed in the Court’s opinion), of whether either side may demand a jury trial under the Seventh Amendment becomes critical.”). The issue largely disappeared when the Civil Rights Act of 1991 made compensatory and punitive damages available in Title VII disparate treatment suits, which necessarily entailed the right to a jury trial. See 42 U.S.C. § 1981a (1991). It remains a possibility for disparate impact cases, which were not reached by this amendment, and for which backpay remains the central monetary remedy.

²⁹ See CHARLES A. SULLIVAN & LAUREN M. WALTER, *EMPLOYMENT DISCRIMINATION LAW & PRACTICE* § 13.09, at 853–55 (2009).

³⁰ 29 U.S.C. § 160 (2012). In contrast, the Fair Labor Standards Act used the term “unpaid minimum wages.” 29 U.S.C. § 216 (2012).

³¹ See, e.g., *Rasimas v. Mich. Dep’t of Mental Health*, 714 F.2d 614, 625–26 (6th Cir. 1983) (looking to NLRA precedents to decide a Title VII case); see also Robert S. Fuchs & Henry M. Kelleher, *The Back-Pay Remedy of the National Labor Relations Board*, 9 B.C. INDUS. & COM. L. REV. 829, 831–35 (1968) (discussing the history of the NLRA’s backpay remedy).

³² The Board is accorded significant discretion in awarding backpay, See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969) (“In fashioning its remedies . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy

In any event, Title VII also tells us that, whatever backpay is, “[i]nterim earnings or amounts earnable with reasonable diligence” must be deducted.³³ This evokes some version of the doctrine of “mitigation of damages” or “avoidable consequences,” which is familiar not only from contracts and tort law but also across the range of legally-redressable wrongs³⁴ but which means numerous sources can be looked to for guidance. However, Congress did not speak generally of “mitigation”; instead it spoke of “interim earnings or amounts earnable with reasonable diligence.” Does the choice to avoid a common law term suggest a narrower meaning? Maybe a Title VII plaintiff is not required to generally mitigate but only to use “reasonable diligence” to earn replacement compensation. Or maybe there is no difference between the two formulations.

Interestingly, the NLRA did not speak explicitly to the mitigation principle, but, after some confusion as to the extent of the duty, the law basically took the “earned or earnable” approach.³⁵ In light of this history, perhaps Congress added the mitigation requirement to Title VII precisely to avoid a similar interpretive problem under the new statute. Or perhaps its grafting of explicit mitigation language on Title VII can be read to suggest that Congress was not looking to prior NLRA precedents as necessarily establishing the meaning of Title VII. In that case, it would be important for Congress to “lock in” doctrines that it did not want to leave to the courts’ judgment. Indeed, later amendments to § 706(g) provided more constraints on courts in this regard.³⁶

And what about the “collateral source rule”? The law of torts in 1964³⁷ would not have credited to a proven tortfeasor’s account any recoveries the plaintiff had from an “independent source,” such as unemployment

must therefore be given special respect by reviewing courts.”). Title VII suits do not involve an adjudicating agency, which might suggest that the law developed under the NLRA is not necessarily apposite.

³³ 42 U.S.C. § 2000e-5(g)(1) (2012).

³⁴ 1 DOBBS, *supra* note 23, § 3.9, at 380 (“Minimizing damages rules apply in all kinds of cases, including contract, tort, and statutory claims.”) (footnotes omitted).

³⁵ See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197–98 (1941) (striking down a Board policy of not looking to amounts that could have been earned as mitigating the backpay amount: “Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Because only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred.”).

³⁶ See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075 (codified as amended in scattered sections of 42 U.S.C.). The addition of § 703(m), providing for “motivating factor” liability, was counterbalanced by the simultaneous addition of what is now § 706(g)(2), limiting plaintiff’s remedies when defendant can establish that it would have made the same decision even had the prohibited consideration not been a motivating factor. *Id.* § 107(b).

³⁷ The doctrine was also applied in contract cases. See 3 DOBBS, *supra* note 23, § 12.21(2), at 484.

insurance.³⁸ In the Title VII context, where lost backpay is often offset by unemployment insurance, the question naturally arises whether the amounts so recovered should be credited to the defendant. Section 706 does not address the collateral source question explicitly (although maybe “earnings” or “earnable” suggests a statutory incorporation of the collateral source rule because such recoveries are not usually viewed as “earned.”),³⁹ but looking to tort law here would be plaintiff-friendly.⁴⁰ In fact, the courts are split on the question under Title VII, but they generally do not deduct unemployment compensation from plaintiffs’ backpay recovery.⁴¹

I won’t push this excursion much further. Enough has been said to show that the statutory language of § 706(g) is susceptible to a range of interpretations, some of which *allow* the courts to look to other areas of the law for the correct answer.⁴² But the examples also make clear that various court responses can be justified by that language because few interpretations can be said to be mandated by the statute. For example, it seems hard to argue that Congress was so clear in its formulation that the judiciary is *required* to adopt NLRA interpretations of backpay as controlling under Title VII. And the avoidance of the traditional “mitigation” language or any direct reference to collateral sources suggests that the courts are free to fashion their own remedial schemes tailored to the purposes of Title VII. That, however, does not mean that they may not look to developments in other areas for guidance.

IV. ASKING THE RIGHT QUESTION

If you are wondering where I’m going, which is a fair question, it’s simply this: asking whether tort law (or any other branch of the law) has relevance to interpreting the anti-discrimination laws is the wrong question. Of course it

³⁸ See 1 DOBBS, *supra* note 23, § 3.8(1), at 372–76.

³⁹ Further, developments since 1964 eroding the collateral source rule in torts could be argued to be irrelevant because Congress should be taken to have looked to the rule as it existed in 1964, not to some evolving version that was unforeseeable at the time.

⁴⁰ However, one could argue that the unemployment insurance is not really an “independent” source because the employer typically contributes to the system.

⁴¹ See Wyatt R. Jansen, *Impermissible Windfalls?: Unemployment Insurance, Back Pay, and the Two Classes of Title VII Plaintiffs*, 18 CONN. INS. L.J. 307, 309 (2011) (noting that while no circuit requires that such benefits be deducted, and some courts of appeals hold that unemployment insurance benefits must be ignored, other circuits “allow[] district court judges to consider such benefits in their sound discretion” In the “discretionary” circuits, district courts tend to consider state subrogation rules as part of their analysis.).

⁴² Assuming that Congress has sub silentio referred the courts to the meaning of a term at common law, there is also the question of whether Congress intended that meaning to be fixed at the time of the referent enactment or wanted it to be able to change as the common law changed. The logic of some of the Court’s discussions suggests the former. See *infra* note 69 and accompanying text. In any given situation, however, Congress could have intended that a term used in a statute evolve with the developments in the area from which it is transplanted.

does—or at least may. The real question is when does a statute *require* or *permit* a court to thumb through the law books looking for an analog to answer an interpretive question. And an equally important question is what limits might be placed on the potential analogs.

In turn, this requires us to choose a theory of statutory construction—and there are many. Indeed, it is worse than that: as Professor Abbe Gluck has ably demonstrated, the Supreme Court—although it regularly deploys theories of statutory construction—does not seem to view its precedents as binding with respect to its methodology.⁴³ So while it may be true that we are all textualists now⁴⁴ (at least in the sense that we avoid textualist arguments at our peril), it is not so clear what stripe of textualism is meant,⁴⁵ and, in any event, a Court that can muster five votes for a purposive interpretation of a particular statute can adopt such a rule without viewing itself as “overruling” any prior decision.⁴⁶

⁴³ See Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 759 (2013); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1901–02 (2011).

⁴⁴ William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1090 (2001) (“We are all textualists.”). “Textualism” is usually used in contradistinction to “purposivism.” James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 159–60 (2008). The former, as its name suggests, focuses primarily or exclusively on the text and structure of the statute to ascertain its meaning; in contrast, purposivism looks also to the purposes of Congress in enacting the law. *Id.* A pure textualist might never look to legislative history; a purposivist could easily do so. *See id.* at 122 (arguing that liberal justices have moved away from use of legislative history because of Justice Scalia’s strong aversion to it); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1887 (2008) (“[I]t appears that several Justices—clearly Justices Scalia and Thomas, and perhaps Chief Justice Roberts and Justices Alito and Kennedy—on the Supreme Court now consider themselves textualists.”). *But see* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006) (“Textualism has outlived its utility as an intellectual movement. . . . Textualists have been so successful discrediting strong purposivism, and distinguishing their new brand of ‘modern textualism’ from the older, more extreme ‘plain meaning’ school, that they no longer can identify, let alone conquer, any remaining territory between textualism’s adherents and nonadherents.”); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 733 (2010) (“Textualists have made an important contribution by forcing statutory interpreters to take the enacted text seriously; but they have persuaded few, if any, trained in the old school that, as the directive force of the statutory text attenuates, one can dispense with a comprehensive consideration of legislative purpose in determining statutory meaning.”).

⁴⁵ See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010) (arguing that many state courts now use a form of “modified textualism,” which ranks interpretive tools in a “strict hierarchy [that] emphasizes textual analysis (step one); limits the use of legislative history (only in step two, and only if textual analysis alone does not suffice); and dramatically reduces reliance on the oft-used policy presumptions, the ‘substantive canons’ of interpretation (only in step three, and only if all else fails).”).

⁴⁶ See *Dorsey v. U.S.*, 132 S. Ct. 2321, 2335 (2012).

Statutory interpretations are precedential, but the methodology of interpreting is not.

Perhaps the closest thing to an answer we can hope to find is more-or-less definitive evidence that Congress intended to adopt (or reject) a particular legal doctrine when it passed an anti-discrimination law. This is most apparent when Congress overrides a court decision,⁴⁷ thus providing strong evidence of what it did not want the law to mean (at least prospectively).⁴⁸ But it is rare to find that Congress incorporated other laws by reference. Some examples do exist—an obvious one is the ADA’s express incorporation of Title VII’s “powers, remedies, and procedures.”⁴⁹

A more dramatic and troubling “incorporation by reference” example is the Court’s conclusion that the various employment discrimination statutes, indeed, almost all federal employment-related statutes, reach only “employees” as the common law of agency would have viewed that term—because that is what Congress must have intended when it used the term.⁵⁰

⁴⁷In the employment discrimination context, enactments include the Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (2012)) (passed to override *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)). See Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 962–63 (2013); see also Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.) (passed to overturn a number of restrictive Supreme Court decisions concerning Title VII); Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 42 U.S.C.) (passed to override Supreme Court decisions restricting the reach of the ADA); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 and 42 U.S.C.) (passed to override *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); see also *supra* text accompanying notes 9–11.

⁴⁸Even in this setting, there has been some dispute as to the extent to which an override should be taken to apply. See Charles A. Sullivan, Response, *The Curious Incident of Gross and the Significance of Congress’s Failure to Bark*, 90 TEX. L. REV. SEE ALSO 157, 158 (2012); Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 513 (2009) [hereinafter Widiss, *Shadow Precedents*]; Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 860–61 (2012).

⁴⁹42 U.S.C. § 12117 (2012) (“The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.”). Even this language, however, has generated controversy. See *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 319, 340 (6th Cir. 2012) (en banc) (finding Title VII’s mixed-motive causation standard not to be a “power, remedy, or procedure”).

⁵⁰There have been serious critiques of other judicial application of agency law principles to employment discrimination, especially in the harassment area. See, e.g., Paula

While this approach can be traced back to federal workers' compensation law, whose connection to torts is obvious, this use or misuse of other sources of law in approaching federal statutory construction is both dramatic and long-standing and as connected to agency law as to tort law.

The key case is *Nationwide Mutual Insurance Co. v. Darden*,⁵¹ which interpreted ERISA but has been generally followed as to federal employment statutes.⁵² *Darden* looked to *Community for Creative Non-Violence v. Reid* (*CCNV*),⁵³ a copyright case, for the proposition that “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms”⁵⁴ Applying that principle to the case before it, the *Darden* Court noted, “[i]n the past, when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine,” and then applied this interpretation to ERISA.⁵⁵

That, as we will see, was an overstatement, and at no point did the *Darden* Court mention a competing principle of interpretation—and an obvious one has been cited frequently by the Court: Absent any “indication to the contrary, words in a statute are assumed to bear their ‘ordinary, contemporary, common meaning.’”⁵⁶ So formulated, the canon has been cited eighteen times by the Supreme Court,⁵⁷ but the underlying notion of reading a statute according to its common (rather than some more technical) meaning goes back at least to 1828. In *Minor v. Mechanics Bank of Alexandria*, the Court stated that “[t]he ordinary meaning of the language, must be presumed to be intended [by the legislature], unless it would manifestly defeat the object of the provisions.”⁵⁸ Indeed, “ordinary meaning” as applied to statutes appears in the United States Reports more than 200 times,⁵⁹ and the Court frequently looks to ordinary

J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 519–20 (2002).

⁵¹ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 327–28 (1992).

⁵² *E.g.*, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444–45 (2003) (citing *Darden*, 503 U.S. at 322–23, in determining whether owners of a professional corporation were employees).

⁵³ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989).

⁵⁴ *Darden*, 503 U.S. at 322 (alteration in original) (citing *Reid*, 490 U.S. at 739).

⁵⁵ *Id.* at 322–23 (citing *Reid*, 490 U.S. at 739–40).

⁵⁶ *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 n.5 (2002) (defining the word “occur” for purposes of determining the start of the Title VII filing period).

⁵⁷ I conducted a WestlawNext search on July 19, 2013 in the Supreme Court database using the search terms: “ordinary, contemporary, common meaning.” The search resulted in eighteen hits. This language originated in *Perrin v. United States* where the issue was the meaning of bribery in a criminal statute. *See* 444 U.S. 37, 42 (1979).

⁵⁸ *Minor v. Mechs. Bank of Alexandria*, 26 U.S. (1 Pet.) 46, 64 (1828).

⁵⁹ I conducted a WestlawNext search on July 19, 2013 in the Supreme Court database using the search terms: ordinary meaning /p statute. The search resulted in 209 hits.

meaning without specifying that that is its methodology. For example, in the anti-discrimination context, *Sutton v. United Air Lines, Inc.* looked to ordinary usage to define “substantially” for purposes of determining whether a condition constituted a disability by “substantially limiting a major life activity.”⁶⁰

Indeed, even the casual reader of the United States Reports over the last two decades will be struck by how often an opinion begins its statutory analysis by citing one of many dictionaries,⁶¹ *Webster’s Third New International Dictionary* being a favorite.⁶² Often the definition verges on (or crosses over into) the pedantic.⁶³ Just last Term, the Court looked to that dictionary in two employment discrimination cases. In *University of Texas Southwestern Medical Center v. Nassar*, it cited a prior decision defining “because.”⁶⁴ And in *Vance v. Ball State University*, it looked to *Webster’s Third New International* to establish that “[i]n general usage, the term ‘supervisor’ lacks a sufficiently specific meaning to be helpful for present purposes.”⁶⁵

The resort to “general dictionaries” necessarily implies a preference for “ordinary meaning” over common law meaning, although, admittedly, the Court also often cites *Black’s Law Dictionary*,⁶⁶ which provides a blend of

⁶⁰ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490–91 (1999). The “ordinary meaning” canon, No. 6 in the Scalia and Garner structure, has been described as “the most fundamental semantic rule of interpretation.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (2012). It is subject to other canons, such as No. 53, the “Canon of Imputed Common-Law Meaning.” *Id.* at 320. But the authors are not very clear as to when No. 6 is trumped by No. 53 or vice versa, although they do recognize that “[n]ot always is it easy to determine whether ordinary meaning or specialized meaning applies.” *Id.* at 76.

⁶¹ See e.g., Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 *BUFF. L. REV.* 227, 228–30 (1999).

⁶² I conducted a WestlawNext search on July 19, 2013 in the Supreme Court database using the search terms: Webster’s Third New International Dictionary. The search resulted in 194 hits. The Westlaw Next search of “Oxford English Dictionary” garnered ninety-four hits. Justice Scalia and Bryan Garner offer a list of appropriate general and legal dictionaries, divided as to time periods relevant to the text to be interpreted. SCALIA & GARNER, *supra* note 60, app. A, at 415–24. In the Appendix, the authors view the Third International definition as “notoriously permissive,” *id.* at 418, and warn that it is “to be used cautiously because of its frequent inclusion of doubtful, slipshod meanings” *Id.* at 422.

⁶³ See e.g., *Bragdon v. Abbott*, 524 U.S. 624, 659–60 (1998) (Rehnquist, C.J., concurring in part and dissenting in part) (debating alternative definitions of “major” in the Americans with Disabilities Act’s use of “major life activity”).

⁶⁴ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2527 (2013) (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)).

⁶⁵ *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2444 (2013).

⁶⁶ I conducted a WestlawNext search on July 19, 2013 in the Supreme Court database using the search terms: Black’s Law Dictionary. The search resulted in 255 hits.

technical and general terms.⁶⁷ In any case, most of the references to *Black's* are complimented by a reference to a general-purpose dictionary.⁶⁸

“Employment” obviously had an “ordinary, contemporary, common meaning” when the relevant statutes were passed, which certainly did not focus on “control” or twelve factors. For example, if we look to the Court’s favorite dictionaries, “employment” has a number of definitions, but none that requires “control.” For instance, the *Oxford English Dictionary* defines employment as “[a] person’s regular occupation; a trade or profession,”⁶⁹ and “employee” as “a person employed for wages.”⁷⁰ As for *Webster’s Third New International Dictionary*, it defines the term employment simply as “work (as customary trade, craft, service, or vocation) in which one’s labor or services are paid for by an employer.”⁷¹

This, of course, raises the question why *Darden* (or *CCNV*) looked to a more technical, common law meaning. It can scarcely be enough that the term has both ordinary and technical meanings—the point of the “ordinary, contemporary, common meaning” canon is precisely to privilege the latter. Recently, in *Sekhar v. United States*,⁷² Justice Scalia suggested a more focused rationale for the canon, but one which does not explain the Court’s choice of canon regarding “employment.” Quoting both a Justice Frankfurter law review article,⁷³ and a prior decision,⁷⁴ he suggested that the common law definition was appropriate when “a word is obviously transplanted from another source” or is a “term of art” accumulating “the legal tradition and meaning of centuries of practice.” The term at issue in *Sekhar* was “‘extortion,’ one of the oldest crimes in our legal tradition,” but obviously this rationale for looking to the common law definition is inapplicable to “employment.”

⁶⁷ Indeed, it could scarcely be otherwise because, as this discussion shows, the “legal” meaning of a term is often also its ordinary meaning.

⁶⁸ There were 111 references to a *Webster’s Dictionary* and twenty-three references to the *Oxford English Dictionary* in those cases citing *Black’s Law Dictionary*. See *supra* note 62.

⁶⁹ *Employment Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/61378?redirectedFrom=employment#eid> (last visited Sept. 13, 2014), archived at <http://perma.cc/YLD4-683J>.

⁷⁰ *Employee Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/61374> (last visited Sept. 13, 2014), archived at <http://perma.cc/KH9D-2UBZ>.

⁷¹ *Employment Definition*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 743 (2002).

⁷² *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013).

⁷³ *Id.* (“[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947))).

⁷⁴ *Id.* (“Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”) (quoting *Morrisette v. United States*, 342 U.S. 246, 263 (1952))).

Nor does a search for the precedential origins of the agency meaning approach provide any real answers. As we saw, *Darden* looked to *CCNV*,⁷⁵ and *CCNV*, in turn, supported its conclusion with a variety of citations, several of which do not justify looking to the common law definition of “employee.” The earliest decision cited by *CCNV* was *Robinson v. Baltimore & Ohio R. Co.*, which, in interpreting Federal Employee’s Liability Act (FELA),⁷⁶ noted that “[w]e are of the opinion that Congress used the words ‘employé’ and ‘employed’ in the statute in their *natural sense*, and intended to describe the *conventional relation* of employer and employé.”⁷⁷ “Natural sense” sounds more like ordinary, contemporary, common meaning than common law agency.⁷⁸

In 1959 in *Baker v. Texas & Pacific Railroad Co.*,⁷⁹ the Court focused more precisely on what legal principles governed the employment relationship, concluding that FELA “does not use the terms ‘employee’ and ‘employed’ in any special sense, so that the familiar general legal problems as to whose ‘employee’ or ‘servant’ a worker is at a given time present themselves as matters of federal law under the Act.”⁸⁰ This seems to point two ways at once: no “special sense” contrasting with “general *legal* problem[.]”⁸¹ The Court did not elaborate on the factors going into the determination other than to list some considerations, including “directive control” by an admitted railroad employee and its furnishing of materials.⁸² However, in the course of holding the question to be ordinarily one for the jury, the Court did cite the *Restatement (Second) of Agency*,⁸³ presumably because it reflected the common law on the question, which, again, would guide the judicial determination of what is federal law.

⁷⁵ See *supra* notes 53–55 and accompanying text.

⁷⁶ 35 Stat. 65, 65–66 (1908) (federal workers’ compensation statute for railroad workers).

⁷⁷ *Robinson v. Balt. & Ohio R.R. Co.*, 237 U.S. 84, 94 (1915) (emphasis added).

⁷⁸ In any event, the *Robinson* Court wrote not to distinguish an employee from, say, an independent contractor, but rather to determine whether an employee of another company (the Pullman Company) was an employee of the defendant. *Id.* (“It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act.”); see also *Kelley v. S. Pac. Co.*, 419 U.S. 318, 322–25 (1974) (explaining that plaintiff was not the employee of one railroad when injured but rather remained an employee of another railroad).

⁷⁹ *Baker v. Tex. & Pac. R.R. Co.*, 359 U.S. 227, 228 (1959) (per curiam) (citing *Robinson*, 237 U.S. at 94).

⁸⁰ *Id.* (citing *Robinson*, 237 U.S. at 94).

⁸¹ *Id.* (emphasis added).

⁸² *Id.* at 228–29.

⁸³ See *id.* at 228 (citing RESTATEMENT (SECOND) OF AGENCY § 220 cmt. c, § 227, cmt. a (1958)).

In short, the question was radically under-theorized in the FELA cases. The issue was one of federal law because it concerned the meaning of a federal statute, and the definition was based on a finding (or better, an assumption) about what Congress intended. By the time of *CCNV*, however, the preference for a common law meaning had developed into an express presumption: In *NLRB v. Amax Coal Co., Division of Amax*, the Court laid down a general principle: “Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”⁸⁴ Although *Amax* did not involve the meaning of “employment,” the *CCNV* Court drew on this approach to look to the common law meaning of employee in construing the Copyright Act’s recognition of employer ownership of “work made for hire.”⁸⁵ And, pushing the question further, *CCNV* for the first time defined the common law test by looking to the *Restatement (Second) of Agency*’s factors.⁸⁶

Given this theoretical basis, it is not surprising that when the question arose of the meaning of “employee” in other statutes, ranging from Title VII to the Americans with Disabilities Act⁸⁷ to ERISA,⁸⁸ these two principles became controlling: first, federal law adopted the common law, and, second, the common law was reflected in the *Restatement*. Although the Court purported to look first to the language of the statute in question to see if it required a different result, the definitions tend to be “completely circular,”⁸⁹ thus leaving no basis for the Court to find that the law “otherwise dictates” a result at odds with the common law.⁹⁰

⁸⁴ *NLRB v. Amax Coal Co.*, 453 U.S. 322, 337–38 (1981) (holding that employer representatives in a statutorily-authorized trust fund were simply fiduciaries for the beneficiaries and did not create union interference or violate labor laws).

⁸⁵ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 732 (1989) (construing the Copyright Act of 1976 in the case of a “work made for hire”).

⁸⁶ *Id.* at 751–52 (explaining *Restatement* factors).

⁸⁷ *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 n.5 (2003) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)) (establishing factors for determining whether owners of a business are also employees for purposes of the Americans with Disabilities Act). *But see* Frank J. Menetrez, *Employee Status and the Concept of Control in Federal Employment Discrimination Law*, 63 SMU L. REV. 137, 148–49, 158–59 (2010) (criticizing *Clackamas* for the misapplication of principles the Court purported to be applying).

⁸⁸ *See Darden*, 503 U.S. at 323 (“ERISA’s nominal definition of ‘employee’ as ‘any individual employed by an employer[.]’ is completely circular and explains nothing. As for the rest of the Act, *Darden* does not cite, and we do not find, any provision either giving specific guidance on the term’s meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. Thus, we adopt a common-law test for determining who qualifies as an ‘employee’ under ERISA”) (citation omitted).

⁸⁹ *See id.* (explaining that an employee is someone employed by an employer).

⁹⁰ *Id.* at 322.

At no point in this line of cases did the Court pause to explain why it chose the technical meaning over the “ordinary, contemporary, common meaning,” most likely an outcome-determinative decision in a huge swath of cases. Further, *Amax* and *CCNV* both recognized that the presumption was rebuttable, and in fact *CCNV* “*cf.*” cited *NLRB v. Hearst Publications, Inc.*, which it described as “rejecting agency law conception of employee for purposes of the National Labor Relations Act where structure and context of statute indicated broader definition.”⁹¹

The *Hearst* case is the seminal labor law decision concerning the status of newsboys as employees, but our concern is with the Court’s methodology rather than its result. Compare the opening paragraph of the *Hearst Publications* discussion with the *Amax* approach:

Whether, given the intended national uniformity, the term “employee” includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word “is not treated by Congress as a word of art having a definite meaning . . .” Rather “it takes color from its surroundings . . . [in] the statute where it appears,” and derives meaning from the context of that statute, which “must be read in the light of the mischief to be corrected and the end to be attained.”⁹²

The Court’s result—to find newsboys covered by the statute—was soon overturned by an amendment to the NLRA,⁹³ but the Court’s purposive approach to statutory construction was not necessarily repudiated.⁹⁴ And at least an occasional lower court resorted to the *Hearst* methodology rather than the *Amax* presumption in construing “employee” under other statutes.

A good example is *Armbruster v. Quinn*, a Sixth Circuit decision which rejected reading the term “in a technical sense, divorced from the broadly humanitarian goals of the Act.”⁹⁵ Looking to *Hearst*, it found “no tacit dichotomy between employees and ‘independent contractors’ enshrined in Title VII.”⁹⁶ One of its reasons was that “the framers of Title VII specifically

⁹¹ *Reid*, 490 U.S. at 740 (citing *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 124–32 (1944)).

⁹² *Hearst*, 322 U.S. at 124 (alteration in original) (citations omitted); see also Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 321–23 (2001).

⁹³ See Carlson, *supra* note 92, at 322.

⁹⁴ One might argue to the contrary that Congress’s intervention to cut back on the Court’s expansive interpretation of the NLRA should be carried over to suggest a similar narrow reading of Title VII. Deborah Widiss has argued that a legislative override should not be read grudgingly but rather expansively as applied to related statutes. See Widiss, *Shadow Precedents*, *supra* note 48, at 581–82. While her examples deal mainly with legislative reversals of judicial restrictions on the anti-discrimination laws, a neutral application of her views would justify application of the Taft-Hartley rule to later enactments, absent congressional indications to the contrary in those enactments. See *id.*

⁹⁵ *Armbruster v. Quinn*, 711 F.2d 1332, 1341 (6th Cir. 1983).

⁹⁶ *Id.*

used the NLRA as their model,”⁹⁷ and the NLRA had been amended to overturn *Hearst* to exclude independent contractors:

This amendment was on the books before Title VII was formulated and yet Congress incorporated no similar provision into Title VII. In that Congress was specifically aware of the judicial construction accorded the term “employee” absent an explicit limitation, we now refuse to imply such a restriction into the otherwise broad terms of Title VII.⁹⁸

While *Armbruster*'s approach has not prevailed under the anti-discrimination statutes,⁹⁹ it illustrates that an alternative to the presumptive common law definition could easily be constructed, even absent statutory language explicitly addressing the question.¹⁰⁰

V. BACK TO TORTS

The point, then, is that resort to torts, agency, or any other body of law to inform the interpretation of a particular statutory command depends in the first instance on a court's approach to statutory interpretation, which in turn depends on a court's general methodology, including the choice of canons and choosing textualist or purposivist theories. Secondly, to the extent that this initial pass *requires* a court to look to other areas of the law, the ultimate reading will likely turn on how faithful the court is to the area which it is examining.¹⁰¹ Third, to the extent that the initial pass *permits* a court to seek guidance elsewhere, there remains the issue of what principles should govern the selection of analogies, and it is here that we might expect some purposive possibilities to creep back into the analysis.¹⁰² But as we shall see, purposivism is not necessarily plaintiff-friendly.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ The Sixth Circuit itself backed away from reading *Armbruster* broadly, essentially finding that the economic realities test it adopted was the same as the control test of *Darden*. See *Simpson v. Ernst & Young*, 100 F.3d 436, 442–43 (6th Cir. 1996); see also *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 218–19 (6th Cir. 1992).

¹⁰⁰ The Fair Labor Standards Act is another example of federal employment regulation that could depart from the common law definition, but the FLSA's statutory language easily justifies a broader approach. See 29 U.S.C. § 203(e), (g) (2012); see also *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–29 (1947).

While the FLSA, like ERISA, defines an “employee” to include “any individual employed by an employer,” it defines the verb “employ” expansively to mean “suffer or permit to work.” This latter definition, whose striking breadth we have previously noted, stretches the meaning of “employee” to cover some parties who might not qualify as such under a strict application of traditional agency law principles.

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (citations omitted).

¹⁰¹ See Menetrez, *supra* note 87, at 158.

¹⁰² The Court is occasionally candid about modifying common law principles to

Although much has been written about the “causation” question,¹⁰³ it is not so clear to me that the problems most commentators identify (too high a barrier to plaintiffs’ recovery) stem from the Court looking to torts law for guidance; in my view, the problem is its choice of which tort law to look to. The operative word in Title VII connecting the prohibited discriminatory motivation and what’s come to be called “an adverse employment action”¹⁰⁴ is “because,” a term that is scarcely self-defining. But by the time the Supreme Court first focused on its meaning under Title VII in *Price Waterhouse v. Hopkins* in 1989, there was an elaborate jurisprudence on causation—mostly developed in the torts context¹⁰⁵—but appearing in all sorts of other legal settings.¹⁰⁶ Further, if the meaning of “because” is to be traced back to what it might have meant in tort law in 1964, the differences by 1989 were not profound.

Basically speaking, torts requires but-for causation between the wrong and the injury, which is frequently denominated “cause-in-fact” (as we will see, it also requires proximate causation in negligence cases). However, tort law finds but-for causation established in “over-determined” cases, that is, a

achieve statutory aims. The most obvious example in the discrimination area is the alternation of ordinary agency principles for sexual harassment liability in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). See generally Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes* (Boston Univ. Sch. of Law Public Law & Legal Theory Paper No. 14-64, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2511265.

¹⁰³ See *supra* note 3; see also Brian S. Clarke, *A Better Route Through the Swamp: Causal Coherence in Disparate Treatment Doctrine*, 65 RUTGERS L. REV. 723, 755–67 (2013); 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, 105–07 (2010); Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857, 860–67 (2010); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 495–511 (2006) [hereinafter Katz, *Making Sense*]; Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1254 (2008).

¹⁰⁴ See SULLIVAN & WALTER, *supra* note 29, § 2.02, at 59–64.

¹⁰⁵ See Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 679–80 (2006); David W. Robertson, *Causation in the Restatement (Third) of Torts: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1007–08 (2009).

¹⁰⁶ For example, contract breaches do not (1) require causation to recover nominal damages; or (2) presume causation when “general damages” (typically, the difference between contract price and either market price or cover/resale price are sought); but (3) do require the plaintiff to prove causation to recover “consequential” damages. See 3 DOBBS, *supra* note 23, § 12.4(2), at 65–69. That seems to mean but-for cause, although contracts also has a doctrine analogous to proximate cause for consequential damages in its requirement that such damages be foreseeable. See *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145, 151; see also RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (1981) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.”).

tortfeasor can be liable even if another cause would have also brought about the same result.¹⁰⁷ At this level of generality, it is hard to fault a Title VII court for looking to tort law for guidance on the meaning of “because”—either due to implicit congressional “incorporation by using terms with a settled common law meaning” or simply because a court must look somewhere.

Price Waterhouse is unobjectionable in applying torts causation. All nine justices across the four separate opinions agreed that but-for causation was required for liability, but six justices (the plurality and two separate concurrences) would have shifted the burden of proving the absence of but-for causation to the defendant when (under somewhat different standards for the three opinions concurring in the result) the plaintiff showed that bias was involved in the decision. At that point, those three opinions agreed that the defendant could avoid liability by showing that it would have made the same decision anyway.¹⁰⁸ This was plaintiff-friendly, but Congress doubled down in this regard by altering the causation structure of Title VII in the Civil Rights Act of 1991 to make proof of “motivating factor” sufficient for liability by adding § 703(m);¹⁰⁹ Congress simultaneously retained the notion of but-for causation for full recovery while shifting the burden of proof of no but-for causation to defendant by adding § 706(g)(1).¹¹⁰

In other words, the plaintiff can prove a violation by showing that a prohibited consideration was a motivating factor in a decision. Such a showing will also shift the burden of persuasion to the defendant to show no but-for causation, which would limit the plaintiff’s remedies but not avoid liability of the defendant. But the congressional amendment does not change the reality that the Court devised a causation structure for Title VII claims that drew from torts law while being sensitive to proof problems of the somewhat different wrong that the statute addressed—not a wrongful act as such but rather a wrongful motivation for acts (hiring, firing, demotion) that are endemic to the workplace. Indeed, given the amorphousness of the “motivating-factor” standard (what level of causation is necessary for a factor that doesn’t

¹⁰⁷ This is also described as “multiple sufficient cause,” which means that each cause would have brought about the same result had the other cause not been present. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (2010) (“If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.”). A similar principle can be found in contract law. *See* 3 DOBBS, *supra* note 23, § 12.4(2), at 66–68.

¹⁰⁸ *See* SULLIVAN & WALTER, *supra* note 29, § 2.03[D], at 69.

¹⁰⁹ Civil Rights Act of 1991, tit. VII, Pub. L. No. 102-106, § 105(a), 105 Stat. 1071, 1074–75 (codified as amended at 42 U.S.C. § 2000e-2 (2012)).

¹¹⁰ *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003). *But see* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173, 180 (2009) (holding that § 703(m) does not apply to ADEA); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2533 (2013) (holding that § 703(m) does not apply to Title VII retaliation cases); *see also* Civil Rights Act of 1991, tit. VII, Pub. L. No. 102-166, § 107(b), 105 Stat. 1071, 1075–76 (codified as amended at 42 U.S.C. § 2000e-5(g) (2012)).

necessarily have any effect on a decision?),¹¹¹ *Price Waterhouse* may have gone about as far as a court could sensibly go without further guidance by Congress.

And, in any event, the bottom line is that *Price Waterhouse* was a pretty plaintiff-friendly decision that drew on torts principles for its rationale. In contrast, the Court's more recent decisions in *Gross v. FBL Financial Services*¹¹² and *University of Texas Southwestern Medical Center v. Nassar*,¹¹³ essentially overturned *Price Waterhouse* when the Court found that §§ 703(m) and 706(g)(1) do not control.

The *Gross* Court held that “because” in the Age Discrimination in Employment Act (ADEA) requires but-for causation with no burden shifting;¹¹⁴ *Nassar* held the same for Title VII retaliation suits (governed by a different statutory section than discrimination claims).¹¹⁵ Both are problematic in various ways, especially *Nassar*'s schizophrenic reading of two provisions of the same statute and “distinguishing” a line of precedent that equated retaliation with discrimination.¹¹⁶ But perhaps the most striking aspect of the two decisions is their dismissal of *Price Waterhouse*, which, as the presumably proper interpretation of “because” in Title VII as originally enacted, would have seemed to govern the use of the same word in another section of that statute¹¹⁷ (*Nassar*) and in a statute modeled on Title VII (*Gross*).

¹¹¹ I have previously argued, with regard to “motivating factor,” that:

[I]f applied over time, the factor would influence an appreciable number of decisions regardless of whether the decision at issue was affected. An appropriate metaphor might be the adding of weights to runners in a race. The added weight might not affect any given race but, over a large number of races, would result in handicapped competitors losing disproportionately.

Sullivan, *supra* note 4, at 1438. Dean Martin Katz frames it as “minimal causation,” a factor that has “some causal weight[,] . . . some tendency to influence the event in . . . question but still not rise to the level of necessity or sufficiency” Katz, *Making Sense*, *supra* note 102, at 498–99.

¹¹² *Gross*, 557 U.S. at 173, 180.

¹¹³ *Nassar*, 133 S. Ct. at 2534.

¹¹⁴ *Gross*, 557 U.S. at 180.

¹¹⁵ *Nassar*, 133 S. Ct. at 2533–34.

¹¹⁶ The majority read § 703(m) providing that “[a]n 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[.]” as reaching only discrimination claims brought under § 703(a), not retaliation claims brought under § 704(a). *Id.* at 2526. To do so, it had to distinguish a line of precedent, reaching back to *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 235 n.3, 237, 250 n.23 (1969) (holding that retaliation for opposing discrimination on a prohibited ground was itself discrimination on that ground). See Zimmer, *supra* note 12, at 712–13.

¹¹⁷ *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 258 (2008) (describing the Court's “usual preference for construing the ‘same terms [to] have the same meaning in

What is more important for our purposes, however, is that *Gross* and *Nassar* essentially chose the causation approach of the dissent in *Price Waterhouse* over that of five of the six justices concurring in the result.¹¹⁸ The plurality, Justice O'Connor's concurrence,¹¹⁹ and the dissent in *Price Waterhouse* all looked to tort law for their rationale, which underscores that, to the extent that the results are objectionable, it is not because torts is a source of inspiration but because, as is often the case, one searching for support in an area of law can usually find what one is looking for.

The majority's ability to find what it wants by simply looking for it is underscored by Justice Breyer's dissent (joined by Justices Souter and Ginsburg) in *Gross*, which pointed out a different, approach that would have applied tort doctrine sensitive to the differences between the ordinary negligence setting in which it evolved and the quite different scenario in the typical employment discrimination case. He began by noting that "[t]he words 'because of' do not inherently require a showing of 'but-for' causation, and I see no reason to read them to require such a showing."¹²⁰ He went on to argue that:

It is one thing to require a typical tort plaintiff to show "but-for" causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of "but-for" causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a "but-for" relation when we consider, not physical forces, but the mind-related characterizations that constitute motive. Sometimes we speak of *determining* or *discovering* motives, but more often we *ascribe* motives, after an event, to an individual in light of the individual's thoughts and other circumstances present at the time of decision.¹²¹

different sections of the same statute") (alteration in original) (quoting *Barnhill v. Johnson*, 503 U.S. 393, 406 (1992))).

¹¹⁸ *Price Waterhouse v. Hopkins*, 409 U.S. 228, 258–60 (1989) (White, J., concurring) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)) (looking to a constitutional decision which had adopted a burden-shifting approach rather than relying on tort principles).

¹¹⁹ This is most obvious in Justice O'Connor's opinion: "[I]n multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the 'but-for' cause of the plaintiff's injury." *Id.* at 263 (O'Connor, J., concurring). But Justice Brennan's plurality opinion is also clearly speaking of torts when it considers the "overdetermined" causation of "two physical forces [that] act upon and move an object [when] either force acting alone would have moved the object." *Id.* at 241.

¹²⁰ *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 190 (Breyer, J., dissenting).

¹²¹ *Id.* at 190–91. He explained:

In a case where we characterize an employer's actions as having been taken out of multiple motives, say, both because the employee was old and because he wore loud clothing, to apply "but-for" causation is to engage in a hypothetical inquiry about what

Breyer would have permitted a plaintiff to prevail by showing that a forbidden consideration played a role in a challenged decision, but noted that “the law need not automatically assess liability in these circumstances,” and he approved *Price Waterhouse*’s recognition of “an affirmative defense where the defendant could show that the employee would have been dismissed regardless.”¹²² He explained:

The law permits the employer this defense, not because the forbidden motive, age, had no role in the *actual* decision, but because the employer can show that he would have dismissed the employee anyway in the *hypothetical* circumstance in which his age-related motive was absent. And it makes sense that this would be an affirmative defense, rather than part of the showing of a violation, precisely because the defendant is in a better position than the plaintiff to establish how he would have acted in this hypothetical situation. I can see nothing unfair or impractical about allocating the burdens of proof in this way.¹²³

The point is not that Justice Breyer was “correct” in so concluding, although he persuaded me, but rather that reasonable minds can reach radically different answers even when answering a supposed textualist question.

Much the same could be said for that other tort causation chestnut, proximate cause. In torts, proximate cause operates in the negligence context and its role is to narrow liability as compared to what but-for cause would allow.¹²⁴ That is clearly how the Court deployed the concept in connection with the anti-discrimination laws in *Staub v. Proctor Hospital*.¹²⁵ But, as I have explored elsewhere, the major problem is not looking to tort law per se but misapplying proximate cause, both in terms of its application to intentional torts and the Court’s choice of the flavor of proximate cause to deploy. Speaking of *Staub* and recent decisions in other contexts, I wrote:

These decisions reflect the Court’s desire to invoke proximate cause to inject liability-limiting factors into the analysis. But they seem to do so as a means of validating what are essentially policy decisions under the guise of straightforward applications of traditional tort principles. . . . [N]ot only do such cases wrench proximate cause from its negligence moorings, but also

would have happened if the employer’s thoughts and other circumstances had been different. The answer to this hypothetical inquiry will often be far from obvious, and, since the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.

Id. at 191.

¹²² *Id.*

¹²³ *Id.* at 191–92 (citation omitted).

¹²⁴ See Sullivan, *supra* note 4, at 1459–67.

¹²⁵ See *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1192 (2011).

they choose Judge Andrews' strain of proximate cause, which is distinctly in the minority among the common-law courts.¹²⁶

I would go further and argue that the *Staub* Court should have entirely rejected proximate cause in favor of but-for cause only. If bias influences an employment decision (whether by a manager, a co-worker or even a third party), it would scarcely be an extreme reading of the statute to say that the decision was "because of" discrimination.¹²⁷ And the Court could have done so by various avenues. First, the statute *permits* a purely textualist reading, unaffected by the gingerbread that various areas of the law might have layered on it. But it seems also to *permit* the Court to look to tort law for the meaning of "because." The problem, then, is that Title VII does not *require* the Court to ignore proximate cause in favor of pure but-for analysis. Similarly, unlike the amended version of Title VII, the ADEA does not *require* the Court to ameliorate the problems of but-for causation by allowing a shifting of burdens on the question, thus allowing the Court to root around among the available doctrines for a liability-limiting principle.

VI. A BETTER CLASS OF LAWGIVERS?

This analysis is leading to an unpleasant reality. Lester Maddox, the segregationist governor of Georgia, when responding to concerns about the state of Georgia's prisons, is reported to have said that he had done all he could and further improvements would require "a better class of prisoners."¹²⁸ We seem to need a better class of either Congress or courts.

With respect to better legislative drafting and even putting aside the electoral politics of Congress, it seems hard to imagine, say, the 1964 Congress forecasting the kinds of interpretive challenges Title VII posed over the years, much less coming up with ways to address them through drafting. And, of course, the politics of the enactment of the Civil Rights Act were unlikely to have permitted much leeway even had the problems and solutions presented themselves. It is true that the 1991 Congress had more reason to

¹²⁶ Sullivan, *supra* note 4, at 1467.

¹²⁷ It is, in fact, hard to see any room for doubts about proximate cause in the facts in *Staub* because the lower level supervisors had the motivation to cause the plaintiff to be fired because of his military service, the intent, in that their acts could cause such an adverse action, and success in that effort. *Staub*, 131 S. Ct. at 1194.

[T]he Court's expansive definition of intent largely seems to subsume any separate inquiry since the "substantially certain" consequence of an act, much less a desired consequence, seems necessarily proximate to the act itself. In short, once the Court was willing to find that a lower-level supervisor's intent could result in employer liability, it could easily have relied on cause-in-fact rather than proximate cause.

Sullivan, *supra* note 4, at 1457-58.

¹²⁸ See William McPherson, *A Better Class of Prisoner*, WASH. POST, Oct. 30, 1984, at A19.

anticipate many interpretive problems, perhaps most obviously its failure to frame § 703(m) to include retaliation cases and its failure to amend the Age Discrimination in Employment Act to add an analogous section. While envisioning those interpretive difficulties was easier, perhaps the delicate political balance that proponents and opponents struck precluded such precision, thus leaving the courts free to strike their own balance.

Much the same can be said of the Lilly Ledbetter Fair Pay Act, which expands the time limits for challenging pay discrimination under Title VII and the other anti-discrimination laws.¹²⁹ As I have explored elsewhere,¹³⁰ the statute—although in many ways sweeping¹³¹—contains an ambiguity as to whether it reaches only “compensation” decisions (whatever they are) or any decisions affecting compensation. It is scarcely surprising that those circuits weighing in so far have taken a narrower view. So, for example, a promotion decision is not a compensation decision, although most promotions entail a raise in compensation.¹³²

In this example, some would say, the freedom of the courts to choose among various possibilities is exactly the courts’ job when Congress can’t articulate a clear rule.

There may be more hope with respect to the Americans with Disabilities Amendment Act of 2008,¹³³ although it is too early to be sure.¹³⁴ If there is, it

¹²⁹ Pub. L. No. 111-2, § 3(B), 123 Stat. 5, 6 (2009) (codified at 42 U.S.C. § 2000e-5(e) (2012)).

¹³⁰ See generally Sullivan, *supra* note 11, at 549–54.

¹³¹ It amends a large number of statutes and applies retroactively. See *id.* at 549–50; see also Widiss, *Shadow Precedents*, *supra* note 48, at 534–36.

¹³² See *Almond v. Unified Sch. Dist. No. 501*, 665 F.3d 1174, 1175 (10th Cir. 2011) (“[D]iscrimination in compensation” addresses “situations in which a member of a protected class receives less pay than similarly situated colleagues—that is, unequal pay for equal work. Because the plaintiffs in this case don’t raise an unequal pay for equal work claim, they do not benefit from the Act’s comparatively generous deadlines and preexisting accrual rules apply.”); *Schuler v. PricewaterhouseCoopers, LLP*, 595 F.3d 370, 374 (D.C. Cir. 2010) (holding that a denial of a promotion with continuing effects on plaintiff’s compensation is not actionable because “discrimination in compensation means paying different wages or providing different benefits to similarly situated employees, not promoting one employee but not another to a more remunerative position”) (internal quotation marks omitted); *Noel v. Boeing Co.*, 622 F.3d 266, 275 (3d Cir. 2010) (holding that plaintiff’s failure to promote claim was not saved by the Fair Pay Act, at least where plaintiff had not characterized it as a failure to give a raise until late in the proceedings).

¹³³ See Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified in scattered sections of 29 and 42 U.S.C.)

¹³⁴ Early analyses suggest that the statute has been largely successful in its primary aim of expanding the cramped approach to the disability question that characterized judicial decisions. See Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050–57 (2013) (gathering empirical evidence so far reveals more decisions on the “qualified” issue, fewer dismissals for the plaintiff not being disabled, and more plaintiff success in surviving various motions); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV.

may well be that the reasons are political rather than technical because the ADAAA was passed with overwhelming margins and signed by a Republican president.¹³⁵ But even such a broadly supported enactment posed interpretive problems for its proponents. Although passed to overturn restrictive Supreme Court decisions as to what constitutes a disability,¹³⁶ the statute contained no new definition of the key adjective “substantially” for purposes of when an impairment substantially limits a major life activity. Instead Congress, although disapproving the existing EEOC regulation,¹³⁷ directed the EEOC to revise its regulations in a manner consistent with the purposes of the amendments. The agency, in turn, also opted not to define “substantially limits” but instead issued nine “rules of construction” to be used in construing the enactment.¹³⁸ While this may well be “good enough for government work,”¹³⁹ it illustrates the difficulties of congressional agreement even on principles for which there is, at one level of generality, a consensus.

But the idea of “rules of construction” is not without merit in its own right. I have suggested elsewhere that Congress might try to take back some of the ground the Court has wrested from it.¹⁴⁰ For example, Congress could instruct

(forthcoming 2014) (manuscript at 38, 64), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=2399724 (discussing empirical study showing courts are generally following the ADAAA’s command to be more receptive to claims of disability but that while they are receptive to physical reasonable accommodations addressing actual functions of a job, there are signs of backlash when it comes to requests for accommodations that relate to “structural norms in the workplace”).

¹³⁵ See Paul R. Klein, Note, *The ADA Amendments Act of 2008: The Pendulum Swings Back*, 60 CASE W. RES. L. REV. 467, 475 (2010) (“In the House, the ADAAA passed by an overwhelming margin, with 402 voting in favor of passage and 17 voting against it. The Senate followed suit, unanimously voting for its passage.”).

¹³⁶ The ADAAA’s Findings and Purposes provide in part:

(4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA.

ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)–(5), 122 Stat. 3553.

¹³⁷ Congress found the EEOC’s regulation, 29 C.F.R. § 1630.2(j), “to require a greater degree of limitation than was intended by Congress . . .” *Id.* § 2(a)(7).

¹³⁸ 29 C.F.R. § 1630.2(j) (2014).

¹³⁹ Urban Dictionary defines this idiom as “[p]robably not the best, but what the hell, at least we got the job done to minimally acceptable standards.” *Good Enough for Government Work Definition*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=good%20enough%20for%20government%20work> (last visited Aug. 20, 2014), archived at <http://perma.cc/D3E5-G9AH>.

¹⁴⁰ See Charles A. Sullivan, Remarks, *Reviving Employee Rights? Recent and Upcoming Employment Discrimination Legislation: Proceedings of the 2010 Annual*

the courts to look to a statute's legislative history (perhaps the relevant House and Senate reports) in interpreting some or all statutes.¹⁴¹ It could also instruct the courts, as the ADAAA does, in how to interpret its statutes, either for particular enactments or more generally. Those who favor such an approach to taming the courts could, for example, seek to inject purposivist analysis into what is now a textualist exercise. While I generally see few conceptual problems in such an approach,¹⁴² it is admittedly largely untried but, if successful, it would reinvest Congress with some of the power that has been taken away from it without at the same time requiring Congress to write better laws.

Of course, maybe this device will fail precisely because the courts can claim they are construing a statute when in fact they are rewriting it. That leads us to the question of a better class of courts. I'll save that for another day.

Meeting of the Association of American Law Schools Section on Employment Discrimination Law, 14 EMP. RTS. & EMP. POL'Y J. 355, 375, 380 (2010).

¹⁴¹The only example of which I am aware is of a congressional instruction regarding legislative history in the Civil Rights Act of 1991, which provides that “[n]o statements other than the interpretive memorandum . . . shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.” Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 103 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 1981 note (2012)). This is less an authorization of the use of legislative history than a prohibition on resort to most traditional sources. *See Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 488 n.13 (3d Cir. 1999) (rejecting an interpretive argument because “the Act precludes us from considering the legislative history upon which this argument relies for support.”).

¹⁴²*See* Nicholas Quinn Rosenkrantz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086–90 (2002); Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 361–62 (2010). There may be constitutional objections when the Congress legislates to overturn constitutionally-based canons. *See* 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, 840 (2009) (“The legislature may legitimately try to influence the interpretive outcome to promote specific policy choices. However, when attempting to control the interpretive process without regard for policy choices, the legislature aggrandizes itself and violates separation of powers.”). Further, Justice Scalia has argued that committee reports may not be generated until a statute has already passed. *See Blanchard v. Bergeron*, 489 U.S. 87, 98–100 (1989) (Scalia, J., concurring). There may be a delegation problem in these instances, but that problem would not be present when a report is available before the vote. As for the argument that Congress would somehow be intruding on the judicial function, it is hard to see why instructing the courts on where to look for a statute's meaning is any more problematic than the Dictionary Act. *See* 1 U.S.C. §§ 1–7 (2012); *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013) (citing 1 U.S.C. § 7) (considering the constitutionality of the Dictionary Act's definitions of “marriage” and “spouse” for more than a thousand federal laws).

